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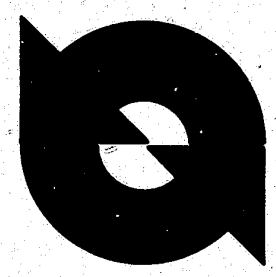

The Role of Courts in the Administration of Decedents' Estates

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THE ROLE OF COURTS IN THE ADMINISTRATION OF DECEDENTS' ESTATES

I

INTRODUCTION

A. Death of a Principal Party

The major feature influencing the doctrine and procedures pertaining to probate and the administration of estates is the absence of one of the principal parties--the testator or intestate--in all contentious and noncontentious matters. The Romans, who managed colorful descriptions of mundane transactions, described the son who contested his father's will as "struggling with the ashes of his ancestor":--but this could not have been much of a contest. When Quintilius Caecelius breached his contract to make a will, the citizens of Rome tied a rope around his neck after his death and dragged his body through the streets:--an action to which Caecilius unquestionably was indifferent.

Since Roman days we have learned that there is not much one can do for or to a testator. He cannot enforce his own will and, when conflicting versions of his will are put forward by interested parties, the choice sometimes must simply be the more probable version unless the testator's expressions are to be ignored and his property allowed to pass by the intestate laws. Even when we establish (probate) his will, the testator cannot amplify or explain his directions when these prove ambiguous. If the testator's dispositions are unjust of if he dies intestate without providing for a person meriting his bounty, there is very little that we can do about the matter unless special factors permit the use of trusts by operation of law or related remedies. Problems in proof of the will, determining the meaning of the terms

of the instrument and the management and liquidation of the estate are all shadowed by the post mortem character of the proceedings. The task of producing and verifying relevant facts which the decedent, if living, might have supplied and explained and the special difficulties in managing and distributing property without oversight by the former owner mould the special relationship of courts to the problems here considered.

B. Outline of the Memorandum

For the convenience of the reader there is first presented a summary of procedure and doctrine dealing with wills, intestate succession and the administration of estates. This summary does not pretend to reflect accurately the situation in any particular state but instead is developed to present a rough cross section of these procedures to display how the courts and their officers participate in the various decisions usually made in handling the distribution of a decedent's property.

The organization of the probate courts and system for supervising the administration of estates are then examined. This includes the jurisdiction ofthe courts, their position in the state court system, the method of selection of judges and officers, their use or non-use of adjunct administrative structures and the method of review of their decisions. A brief history of the vicissitudes of probate jurisdiction in England and the United States is considered in this context and an equally brief discussion as of comparable foreign systems is presented.

There is then an attempt to evaluate the performance of the courts in supervising probate and administration and in adjudicating issues stemming from this supervision. This evaluation has to be

based for the most part on the writer's observation of activity at the probate court level and on appellate opinions, there having been few published studies of much assistance and objective tests for evaluation yet being far in the future. It is difficult to determine from data currently available, for example, what impact a court's decision, attention or lack of attention has had upon the structure of the family involved, upon the value or use of the assets being dealt with and upon the public costs produced by the proceeding. One working in this field quickly senses that values other than wealth are involved but it will be difficult to judge a value unmeasurable in dollars.

Last, internal reforms and institutional alternatives are suggested with proposed strategies, such as the Uniform Probate Code, discussed.

II

Summary of Procedure and Doctrine: Intestate Succession; Wills and Administration

A. Intestate Succession

Approximately 85% of all decedents who die leaving property in this country die without a valid will. In most instances their property passes by "will substitutes" such as life insurance, joint bank accounts, tenancies by the entirety and, rarely, living trusts. Any property not passing by these schemes in theory at least passes under the state intestate law. This is a statutory system stating the order in which relatives of the decedent are entitled to succeed to his property. Some states have a single intestate law. Others have one scheme of succession for land and another for personal property.

The state intestate law is supposed to reflect the desire of the average decedent for distribution of his property. Actually, the intestate law tends to reflect a 19th Century legislature's judgment concerning the decedent's responsibilities to various family members. Few of these statutes have been updated to reflect the role of the wife as an economic contributor to the family. Few also are congruent with modern death tax laws. For example, most of the intestate laws currently in force will not transmit to the spouse a full one-half of the estate if there are children or descendants of deceased children. Consequently, the full federal estate tax marital deduction is not available in the estate and, even if the share is available under the particular statute or is conferred upon the spouse by disclaimers by heirs and distributees, the spouse's share bears a portion of the estate tax burden so that the deduction is reduced. For tax reasons, if for no other, most persons owning substantial estates will execute valid wills.

For the small estate, little property is left to pass by the intestate law. In these situations often there will be no grant of letters of administration. Creditors will be paid or ignored and those who have been close to the testator or his property appropriate it. Local taxes on the property may never be collected. From time to time stock transfer agents, banks or insurance companies may force administrations in these small estates. Also there may be conflict among relatives or a need to clear title to land owned by the decedent, either situation inviting an administration.

When an administration becomes necessary, persons may apply for letters of administration who are designated in a state statute in the priority there stated. Usually at some point in this order of priority a creditor may apply for letters. The petitioner for

letters is required to take oath that no will has been found, file a list of heirs, and give bond with property or corporate security. The administration usually is conducted under the general supervision of an officer of the court who receives and approves or disapproves the administrator's accounts. The court does not become involved in the administration unless a hearing is required on an objection to an account or perhaps to approve some special power requested by the administrator. Yet administrations of intestate estates are expensive due to the requirements of security on the bond of the administrator. In a will, security can be waived by the testator in most of the states.

