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The Uniform Probate Code: Article III Analyzed in Relation to Changes in the First Nine Enactments

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The Uniform Probate Code: Article III Analyzed in Relation to Changes in the First Nine Enactments

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When it is not necessary to change, it is necessary not to change.

Lucius Cary—A Discourse on the Infallibility of Rome (1660).

No written laws can be so plain, so pure, but wit may gloss, and malice may obscure.


The eleven pioneer states that have adopted the Uniform Probate Code have amended its provisions in various ways. This Article reviews the changes made in article III, the central procedural section of the Code. The authors analyze the import of these amendments, considering the interplay between the carefully drafted provisions of the Code and its policy of uniformly minimizing the judicial intervention and expense involved in the administration of estates. Analysis of these first enactments should prove helpful in those states currently considering adoption of the Uniform Probate Code as well as to lawyers and the courts in pioneer states.

I. INTRODUCTION

At this writing, eleven states have enacted the Uniform Probate Code.¹

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Legislatures in several other states are presently studying the Code and edging, at varying rates of speed, toward enactment. Since the Code is "in process" in so many states, identification, discussion, and evaluation of variations from the Code enacted in the pioneer states are particularly important at this time. This Article will examine some of the important changes in article III, the Code's procedural article, which have surfaced in nine of the eleven Code states. The changes selected for treatment, though not exhaustive, are among the more important amendments. Enough of the minor changes will be examined to reflect a sense of the kind of legislative surgery which the enacting states have performed. No consideration is given to changes that have occurred in Minnesota and New Mexico, because neither the 1975 amendments to the 1974 legislation that brought Code articles I, III, and IV to Minnesota nor the New Mexico enactment was available in time to be included in the study.

Article III of the Code is its largest division. It is also the most important because it is the procedural package which meets the Code's goal of bringing reason and flexibility into the probate process. These very goals, however, have provoked vigorous opposition to enactment of the Code as promulgated. The law dealing with administration of estates has for so long been a wasteland where lawyers serve as scriveners and messengers that the flexibility and creativity the Code introduces is frightening to many whose work it would affect. Also, the relatively small groups of experts in each state who have


2. According to information available to Professor Wellman as of February 1, 1976, a Code bill has been passed by the Hawaiian Senate and is pending before the House; bills to conform New Jersey probate law to the Code, which were pending throughout 1974 and 1975 before the New Jersey Legislature, died and will be re-introduced, probably in 1976. Code bills currently are under study by the House and Senate Judiciary Committees of the Michigan Legislature, and a Code bill has been introduced and is presently under study by the District of Columbia Council. In Maine, a legislatively created Commission to Prepare a Revision of the Probate Laws and the Administration Thereof has been at work since 1973. In Tennessee, the Law Revision Commission has completed a study and comparison of local probate laws with the Code, and is now drafting a proposed "Tennessee Probate Code." Alabama Act No. 147 (1975) created a joint interim committee to consider amending Alabama law to conform to the UPC. In Kentucky, a Uniform Probate Code Subcommittee of the Legislative Research Commission is considering probate law reforms, and in South Carolina, a study of the Code as compared to local probate law has been pending for some time. The Judiciary Committee of the Assembly, California Legislature, conducted a 2-day hearing on the subject of probate law reform in late October, 1975. In Missouri, a UPC-oriented probate code improvement bill as prepared and recommended by the Missouri State Bar Association is being considered by the legislature. Bar association committees are actively studying proposals for change of probate law in Illinois, Ohio, Texas, Georgia, and Mississippi.


understood the details of local probate law and its relation to estate planning include some who would prefer that the lawmakers in their state accept their ideas about how probate law may be improved, rather than rely on the growing number who understand the uniform law. Resistance to the Code is found not only among attorneys but also among such interests as surety bond companies, legal notice publishers, and powerful probate court administrators.

Many of the changes that have occurred in the first nine enactments are more indicative of continuing efforts by these groups to frustrate purposes of the Code that threaten them, than of error or oversight on the part of the Code's drafters. The discussion that follows is organized around some important features of article III that have been changed in some significant way by one or more of the enactments. Though not every significant change revealed in the enactments studied is identified in the discussion, all of those that relate to vital features of this portion of the Code are included.

II. THE "DO-NOTHING" AND "PROBATE AS MUNIMENT OF TITLE" OPTIONS

Section 3-108, which fixes the ultimate time limit for probate proceedings, is one of the Code's central provisions. This section establishes a 3 year period from death during which, with minor exceptions, steps to establish or contest any will of a decedent must have been commenced and any appointment of a personal representative must have been made or requested. Coupled with section 3-104, the bar on opening an estate for administration serves to bar creditors' claims. Consequently, when nothing happens and the bar applies, the estate is conclusively deemed intestate and free of any risk of administration, and the debts of the decedent cannot be collected from the heirs. Assuming that there is no need to determine heirs, the bar removes most of the potential for clouds on title attributable to the owner's death in cases where the decedent's survivors and creditors refrain from any postmortem

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9. The exceptions to the 3 year bar described in Code section 3—108 relate to instances where the time of death was not originally established sufficiently to support a timely proceeding, instances involving the estate of an absent person under a conservatorship who is eventually shown to have died, and cases where a will is informally probated when less than a year remains of the 3 year period. Proceedings to construe wills and proceedings to determine heirship are excluded from the definition of testacy proceedings. Proceedings to secure appointment of a personal representative of an estate as to which there has been a prior administration and to secure local probate of a will previously probated in the decedent's domicile are also excluded.
10. A bar on creditors' claims after 3 years from death of the debtor is expressed also by UPC § 3—803(a)(2).
activity in probate court concerning the estate. The section 3-108 bar also supports another feature of article III which permits wills to be probated as muniments of title without administration; it serves to make the will so probated conclusive when no contest or administration is commenced within the basic limitations period. The "do-nothing" and the "probate as muniment of title only" options involve risks that well-advised persons might want to avoid. Nevertheless, the Reporters and the National Conference were persuaded that each provided advantages that the Code should offer to those willing to assume some risks. The availability of these options gives substance to the Code's underlying philosophy that the law should not compel probate or appointment or otherwise attempt to prevent persons from taking chances with their own property. Hence, additional exceptions to the bar of section 3-108 cut significantly into an important Code purpose.

Nebraska, Montana, Utah, and Arizona nonetheless have qualified section 3-108 by language permitting probate or appointment, under some circumstances, more than 3 years after death. Arizona and Nebraska allow informal or formal proceedings more than 3 years after a decedent's death if there has been no "proceeding" of any kind within the 3 year period. Assuming that there is no bar on a late appointment of the personal representative, the Arizona and Nebraska versions provide that any personal representative appointed after the normal limitations period has no right to possess or recover estate assets as otherwise permitted by section 3-709 beyond that necessary to confirm title thereto in rightful successors to the estate. Moreover, claims other than expenses of administration may not be presented. Apparently, the drafters foresaw only that a late appointment would produce a personal representative who could execute instruments of distribution, thus identifying the heirs or devisees and creating a recordable title. Under section 3-910, this title would protect their purchasers immediately and would eventually become absolute by the limitations described in section 3-1006. From this perspective, the innovation seems to offer a harmless and useful means of

11. Exceptions to section 3-102's requirement that a will must be probated before it can be admitted as evidence of a devise create instances where a devisee may prevail over the heirs in possession of the estate even though probate of the will has been barred by limitations. These exceptions have no bearing upon estates possessed by the heir within the 3 year limitations period.


13. See id., art. III, General Comment, paragraph 5.

14. Id.


17. The term's meaning is suggested by UPC §§ 1–201(32), (19) & (15).

18. Presumably, the filing of a demand for notice without more within the 3 year period is not a "proceeding" that would prevent a late proceeding. See id. § 3–204. The effect of an informal probate or appointment proceeding that resulted only in a declination by the registrar to act is more doubtful. See id. §§ 3–305, –309.

settling titles resulting under the "do-nothing" and "probate as muniment of title only" options. On reflection, however, this qualification on section 3-108 leaves much to be desired.

The most striking problem created by the change from the Uniform Act involves the meaning of the attempted restriction on the power of a late-appointed personal representative. How is this restriction to be correlated to other provisions of part 7 of article III, which are designed to give all personal representatives unrestricted power to possess and sell estate assets? The Code goes rather far in making letters issued to a personal representative a badge of authority that will excuse purchasers from examining court records or otherwise informing themselves about the circumstances of appointment. If a late-appointed personal representative lacks power to create a good title in purchasers, and nothing in his letters of appointment need show his restricted authority, a risk has been created for those dealing with any personal representative. Persons who have no way of knowing whether the representative with whom they might deal can protect them will be reluctant to deal with him. However, letters will continue to be a source of protection to third persons if the restriction on the authority of a late-appointed personal representative is interpreted as pertaining only to his liability to estate beneficiaries, rather than to his ability to protect purchasers.

There are other questions. How is the attempted restriction to be related to the Code provision that makes a personal representative's demand for possession of estate assets conclusive evidence of his right to prevail in any possessory action? What is embraced by the late-appointed personal representative's power to confirm title in rightful successors? Does it include the power to recover possession of estate assets if that should be deemed useful incident to making distribution to the rightful heirs? If so, a "do-nothing" settlement of a concededly intestate estate would always be subject to a

21. Id. § 3–714.
22. The Code provides that restrictions on the power of a personal representative may be endorsed on his letters in supervised administration proceedings, but not otherwise. Id. §§ 3–714, –504.
23. Code sections 3–711 and 3–712 should be applied to reach this conclusion. The question that may have to be resolved in Arizona and Nebraska concerns the language added to the counterpart of UPC section 3–108 in these states. For example, Ariz. Rev. Stat. Ann. § 14–3108 (4) (1975) provides:
   
   If proceedings are brought under this exception, the personal representative shall have no right to possess estate assets as provided in § 14–3709 beyond that necessary to confirm title thereto in the rightful successors to the estate . . . . (emphasis supplied).

   Is the language "no right to" a qualification of UPC section 3–711 which speaks of the "power" of a personal representative, or is it an indication, in the language of UPC section 3–712, that "the exercise of power concerning the estate is improper"? A holding that the new language in UPC section 3–108 means that a late-appointed personal representative lacks power in the sense intended by UPC section 3–711 would play havoc with the Code's effort to permit independent administration.

24. See UPC § 3–709.
potential personal representative's power to recover, and possibly to sell, estate assets if re-distribution in kind is inappropriate for some reason. It may not matter that the persons who assume they are the heirs of a decedent know of no controversy or question that might cast doubt on their status. If a late-appointed personal representative has the power to make a wrongful sale and so defeat the title of the heirs, the mere possibility that a personal representative might someday be appointed may cloud the title. Further, no time limit other than that involved in a possible adverse possession will dispel the doubts concerning "do-nothing" settlements produced by the variations in section 3-108.

The Nebraska draftsmen state in their comment to section 3-108 that the change "allows a will to be probated after the three year statute of limitations for the sole purpose of confirming title in the rightful owners if there has been no prior formal or informal proceeding within the three year period." It may be assumed that concern over later discovered wills underlies the changes wrought in section 3-108 by the Arizona and Nebraska Legislatures. Nevertheless, it is somewhat difficult to correlate this concern with the Nebraska version of section 3-108, which serves to bar late-discovered wills in cases where an estate has been administered, possibly without adjudication, as intestate, or where a prior will has been probated as muniment of title only.

The exception from the Code's basic 3 year limitations period leaves wills that are probated informally after the period has run subject to the discovery of still later wills for an indefinite period. Hence, persons interested in late-discovered wills that are not barred by the Arizona-Nebraska version of section 3-108 will be likely to demand a formal testacy proceeding to protect their titles. Alternatively, they may cause the estate to be opened so that they can become distributees, thereby gaining the protection of the limitations on actions against that class of persons established by section 3-1006. The Arizona-Nebraska qualification of section 3-108 not only eliminates a source of comfort for persons interested in a "do-nothing" estate, but also forces persons interested under late-discovered wills that may still be probated to resort to formal testacy proceedings or administration in order to protect their own titles.

The Arizona-Nebraska deviation also does considerable damage to the

26. Id.
27. See ARIZ. REV. STAT. ANN. § 14–3108(4) (1975); NEB. REV. STAT. § 30–2408 (Cum. Supp. 1974). Unlike the exceptions to the section 3–108 bar recognized in the Official Text, the exceptions added in Arizona and Nebraska permit informal proceedings that apparently never can become final by limitations.
28. UPC §§ 3–401 to –414 describe "formal testacy proceedings"; the term is defined, also, by id. §§ 1–201(14), (44).
29. Id. § 1–201(10) defines "distributee." The Code protects purchasers of assets from distributees if the distributee received the property under an instrument or deed of distribution from a personal representative. See id. §§ 3–801 to –816.
Code's purpose of providing substantially equivalent procedures for testate and intestate estates. In these two states, persons interested in an intestate estate will have to open an administration within 3 years from death or use a formal testacy proceeding to obtain a declaratory order of intestacy to protect against late administration and late-discovered wills. By contrast, persons interested in testate estates may gain the protection of the 3 year limitation period merely by timely use of informal probate proceedings for muniment of title purposes only. They do not need to secure an adjudicated probate or to open the estate. It is doubtful that this imbalance will lead many who might otherwise remain intestate to prepare wills. Hence, the effect is to eliminate a useful short-cut in settling the small estates that are most likely to be intestate.

The Utah change is a variation on the Nebraska-Arizona theme. It also allows commencement of informal or formal appointment proceedings after expiration of the 3 year period. The Utah qualification on the basic 3 year limitations applies if there has been no proceeding within the section 3-108 period other than an informal probate. As in Arizona and Nebraska, and subject to the same doubts noted above, the Utah deviation attempts to restrict the authority of late-appointed personal representatives. Since it permits late opening of an estate where a will has been probated as muniment of title, the Utah variation cuts even more deeply than the others into the Code policy of favoring time limitations on late estate administration.