The intestate law is a backdrop to inter vivos and testamentary dispositions. What does not pass by the "will substitute" or by the will passes under the intestate law. It is also accurate to view intestate succession as necessarily linked to the death of the property owner. As will be noted shortly, this linkage also exists for the will, but unlike intestate succession the will linkage is a matter of custom or perhaps convenience.

B. Wills

By the generally accepted view, the will operates only at death. Until death, the will is tentative and revocable. Also the will is ambulatory in the sense that it can pass property which the testator did not own when the will was executed but acquires before his death, although the ambulatory feature was not applied to a devise at an early date due to the analogy made by the common law courts between a devise and a conveyance.

Each state sets forth formalities which must be met in order to make an effective will. The statute requiring formalities is

usually described as the "wills act" and courts frequently refer to the "wills act" as implementing basic policies concerning the making of wills. While these policies are quite obscure, there are certain difficulties attending the establishment of a will to which the "wills acts" certainly are addressed.

The first difficulties are in finding and producing the will. Although states have statutes requiring production of a will, the major problem often is whether the decedent made a will and, if he did make the will, where it can be found. The current wills acts attempt to meet this difficulty in part by requiring witnessing of the will as a formality. If the will is witnessed when it is executed there is some chance (albeit a very slight chance) that the witnesses can report after the death of the decedent that a will has been made. On the other hand, in states where holographic wills (entirely in the handwriting of the testator) are recognized as valid without attesting witnesses, the wills often are discovered long after the death of the testator and this suggests that many are never discovered. The need for notoriety of the will to offer some promise for production for public scrutiny after the testator's death competes with the testator's demand for secrecy of his dispositions during his lifetime. Various compromises concerning these demands tend to reflect the degree of community support and interest in the power of testation. In Republican Rome, for example, the will calatis comitiis was made on two days set aside for will making (24 March and 24 May) and was likely to attract public attention due to the time made. The testamentum in procintu was made when the army was drawn up in battle array and the commander had made his

auspices. While the dramatic circumstances of this will making might impress its making on the mind of a witness, the wills were made verbally and probably in great numbers. The survival of witnesses also was problematical. Understandably, both the will calatis comitiis and the testamentum in procintu fell into disuse. The later testamentum militis which did not have to be made while a battle was imminent and in which the authority of the military commander was invoked for notoriety and enforcement survives in modified form as the soldier's will of personal property recognized currently by many states. The testamentum per aes at libram, which long persisted, involved a significant ceremony which would attract attention. The familiae emptor in the presence of five witnesses and a libripens would strike the scales with a bronze piece and give this bronze piece to the testator as a symbolic price. The testator, holding the tablet upon which the will was written then confirms the provisions by his nuncupatio. The formalities of the Roman will in the time of Justinian required seven witnesses specially summoned. The witnesses were required to know that the document was a will. Relatives of the testator were excluded as witnesses, not because of pecuniary interest but instead to publicize the transaction beyond the family.

The major chance for notoriety of the transaction under American wills acts is not from the formalities as such but in those instances in which the executed will or a copy of it is deposited with an attorney, a nominated executor or with a court official (the latter deposit being permitted by some statutes). Except in Louisiana, there are no formalities comparable to the French will by public act "authentic will" in which the will is written by a notary in the presence of two witnesses and the testator; or the "testament mystique" in which the testator presents the will to the notary

in a sealed envelope in the presence of two witnesses, the testator declares the envelope contains his will, the notary endorses the envelope with a short description of the transaction which the witnesses, and the notary, the testator and the witnesses then sign. The relatively new "self proved" affidavit enacted in a number of states and included in the Uniform Probate Code achieves some notoriety for the will but is not a "formality of execution." The current American formalities for execution are conducive to notoriety of the will only through the witnessing requirement for the ordinary attested will and then only in those states in which the testator must publish his will (notify the witnesses that the document offered for their signatures is a will).

Another difficulty to which the wills acts are addressed is authenticity of the document. The authenticity issue is usually resolved by proof of the testator's signature to the instrument, the will acts requiring that the testator either sign the will or sign by proxy. But the testator or his proxy may sign only one page. The courts thus require, as a supplement to the requirements for an ordinary attested will that the pages be presented in the same location when the testator signs the will and that he intend each page to be part of his will. This judicial process is described as "integration of the will." The formalities required by the wills acts are said to have a "packaging effect" in that writings not present when the will is executed are to be ignored unless the testator meets the requirements for incorporation by reference, these requirements being judicially imposed subsidiary requirements for execution determining when an extrinsic writing can be read as part of the will. The authenticating function is certainly the major function of formalities for execution.

Testamentary formalities are also said to induce a reflective state of mind of the testator when the will is executed, a desirable condition if formalities do have this effect; and it is stated frequently that formalities are conducive to speedy administrative action when the will is offered for probate. Some of the formalities are objective and can readily be discerned on the face of the instrument. It is easy enough to tell whether a sufficient number of witnesses signed the will and, usually whether the testator signed. But it is not easy to determine whether the "presence" requirement was satisfied from the face of the will or whether the requisites for a proxy signature were met.

These are the "wills act" policies to which the courts so frequently allude and these "wills act" policies are the foundation of a further policy requiring formal approval of the will by a public officer before the will can be used as the basis of an executor's powers or be used to prove title to property.

The ex parte probate, the proof of the will without notice to interested parties, is the only probate to which 95% of all wills are subject in jurisdictions in which this procedure is available. While the ex parte probate is usually before an administrative or quasi judicial-officer (a clerk of court, for example) some judicial functions are involved.

Jurisdiction must be found to probate the will. Death of the testator is a jurisdictional fact which is proved usually by the certificate of death. Either domicile of the testator or the presence of assets are also jurisdictional facts for probate and these elements are usually stated in the executor's petition for probate of the will and grant of letters testamentary. The officer probating the will examines the document to see if the objective formalities of execution

have been performed, takes the executor's oath that the latter believes this is the testator's last will, receives a list of heirs to be placed on record, examines the available witnesses and then, if all is in order, admits the will to record.

The major functions of ex parte probate are authenticating the will and giving it notoriety by placing it in the public record, both of these functions also being involved in the formalities for executing a will. The ex parte probate involves a review of objective facts much as witnesses review these facts at execution. When it is considered that the formalities now required are based for the most part on English statutes of the 17th or 19th Centuries and that few changes have been made in this country in execution requirements despite the availability of more sophisticated techniques for insuring the validity of wills, the need for a closer coordination currently between formalities for execution and the ex parte probate becomes apparent.

There is no trial at ex parte probate. If facts are disputed, these must be resolved in a court which has jurisdiction to conduct an adversary proceeding and resolve disputed issues of fact. As will appear subsequently, there is still major diversity among the states in how this adversary probate jurisdiction is managed and how contests of wills are presented. But since the purpose at this stage is merely to illustrate procedures and doctrine in broad outline, the emphasis here will be on the sequence or procedures and content of doctrine rather than upon court organization.

Standing

The first issue in an inter-parties or adversary proceeding (apart from the issue of jurisdiction previously discussed) may be

that of the standing of a party to contest. Statutes usually state that a person "interested" or "aggrieved" may contest, these words usually being construed to mean that the contestant must have a pecuniary interest which may be affected adversely by establishment of the will. Thus an intestate heir or distributee or a legatee or devisee who takes more under an earlier will has standing to contest as would, in many states, a creditor having a lien on property of such prospective contestants. A general creditor of an heir, distributee, legatee or devisee has no standing to contest and the administrator of the intestate estate of the decedent and perhaps the executor under an earlier will may be held to lack standing also. The standing issue is usually determined in a separate preliminary proceeding from which an appeal lies to a reviewing court.

Jurisdiction

The jurisdiction of the court may also be raised at this early stage but, as in other types of cases, can be raised at any stage of the proceeding. There would almost never be in an ex parte probate a determination made of the death of an absentee testator or intestate. This determination would be made (following the procedures of the local Enoch Arden Statute) by a court having extensive powers to issue process and take evidence. Moreover, domicile, which may be a basis of jurisdiction in a particular case, is a complicated legal concept which one could not expect to be dealt with satisfactorily in an ex parte probate when little evidence may be taken and especially when the ex parte probate is often conducted by a person lacking legal training.

Procedure

Interested parties are served with process in this proceeding. The proceeding will be conducted substantially as any other adversary proceeding would be conducted, the court either empanelling a jury to determine contested issues of fact or framing issues to be considered by a jury empanelled by another court. Evidence is limited to the issue "will or no will." There may have to be limited construction of the meaning of the will at this stage as, for example, when it is alleged the will in question is revoked by inconsistent provisions in a will executed later:--but the ultimate issue in probate is the validity of the will and not the meaning of the will.

Since the testator is not available to testify, caution is exercised in admitting evidence bearing upon his intention. Particularly suspect is evidence by survivors concerning declarations by the testator. If this evidence is to be considered by a jury, the party offering it is usually required to proffer the testimony for review by the court before the jury is permitted to hear it. Often it will be barred under a "dead man statute" or by the "wills act"--the position in the latter instance being the "packaging policy" of the wills act which is intended to exclude statements by the testator lacking the imprimatur of testamentary formalities. But since it is impossible to wrap up the will as a package so that it is insulated from extrinsic factors, irrespective of the intent of a state legislature in its wills act, the testator's statements concerning these extrinsic factors as these bear upon the factum of the will probably will be admitted although with caution and perhaps with a cautionary instruction to the jury.

Perhaps the most infrequent ground of attack at inter partes

probate is lack of testamentary formalities when prior ex parte proceedings are available and utilized. Probably this is because of the objective character of many of these formalities. But such matters as qualification of the witnesses; subjective elements, such as those involved in "presence" (the testator being required to sign or acknowledge of the presence of the witnesses, the witnesses required to sign in the presence of the testator, a proxy signer being required to sign in the presence of the testator); and, in holographic will states, identification of the testator's handwriting, might not have been explored fully in the non-adversary ex parte proceeding and might now be litigated.

Revocation of the will with counter arguments of revalidation or republication are frequent contentions in inter partes probate. A major characteristic of the will is its revocability. This ceases to be possible only when the testator loses mental capacity. The methods are established by statute although some states recognize common law methods of revocation by operation of law based upon changes in domestic circumstances. The usual statutory methods are revocation by subsequent instrument (either expressly or by implication); revocation by physical act (such as burning, tearing or destruction) and revocation by operation of law (such as revocation of the share of a spouse by reason of a divorce a vinculo). The first two methods depend upon the intent of the testator (often a difficult matter of proof when he is not there to testify); although the revocation by operation of law usually occurs irrespective of intention. Perhaps the most frequently presented revocation issue concerns the executed copy of the will which is in the testator's possession and cannot be found at his death--in which case there is a rebuttable presumption

that the will is revoked by destruction, the proponent having an opportunity to introduce evidence to show that the will was merely lost and not destroyed with the intent to revoke it. Should the proponent be able to rebut this presumption, then the proponent can establish the lost will. He might be able to do this by means of a copy or by testimony (perhaps that of the scrivener) concerning the contents of the missing will.

Grounds of contest more frequent than either lack of testamentary formalities or revocation cluster around the issue of testamentary intent. The will is particularly vulnerable to attacks relating to this point since the testator is not available to testify.