The Montana change, like those in Arizona and Nebraska, allows any sort of probate proceeding to be commenced at any time so long as there have been no previous proceedings within the 3 year period. Though it appears to be more disruptive because it makes no reference to restrictions on the personal representative's powers or to creditors' claims in late-opened estates, it is probably no more undesirable than the Arizona-Nebraska variant. Wills probated for muniment of title purposes within 3 years are protected by the limitations, and the estates devised by them cannot be opened late. Estates assumed to be intestate remain subject to administration indefinitely as in

30. See UPC, art. III, General Comment.
34. Id.
35. See id.
36. See UPC, art. III, General Comment, paragraphs 5, 8.
Arizona and Nebraska. The omission of a provision for creditors' claims should be harmless, since such claims are barred in any event by section 3-803(a)(2) unless presented within 3 years from death.

The adjustments in section 3-108 in the four states just mentioned reflect that the original version of the Code probably did too little to remedy proof of title problems arising because of section 3-108's bar against opening estates after 3 years from death. One of the improvements in the Code that was approved by the National Conference at its 1975 meeting makes it explicitly clear that the Code's method for notifying interested persons of formal probate proceedings applies in proceedings to construe probated wills or to determine heirs in estates that were not opened for administration within the time permitted by section 3-108. Before the change, the Code excepted these proceedings from the 3 year limitation, but did not establish whether the quasi-in-rem notice system prescribed by section 1-401 applied, except in proceedings involving an estate that had been opened for administration. In the view of the Joint Editorial Board, formal proceedings for determination of heirs or for construction of a probated but unadministered will are to be preferred for title clearing purposes to any solution which involves a perpetual risk of late administration for persons interested in estates settled as testate or

38. Id. § 91A-3-803(1)(b).

39. The Joint Editorial Board's recommendations concerning UPC section 3-106 were presented and explained in a Report of the Board which was distributed to all Commissioners in advance of the 1975 Annual Meeting of the National Conference, August 2-8, 1975, Quebec City, Quebec. The recommendations were presented along with the original text of the Code, with additions shown by underlining, deletions shown by cancellation, and new official commentary appended. The recommendation concerning UPC section 3-106 appeared as follows:

SECTION 3-106. [Proceedings Within the Jurisdiction of Court; Service; Jurisdiction Over Persons.] In proceedings within the exclusive jurisdiction of the Court where notice is required by this Code or by rule, and in proceedings to construe probated wills or determine heirs which concern estates that have not been or cannot now be opened for administration, interested persons may be bound by the orders of the Court in respect to the property in or subject to the laws of the state by notice in conformity with Section 1-401. An order is binding as to all who are given notice of the proceeding though less than all interested persons are notified.

Added Comment

The Joint Editorial Board, in 1975, recommended the addition after "rule," of the language, "and in proceedings to construe probated wills or determine heirs which concern estates that have not been and cannot now be opened for administration." This addition, coupled with the exceptions to the limitations provisions in 3-108 that permit proceedings to construe wills and to determine heirs of intestates to be commenced more than three years after death, clarifies the purpose of the draftsmen to offer a probate proceeding to aid the determination of rights of inheritance of estates that were not opened for administration within the time permitted by section 3-108.

40. UPC § 3-108.

41. Code section 3-106 made the notice provisions of section 1-401 applicable to proceedings within the "exclusive jurisdiction" of the court. Section 3-105 described these proceedings as those "to determine how decedents' estates . . . are to be administered, expended and distributed." Section 3-103 provided: "Administration of an estate is commenced by the issuance of letters." Read together, these provisions can be said to limit the clear authority to proceed after notice as described in section 1-401 to formal proceedings involving an estate that is being administered.
intestate by the combination of inaction and section 3-108.\textsuperscript{42} Heirship frequently can be proven without adjudication, and wills do not always need to be construed. Hence, the settlement via section 3-108 will be final in many situations under the Code as officially amended. This is preferable to creating a cloud of late administration over every "do-nothing" intestacy; it is vastly to be preferred over the more serious Utah variation which totally destroys the utility of probate without administration.

### III. Notice and Informal Proceedings: Sections 3-306 and 3-310

Among the sections of the Code dealing with informal proceedings,\textsuperscript{44} the no-notice provisions have probably received the most consideration by commentators.\textsuperscript{46} There seems to be a lurking suspicion that unless an applicant for informal probate or appointment is required to give notice of his application, the heirs or devisees will be quickly cheated of their interests.

Before discussing enactments that alter the Code's provisions regarding notice, the broader topic of informal proceedings must be put in perspective. This type of proceeding is available for only two purposes: To establish a will and to open an estate.\textsuperscript{45} Both may be handled by a registrar;\textsuperscript{46} neither involves an adjudication.\textsuperscript{47} The analogy to administrative proceedings is most appropriate.\textsuperscript{48} In themselves, informal proceedings have no finality in the usual sense of the word. They become final only if no contest is commenced during the basic 3 year limitations period provided by section 3-108 or within 1 year after the informal proceeding, if that is later.\textsuperscript{49} Thus, the usual time period that may make informal proceedings incontestable runs from death rather than from the administrative action.\textsuperscript{50}

There are several reasons why notice requirements were omitted from informal proceedings. The addition of a notice requirement as a prerequisite to informal proceedings would have blurred the Code's line between functions requiring the presence of a judge and those that can be handled by less...
qualified and less expensive personnel. Requirements that heirs and devisees be notified complicate and delay the opening of estates and prolong the vacuum of managerial authority caused by death. No-notice procedures avoid complications when some successors are minors, a circumstance that has led, in some states, to appointment of guardians for minors for the sole purpose of receiving or waiving notice, an example of red tape causing more red tape.

It must also be recognized that non-probate methods of wealth transmission at death which operate without notice requirements are readily available. Article III seeks to strip the probate process of non-essential complexities to the end that it might become as popular for effecting uncontested transfers at death as revocable trusts, life insurance contracts, and joint tenancies, all of which have functioned successfully for decades without provisions for notice to heirs and devisees.

Persons who examine the no-notice provisions of informal proceedings should also recognize that although a majority of jurisdictions presently require notice of probate proceedings, there are several which do not. Pennsylvania has a working, successful informal probate procedure that has withstood the tests of more than 150 years of experience; New Jersey has a similar procedure. The experience in these and other American and United Kingdom jurisdictions that have relied on informal probate procedures tends to prove the obvious; the family survivors who are usually interested in inheritance prospects need no more notice than the fact of death as a warning to look after their interests. The patterns in these jurisdictions were studied with great care by the Code draftsmen, who sought tested models for every device that seemed to contribute to the goal of simplification.

In spite of these considerations, many lawyers urge that modern conditions compel the continuation of existing notice requirements as a safeguard. Some of these assertions may be rooted in a concern that lawyers will not be needed if estate procedures become too simple. Others surely reflect positions held

51. Compare id. § 1–201(15) (formal proceeding), with id. § 1–201(19) (informal proceeding).
in good faith by persons who may not have given full consideration to the protective features built into the Code\(^6\) and the degree to which they make the additional safeguard of notice unnecessary when weighed against its inherent inconveniences. Thus, in an informal probate proceeding the proponent of the will must file a verified application with the registrar, a court official, which contains a large amount of relevant information.\(^6\) The filing becomes part of the public record and penalties for perjury are available for the giving of false information in the application.\(^4\) Moreover, deliberate failure to supply available information required in an application, or falsification of this information, would constitute fraud making the person responsible liable to the persons injured for resulting damages.\(^4\) A cause of action for fraud is not subject to the basic 3 year limitation period on probate proceedings. Rather, section 1-106 provides that suit against the perpetrator is not barred by limitations until 2 years have elapsed after discovery of the fraud.\(^4\)

The registrar is required to examine the application to assure that it is complete, that it was made under oath, that the applicant is an interested person, that venue is proper, that a duly executed will is in his [the registrar's] possession, that any notice required by section 3-204 has been given, and that the time limit for original probate has not expired.\(^4\) The registrar's inspection tends to assure compliance with the requirements of section 3-301. In addition, the registrar has a statutory power to refuse informal probate if for any reason he is not satisfied that the application should be granted.\(^6\)

If an applicant seeks to open an estate, additional information demonstrating his right to handle the estate by virtue of statutory position, waiver, or nomination must be provided in the application.\(^6\) The statute directs the registrar to determine that the applicant appears to have priority.\(^7\) Again, the sanctions for perjury,\(^8\) the damage remedy for persons injured by fraud,\(^9\) and the participation of the registrar\(^7\) narrow the likelihood of fraud or error.

In addition to these safeguards, various other factors serve to further reduce

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60. *See* UPC § 3–301.
61. *Id.* § 1–310.
62. *See* id. § 1–106.
63. As supplemented by the 1975 amendments, the Code provides that the person completing an application in informal proceedings consents to the continuing jurisdiction of the court in any action or proceeding relating to the application. This new long-arm provision adds significance to the utility of the fraud remedy described in UPC 1–106.
64. UPC § 3–303(a).
65. *Id.* § 3–305.
66. *Id.* §§ 3–301(3)–(6).
67. *Id.* § 3–308(a)(7).
68. *Id.* § 1–310.
69. *Id.* § 1–106; *see* note 63 supra.
70. *Id.* § 3–303(a).
any risks that may be associated with informal probate. Persons who are most likely to be the heirs or devisees of a decedent are also likely to be aware of the death and of the location of the probate office where the estate is to be probated. These persons have the ability, through a demand for notice and their own standing, to initiate formal probate proceedings, thereby blocking any later-started informal proceeding and attendant risks. The only risk of an informal probate proceeding in which no appointment is sought is that it may establish a testamentary instrument which becomes incontestable if not timely challenged. Only in very rare cases will heirs be without information or ability which would permit them to launch an effective protest against an informally probated will.

If informal appointment is involved, the legal beneficiaries can look to the estate fiduciary for proper performance; his liability to them becomes an added guarantee that they will receive what is due them from the estate. Most importantly, the Code does about all that written law can do to prevent strangers to the decedent and his heirs from becoming the estate fiduciaries through appointment in informal proceedings. Thus, if the registrar performs his function and the recitations in the application indicate that there is no nominated executor or spouse, all heirs or devisees share priority for appointment, meaning that those who do not waive their authority must serve jointly or concur in nominating one of their own or an outsider. Non-residence does not disqualify persons with priority; hence, preferred family members who reside in other states do not have to submit to an in-state stranger selected by the registrar as personal representative. Finally, the registrar has power to decline an appointment for unspecified reasons, thus forcing an applicant to resort to judicial proceedings involving full notice if he wishes to go further.

Assuming that letters are issued in informal proceedings, it is to be noted that the personal representative has a duty to inform heirs and devisees of his appointment not later than 30 days after his appointment. Although this requirement may seem somewhat contradictory of some earlier observations relating to notice provisions, it is not. This notice, which is not jurisdictional, is given after appointment and does not involve the registrar or court; conse-

71. See id. § 3–204.
72. See id. § 3–401.
73. Id. § 3–108.
74. See id. §§ 3–703, –712.
75. Id. § 3–203.
76. Id. §§ 3–203(f), (g).
77. If the decedent was domiciled in another state, a waiting period of 30 days from death must elapse before any appointment can be made in informal proceedings. Id. § 3–307(a).
78. Id. § 3–309.
79. Id. § 3–705.
quently it will not complicate the appointment proceeding or delay the time when full managerial authority over estate assets is restored. It is appended as a duty of the office assumed by the personal representative rather than defined as a constituent of the appointment process.

Starting with the first enactment in Idaho, several states have inserted a requirement that a post-proceeding notice be given in cases of informal probate for muniment of title purposes only. If the probate is accompanied or followed by appointment of an estate representative, the requirement is merged with the post-appointment notice required by section 3-705. Proponents of the new post-probate notice argue that it is needed to prevent disinheritance by surprise when a devisee who obtains informal probate of a will avoids having the will questioned by refraining from possessing or claiming the devised assets until after the 3 year limitation period has run. Those defending the Code as originally promulgated might argue that the heirs have plenty of opportunity to prevent an informal probate or to discover and contest a will that has been probated before they were able to take defensive action. Nonetheless, at the request of the Joint Editorial Board, the National Conference approved optional additional language for the Official Text that accepted the Idaho recommendation. In the interim the enactments in Arizona, Nebraska, and Utah have added various features to this and other information requirements that warrant discussion.

Arizona requires that the applicant for informal probate give the heirs and devisees written notice of probate and a copy of the will within 10 days of the proceeding. If a personal representative is appointed, the informational notice required by section 3-705 may be combined with the information required about the informal probate and may be given by the personal representative rather than the applicant.

At this point, however, the Arizona provision takes a peculiar twist that results in an early end to will contest risks for those using informal probate. Under the statute, any heir who receives the required information is barred from commencing a formal testacy proceeding, except "to probate a later

81. the Joint Editorial Board's recommendation, which was accepted by the National Conference at its 1975 Annual Meeting, was the addition of a bracketed (optional) subsection (b) in UPC section 3–306, as follows:

"(b) If an informal probate is granted, within 30 days the applicant shall give written information of the probate to the heirs and devisees. The information shall include the name and address of the applicant, the name and location of the court granting the informal probate, and the date of the probate. The information shall be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the applicant. No duty to give information is incurred if a personal representative is appointed who is required to give the written information required by 3–705. An applicant's failure to give information as required by this section is a breach of his duty to the heirs and devisees but does not affect the validity of the probate."