For example, the issue may be raised that the instrument is not a will but instead a contract, deed or other inter vivos transaction which should not be probated. The question will be whether the testator intended to create property interests by the instrument at or after his death and not before. If he intends to create interests in property at or after his death, the instrument is said to have testamentary character. This analysis is also used in handling will substitutes, an issue usually presented during administration of an estate which will be considered hereafter. Perhaps the issue at probate will emphasize the <u>reality</u> of intent--whether the instrument was intended as a sham or joke. Evidence of the intent <u>not</u> to make a will when the instrument bears evidence of testamentary character upon its face, if admitted, is admitted with great caution. The issue may be that the intent of the testator was conditioned upon the existence of some fact or law.

The intent issue may be developed in the context of capacity to have intent--the testamentary capacity issue. Often this attack will

be coupled with a contention of undue influence--the argument being that someone has superseded the testator's intent by psychological or physical pressure--the testator being placed in the position when the will was executed of saying "this is not my will but I must do it." In terms of frequency of use, the testamentary capacity-undue influence tandem in will contests far exceeds other grounds of contest but, it appears, with notable lack of success although a jury may seize upon these issues to invalidate a will which it perceives as unjust. Probably the frequency of use lies in the facts that all testators at some time display some eccentricities and all tend to receive advice concerning their testamentary dispositions. Thus an evidentiary foothold may be provided which will survive a motion to strike even though the evidence ultimately may be insufficient to induce a favorable decision.

Distortions of testamentary intent through mistake may be urged at probate as grounds for contest. It has been difficult to develop effective mistake arguments at probate, the courts taking the position that all testators are subject to some mistakes when the will is executed and thus are prepared to give a probate remedy for a mistake in the inducement only when the mistake and what would have been done in the absence of the mistake appears upon the face of the will. There may be a probate remedy for a mistake in the factum, as for example when it is shown that a clause was placed in the will as a result of a clerical error. But effectively to contest the will or part of it on the ground of a mistake in the factum, the contestant first has to overcome a presumption that the testator knew all parts of the will if the proponent proves he read the will or the will was read to him.

Fraud is a more frequent ground of contest than mistake. However the contestant who urges fraud has a heavy burden of proof. Also proof of fraud is fruitless at probate if a provision has been omitted from the will as a result, the court being unable to restore a provision which has not been subject to formalities of execution. In the latter case the contestant's remedy is by a constructive trust which the probate court may or may not be able to provide. It may be necessary to probate the will and then resort to a court having equity powers to seek imposition of a constructive trust on the person who took the property as a result of the fraud.

The order of the court which has jurisdiction probating or denying probate of the will is appealable to the intermediate appellate court or to the high court of the state. The decree is not subject to collateral attack in courts of coordinate jurisdiction in the same state but, as noted earlier, it may be necessary to probate the will in several states, particularly in those in which land is located. The courts where land is located for example will make their own determinations as to validity of the will based on the law of the situs of the land. It may be that a presumption in favor of validity of the will exists in the state of situs of the land if the will was probated in the state of domicile as meeting also the formalities of the state of situs.

C. Administration of the Estate

At the time the will is probated ex parte, or if an intestacy is determined, the executor or administrator c.t.a. (in the case of a testate estate) or the administrator (in the case of an intestate estate) will, if there are assets, have given bond and qualified. During a will contest or pending probate of a will following an

adjudication of intestacy, the court may appoint a curator or conservator to perform the tasks of administration temporarily.

Small Estates

If the assets are below an amount specified by statute there usually will be no qualification. If amounts are due from debtors in this situation, these amounts can be paid into court which will receipt for the payment or the receipt will be given by a court commissioner. The court or commissioner then pays the creditors and distributes the balance to those entitled. Since fees usually are charged for this handling of the small estate, probably under these circumstances there usually will be no effort to probate the will or seek letters of administration since these actions will tend to set in motion the judicial or administrative machinery. The debts are collected (if the debtor will pay to a person who has not qualified as personal representative) and creditors are paid (and there is never any difficulty in having the latter accept payment). Statutes often permit small bank accounts or savings and loan accounts to be paid over to the next of kin without administration. Title to automobiles, boats and similar property often can be transferred without administration. And of course, property held jointly with right of survivorship passes to another without administration. Insurance, not being part of the probate estate, is paid to the beneficiary named in the policy whether the estate is administered or not and it is only when there is no beneficiary to be paid that the insurance company might seek to pay the amount due into court or press for appointment of a personal representative. The United States, in the handling of retirement payments to survivors and gratuities of various types,

has special rules for determining the payee and little attention is paid in this process to state personal representatives. Indeed a federal law of testate and intestate succession and administration may be said in the process of development in the handling of these funds.

Why Administration?

The amount of assets in the estate, the type of assets and the complexity of estate problems are the features tending to produce estate administrations. For example, transfer agents of stock may be unwilling to transfer stock without presentation of a certificate of death of the owner and a certificate of qualification by a personal representive requesting the transfers. Transfer agents tend to differ in their requirements. Large bank accounts usually will not be paid to a person not presenting letters testamentary or of administration ($1,500 is a typical top limit for payment without letters). If the decedent left land, there will be much interest in barring creditors by means of the "non-claim" statute which can be invoked by a personal representative after publication. Creditors who do not file their claims within the non-claim period are barred. When barred, those who do not have liens on the land cannot, of course, satisfy the barred claims against it. If litigation is necessary on behalf of the estate, a personal representative will have to qualify. An example might be recovery of medical expenses and other damages caused by injury to the decedent. A personal representative may be the party designated to sue under the state death by wrongful act statute. While the administrative machinery is used for the collection of income, gift, inheritance and estate taxes, these taxes can be collected from persons in possession of the decedent's property. The tax collectors certainly have encouraged administrations since the inventory is an

important item of tax intelligence and distribution of the estate is blocked until taxes are paid. Also, because the estate is a taxable entity under most of the state income tax laws and the federal income tax law, there has been interest in administration in certain estates for income tax economy. Indeed administrations have been prolonged for this purpose.

The Bond and Security

The bond may state basic fiduciary responsibilities which the executor or administrator agrees to discharge. For this reason, in many states in which the bond states these duties, the bond cannot be waived by the testator. Of course the fiduciary duties stated in a bond are never regarded as exclusive. Moreover duties are imposed when none are stated in the bond. The local remedies against the fiduciary may be keyed in part to the bond and this may lead to a rule against waiver. While the bond may not be waivable, usually security or surety on the bond can be waived by the testator in the will. This results in a major distinction in expenses in the administration of testate and intestate estates since security or a surety will be required normally for an administrator of an intestate estate and the premiums for a corporate surety on a fidelity bond are high.

Inventory

Once the executor or administrator qualifies by giving his bond and taking oath, and after paying various fees and taxes, such as a probate tax, his first major task is to inventory the estate. This is the most important step in administration since the inventory furnishes the basis for accountings and is a recorded disclosure of estate assets.

One difficulty in the inventory in states which follow the old rule that title to land does not pass to the executor or administrator is that the inventory will reflect only personal property or land which the executor has the power to sell or from which he is empowered to collect rents and profits. In these states the inventory is not a complete disclosure although it could be argued that the land holdings of the decedent in the jurisdiction could be determined from the will and deed books.

The practice of requiring an appraisement with the inventory is now falling into disuse, these appraisals having been found inaccurate and the bond being set at a multiple of the estimated value of the estate in an effort to compensate for this inaccuracy. A professional appraisal may be necessary if the value of property cannot be ascertained from published sources. This professional appraisal will almost certainly be required when the property is valued for tax purposes.

Degree of Supervision by Court after Inventory

Once the inventory is filed, the trend in this country is to have little or no supervision during the course of administration until the time for a statutory accounting (usually a year from the time letters are issued). In this period the executor or administrator will collect claims due the estate, collect the income due on estate property and, if the estate is clearly sufficient to pay creditors, pay those creditors who have valid claims as these are submitted. Usually the executor or administrator does not make distribution of assets to legatees or distributees until all creditors are paid and

until the order of distribution is signed by the court. A family allowance may be payable to the surviving spouse and minor children of the decedent during administration and the executor or administrator pays this allowance when payment is authorized by the court. The executor or administrator publishes the requisite newspaper notices to bar creditors under the non-claim statute and is obligated to resist payment of the claims of creditors when he believes these claims to be invalid.

A particular state may require closer supervision of an estate administration; and even those states lacking step by step supervision of the administration may have a suit for complete administration in which virtually every administrative action is under the supervision and by the order of the court. These complete administrations, where available, are seldom used.

Will Substitutes

As the executor or administrator is engaged in the collection of estate assets, he may be concerned with the pursuit of assets passing by will substitutes. As has been noted, when the will is offered for probate the question may be raised whether in fact the instrument was intended as a will. By the same token, certain purported inter-vivos transfers may have been testamentary and lacking in testamentary formalities. If the asset is part of the estate at death, then the executor or administrator should recover it. Often these transactions will be between the testator or intestate and members of his family and the executor or administrator will be pressed by disappointed family members to pursue the asset.

The current test is to examine the transaction to see if the transferor intended to create an interest in his transferee during

the transferor's lifetime (in which case the transfer is intervivos) or not until the transferor's death or after his death (in which case the transfer is testamentary and requires testamentary formalities in order to be effective). The subjective factor of intent is awkward to determine when the transferor is dead. Consequently the emphasis in making this determination is upon objective features of the transaction with evidence of the transferor's statements as reported by others rigorously excluded.

The trend has been to sustain these transactions as intervivos in case of doubt. The executor or administrator is then left with the disappointment of a hopeless foray which they believed themselves compelled by duty to undertake. Statutes thus sometimes state that the executor or administrator is not compelled to attempt to recover these assets unless specially requested to do so by a beneficiary of the estate or, as in the Uniform Probate Code, these intervivos transactions are validated and put beyond the reach of the personal representative.

Will Construction

In addition to the possible pursuit of will substitutes at this stage of the administration, the executor of the will may be concerned with questions of construction of his powers. He will then be before his probate court or perhaps a court exercising equity powers to interpret the will. Various terms are used to describe the procedure he would follow. Typical are a "Bill for Instructions"or a "Suit for Aid and Direction."

Powers may be, and usually are, stated in the will or incorporated by reference from a state statute. Nevertheless, it may be possible to imply powers from those stated or from the kinds of activities

that the executor is directed to undertake--such as a direction to operate a business or a farm. The court will be requested to instruct the executor concerning his powers and, in doing so, the court will seek the testator's intent from the will. But unlike the situation in which it deals with the issue of testamentary intent, which is sought from the face of will, the court will deal in this situation with evidence extrinsic to the will to resolve ambiguities although it will usually also exclude testimony or other evidence concerning direct declarations by the testator concerning the matter in issue so as to implement the "policy of the wills act."