82. Ariz. rev. stat. ann. § 14–3306(b) (1975).
83. Id.
discovered will,” unless he does so within 4 months of receipt of the notice. If an heir is not given notice in this manner, he may contest the will on any ground at any time within the limits of section 3-108.84

The Arizona change is not outrageous, but it is unnecessary, unclear, potentially burdensome, and possibly dangerous to the Code’s validity. It is unnecessary because the Code’s formal testacy proceeding provides a method by which a will proponent may secure a court adjudication of a will’s validity and thereby gain assurance against later will contests long before the running of the 3 year limitation period.85 It is unclear because the exception concerning later discovered wills does not indicate who must lack information about the other instrument and when this ignorance must exist. Further, it does not state that the later discovered will must have revoked the first will; it may be enough that it was not discovered within the 4 month period and is now being offered by someone seeking advantage in getting it admitted to probate. It is potentially burdensome, not only because it may entail the production and mailing of many copies of the will, however complex, but also because it may have the unfortunate effect of forcing heirs to initiate formal proceedings to contest a will whenever there are concerns about validity that cannot be resolved within 4 months of probate.

The most worrisome implication of the Arizona device is that it blurs the Code’s distinction between administrative and judicial determinations in probate. The strength of the Code’s informal procedures is that their use cannot extinguish the substantive rights of anyone except as unadjudicated matters become final through limitation periods which do not expire sooner than 3 years after death.86 The Arizona enactment may extend the good idea of limitations too far by barring will contests by heirs who fail to move promptly after another has caused the informal probate of the will. How is

84. Id.
85. A formal testacy proceeding order becomes final when the times for appeal and vacation have passed. The time for appeal is governed by section 1–308 or by general procedural statutes or rules. Section 3–412 permits vacation after the time for appeal of a formal testacy proceeding order for certain limited causes and for certain periods which cannot exceed 12 months after the entry of the order. See UPC § 3–412(3).
86. Informal proceedings may result in the appointment of a personal representative who has power to sell assets and distribute proceeds. If a personal representative breaches a duty to persons interested in the estate, he incurs a personal liability which cannot be ended except via formal proceedings or by careful use of the closing statement routine described in section 3–1003. A personal representative who erroneously determines the successors to an intestate estate and consequently makes a distribution that omits one or more heirs cannot gain protection by the closing statement device, because that must involve a truthful statement that he has distributed the estate to the persons entitled thereto and has sent each a copy of the closing statement and a full accounting of his administration. A personal representative may be absolved if he distributes according to an informally probated will before receiving notice of a proceeding to contest the will. UPC § 3–703(b). But if the contest is successful, the distributees will be liable to the persons found to have been entitled as a result of the contest. Id. § 3–909. This distributees’ liability will not be ended by limitations until at least 3 years from death have elapsed. Id. § 3–1006. The liability of distributees who benefited from an incorrect distribution is personal, and is not dependent upon their continuing ownership of the distributed assets or the proceeds thereof. Id. § 3–909.
the critical act of giving or receipt of notice to be proved? If those of whom
the proponent was unaware and who received no notice are not barred from
defeating the will, can another who is barred benefit from their contest?
These questions, coupled with those noted earlier concerning the exception
for later discovered wills, support the conclusion that, in cases where it is
important to cut off will contest rights before the 3 year period has run,
prudent Arizona counsellors may prefer to use the adjudication route rather
than rely on the validity of Arizona's short-contest period following informal
probate.

The Nebraska provisions on notice are directly attributable to efforts by a
sizeable segment of the Nebraska State Bar Association to prevent enactment
of the Code. Following a 1972 vote in the House of Delegates of the Bar
Association approving the Code "in principle" for enactment in Nebraska, a
dissenting group succeeded in promoting a resolution opposing the Code "or
any other legislation providing for 'informal probate' or 'informal administration'
of estate without notices to heirs and creditors . . . ."87

Thereafter, a special committee of the Nebraska Bar Association decided
that it was politically more feasible to seek amendments to the Uniform
Probate Code bill than to oppose its enactment. The recommendations of this
group concerning notice, as ultimately accepted by the Judiciary Committee,88

87. A copy of the initiative petition is on file in Professor Wellman's office. The resolution
also directed the Association to "actively embark upon a program to inform the citizens
of Nebraska concerning the protections afforded the citizen, creditors, and individual
property rights by the normal Nebraska system of probate and administration of
letter indicates the attitude of the Nebraska Bar:

   Enclosed is a copy of the results of the Nebraska State Bar referendum.
   There are 2,813 active members in the Nebraska State Bar Association, and
   you will note that 1,233 of those voted. If my mathematics are correct, that
   means that 43.8 percent of the active members voted and, of those voting,
   73.46 percent voted to oppose the Code. Of course, this referendum was the
   first under our new rules, and the question was submitted to the membership
   without information concerning the previous activity of the bar and the posture
   before the Legislature.

Letter from Howard H. Moldenhauer, Joint Editorial Board's State Chairman for
Nebraska, to Professor Wellman, April, 1973.

88. The source of this statement is a document dated Dec. 21, 1973, entitled Technical
Memorandum on Amendments Proposed by the Judiciary Committee to L.B. 354,
bearing the names of the Judiciary Committee and signed by Roland A. Luedtke,
Chairman. The pertinent portion concerns section 93 of the bill, the counterpart of
The report stated:

   This amendment adopts a prime recommendation of the Bar Committee that
   there be published notice following an informal probate or informal appoint­
   ment of a personal representative. This notice is an addition to the duty of
   the personal representative to supply information to heirs and devisees under
   section 144 and to give notice to creditors under section 161. The Bar recom­
   mended procedure for having the clerk issue the notice follows the Iowa rules
   in effect for several years. The notices under the different provisions of LB
   354 can be combined so long as all requirements as to each notice are met.
   Since informal probate or informal appointment of a personal representative
   is not a "judicial" act, the section makes clear that a defect in the publica­
   tion, like the defect in the other proceedings covered by section 93(a), does
   not void the proceedings. The informal probate or appointment not being
catered to the unlimited appetite of newspaper lobbyists for statutory requirements of published notices, as well as to the concerns of the lawyers. The compromise resulted in a requirement of published and mailed notice for every informal probate or appointment. Since this notice may be combined with the published notice which the approved text of the Code requires to be given by personal representatives for the benefit of creditors, and since it is a nonjurisdictional notice that will not delay informal proceedings, the Nebraska change does not at first appear to be drastic. Indeed, one might say that it only adds a new publication requirement to the predictably infrequent cases where a will is probated informally for muniment of title purposes only.

But there is more to the Nebraska change. It places the duty of arranging for published notices on the probate court clerk, rather than on the personal representative as provided in the approved text. Evidently the publishers felt that a mere statutory duty imposed on estate fiduciaries to publish notice provided inadequate assurance that publication would occur and sought to insure a sale of notice to every estate by requiring a public official to be the purchasing agent. Unfortunately, the publishers' cure involves a contradiction of the Code's major objective of detaching the probate court from its traditional role as protector of decedents' estates. Moreover, by specifying that the supreme court is to prescribe the form of notice and by adding that the mailing of the published notice is to be proved in the same manner as for published notices in litigated matters, the Nebraska addition complicates the informal probate or appointment transaction considerably. It consequently diminishes any prospect, however slight, that court clerks might permit some survivors to attempt to handle inheritances without legal counsel. On balance, the Nebraska variation regarding notice is seriously prejudicial to the Code's goals. Still, it is not as harmful as the Utah variation which is described next, and it may have been the best obtainable under the circumstances.

Utah did the greatest damage to sections 3-306 and 3-310; it simply rejected the Code's no-notice concept in informal proceedings. In that state, as a precondition to an informal probate or informal appointment, the clerk must give 10 days notice by mail to each heir and devisee who has not waived notice in writing. The Utah compromise of informal probate and appointment procedures appears to have come from recommendations of lawyers who

90. Id. § 30-2415(b).
91. See id. § 25-520.01 (1964).
advised the committee which handled the study and drafting stages of the enactment project. Perhaps the advisors were interested in assuring validity for the strange new procedures; perhaps they wanted to keep the new probate process as familiar and as close to the court system as possible. In any event, it seems fair to predict that the changes will serve to discourage use of the Code’s informal proceedings in Utah. Why would one desiring a probate and appointment use the registrar’s services, leaving the will and appointment subject to being upset for 3 years after death, when he can use his waivers of notice to get final adjudication that the will is valid and the appointment is proper? Do persons receiving notice from the clerk under Utah’s version of informal probate or appointment have a right to appear and be heard? As noted elsewhere in this Article, Utah also changed section 1-307 so that a judge of the court must handle informal proceedings, and it might be predicted that judges will continue to act as they have been accustomed. If informal probate is obtained after notice or waivers and later contested, are those who waived notice or remained inactive now handicapped in any way in the subsequent formal proceedings? Is the court to give any weight to the earlier determinations in a noticed informal proceeding when it considers a later petition in a formal testacy proceeding? Utah lawyers can anticipate several lawsuits on these issues as they struggle to make undisturbed Code provisions mesh with the changes that put Utah’s provisions very close to the widely criticized, older procedures that allow contestants two chances to test a will in court.

IV. ELIMINATION OF BOND: SECTION 3-603

Section 3-603 represents one of the Code’s more sweeping departures from former law and slashes directly at a powerful special interest, the surety industry. The Code eliminates the bond requirement in both testate and intestate estates with three exceptions. If the will does not relieve the personal representative of bond, it may be required by the court if a part 4 formal proceeding is held. Even where a will requires bond, the court in formal proceedings has discretion to dispense with it when satisfied that security is unnecessary. As was to be expected, this section has generated heated

93. This statement is based on conversations between Professor Wellman and representatives of the Wills and Probate Subcommittee that occurred in Salt Lake City in December, 1974.

94. See text accompanying notes 271–72 infra.


96. UPC § 3–603. Bond is still required when a special administrator is appointed, when a will expressly requires a surety, or when an interested person demands a bond under section 3-605. Id. § 3–603; See id. §§ 1–201(39), 3–614 to –618.

97. Id. §§ 1–201(19), 3–603.

98. Id. § 3–603.
and perhaps not surprisingly, some of the enacting states have been pressured to desert the reform which section 3-603 would effectuate.

Traceable historically to an unfortunate assumption that courts control estates through executors and administrators, the traditional approach requires personal representatives to post bond before undertaking their duties of administration in both testate and intestate cases. Most states, however, have permitted a specific provision in a decedent’s will to excuse the personal representative from the requirement of bond or surety. In practice such exclusionary language has become boilerplate where it is effective. 100 The real impact of the statutory bond requirement is on intestate estates, which studies have shown are almost uniformly small and administered by close family members for family beneficiaries. 101 These estates are usually settled peacefully and routinely. 102 In such a setting, bond expenses are most onerous and the justification for blanket bond requirements is least persuasive. 103

No convincing argument supports a position that heirs routinely need the protection of probate bonds. The Code provision on priority for appointment assures that those with the greatest interest in the estate will have an opportunity to serve as personal representative, or, with the concurrence of other beneficiaries, to designate the personal representative. 104 Section 3-309 allows the registrar to deny informal appointment for any reason. The location of the successors, their relationships, the mode by which priority is established and other information contained in the application concerning the risks of the proposed appointment are all factors to be considered in denying informal probate. If the application is denied, the moving party must institute a formal proceeding to gain appointment. 105 In a formal proceeding interested persons may raise the issue of bond, and bond may be ordered by the court. Of course, interested persons need not wait for someone else to commence proceedings. If they feel that their interests would be threatened by informal proceedings, they may institute formal testacy proceedings, thus suspending the registrar’s power to make an informal appointment 106 and assuring judicial consideration of the question of bond. An interested person also may raise the question after

102. Notes Supplement, supra note 6, at 6.
103. A chart showing the cost of probate bonds in 20 representative states is printed in Notes Supplement, supra note 6, at 2, and in Wellman, The Uniform Probate Code: Blueprint for Reform in the 70's, 2 CONN. L. REV. 453, 508 (1970).
104. U.P.C. § 3-203.
105. Id. § 3–305, Comment.
106. Id. § 3–401.
a personal representative has been appointed by means of formal appointment proceedings. More simply, an interested person may require a bond merely by filing a written demand with the registrar. If a personal representative becomes obliged to post bond after his appointment, his powers are substantially suspended until he meets the obligation or eliminates it by discharging the claim of the demandant or by obtaining judicial relief from the bond requirement. If a duty to post bond is not met within 30 days, the personal representative may be removed upon petition to the court. Moreover, it should be remembered that interested persons may invoke the provisions of section 3-607 at any time to obtain an order restraining the personal representative from performing specified acts.

Few would argue that bond should be required when the personal representative is the sole beneficiary and will bear personal responsibility for claims that are not discharged by the estate. Yet a blanket statutory bond requirement has this effect. Sole beneficiary intestacies will occur frequently under the Code's provisions which give the surviving spouse the first $50,000 plus family allowances which normally will amount to $14,500. Only infrequently will the aggregate value of $64,500 be exceeded by intestate estates. Also, the priority provision mentioned above means that the surviving spouse will receive appointment in most cases, and so would be posting bond to protect herself from herself. Where there is no surviving spouse, the decedent's issue will take the entire estate and also share priority for appointment. If the eligible children accept a joint appointment, a blanket bond requirement again would be indefensible.

What about the need for bond to protect creditors? Especially in intestate estates, creditors' claims prove to be a small concern. Since there are no tax benefits to be gained by passing these claims through probate, few are paid this way. Evidently, whatever debts remain after application of creditor life insurance are paid voluntarily by family survivors. Family members who accept letters only to ignore creditors and facilitate distribution will incur long lasting personal liability to creditors, and their distributees will also be.

107. See id. §§ 3-414, -603.
108. Id. § 3-605.
109. Id.
110. Id. §§ 3-605, -611.
111. Id. § 2-102 (assuming decedent left no issue who are not also issue of the surviving spouse).
112. See id. §§ 2-401 to -404.
113. Id. §§ 2-103, 3-203.
114. Sussman, Cates & Smith, supra note 101, at 183-84.
115. Code section 3-703 describes the basic duties of a personal representative who, unless he advertises for claims as required by section 3-801, pays all allowed claims as required by section 3-807, and files an honest closing statement as permitted by section 3-1003, or secures a court order discharging him from responsibility as provided by sections 3-1001 or 3-1002, never gains protection under the Code against an unpaid and unbarred claimant. See UPC § 3-1005.
liable to unpaid creditors to the extent of the values they have received from the estate.\textsuperscript{116} Creditors' rights in these circumstances are neither dependent on tracing nor encumbered by the need to proceed against all in order to secure full payment.\textsuperscript{117}

Blanket bond requirements cannot be justified in order to provide protection for possible minor beneficiaries or unknown heirs and devisees. A bond requirement that attached only when the application for appointment revealed the presence of minors or missing heirs would be different. The Code does not expressly describe this qualified requirement, but the registrar's discretion to decline appointment,\textsuperscript{118} and the judge's authority to appoint guardians ad litem for minors or incompetent beneficiaries who can demand bond, or to require bond by order, assures the same protection.\textsuperscript{119} But the surety industry representatives are not content with the small, forced market that these provisions generate. After all, the chances of a decedent's leaving minor heirs is small.\textsuperscript{120} Consequently, bond requirements sensitively tailored to the needs and prospects of minor beneficiaries would yield few bonds.

Heirs and devisees who are unknown because their rights depend on an as yet undiscovered will or a still-to-be-started will contest gain no real protection from probate bonds because, unless they appear before distribution is made, the personal representative has no duty to them,\textsuperscript{121} and probate bonds merely insure that a probate personal representative will perform his duties. Any realistic possibility that unknown persons may appear during administration and put forward claims will be another factor encouraging the personal representative to seek protective court orders and thereby open to court scrutiny the question of a need for bond.\textsuperscript{122} Moreover, the likelihood of undiscovered wills and of the appearance of long-lost heirs is somewhat more remote in modern times than formerly. Ease of communication, the realization that wills must be probated within 3 years of death or be barred, and the Code's limitations on inheritance by remote collaterals all contribute to the reduction of this problem to a point approaching insignificance.

Of the nine enacting states, five—Alaska, Arizona, Colorado, Nebraska, and

\textsuperscript{116} Id. § 3–1004.
\textsuperscript{117} Id.
\textsuperscript{118} Id. § 3–309.
\textsuperscript{119} Id. §§ 1–403(4), 3–603, –605.
\textsuperscript{120} A sample of estates closed in Cuyahoga County (Ohio) Probate Court between November 1964 and August 1965 found that the average age of the decedent was 67.8 years. \textsc{Sussman, Cates & Smith}, supra note 101, at 65. The possibility that estates will pass to minor issue is further reduced by the priority distribution of exempt property, \textsc{UPC} § 2–402, the family allowance, \textit{id.} § 2–403, the homestead allowance, \textit{id.} § 2–401, and by the many cases in which the surviving spouse gets the entire intestate estate on first priority for a substantial monetary value. \textit{id.} § 2–102A.
\textsuperscript{121} \textsc{UPC} § 3–703.
\textsuperscript{122} \textit{See Notes Supplement}, \textit{supra} note 6, at 6.
Utah—have rejected the Code's full no-bond provision.\textsuperscript{123} Alaska,\textsuperscript{124} Arizona,\textsuperscript{125} Colorado,\textsuperscript{126} and Utah\textsuperscript{127} changed section 3-603 to require all personal representatives to post bond with certain exceptions. All four states allow a testator to waive bond expressly in his will, thereby following a pre-Code pattern that existed in 42 states and that offers nothing for the small unplanned estate.

Alaska, Arizona, and Utah provide that the personal representative is excused from bond when all heirs or devisees waive the requirement in writing.\textsuperscript{128} Though this offers some relief to intestate successors, it is far from the Code goal vis-a-vis bond. When estate values are uncertain at the time of opening, the consent of all issue may be a practical necessity even though later events prove that the personal representative spouse is entitled to the entire estate. The necessity of locating heirs or devisees quickly and of receiving their written agreement to waive bond will tend to delay the quick opening of estates. Because many persons who receive a communication requesting the waiver frequently will not understand the situation, they may be reluctant to waive some apparent protection. The waiver of bond possibility is not very useful where minors or incompetents are involved; it merely invites troublesome questions about the effectiveness of waivers. The surety industry lobbyists undoubtedly calculated that in many cases the moving party will post a bond merely to save time and red tape.

Compromises on the bond question produced other variations. Arizona excepts its version of section 3-1203\textsuperscript{129} from the necessity of bond\textsuperscript{130} even though that section is designed to accommodate estates that may not appear to be small or insolvent at the time of opening. Colorado provides that the court may waive bond for "any . . . valid reason,"\textsuperscript{131} and similar language appears in

\textsuperscript{123} The policy underlying the Code's position on probate bonds was succinctly summarized in a memorandum dated July 9, 1969, submitted to the National Conference of Commissioners on Uniform State Laws which stated as follows:

The argument in support of the Code's position regarding bonds in intestate estates is relatively simple. It rests on the fact that the heavy majority of cases falling within the category in question will involve very small estates being administered by a close family member for himself and other members of the family, or by an attorney or other outsider who is agreed to by the survivors after the decedent's death. The Code accepts the proposition that succession to small, unplanned estates should not be made relatively more expensive or complicated than succession to larger estates. Thus, bond requirements which are routinely avoided by persons planning large estates should not be imposed on successors to modest estates.


\textsuperscript{125} ARIZ. REV. STAT. ANN. § 14-3603 (1975).

\textsuperscript{126} COLO. REV. STAT. ANN. § 15-12-603 (1973).

\textsuperscript{127} UTAH CODE ANN. § 75-3-603 (Spec. Unif. Probate Code Pamphlet 1975).


\textsuperscript{129} ARIZ. REV. STAT. ANN. § 14-3973 (1975).

\textsuperscript{130} Id.

\textsuperscript{131} COLO. REV. STAT. ANN. § 15-12-603(1)(b) (1973).
the Arizona\textsuperscript{132} and Utah\textsuperscript{133} statutes. Perhaps some legislators in these states did not perceive the great practical difference between a statute permitting a court to waive a required bond and the Code provision which permits a court to require bond even though the statute does not. The contrast is especially marked in view of the Code's division of labor between the judge and the registrar, authorizing the latter to respond to requests for official action only in narrowly restricted circumstances.\textsuperscript{134} If it is necessary to go to the judge in formal proceedings in order to have the statutory requirement of bond waived, there will be little use of the exception simply because the cost of providing bond will be less than the cost of getting rid of the requirement. As originally enacted, the Nebraska provision\textsuperscript{135} was much closer to the Code than the comparable provisions of the other states which changed the Code language. In essence, it merely enabled the court to impose bond in formal proceedings. The Nebraska bond provision, however, was amended in 1975 to align it more closely with those of Arizona and Alaska.\textsuperscript{138}

It is not surprising that surety industry advocates have succeeded in winning rather broad changes of the Code's stance on bond. The Code enactment in Idaho apparently was the first statute in the United States which permitted a regular intestate estate administrator other than a corporate fiduciary or an individual who was also the sole heir to avoid a bond requirement.\textsuperscript{136} In addition, several states refuse to give testators full authority to waive bond by provision in their will.\textsuperscript{137} The advent of the Code has forced surety industry representatives to concede that no bond should be required by statute where all intestate successors have waived the safeguard or where a will excuses bond.\textsuperscript{138} In Idaho, the state with the most experience to date with the Code, the legislature recently rejected a determined effort by surety lobbyists to

\begin{itemize}
\item \textsuperscript{132} ARIZ. REV. STAT. ANN. § 14–3604(A) (1975).
\item \textsuperscript{133} UTAH CODE ANN. § 75–3–603(1)(c) (Spec. Unif. Probate Code Pamphlet 1975).
\item \textsuperscript{134} These include his part 3 functions relating to applications concerning informal probate and appointment, as well as his power to reduce bond within the guidelines of section 3–604.
\item \textsuperscript{135} NEB. REV. STAT. § 30–2446 (Cum. Supp. 1974).
\item \textsuperscript{136} Indeed, the amendment proposed in Nebraska is more favorable to corporate fiduciary and surety industry interests than the comparable provisions in Arizona, Colorado, Utah, and Alaska. Legislative Bill 500 proposed changing NEB. REV. STAT. § 30–2446 (Cum. Supp. 1974) so that unless the fiduciary is an approved bank or trust company, bond would be required "unless all the heirs, if no will has been probated, or all the devisees under a will, file with the court a written waiver of the bond requirement."
\item \textsuperscript{138} This statement reflects the views of David Q. Cohen, Counsel, American Insurance Association, as expressed in a letter to Allison Dunham, Executive Director, National Conference of Commissioners on Uniform State Laws, dated June 7, 1968, a copy of which is on file in Professor Wellman's office.
\end{itemize}
change the bond provision\textsuperscript{140} to one patterned on the Alaska and Arizona enactments. The Idaho legislators were influenced by attorneys and others in Idaho who had gained experience with the Code’s no-bond provision and liked it. None of the states that rejected the Code position on bond initially, or amended an original Code enactment to a bond requirement before effective date, as in Alaska and Nebraska, have had any experience with a no-bond statute. These statutes prove nothing more than the effectiveness of the surety industry lobby, while the Idaho law now reflects experience under both the old and the new assumptions about bond.

V. Independence of the Personal Representative During Administration: Parts 7, 9, and 10

If article III is the heart of the Code, part 7 on the personal representative’s duties and powers, and the supporting sections in parts 9 and 10 that protect various persons who rely on unadjudicated distributions from estates, are the heart of article III.

Under the Code the personal representative provides a mechanism for the efficient administration and prompt distribution of estates which obviates the need for court involvement after appointment. The personal representative may exercise vast powers of administration without notice, hearing, or court order so long as interested persons are satisfied with his performance. One who disapproves of his performance may petition the court for a whole spectrum of orders ranging from an ex parte order restraining a particular transaction\textsuperscript{141} to supervised administration with its ongoing court control and review of the estate.\textsuperscript{142} The personal representative’s independence from the court appointing him derives in part from section 3-107. This critically important section limits every probate court proceeding, other than supervised administration, so that the court may only respond to the petitioner’s prayers for relief; also, it prohibits prayers for relief that would involve any delay in the final order.

Independent administration is further supported by statutory descriptions of the status, power, and duties of personal representatives\textsuperscript{143} and by vital sections protecting third persons who deal for value with personal representatives or with their distributees.\textsuperscript{144} A personal representative’s duties are owed, not to the appointing court as the focus of some public responsibility relating to the affairs of decedents, but to those with property interests in the estate;\textsuperscript{145} accordingly, these duties are subject to change by private agreement. This

\textsuperscript{141} UCP § 3–607.
\textsuperscript{142} Id. § 3–501 et seq.
\textsuperscript{143} See, e.g., id. §§ 3–703, –704, –715.
\textsuperscript{144} Id. §§ 3–714, –910.
\textsuperscript{145} See id. § 3–703 and Comment.
critically important concept is expressed negatively by section 3-107 and related sections which make it clear that a court’s concern about a personal representative ends with the appointment where supervised administration is not involved. The same concept is expressed affirmatively by sections 3-703 and 3-704, which describe the personal representative as a fiduciary who is to act without court order where feasible and for the best interests of those succeeding to the estate. Further, except for rules that may be asserted by creditors and taxing authorities, section 3-912 explicitly subordinates the terms of any will and the rules otherwise applicable to the determination of successors and the administration of estates to any written compact by all devisees or heirs. Sections 3-714 and 3-910 protect third persons who deal for value with personal representatives or distributees, and section 3-715 and related sections\textsuperscript{146} cover the compensation of personal representatives and their employees, including attorneys, in ways that are designed to make non-adjudicated estate settlements feasible for most estates.

Other provisions of the Code buttress the independent administration concept by covering familiar sub-topics like bond,\textsuperscript{147} family allowances,\textsuperscript{148} appraisals,\textsuperscript{149} spouse’s election\textsuperscript{150} and others in ways that do not involve court orders. Part 8 employs limitations, public office filings, fiduciary authority, and possible personal liability by estate beneficiaries to balance the rights of decedents’ creditors against the interest of heirs and devisees in marketable inheritances. Systems designed to operate without court aid for informing beneficiaries about the personal representative’s administration\textsuperscript{151} and for determining rights of possession during administration of estate assets\textsuperscript{152} are described, as are systems for distribution and closing without court orders.\textsuperscript{153}

Finally, section 3-108 specifies the time limits governing the initiation of probate, and sections 3-1005 and 3-1006 set periods of limitation on actions against a personal representative for breach of fiduciary duties and actions against distributees to correct erroneous distributions. These sections assure eventual peace of mind for persons receiving property from estates settled without court orders.

In sum, an estate may be opened by informal or formal proceedings and the personal representative may proceed without court supervision through administration, distribution, and closing so long as no disagreement develops. If a controversy develops or if the personal representative wants the protection

\textsuperscript{146} Id. §§ 3–715(21), (27), –719, –721.
\textsuperscript{147} Id. §§ 3–603 to –606.
\textsuperscript{148} Id. §§ 2–403, –404.
\textsuperscript{149} Id. §§ 3–706, –707.
\textsuperscript{150} Id. §§ 2–201 to –207.
\textsuperscript{151} Id. §§ 3–705, –706, –713.
\textsuperscript{152} Id. §§ 3–101, –709.
\textsuperscript{153} Id. §§ 3–906, –1003.
of an adjudication, a court order determining any matter may be obtained in a new, self-contained court proceeding. Parties may move in and out of court at need, but the court is not, like the tar baby, once touched, never released. This concept is central to the Code’s promise to reduce the red tape of probate.