Although a century ago, the courts were willing to instruct executors concerning prospective problems, today, because of the press of business, these instructions are limited to present and urgent issues confronting the executor. The major judicial burden of construing the will, although construction may commence while the executor is collecting assets of the estate and paying creditors, falls when the time arrives to distibute the assets of the estate to the legatees. Questions of entitlement to the assets are then presented which can involve protracted litigation, and these questions may continue to be presented in the indefinite future as the trustees of trusts established by the will (testamentary trusts) seek instructions to determine their powers or the proper distributees of trust income or assets. Even if no trust is involved, issues concerning title to land passed by the will and involving construction of the will are presented as long as the local title search standards require a review of the will as a link in the chain of title. This construction often involves the law of successive interests and conditions upon interests,

usually described as "future interests" although actually dealing with the identification of persons who take property and "future possessions." In these later cases, in particular, the courts tend to rely on presumptions of the testator's intent to aid in surmounting the frequent ambiguities found in wills, the availability of extrinsic evidence of a reliable nature to construe the will diminishing almost in direct proportion to the increased lapse of time.

The administrator of the intestate estate has powers conferred by statute and may need to seek instructions as to the exercise of these. During the phase of administration of the estate and through the time of distribution his need for judicial assistance may be greater than that of the executor. But involved are matters of statutory construction as to which the court may have precedents available from earlier cases. Wills, on the other hand, even though patterned to some extent by the draftsman's use of form books, are substantially unique and each testator's intent must be sought. As frequently observed "no will has a brother."

Distribution

The distribution of the estate under court order at the conclusion of administration normally is in accordance with the terms of the will or with the state intestate law. There is, nevertheless, no way in which the property can be kept in the hands of the distributees or put to the uses specified by a testator unless the testator uses a trust. Thus there has been some tendency to respect family settlements in an order of distribution (in which case the intent of the testator after all of the formalities and probate effort to establish his will is then substantially ignored in the interest of family harmony).

While most of the courts in their orders of distribution insist that the orders track the will or the intestate law as the case may be, the increasing attention to family agreements concerning distribution of an estate or, to put the matter somewhat differently, an increasing tendency to disregard the testator's wishes which faced with solid family opposition, means that the administration of the estate will be a process of decreasing importance in carrying out the testator's wishes expressed in his will.

Accountings

Accountings for an executor or administrator are usually required by statute and, if not, are nevertheless required as part of the duty of these fiduciaries to give information to persons with an interest in the estate. The statutory requirement prevails generally.

There may be only one accounting. But because estate administrations today, for tax and other reasons, tend to run over a year, often there will be one or more intermediate accountings and then a final accounting. It is at these accountings that judicial control tends to be reasserted. The degree of control varies from state to state and from court to court within a state. The account may be reviewed by the court having probate jurisdiction or, more frequently, by an officer of that court. Initiative may be demonstrated by the reviewer in correcting the performance of the fiduciary or the accounting may be perfunctory, there being simply a check to see that the books balance as of the time of the accounting.

The final accounting, on the other hand, is typically the point at which legatees or distributees have an opportunity to complain concerning the acts of the personal representative. This accounting

will be preceded by public notice of the time and place. The executor will have obtained an order of distribution from the court, this probably being preceded by its own "show cause" public notice. This distribution will be shown in the account.

Persons objecting to the manner in which the fiduciary has performed his duties may then object or "except" to the account and these objections will be heard by a court officer with a report to the court and a recommendation concerning them. Upon this report, or perhaps in a separate action such as a "bill to surcharge and falsify the account" the propriety of the conduct of the fiduciary is then tested in adversary litigation. If there is no objection to the account, the personal representative then receives his discharge and his surety, if any, is released.

D. Summary

The reader should recognize that this description, while presented as a cross-section of probate an administration, with no state conforming to the description in all particulars, is moreover not an apt characterization of the vast amount of local custom tending to develop in this area. A judge or probate court officer of long service will tend to develop his own way of doing things. The degree of actual participation by the judge or the officers of the court in the probate process depends upon the time available to them, their interests, their predisposition to aggressiveness in judicial matters and, probably most important, the level of ability of the executors and administrators with whom they are required to deal. When faced with a generally low level of competence among fiduciaries, and within the local bar advising these fiduciaries or serving as fiduciaries,

the courts and court officers may become involved directly in fiduciary functions. For example, commissioners of accounts (court officers delegated authority by the court to handle fiduciary matters during administration) in Virginia, in some areas of the state will do most of the work of the fiduciary, including the publication of notices and the preparation of the account.

The effectiveness of the local bar has a major bearing on the degree of judicial participation in the process or, as it is sometimes described, "intervention." Moreover, the ability of the bar to which advisory and operational functions fall in "independent" administrations (without court control) has much to do with whether a formal prescription of "independent" administration will be accepted in a state and, further, whether there will be independent administrations in practice even if such legislation is enacted. The courts, usually through their officers, will tend to fill the professional vacuum in this area when that vacuum is found.

In summary of the description of probate and administrative procedure and doctrine described here, the reader should note the following:

1. The area is shadowed by the absence of the testator of intestate. No will is effective until the testator's death and no intestate property is distributed until then. If the decedent's intent is accepted as a relevant factor, evidence of this intent must be sifted with care and presumptions must be developed to dispose of the matter when evidence is lacking.
2. Two major problems for decision makers concerned with the area are securing "notoriety" of the transactions and estab-

lishing their "authenticity." To neither problem have fully satisfactory solutions been offered. We value the element of privacy in a will, for example, but the consequence of implementing that privacy may mean that the will is never discovered and never probated. The courts, as public bodies, have an obvious, though certainly not indispensable role to play in the "notoriety" and "authenticity" processes.

3. Basic policies underlying the system for establishing the authenticity of wills (a process complicated by the absence of the testator) seems dubious upon close examination. The "policy of the wills act" is invoked to explain many judicial actions or "interventions" in this area, yet there is seldom an effort to articulate or evaluate this policy.

4. There is no indissoluble link between establishing a will or determining an intestacy on the one hand and administering an estate on the other. Because the court participates in the first process, does not mean that it must participate in the second or perhaps continue its supervision over testamentary trusts created by will.