The changes made by Arizona, Nebraska, Utah, and Montana in section 3-108 were noted previously. While striking at the Code’s systems for settling “do-nothing” estates and establishing a will for muniment of title purposes, these changes have no bearing on independent administration. Similarly, the added notice requirements for informal probate and appointment tend to encumber the process of opening estates, but do not jeopardize independent administration. Bond requirements, which bring sureties into the circle of persons interested in estate settlement, would jeopardize independent administration if corporate sureties were to create new and independent pressure for court supervised administration or adjudicated estate settlements either through the terms of the bonding contracts or by rate differentials that discriminate against non-supervised fiduciaries. Fortunately, there is no evidence of any such development. For these reasons, the changes discussed to this point have not detracted from the Code’s goal of freeing fiduciaries from the burdens of court supervision.

Except for a modification in Utah affecting administration of the family allowance, none of the numerous changes evident in the enactments under discussion have caused any serious damage to the Code’s independent administration concept. This cheerful consequence is not due entirely to full comprehension and acceptance of the Code provisions that are designed to facilitate independent administration. Indeed, the enactments suggest that several legislatures have attempted to restrict the general duties and powers of personal representatives. The Code’s key administrative concept, however, is described in so many ways by so many sections that it seems relatively immune to defeat by those who cannot prevent enactment of the basic package.

The most damaging change, adopted in Utah, does not appear in the article concerned with estate administration, but is tucked into the probate exemption provisions of article II. The Utah legislature was persuaded to restrict the family allowance provisions so that only sums approved by the court may be paid to the spouse or to dependent minor children as exempt from creditors’ claims and the terms of any will. The Official Text of the Code permits the personal representative to determine and pay a family allowance of up to $500 per month for 12 months without court order. Perhaps Utah’s deviation

154. See text accompanying notes 15–39 supra.
155. See text accompanying notes 80–95 supra.
157. UPC § 2–404.
will be repealed prior to the effective date of the new Code. If not, only
time and experience will disclose how serious this impediment will be to the
Code's goal of administration without court order. In most estates involving
a surviving spouse, he or she will be the sole beneficiary.158 Assuming this
pattern, predicating the payment of the family support allowance on a court
order probably will result in non-use of the family allowance exemption except
in insolvent estates. If so, the damage from the Utah requirement will not be
great. Nonetheless, forcing recourse for family allowance purposes to formal
court proceedings whenever an estate is insolvent is unfortunate, because the
extra costs of the court's involvement may work unique hardships in this
category of cases.

Well intentioned tampering with the Official Text may have unexpected,
but dire consequences for the Code policy of independent administration.
Though probably not anticipated by those responsible for the change, a slight
modification of the wording of Colorado's original version of section 3-713159
frustrated the Code's purpose of enabling personal representatives to sell land
without court order. The change, affecting the characterization of sales involv­
ing a conflict of interest on the part of the personal representative, substituted
the word "void" for "voidable" as it appeared in the Official Text. Colorado
land title experts erroneously decided that the protection afforded good faith
purchasers from personal representatives by section 3-714 was implicitly limited
to "voidable" transactions and was, therefore, of no help in cases of conflict
of interest. Further, since conflict of interest is a non-record peril that may
attend any transaction, the experts took the position that no probate land sale
could result in a marketable title unless it was pursuant to a court order.
In 1975, the Colorado Legislature amended the Code to restore the word
"voidable" in section 3-713, eliminating the difficulty in Colorado.160 The modifi­
cation and subsequent correction emphasizes the dangers that can lurk behind
even slight and benign changes in the Code language dealing with the touchy
subject of protection for purchasers from personal representatives and their
distributees.

Other changes focusing on estate sales of real estate threaten, but do not
reach the concept of independent administration. Thus, Utah's version of
section 3-704161 implies that the personal representative is not to proceed
without adjudication in regard to real property. In context, this Utah qualifica­
tion should be meaningless. Other provisions of the Utah enactment include
unchanged Code provisions empowering the personal representative to sell

158. This is because most married testators devise everything to the surviving spouse. See Sussman, Cates & Smith, supra note 101, at 89. The Code's plan governing intestate succession favors the surviving spouse. See UPC § 2–102.


or distribute land without court order and protecting purchasers from the personal representative or from the distributees. No court order to administer real estate will be necessary and none will issue until some interested person opposes a necessary sale, or the personal representative, for his own protection, initiates a formal proceeding for explicit sale authority. This should seldom happen if communications between the personal representative and other interested persons are in good order. Even without the Utah qualification, it is doubtful that many unsupervised personal representatives would risk conducting estate sales of land not approved by will or court order without some assurance that no interested person will dissent. Land values are frequently so difficult to ascertain that criticism of the timing and price of any sale may be expected from anyone who has not been consulted. Hence, at most, the Utah modification may lead unnecessarily to formal proceedings for sale authority.

A somewhat related Utah change, modifying section 3-711, enables any heir or devisee with an interest in estate realty to file a demand that the property not be sold, thereby making it a breach of duty for the personal representative to sell without the protection of a prior court order. The relationship of this new device to a testator’s directions for a land sale is obscure; it is also unclear why the proponents of this change felt that the Code’s restraining order remedy was inadequate. In any event, the addition makes it somewhat easier for successors to force court proceedings in relation to land sales. Since the effect of the Utah qualification on section 3-704 may be to discourage personal representative sales of realty except when all heirs or devisees consent, or where a will explicitly directs, insuring that Utah successors can block land sales by filing demands merely accomplishes the same result another way.

The Arizona enactment also enables an interested person to demand that formal proceedings be utilized for land sales. Arizona’s version of part 5 on supervised administration includes two sections derived from pre-Code Arizona law. These sections describe proceedings for confirmation of land sales by personal representatives and allow a previously contracted sale price to be rejected in favor of a higher bid made at a confirmation hearing. Supervised personal representatives are required to use confirmation proceedings; other personal representatives can be compelled to use them if a demand for land sale confirmation proceedings is filed by an interested person before the

162. See id. § 75–3–714(w).
164. Id. § 75–3–710.
165. UPC § 3–607.
167. Id. §§ 14–3506, –3507. Ten days notice is required before the confirmation hearing can be held.
personal representative contracts to sell. Unsupervised personal representatives may also use these proceedings even though no demand has been filed. These provisions, like those in Utah, do not prevent a land sale by an unsupervised personal representative who may either sell at his risk or sell with the consent of all interested persons and thereby give a good title without court order. Assuming that land title insurers will approve titles created by a personal representative's sale under his statutory powers, Arizona's optional confirmation procedure may provide a harmless alternative method of sale. Those who believe that higher prices are more likely if the first wave of potential purchasers have assurance that their bids, if accepted, will not be upset, can avoid the court proceeding.

The Arizona provision would involve more than a harmless alternative if it is interpreted to permit an unsupervised personal representative, who has not been compelled by demand, to upset his contract of sale and the deed by seeking court confirmation of a later transaction under the upset bid procedure. If this were possible, no title in a purchaser from a personal representative would be insurable until it had been confirmed or until the personal representative ceased to have authority. The authors have been informed that title insurance is being issued in Arizona to purchasers from personal representatives on the strength of section 3-714. This probably indicates either that the upset bid procedure is not available after the personal representative has made a deal, or that at least it cannot upset his deed once delivered. If the alternative procedure does not depress prices in personal representatives' transactions that are completed without court confirmation, it probably will seldom be used once Arizona professionals become accustomed to independent administration. Nonetheless, because the procedure is familiar to those accustomed to pre-Code procedures in Arizona, judicial land sale proceedings probably will be more common in Arizona estates than in Code states that have no upset bid procedure.

One other state enactment frustrates the Code's goal of administration without court order in uncontested estates. Nebraska altered the statutory authority of a personal representative to sell realty as conferred in section 3-715(23) by limiting the provision to cases where a will or a court order authorizes the sale. Superficially, this change appears relevant only to intestate estates and to those governed by poorly drawn wills. Moreover, since other provisions of the Nebraska enactment accept Code provisions which protect purchasers from personal representatives who do not inquire and

168. Id. § 14-3722.
169. Id.
170. See text accompanying notes 161-64 supra.
learn that proposed sales would involve breaches of duty, as well as place the benefit of a personal representative’s duties solely with interested persons, the Nebraska restriction should be meaningless where all heirs or devisees consent to a personal representative’s land sale. Even so, the restriction is unfortunate. It perpetuates without justification the age-old distinction between land and personal property. Further, it discriminates against successors to intestate and ill-planned estates by adding a legal complication that can be, and routinely will be, eliminated by lawyer-drawn wills.

Two Colorado insertions in the Code pose direct threats to the concept of independent administration, but it may be hoped that neither will be used. In modifying section 3-611, the Colorado code provides that the court, on its own motion, may remove a personal representative for cause. Still, Colorado’s legislature enacted section 3-107, which provides that, except in the case of supervised administration, the appointment of a personal representative ends the proceeding that led to his appointment. Hence, the Colorado version of section 3-611 makes the court a kind of prosecuting agency that can move, via its own orders, directly against a personal representative who appears to be disregarding the law. Practical considerations, as well as conflict with traditional assumptions about the role of courts, make it difficult to understand how removal on a court’s own motion is to be accomplished. A Code personal representative is not an officer of the court. The court’s jurisdiction over estates does not mean that the court has title to or control of estate assets, nor does it explain how it is to function except through orders and judgments when interested parties seek its aid. Presumably, a court which undertakes to play the strange role created by the Colorado version of section 3-611 would not act before giving notice to estate beneficiaries and affording an opportunity for hearing. It seems unlikely that a court acting on its own motion could ascertain whether deaths, transfers, renunciations, or agreements have altered the beneficiary group since the estate was opened. Assuming that the court might simply appoint a successor personal representative, how is the authority and power of the existing personal representative over assets, including the power to protect purchasers, to be ended? Under the Code, the power of a personal representative derives from the statute, through an administrative act of appointment, as a qualification of the ownership arising at death in the decedent’s successors. The court acts as a mere statutory conduit which routes this authority to the personal representative by appointment. The court and the personal representative have no authority that arises above the interests of estate successors. This basic assumption was reaffirmed in Colorado when the legislature enacted section 3-912 from the Official Text, which had been

173. Id. § 30–2475.
174. Id. § 30–2472.
omitted from the original enactment.176 This section declares that, subject to the
dricts of creditors and taxing authorities, estate successors can direct the
personal representative to dispose of the estate assets irrespective of the
tems of any will.

Moreover, the Code does not authorize a court to appoint a successor
personal representative except on petition or application. A Colorado probate
court surely would prefer that someone petition for the personal representa-
tive’s removal even if it learns independently that removal may be warranted.

Section 3-703(3) as originally enacted in Colorado177 purports to allow the
court on its own motion to require supervised administration. Hopefully, this
statute will not be used by a court to reach a previously appointed personal
representative who appears to be misbehaving. Amendments to the Colorado
Probate Code in 1975 moved this provision from section 3-703 to section
3-502,178 where it becomes a part of the provisions describing supervised
administration. This transfer did not change the language that appears to
make this procedure available under any circumstances, but it introduced the
provision into a context relating to a proceeding then before the court. The
intention of the Official Text is not seriously compromised when a court, in
a proceeding otherwise regularly before it, directs a form of relief not originally
sought by the petitioner. Further, a court, in formal proceedings, can appoint
a guardian ad litem for a person who is unable to protect his interest179
and, presumably, can require the guardian ad litem to seek supervised admin-
istration. If, however, this Colorado change is not limited to pending proceed-
ings, it raises all of the problems noted above in relation to removal of a
personal representative on the court’s own motion.180 Fortunately, the notion
that supervised administration may be the best remedy for various underlying
estate problems should disappear as courts and practitioners become more
familiar with the galaxy of remedies that the Code offers in relation to an
independent administration.

The other deviations from the Code provisions that support the independent
administration concept can be described as nuisance changes. They will serve

Committee, Probate and Trust Law Section, Colorado Bar Association, dated August
20, 1974, a copy of which is on file in Professor Wellman’s office, contained a proposed
bill for introduction in the legislature containing Colorado Bar Association recommen-
dations for amendments to the probate code. These recommendations of the Colorado
Bar Association for 1975 amendments to the probate code, including the restoration
of section 3–912, are described in Cox, CPC Newsletter—Proposed Amendments to the
Colorado Probate Code, COLO. LAW. 457 (Feb. 1975). The recommended amend-

1975).


179. See note 119 supra and accompanying text.

180. See text accompanying note 175 supra.
more to perpetuate the myth that local probate procedures are unique in spite of the Code's enactment than to detract from the Code's goal of independent administration.

Several changes affecting the personal representative's duty regarding inventory and appraisal of estate assets are of this nature. Idaho has added the state tax commission to the list of persons to whom the personal representative must send a copy of the inventory if he chooses not to file the original with the court. This appears to be a simple, non-disruptive addition to the demands of section 3-706 to assure notice to the taxing authority. Arizona requires broader circulation of the inventory than does the Code. If the personal representative files the original in court, he is still required to send a copy to interested persons on request. If he chooses not to file the inventory in court, then he must mail copies to all heirs in intestate estates, or to each devisee where a will has been probated, and to other interested persons who request it. One suspects that this change encourages personal representatives to file the inventory with the court. If so, the change cuts, regrettably, against the Code purpose of enabling families to keep estate inventories and appraisals private. Local public records are easily accessible to various undesirables, including persons who would marry for money and those seeking easy sales to recently affluent successors. The impact of Arizona's modification will be lessened, however, because the number of heirs or devisees of an estate is unlikely to be large enough that the requirement of a copy of the inventory for each will be particularly burdensome. Colorado added a paragraph which directs the personal representative to send a copy of the inventory to the attorney general within 3 months after appointment if the heirs or devisees of the estate are unknown or if there is no one qualified to receive the shares of such persons. Since these situations will occur infrequently and this requirement simply puts the state on notice of the possibility of an escheat, there is no objection to this addition. The Montana version of section 3-706 requires the personal representative to mail a copy of the inventory to the department of revenue. A more significant Montana alteration requires the personal representative to employ at least one appraiser. Unless the personal representative has some problem with valuation, an appraiser is simply not needed. Fortunately, the personal representative in Montana, as in other Code


182. ARIZ. REV. STAT. ANN. § 14-3706(B) (1975).

183. Id. North Dakota goes even further by requiring the personal representative to mail copies to certain interested persons whether they request them or not. N.D. CENT. CODE § 30.1-18-06 (Spec. Unif. Probate Code Pamphlet 1975).


186. Id.
states, is answerable only to interested parties. Hence, if estate values are indisputable and the heirs or devisees are not contentious, the requirement can be safely ignored.

The Nebraska alterations in section 3-706 are more serious, for they require the personal representative to file the inventory with the Court. Unlike the Arizona change that merely encourages personal representatives to file the inventory, the Nebraska idea absolutely destroys the Code's effort to protect successors' privacy through a mailing. As in Montana, however, if all interested persons concur in the judgment of a Nebraska personal representative to keep the record of inherited assets off the public record, the required filing can be avoided since there is no sanction for non-filing.

The omission of section 3-711 in the Montana statute is disconcerting but probably harmless. The section was designed to resolve the old question of the location of legal title to estate property between the time of death and ultimate distribution by placing it in the successors, subject, however, to an absolute power in trust that the personal representative can exercise without court order. Section 3-711 is not vital in view of section 3-101's description of the devolution of title at death, and the specific descriptions in several remaining sections of part 7 of the personal representative's authority, of the protection for those who deal with him, and of his independence from court control. It was included in the Official Text for its potentially useful statement that there is no limit on the fiduciary's absolute power. Personal representatives are thus entirely like trustees in spite of the technicality that title moves to successors immediately on death. Without section 3-711, an undesirable risk exists that lawyers and judges may conclude that the power of a personal representative is restricted to matters that he can handle rightfully. If so, transactions that are not explicitly covered in the exhaustive listing of section 3-715 might raise doubts which would be particularly serious where the purchaser provisions of section 3-714 do not apply.

An Arizona qualification to section 3-714 limits its protection of persons dealing with personal representatives to transactions occurring within 60 days after the personal representative's letters have been certified by a court official. In addition to the obvious and bothersome impact of forcing personal representatives back to the court clerk for re-certified letters every 2 months, the provision raises the question of what the clerk is to do or to pass upon when requests for re-certification are received. The provision seems to imply that the court is continuously informed about, although not concerned with, the actions of personal representatives to whom it has issued letters, and is therefore in a position to say that all is well with the estate and its administra-

187. See id. § 91A-3-710; UPC § 3-712.
tion. Unfortunately, all other relevant provisions of the Arizona Code are to the contrary. At most, the Arizona clerk might be expected to decline to re-certify letters if the court records show that the personal representative has been removed; manifestly, the court officials would not be able to re-certify the competence of the personal representative or to evaluate petitions or other filings relating to the estate. In short, the Arizona change seems certain to result either in many meaningless and possibly misleading re-certifications of letters or in efforts by the courts’ personnel to get into matters they cannot evaluate. It deserves to be disregarded by other states.

Although section 3-715, setting out the specific powers of the personal representative, has been overwhelmingly accepted, three state changes deserve mention. Colorado substituted its existing, comprehensive list of powers set out in the Colorado Fiduciaries’ Powers Act for the Code section. Since that formulation is quite complete, the Code loses little in the trade. The undesirable Nebraska modification of section 3-715(23), which significantly denies the personal representative the power to sell realty unless authorized by will or by court, already has been discussed.

Montana made several significant changes in section 3-715 which tend to reduce the personal representative’s discretion and his ability to settle estates quickly and without resort to court. Since none appear to be beyond the corrective measures available to the personal representative, these changes do not detract seriously from the prospect of independent administration in Montana. One restriction, preventing abandonment of estate property except as approved by heirs, devisees, or the court, is harmless simply because it will not fetter action that will be desirable in many situations. Another, which states that a personal representative may compromise claims only with the consent of heirs, devisees, or the court, will impede efficient estate administration in a greater number of instances. A third provision precludes a personal representative from purchasing assets directly or indirectly from the estate without prior court approval received in a formal proceeding. It is far from clear how this restriction is to be related to section 3-713’s comprehensive coverage of self-dealing, which Montana accepted without change. In any event, since the section 3-715 powers are of concern only as between the personal representative and the beneficiaries of his administration, the added restriction surely will be ineffective in cases where all interested parties approve or ratify the transaction.

Other Montana additions and changes in the several sections supporting independent administration as originally enacted in 1974 were corrected by 1975 amendments that brought the statute almost back to the Official Text. Thus, a provision inserted as section 3-714, which required a full accounting to the court or to all interested parties supported by court-filed vouchers and tied into a mechanism for court review in the event of the filing of any protest, was repealed in 1975. Montana's original enactment also purported to prevent any sale of estate assets, other than as ordered by a court, until a full inventory had been filed and any inheritance taxes paid or secured to the satisfaction of the department of revenue. As amended in 1975, this provision merely subjects a personal representative to criticism by interested persons if he sells estate assets before filing an inventory with the department of revenue or obtaining a waiver of lien on the subject property from the department. Finally, the Montana Legislature added a provision which purports to prevent the closing of an estate before the probate clerk has received a statement from the department of revenue indicating that any inheritance taxes due in relation to the estate have been paid. The provision should not necessitate court-ordered estate closings, however, since closing by filed statements of the personal representative remains possible under section 3-1003 as taken from the Official Text. Alternatively, since Montana accepted all of the important Code provisions concerning the basic relationship between personal representatives, the court, and interested parties, there is no reason why estates cannot be closed by complete distribution to the successors upon receipt and release of all claims against the personal representative. Where distribution has occurred, court records showing that an estate is unclosed should be unimportant to everyone.

VI. COMPENSATION OF THE PERSONAL REPRESENTATIVE AND HIS AGENTS: SECTIONS 3-719 AND 3-721

Section 3-719 provides that "[a] personal representative is entitled to reasonable compensation for his services," but does not suggest how this "reasonable" fee should be computed. The only thing that is clear is that the personal representative and the successors may agree upon a fee without court approval. Perhaps agreement will occur as the personal representative sets his own compensation and no one objects. Nevertheless, the typical personal representative will want assurance about compensation in advance of work. If

202. Id. § 91A-3-1003.
there is no agreement and the successors are upset with the personal representative's bill, the Code makes explicit provision for a formal proceeding to review fees. In addition, the identity of the personal representative as controlled by section 3-203 safeguards against unreasonable fees. The Code practically assures the personal representative will be someone who has a substantial financial interest in the estate, is agreed to by such persons, or is selected by the testator. Relatives having priority are not disqualified by non-residence. Strangers to the surviving beneficiaries will not gain priority unless nominated as executor by the decedent. Amateur family members who serve as personal representative are not likely to overcharge and persons designated in the will may well have made an agreement with the decedent about fees that will control.

Since the personal representative determines the fees of his agents, including attorneys, in the first instance, most compensation arrangements with counsel will be arrived at through advance agreement. Consequently, there should be increased understanding between estate representatives and attorneys regarding the work and responsibility of attorneys, and a correlative drop in fee complaints. This approach to determining fees may or may not produce lower attorneys' charges than those resulting from statutory or bar schedules using percentages of estate values. At the least, the elimination of these arbitrary methods of fee determination, particularly the percentage scale with which probate critics have had such a field day, should reduce talk of the "lawyers' tax" on estates and slow the flight from probate which has occurred in recent years.

Montana and Utah changed section 3-719, on compensation of the personal representative, to include statutory percentage schedules of maximum fees for personal representatives and attorneys. Both retain the Code provision permitting renunciation of the compensation clauses of a will; and both provide that the court may allow additional compensation to the personal representative and attorney as it may deem just for extraordinary services. Although the percentages in these states are different, the effects are the same: The statutory scales go far to gut the Code's effort to deal with the notoriety and odium that have surrounded probate fees.

Still, it may not be vain to hope that the advent of the Code in these states may lead to increased use of fee agreements. The procedural flexibility offered by the Code as well as the publicity about fees which attended its enactment should induce professionals to use their new opportunities to minimize probate red tape and to attract more clients by passing on some of the economies they

203. **UPC** § 3–721.
204. *Id.* § 3–203 (priority of appointment).
205. *Id.* §§ 3–715(21), –719.
can realize in time expended. In view of the new procedures, it would be foolish to predict that the courts of Montana and Utah will perpetuate the old assumption that a probate fee that does not exceed statutory maxima is reasonable. If the courts in these states emphasize the factors of time and responsibility in fee dispute cases and question representatives and attorneys who make excessive use of formal proceedings, the Code's promise of a better deal for the public on probate fees may be fulfilled in Utah and Montana despite the statutory changes.

Colorado made an addition to section 3-721 that may prove beneficial. It lists "[f]actors to be considered as guides in determining the reasonableness of a fee."

These statutory guides conceivably may give everyone concerned with probate fees a sounder basis for defining the factors to be considered in judging reasonableness. The Colorado subsection includes the following criteria: (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the service properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment; (3) the fee customarily charged in the locality for similar services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the personal representative or by the circumstances; (6) the nature and length of the relationship between the personal representative and the person performing the services; and (7) the experience, reputation, and ability of the person performing the services.

VII. CREDITORS' CLAIMS: PART 8

The Code's system for the presentation and payment of creditors' claims has been tampered with at least as much as any other part of article III. This legislative attention to creditors' claims probably derives from the habit of lawyers to view probate procedures as a mechanism to protect a decedent's creditors. Closer examination reveals, however, that the creditor protection provisions of probate codes are really not very important. Decedents, as a class, are not a major concern of commercial creditors; advanced in years, they generally leave little unsecured debt. Moreover, surviving family members are likely to pay many of a decedent's bills whether or not there is an adequate probate estate from which payment can be exacted. For whatever reason, during the last decade of well-publicized debate about probate reform, creditors' representatives have not exhibited the slightest concern about the Code's provisions regarding creditors' claims. The topic is a favorite of lawyers who argue with one another about various theories and generate a large body of variant statutory provisions that are rarely tested or fully vindicated.

207. COLO. REV. STAT. ANN. § 15-12-721(2) (1973).
208. Id.
The Code's provisions on creditors' claims are designed to allow simple presentation of bills, fair and rapid allowance or disallowance, and payment, thus permitting rapid distribution and finality for all concerned. Rapid payment of claims is encouraged by section 3-807, which allows the personal representative to pay any just claim which has not been barred at any time after his appointment, irrespective of whether it has been presented in the manner prescribed by the Code. Whether or not a personal representative uses his ability to make a quick payment of claims, he will know the maximum amount of claims against the estate at the close of the 4 month non-claim period and may safely satisfy allowed claims as soon as disallowed claims are disposed of or barred.

Since creditors are "interested persons" within section 1-201(20), they have standing to force the appointment of a personal representative. To keep track of proceedings started by family survivors, a creditor may assure himself of receiving notice of all proceedings relating to the estate by filing a demand for notice under section 3-204. If he wishes to prevent informal proceedings for appointment or probate, he may petition the court in formal proceedings, seeking the posting of a bond or supervised administration. In the alternative, he may wait and watch how an informally appointed personal representative handles his position. If he becomes dissatisfied with the personal representative's performance of his duties, he may demand the posting of a bond if his claim is large enough, or commence supervised administration proceedings, thereby suspending the personal representative's power to distribute assets pending its outcome. Also, at any point during administration, a creditor, on sufficient showing of jeopardy, may obtain an order restraining the personal representative from performing any specified acts of administration.

In order to shorten the 3 year statute of limitations barring creditors' claims to 4 months, the personal representative must publish weekly notice to creditors for 3 consecutive weeks in a newspaper of general circulation within the county. General statutes of limitations which were running against a creditor prior to the decedent's death are tolled for 4 months after death. Hence, a creditor cannot be barred until at least 4 months after his debtor's death, and even then the Code's 4 month non-claim period will not bar the creditor unless he fails to protect his claim after advertising has occurred.

Protection against non-claim is easily secured. Simple presentation of claims

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210. See UPC § 3–803(a).
211. Id. § 3–203(b).
212. Id. §§ 3–401, –502, –603.
213. Id. § 3–605.
214. Id. § 3–503. See also id. § 3–401 (formal testacy proceedings).
215. Id. § 3–607.
216. Id. See also id. § 3–802(a) (limitations on presentation of claims).
217. Id. § 3–802. It should be noted that tort claimants receive special treatment under the Code since they present special problems. See id. § 3–803(c).
is facilitated by keeping form and content requirements for writings that are recognized as presentations of claims to a minimum. The Code approves of any written statement of the claim that indicates its basis, the name and address of the claimant, and the amount claimed.218 Although the Code directs that certain other information be given if applicable, its omission does not invalidate a presentation.219 The statement may be delivered or mailed to the personal representative or filed with the court at the option of the claimant.220 Unless the court filing method is used, however, the claimant must see to it that he can prove he delivered or mailed the statement.221 The self-interest of claimants should insure prudence.