5. Court involvement with wills and intestacies will continue after probate or a determination of intestacy even if the particular court does not participate actively in the supervision of administration because of complaints concerning conduct of the administration or petitions to determine the meaning of the will or statutes possibly applicable to some phase of the administration.

III

ORGANIZATION OF PROBATE COURTS AND THEIR PROCEDURE

A. Background in Roman and English Law

There was no court in the Roman legal system specialized to probate matters. In the Republican and early Imperial periods the execution of the will served substantially the "notoriety" and "authenticity" functions of our ex parte probate. A contest of a will during the Republic would be before the Centumviri where grounds of contest similar to those heard today would be argued. In the early Imperial period, the function of the Centumviri was assumed by the delegate of the Praetor and, much later in the Eastern Empire at about the time of Justinian, a process similar to our ex parte probate developed, the will being opened before the magistrate who then required the witnesses to identify their seals and state their part in the making of the will. Administration in the Anglo-American sense was not conducted, the universal heir, without whose designation early Roman wills were invalid, succeeding to assets and debts of the decedent and, in effect, continuing his personality.

Nothing in the Roman background or the Civil Law of Justinian could serve as the basis for the jurisdiction to probate testaments of personal property and administer intestate personal estates which was acquired by the Church Courts in England. There was a revival of interest in Roman Law in Western Europe at the time the Church Courts in England acquired their status independent of the local (communal) and royal courts in the late 12th Century. By the late 13th Century these Church Courts had a firm grip on probate jurisdiction, so firm that it was recognized as routine by Glanvil. The events of the inter-

vening century are obscure.

There were claims by several monasteries of Papal grants of probate jurisdiction. Yet it is probable (but by no means certain) that the Church Courts developed their probate jurisdiction by first extending their reach over the personal representative of a decedent. Control over the personal representative would lead to examination of the will as his source of authority and thus a determination of validity or invalidity of the disposition. Jurisdiction over administration (if that term can properly be used for the early representation of a decedent) probably led to jurisdiction over probate. This extension apparently occurred rather rapidly during the civil wars of Stephen and Matilda. The political structure of Henry I collapsed in this period and tenants in capite, particularly the Bishops, who tended to stand aside from the conflict, gained great power. It is probable that testators in this troubled period invoked the powers of the Bishops to supervise their representatives to insure their wills were carried out. This was a congenial task for the Bishops since most wills of the period contained substantial legacies to the Church. In Rome the power of Caesar, for example, had been invoked to support the testamentum militis. Although some feudal barons in England contested this Church jurisdiction for years, claiming jurisdiction to probate the wills of their tenants, no significant inroads were made upon eccleasiastical authority over the probate of wills of personal property and the grant of letters testamentary until the 19th Century.

Intestate estates were administered directly by the Church Courts until 1387 when the power of the Ordinary (the officer handling estate matters in the consistory court) to administer the chattels of an intestate was divested by statute. The Ordinary was required to

appoint an administrator who, like the executor, was accountable to him. This change resulted from proof of myriad abuses by the Church Courts in the handling of intestate property in an age notorious for corruption.

The Common Law Courts (particularly the Court of Common Pleas) consolidated their jurisdiction over land transactions during the period being considered. When wills of certain land were authorized generally by statute in 1540, decises of land were established in the Common Law Courts in actions for trespass or ejectment. There was no probate of a will of land nor was land administered.

Throughout the Middle Ages the Church Courts purported to supervise administrations of personal estates. In doing this the Church Courts developed the techniques of inventory, fidelity bonding and accounting as applied to estates. Doctrines concerning the liability of the executor or administrator for negligence causing loss to the estate also were formulated.

Nevertheless, as the contest between Church and Crown in England became increasingly intense, the Common Law (Royal) Courts undercut ecclesiastical jurisdiction over administration by allowing personal representatives to sue and be sued in the Common Law Courts. By writs of prohibition the Common Law Courts blocked the Church Courts from inquiring into the truth of an inventory, examining an account or entertaining an action on a bond. No new structures were developed from this virtual demolition of ecclesiastical jurisdiction over administration until the Chancery Court, exercising its in personam power over personal representatives, systematized administration of both estates and trusts, developed the modern concept of the fiduciary, and harmonized the older ecclesiastical doctrines dealing with administration with the social and economic conditions of the Seventeenth Century.

While the American colonies might reasonably have been expected to emulate the model of ecclesiastical courts probating wills and granting letters testamentary and of administration, chancery courts supervising administration and common law courts proving devises of land in actions at law, the impact of the example was delayed until well over a century after the first settlements.

There were no separate ecclesiastical courts in the colonies and some had no chancery courts. The tendency was to experiment with one probate institution which had, initially, jurisdiction to probate wills and grant letters of administration but not the power to supervise administrations. This early jurisdiction might be reposed in the governor and his council, special courts established for the purpose or in existing courts. "Orphans' Courts," similar to the Court of Orphans of the City of London, were established in five colonies with jurisdiction over the estates of minors gradually extended to jurisdiction over administrations. Three others, South Carolina, Georgia and North Carolina early conferred jurisdiction upon existing courts not only to probate wills but to supervise administrations as well. This allocation of jurisdiction did not remain. As chancery jurisdiction received increasing recognition in the late colonial and post revolutionary periods, courts exercising equity powers acquired an increased role in the supervision of administration as in England with the separate probate court having a role similar to that of the English Church Court.

B. Current Probate Organization

Courts of Record with Broad Jurisdiction

The current trend in probate organization is towards placing probate and supervisory powers in a court of general jurisdiction

(perhaps establishing a division or divisions of such a court for probate matters as in Florida for the Circuit Courts) or for a separate court based upon the Model of the Uniform Probate Code. The UPC does not mandate any particular type of court and the court of the Uniform Probate Code can be equated with ease to the court of general jurisdiction exercising probate powers.