Rapid evaluation of all claims by the personal representative is coerced by section 3-806, which provides that the personal representative’s failure to respond to a claim within 60 days after its presentation constitutes allowance,222 thereby placing the burden of changing this classification on the personal representative and keeping the claim alive until a suitable period after notice of disallowance to enable the claimant to start any necessary proceeding.223 This system should restrain even the most insecure claimants from rushing into court merely to settle nerves jangled by a personal representative’s procrastination. Thus a dual benefit is provided: Personal representatives are prodded to send notices of disallowance by the realization that they may be liable to estate beneficiaries if any but valid claims are allowed,224 and the number of claims that will end up in court is reduced.

In addition, the 4 month non-claim period which runs from the first publication of notice to creditors forces all creditors to present their claims quickly after appointment of the personal representative, since arranging for the necessary publications normally will be one of his first acts. Disallowed claims must be made the subject of a formal proceeding started by the claimant within 60 days after disallowance.225 Hence, if all presented claims are allowed or if rejected claims are promptly disallowed and are not made the subject of suit, all claims questions normally will be resolved within 4 to 6 months after first advertisement.

Creditors who are not barred also may have rights against distributees. Section 3-1004 provides that unbanned and unpaid creditors may pursue any distributee for the amount of the claim up to the value of the defendant’s distribution; the creditor is not required to join other distributees. However, the

218. Id. § 3–804(1).
219. Id.
220. Id.
221. Id.
222. Id. § 3–806(a).
223. Id.
224. Id. § 3–703. See also id. §§ 3–608, –1003.
225. Id. § 3–806(a).
creditor may prefer to pursue the personal representative, whose failure to discharge claims before distribution renders him personally liable to the creditor. In this situation, section 3-602 provides that the personal representative is always subject to suit in the court where he was appointed.

Most of the enacted modifications of the claims sections complicate the Code provisions. Nebraska, Montana, South Dakota, and Colorado all involve the clerk in the publication or proof of notice to creditors required by section 3-801. These changes are regrettable, because they reduce the prospect that many personal representatives will determine that the risk of unknown and disputable claims is slight enough to warrant omission of any advertisements. This approach also adds undesirably to the paperwork of the clerk. Nevertheless, there are slight advantages to publishing through the clerk: It tends to assure publication in newspapers of general circulation, and it permits consolidated publication for several estates, thereby reducing the cost. Unfortunately, only South Dakota and Colorado mandate consolidation of notices.

Nebraska also added a requirement that copies of the published notice be mailed within 5 days after publication to all “known parties.” This makes some sense when viewed against the fact that the Nebraska claims publication normally will be combined with that required following an informal probate or appointment. However, if “known parties” is construed to include known creditors, the addendum constitutes a major setback in the war against red tape.

The Code’s non-claim provisions as described in section 3-803 were the subject of several niggling changes. Colorado cut the maximum period from 3 years to 1; Nebraska shortened the non-claim period for pre-death debts from 4 months to 2, with a proviso allowing up to 30 days extension by the court for “good cause shown,” but with no suggestion as to how the court’s discretion is to be invoked. Montana and Utah shortened the non-claim period to 3 months; Nebraska made it 2 months. Nebraska, Idaho, and Arizona rewrote section 3-803 as local draftsmen disagreed with the Code.

226. Id. § 3–703(b) (liability to persons interested in estate).
228. UPC § 3–801, Comment.
231. See text accompanying notes 89–91 supra.
policy of subjecting expenses of administration to the risk of bar via non-claim provisions. These changes are not very important. More serious is Montana's exemption of tort claims from non-claim. The obscure line between tort and other classes of claims which was made unimportant by the Official Text has been resurrected in Montana probate matters. The Code's approach of treating a decedent's liability insurance as a form of security immune from non-claim accomplishes the principal purpose of the exemption of tort claims from the non-claim bar without the confusion created by the Montana approach.

Section 3-804 was also subjected to alterations. The Colorado version limits suit by claimants on pre-death debts to the court where the personal representative was appointed; Montana's provision requires a claimant who presents his claim to the personal representative by mail to obtain a return receipt. Nebraska took the next step by requiring all claims to be filed with the court, thus eliminating the method of presentation by mail. The Nebraska change greatly multiplies court paperwork and forces an unnecessary and artificial procedure into the estate settlement process; it displays Nebraska's reluctance to accept the personal representative as conceived by the drafters of the Code. The thrust of the Code, deflected by Nebraska, is to move estate settlement away from public office involvement towards normal business practices. Although the ostensible reason for the Nebraska change was "to minimize potential disputes as to whether or not the claim was properly presented," any real concern of this nature could have been dealt with by less drastic measures such as a registered mailing requirement. Hence, it seems fair to say that the real reason for the change was that Nebraska had difficulty progressing from the counter-productive notion that anything relating to probate which does not pass under the supervision of court personnel passes unsafely.

One disconcerting change in section 3-805, the Code section which establishes the classification for payment of claims when the estate is insufficient to meet all its obligations, appears in Colorado. That state's version of section 3-805 stipulates that claims to personal property held by the decedent as trustee or fiduciary have first priority in payment of claims. This change was unnecessary because the Code's definition of "claim" excludes assertion of ownership rights to specific assets under the decedent's control. One hopes this Colorado change does not cause some new problems by implication. For

237. UPC § 3–803(c).
241. Id., Nebraska Comment.
243. UPC § 1–201(4).
example, the Code’s placing of family exemptions ahead of “all claims against the estate”\textsuperscript{144} may now be thought to mean that a surviving spouse’s right to exemptions from a probate estate may supersede the rights of beneficiaries of a trust of personal property being administered by the decedent. Code drafters had no such intention.

Arizona adapted section 3-806 to accord with its provisions regarding the liability of community and separate property of the decedent and surviving spouse to various kinds of claims. The Arizona change forces the personal representative to classify claims and give the creditor notice of his decision in order to prevent the debt from becoming payable out of both separate and community assets.\textsuperscript{145} Idaho, also a community property state, has managed to get along without this sort of provision.\textsuperscript{146}

Montana changed section 3-806 so that silence on the part of the personal representative means that the claim is rejected.\textsuperscript{147} Thus, Montana alone among enacting states puts the burden of forcing action on the claimant. As discussed above, this encourages court proceedings by creditors who must protect themselves from the combination of the relatively short non-claim period and an unresponsive personal representative. A study of Montana court records a few years hence will disclose whether proceedings have in fact increased. Even if no traceable increase occurs, the Montana deviation frustrates the purpose of establishing a single national pattern that might be useful to interstate creditors. More importantly, the Montana procedure puts an unnecessary strain on the Code concept that the personal representative is a fiduciary for all interested persons.\textsuperscript{148} The idea that a personal representative may cause a claim to be rejected, and possibly barred, by failing to respond to a statement in his hands that names and locates a claimant, simply does not square with normal fiduciary conduct. Worse, the provision may support the conclusion that the personal representative owes a duty to potential distributees to fail to respond, thus increasing the prospect that creditor inadvertence will result in a bar that will benefit residuary beneficiaries. These bizarre possibilities demonstrate the folly of the Montana position.

VIII. CLOSING ADMINISTERED ESTATES: PARTS 10 AND 12

Code provisions dealing with closing administered estates exemplify the flexibility of the Uniform Probate Code. The Code explicitly recognizes three modes of settlement, with a fourth implicit in the basic structure of independent administration. By the first mode, a section 3-1001 formal proceeding, a court may determine whether the estate is testate where this question pre-

\textsuperscript{144} Id. §§ 2–403, –404.
\textsuperscript{146} Idaho Code § 15–3–806 (Supp. 1975).
\textsuperscript{148} See UPC §§ 3–703, –711.
viously has been determined only by informal proceedings, review all acts of administration and distribution by inquiry into the personal representative's accounts, determine heirs or construe the will, discharge the personal representative, and finally settle the rights of all interested parties.

The second mode, a section 3-1002 proceeding, is limited to determining matters between the personal representative, any unpaid and unbarred creditors, and the devisees under an informally probated will. The adjudication will not preclude a contest by disinherited heirs. Both section 3-1001 and section 3-1002 describe formal court proceedings involving full notice to all interested persons.

As the third option, section 3-1003 provides for an unadjudicated closing of record of the estate. It amounts to a semiprivate accounting by the personal representative to interested persons which, buttressed by a detailed statement that is filed as a part of court records, triggers certain limitation periods that are not otherwise started. The principal requirement is that a truthful statement be filed showing that the personal representative has followed all requirements of administration and has sent a full account to all distributees and unpaid, unbarred claimants. If no proceeding involving the personal representative is pending 1 year after this filing, the appointment of the personal representative and his authority ends. Also, the closing statement triggers the limitations described by section 3-1005, which may in time protect the personal representative from complaints of maladministration.

There is no correlation between the choice of formal or informal procedures to open the administration of an estate and the kind of proceeding needed to close it. If, however, supervised administration has been commenced, only a procedure like that described in section 3-1001 is appropriate to close the estate.

A fourth alternative is simply to distribute the estate. Under this option, the personal representative relies on receipts and releases from distributees; “settlement” occurs when the expiration of the limitations described in section 3-1006 ends any dangling liabilities between distributees. Since no limitations protect the personal representative unless he has used a 3-1003 closing statement, this approach offers the greatest exposure for the longest time; hence, its use should be reserved for relatively small estates or those administered by persons willing to take uncompensated risks. In states where supervised administration has been required, such “settlement” may prove disquieting to those accustomed to the idea that something is amiss if court records fail to show the

249. See id. § 3–1002, Comment.
250. Id. §§ 3–1003(b), –1005, –1006.
251. Id. § 3–1003(a).
252. Id. § 3–1003(b).
253. Id. § 3–501.
254. See id. § 3–1003(a).
Closing of an opened estate. In Colorado this procedure may invite a test of whether the court will remove a personal representative on its own motion.255 These problems should fade as communities become accustomed to unsupervised administration.

Considering the importance of part 10 to the Code, it is fortunate that relatively few important changes were made by the enacting states. Arizona, Nebraska, and Utah shortened the minimum time period prescribed in section 3-1003 before closing statements may be filed.256 The latter two states also shortened the time periods prescribed in the non-claim sections.257 Apparently designed to provide dramatically short minimum periods for settlement under the Code, these changes may prove to be largely cosmetic. The waiting period required for a 3-1003 closing statement is not an accurate measure of the maximum speed of administration under the Code; unsupervised administration permits an estate to be distributed instantly if the personal representative and interested persons concur in some risk-taking, which is frequently of minimum dimensions.

Utah attempted a more fundamental change in section 3-1003, requiring that all distributees must give their consent in writing before the personal representative may use the closing statement procedure.258 Since the option of distributing merely on receipt and release is still available in Utah,259 this requirement is not likely to harass professionals interested in maximum efficiency. Indeed, the necessary consent may be written into the receipt and release form. The more worrisome potential of the change is that it may give those who are interested in expanding the number of procedures in an administration an excuse to resort to unnecessary formal closing proceedings.

Moreover, the Utah addition may cast some doubt on the functioning of the closing statement device. Utah changed neither the Code provision that each distributee must receive a copy of the personal representative’s settlement nor the 6 month period for objection to that report.260 There may be a risk that consent to informal closing will be interpreted as approval of the account rather than mere approval of the use of the closing statement device. Conversely, there may be a risk that explicit releases combined with consents to an informal closing may be disclaimed within 6 months after the filing of the closing statement. If so, few will want to use closing statements. The change is unfortunate.

255. See text accompanying notes 175–78 supra.
259. Id. § 75–3–1003, Comment.
In all likelihood, the framers of the change, disturbed by the Code's concept of independent administration, sought to reduce the likelihood of unadjudicated closings. It is not clear in retrospect that they accomplished much. A personal representative who knows in advance that an objection is likely to be made to his accounting will tend to use an adjudicated closing proceeding anyway. If there is no dissent, the natural course for the personal representative is to distribute on receipt and release, with or without the backstop of the section 3-1003 closing statement. Utah draftsmen and legislators simply failed to understand the meaning of the Code in relation to closing without a closing statement. If they had understood the interrelationships, they might have concluded that use of closing statements should be encouraged rather than discouraged, if only because the closing statement, when falsely made, may add the penalties of perjury to the other remedies available for maladministration. Their misunderstanding becomes more evident as one notes a further Utah change to section 3-1003, which provides that any accounting required by sections 3-1001, 3-1002 or 3-1003 may be waived in writing by all distributees. As viewed by the framers of the Official Text, this waiver possibility was plainly implicit in the Code's system of unsupervised administration.

Similar lack of comprehension explains some additions to Montana's version of section 3-1003. There, the closing statement routine, as altered in 1975 before the effective date of the 1974 enactment of the Code, requires the personal representative to file a sworn accounting with the court or to deliver copies to interested persons. As framed nationally, the personal representative must account to his distributees and recite in the filed closing statement that he has done so. Consistent with the Code's treatment of the inventory, this approach enables persons to use the closing statement procedure without making the details of the estate a matter of public record. Under the Montana variation, if the alternatives expressed are taken literally and the personal representative can avoid sending copies of his accounts to the interested parties, there is a prospect that some personal representatives will use the court filing alternative merely for their own convenience. Distributees will have to go to the court to obtain copies for their own use. Although the Montana provision in effect only substitutes a court's copying equipment for the personal representative's, the change damages the Code's effort to make the personal representative responsible to interested persons and to minimize the role of the court.

Before using any closing procedure involving the court, Montana requires the personal representative to obtain and file with the clerk a certificate from the department of revenue showing that any inheritance tax due on the estate has been paid. The statute does not prevent closing by the simple expedient

261. Id. § 75-3-1003(3).
263. Id. § 91A-3-1004.
of distribution on receipt and release. Montana professionals undoubtedly will devise methods for clearing the lien of death taxes from inherited assets when there has been no formal closing procedure or closing statement. It is to be hoped that releases from the lien will be received and filed by probate court personnel even though no other court records relate to the estate.

Part 12 of article III offers two more procedures for rapid settlement of small estates. Sections 3-1201 and 3-1202 are facility of payment provisions which enable collection of personal property by affidavit of a successor, and protect those who deliver assets upon such request. The primary purpose of these two sections is to facilitate the transfer from the decedent to his successors of moneys owed to the decedent and of personal assets of the decedent that are represented by registered titles. Paradoxically, in Arizona the Official Text language was found too restrictive to cover re-registration of auto titles because state officials refused to amend their procedures unless the legislation made explicit reference to auto titles. An amendment solved the problem.

Sections 3-1203 and 3-1204 provide legitimate means by which a personal representative may omit advertising for claims or may distribute and close through a closing statement before the non-claim period has run in instances where advertisement for creditors’ claims has occurred. These options are available when the inventory and appraisal indicate that the entire estate, less liens and encumbrances, does not cover family allowances, administration expenses, funeral expenses, and expenses of the decedent’s last illness. Upon this determination, the personal representative is empowered to distribute the estate summarily without notifying creditors and file a settlement under section 3-1204. Since the Code empowers a personal representative to handle an estate as he sees fit provided no interested person’s interests are adversely affected, the quick distribution could be accomplished without sections 3-1203 and 3-1204. However, the closing statement method, which makes the records show the estate to be closed and starts a limitations period that might protect the personal representative, would not be available. In a sense, therefore, the procedures of sections 3-1203 and 3-1204 are only an extension of the procedure of section 3-1003.

Any interested person who can show that the conditions for summary administration were not met has rights against both the personal representative and the distributees. In the absence of official or adjudicated values, the personal representative is responsible to creditors if he errs in determining that the estate meets the section 3-1203 criteria; hence, the summary closing will be chosen with care. Whenever a personal representative has any doubt about valuations or the amount or classification of priority claims, he should

use the usual procedure and advertise for claims, deferring distribution until all claims are known, and then seek the protection of a court ordered closing. Alternatively, he can use the section 3-1003 closing statement device which, coupled with section 3-1005's limitations provisions, discharges him from possible complaint 6 months thereafter.

The nine enactments did not change part 12 significantly. Four states changed the maximum value, set out in section 3-1201, that may be collected by affidavit. Colorado, Nebraska, and Utah raised the ceiling from the Code's $5,000 figure to $10,000, thus increasing the number of small estates that can be settled entirely without the aid of a public office.\(^{265}\) The drafting committees in Montana were evidently uninterested in aiding small estates to be collected without administration; they reduced the maximum figure to $1,500.\(^{266}\) Montana also tampered with sections 3-1203 and 3-1204 by extending use of the abbreviated administration device to instances when the estate either does not exceed the 3-1203 items or when the net distributable estate is less than $1,500.\(^{267}\) This change, though superficially related to the use of the $1,500 figure in sections 3-1201 and 3-1203, again reveals that the Montana committees were not thinking too clearly as they sprinkled the Code with small changes. If the priority claims listed in section 3-1203\(^{268}\) do not amount to $1,500, a situation conceivable in a case where no exemptions applied and the decedent died suddenly and was buried cheaply, the result is unclear. The residue should pass to unsecured creditors, if any, but creditors cannot be identified save by the Code's system of advertising for claims and waiting 4 months. There is no sense at all to Montana's attempt to make sections 3-1203 and 3-1204 apply whenever an estate grosses less than $1,500.

Another curious addition to section 3-1204 occurred in Alaska, where the section empowers the superior court to dispose in any manner it sees fit of personal property not disposed of under section 3-1204 because no heirs or claimants were located within 6 months.\(^{269}\) The section does not apply when values are distributable to the heirs, and it is difficult to imagine how a personal representative can make a statement under oath that the preferred claims contemplated by section 3-1203 exceed the value of the estate unless he knows who the preferred claimants are.

267. Id. §§ 91A–3–1203, –1204.
268. The claims are: Homestead allowance, exempt property, family allowances, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent. Id. § 91A–3–1203; UPC § 3–1203.
IX. Identity of Registrar and Priority as Personal Representative

The Official Text identifies the registrar as "either . . . [the] judge of the Court or . . . [the] person, including the clerk, designated by the Court by a written order filed and recorded in the office of the Court." The identity of the registrar is potentially important. He is the official who can probate wills and open estates informally. He may be the only contact between the court and a given estate, for the Code enables a personal representative to settle and distribute an estate without any further contact with the court.

The drafters of the Official Text and the National Conference wanted this official to be easily available. Nomination of the person within the court organization who would serve as registrar was left with the judge because, as head of the office and normally answerable to the electorate for its function, he would be qualified to make a designation that would best meet the needs of his community.

Evidently fearful of erosion of their traditional role in the probate process, lawyers in Idaho and Utah convinced local drafting committees to alter section 1-307 so that the judge of the court must act as registrar. It is doubtful whether this change means that the practice of law is involved when one represents another in an informal proceeding, for the function of the court official in this kind of transaction is plainly administrative rather than judicial. Still, lawyers in these states undoubtedly have derived some comfort from the certainty that, under their version of the Code, a lawyer-judge would have to act on every informal application. A judge can be trusted to permit persons to act without legal counsel on occasion. At the same time, a judge can be counted upon to discourage new high volume organizations, such as H & R Block, Inc., from springing up to assist survivors who seek to avoid lawyers.

Apart from the question whether the public or the legal profession should be entitled to some kind of protection against new, non-professional entrepreneurs in probate, one may ask whether there was any need to change section 1-307 as drastically as Idaho and Utah changed it. Much depends on the degree of control the judges of a particular jurisdiction exercise over the selection and direction of the non-judicial employees of the court. If the judges can hire and discharge these employees, there is little reason to imagine that registrars will not carry out the policy of their employers. A certain consequence of the Idaho-Utah change is that the judge will not be available to respond to informal applications at all times the office is open. Applicants

270. UPC § 1–307.
probably will be asked to come back in a day or two or to come in only on particular days or hours. As a result, the desired simplicity in establishing a will and opening an estate will be compromised.

The North Dakota solution of the judge-registrar matter also steps back from the national purpose of creating a different kind of public official to handle informal proceedings, but it avoids the delays and inconveniences that are likely to result from the Idaho-Utah variation. In North Dakota, the word “registrar” is deleted from the Code; the “court” responds to all proceedings. Section 1-307 provides that action for the “court” may be performed by the judge of the appropriate court or by a person, including the clerk, designated by the “appropriate court” by a written order, filed and recorded in the office of the court. The provision appears circular. Passing this, it appears to be an unobjectionable way of declining the opportunity afforded in the national version to create a new probate official.

Nebraska committees changed sections 3-202 and 3-408 to limit the recognition there provided for formal proceedings or adjudications of courts of other states to those in states which give reciprocal recognition to out-of-state proceedings. Both Code provisions were designed to reduce the likelihood of multiple, possibly conflicting, determinations of domicile between courts of different states, and to buttress the Code’s purpose of permitting multi-state estates to be unified under the law of the decedent’s domicile where its location is not disputed. The Nebraska changes probably were comforting to some lawyers, but it is not clear that most Nebraska lawyers will find the rules under their new statute to be to their liking, for it will be impossible for them to rely on the old rule that judgments of other states cannot affect Nebraska land titles. Nor will they be able to rely on the new, simple tests contemplated by the Official Text. In the case of conflicting claims of domicile in pending litigation in two states, the Official Text resolution is keyed to the order in which the proceedings were started. In the case of a previous judgment from another state in a proceeding that established, rejected, or construed a will, the Code directs the local court to follow the prior judgment if it is based on a finding that the decedent was domiciled in the state of the judgment. Nebraska lawyers may or may not be bound by these rules. To discover the answer, they must look outside their local law into the laws of the state or states involved to determine if they have accepted the Code rule. The inquiry may be more complicated than profitable.

Finally, some reference should be made to enacted changes in section 3-203, the provision describing priorities and qualifications that determine who may serve as personal representative. One major objective of this section was the elimination of residency requirements that have served in many areas to

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orce strangers to the testator and his family into the role of estate administrator. Another, frequently overlooked by critics of the Code who deplore what they assume to be the power of almost anyone interested in the estate to run to court and get letters without advance consultation or notice, was to require concurrence of all heirs or devisees regarding the identity of the personal representative in cases where neither a named executor nor a spouse can or wishes to assert his or her clear priority.

In view of the critical importance of section 3-203 to the Code's goal of getting inheritance procedures back into family control, it is heartening that none of the nine enactments studied changed the section in any detrimental manner. Indeed, except for the explicit disqualification of foreign corporations that was added in the Arizona enactment,275 the only local variations here relate to bracketed figures in the Official Text concerning the minimum ages of heirs or devisees for purposes of serving as personal representative or for joining in the nominations of others, and mention in Idaho276 and Montana277 of a low priority for public administrators. The Arizona provision prevents a testator's choice of a corporate executor from another state, but prohibitions and other restrictions commonly found in state banking codes against foreign corporations doing trust business locally would frequently have the same effect. The Arizona disqualification would not seem to affect the ability, under section 3-202(a)(1), of a foreign corporate fiduciary nominated as personal representative by a will from designating a qualified person to serve instead, if the will gives the named executor power to designate another to act in its place.

X. Conclusion

Article III, the procedural heart of the Uniform Probate Code, is its longest division. In its official version, with comments, it runs 115 pages in 128 sections, approximately 40 percent of the entire Code. Such a weight of statutory material would predictably attract a flood of amendments in the course of enactment in nine states, especially since probate procedure is traditionally a matter where local rules have differed. Further, this portion of the Code affects the work and pocketbooks of probate court personnel, professional sureties, publishers of legal notices, and practicing attorneys. Therefore, the most noteworthy observation that arises from a detailed study of the first nine enactments of this portion of the Code is that, although there have been several deviations from the Official Text, the expected flood did not materialize.

None of the changes appears to pose any serious threat to the Code’s goal of facilitating non-court settlement of decedents’ estates. However, provisions were added to the Code in Arizona, Nebraska, and Utah that may be used to keep probate real estate sales in court unnecessarily, and awkward additions in Colorado and Montana may lead some probate courts there to attempt to supervise non-supervised representatives or to force court accountings though none is desired by any party in interest. Also, the Code’s purpose of bringing common form probate into all states as a method of opening estates with a minimum of red tape was substantially thwarted in Utah and compromised in Nebraska. The Code’s effort to lead the way toward greater flexibility in the pricing of services of estate fiduciaries and attorneys may have been thwarted in Montana and Utah where the enactments retain statutory scales based on estate size for guidance in fee determinations.

Much of the success with which the independent administration concept has come through the legislatures is due more to the difficulty of isolating this concept from the dozens of sections of article III that express and support it than to the enthusiasm of local draftsmen and reviewers for the concept. Thus, unaltered provisions of the Code as enacted in Arizona, Nebraska, and Montana will enable counsellors to keep estates out of court even where real estate must be sold, and the Colorado and Montana provisions that appear to give the court some overriding controls over all estates probably will prove ineffective simply because interested persons can use other provisions to avoid or block them. Finally, all of the enactments followed the Code’s lead in permitting probate fees to be determined by interested persons without the need of a court order.

The enactments in Idaho, Alaska, North Dakota, and South Dakota are free of any obvious statutory impediments to the functioning of article III as intended by the national draftsmen, and the Colorado and Arizona deviations are so slight that they should not cause serious problems. The future for the Code in Montana, Nebraska, and Utah is more difficult to predict, but these statutes, like the others studied, clearly enable practitioners to reduce probate delays and costs significantly if they choose to do so.

This study demonstrates that very few improvements in the Code have emerged as a result of the intensive studies and discussions that preceded the enactments in each of the states. Several of the changes discussed appear attributable to efforts to gut the proposal, possibly growing out of defeat of flat-out opposition. Moreover, most well-motivated changes that were evolved by local committees or tacked on in the legislative process do not bear analysis. Some are merely harmless or redundant; others interject doubts of theory which may result in litigation. Overall, the study vindicates the Official Text and provides a fresh basis for supporters of the Code to insist that article III be enacted just as recommended.
At its 1975 meeting, the National Conference of Commissioners on Uniform State Laws accepted and approved recommendations from the Joint Editorial Board for amendments to 9 of article III's 128 sections. Two of these were adopted from additions to the Code as first enacted in Idaho; two others evolved from problems identified in pre-enactment studies in Arizona. The others came from suggestions generated in Board discussions, and from recent improvements in Colorado's version of the Code. No post-enactment amendments to article III have been found necessary in Idaho, where relatively few pre-enactment changes were made. Idaho also has had the longest experience with the Code, and several reports have indicated that the national recommendations are working very well there. Hopefully, the 1975 amendments to the Official Text, many of which have been circulated and published as recommendations of the Board since early 1973, will generate a sense that the Code is now settled. With information from this study indicating that local efforts to improve on or to modify article III have been largely counterproductive, coupled with growing confidence in the functioning of independent administration in all Code states, it is hoped that efforts to tamper with article III will face increasingly effective resistance as the Code comes on for study and enactment in other states.


* After this Article had gone to press, the South Dakota Legislature repealed the Uniform Probate Code, effective July 1, 1976. House Bill No. 705, S.D. Legis. Assembly, 1st Sess. (1976). The Code, which became effective January 1, 1976, note 1 supra, will have been in operation for only 6 months in that state.