The UPC in § 1-302 confers jurisdiction over the estates of decedents, construction of wills, determination of heirs and successors of decedents, estates of protected persons, protection of minors and incapacitated persons and trusts. The court is to have full power (and this would include equity power) to make orders, judgments and decrees and take all other action necessary and proper to administer justice in matters coming before it. Appellate review is that for a court of general jurisdiction.

There is a registrar of the court who can probate a will informally or ex parte and who can appoint a personal representative. The UPC has comprehensive provisions concerning the informal probate setting forth the contents of the application and the proof and findings required and has similar requirements for the informal appointment of the personal representative. Notice is required in the informal probate to any person who files a demand for notice under § 3-204 and to any personal representative of the decedent whose appointment has not been terminated. Notice of an intention to seek an informal appointment is required to an existing personal representative, to any person demanding it under § 3-204 and to any person having a prior or equal right of appointment not waived in writing and filed with the court. No other notices are required.

Formal testacy and appointment proceedings under the UPC are before the Court. The proceeding may be commenced without a prior informal probate by a petition filed by an interested party in which he requests that the Court, after notice and hearing, enter an order probating a will. Alternatively the petition may be to set aside an informal probate or prevent a pending informal probate. The petition may be for an adjudication of intestacy and determination of heirs--a declaratory judgment. Notice to interested parties is required by mail or, when the address or identity of any person is not known and cannot be ascertained with reasonable diligence, by publication once a week for three successive weeks in a newspaper of general circulation in the county in which the hearing is to be held. Persons to be given notice are described in § 3-403. These include not only the surviving spouse, children and other heirs of the decedent but also the devisees (the terms being used in the UPC to describe takers of either real or personal property) and executors named in any will that is being or has been offered for formal or informal probate in the county or that is known by the petitioner to have been probated or offered for formal or informal probate elsewhere. Any personal representative of the decedent whose appointment has not been terminated must also be served. When the petition is unopposed, the court may probate or order an intestacy on the strength of the pleadings or may conduct a hearing in open court and require proof of the matters necessary to support the order sought. § 3-405. When the will is in "self-proved" form as provided in the UPC, compliance with signature requirements of the will is conclusively presumed. This would include such matters as the issue of the witnesses signing in the presence of the testator and vice versa. § 3-406(b). Proof of fraud, forgery, undue influence and the like is not foreclosed.

Perhaps the most innovative features of the UPC are those concerning the administration of estates. In either the informal or the formal testacy proceedings it is not required that the petition be accompanied by a request that a personal representative be appointed. The informal and formal probate dichotomy substantially tracks the ecclesiastical common form--solemn form procedures with additional flexibility in procedure. But the UPC in the administration of estates affords major options.

It is possible that there would be no petition for appointment of a personal representative and this may be unnecessary in some states. Usually a personal representative would be appointed but then there are options as to the element of court supervision of the administration.

Under the UPC, title to both land and personal property passes directly to the takers under the will or to the intestate successors. § 3-101. (There is a special provision for community property states.) If there is no administration, these persons simply retain title to the property. Upon appointment of the personal representative, he acquires a "power over title" as an owner would have, in trust, however, for the benefit of creditors. § 3-711.

To appreciate the flexibility the UPC provides in administration, the essentially routine character of many of the steps involved should be understood. While these steps could require the application of judicial discretion in particular cases, usually the skill required in business judgment is necessary or perhaps the act is really of a clerical nature.

Under the UPC there could be an election of a fully supervised administration. As an alternative the personal representative could

proceed without supervision, coming into court only when a problem requiring judicial action is presented. Thus, if a dispute arose concerning a claim against the estate, the personal representative might go before the court for adjudication of the matter. The account could be had formally with notice and hearing or the personal representative could account to each interested person and rely upon the statute of limitations for his protection. The distribution could be by court order or the personal representative could distribute the property informally. Essentially, the personal representative is treated as the trustee of an intervivos trust is treated, the trustees of intervivos trusts generally not functioning under court supervision with the power of the court being invoked only when a problem requiring judicial action is presented.

This flexibility in permitted administrative schemes under the UPC clearly will unburden the court and its officers of responsibility for performing merely routine acts that properly should be the responsibility of the personal representative. Moreover the cost of handling an estate so far as this includes filing fees and other court costs will be reduced. Unsecured creditors in the informal proceedings will be barred within three years of the death of the decedent since administration is barred after this time and an unsecured creditor can effectuate his claim only through a personal representative. § 3-104.

Some Other Systems Comparable to the UPC

Texas, Pennsylvania and Washington offered an option for unsupervised administation before the Uniform Probate Code was drafted. Unsupervised "administrations" are also the pattern in Western European and Latin

American countries sharing the Roman Law inheritance. Where unsupervised administration is routine, typically the bar plays a decisive role.

In France in le reglement des successions there is no personal representative in the sense of an intermediary between the deceased and his successors. There is no grant of administration or collective administration with settlement of debts. The Notary (usually the family lawyer) is the primary figure. The heir upon whom a succession devolves becomes its owner immediately upon the death of the decedent by operation of law. This heir, if he has the right of immediate possession (Saisine) also inherits the debts of the estate unless he accepts with benefit of inventory or renounces. The element of authenticity in transactions respecting the administration is by actes authentiqes of the Notary and certificats de propriété which recite the payment of duties. None are orders of court. Proof of title is effectuated by actes de notoriété or by the intitule d' inventoire, the latter being an "acte" drawn up before all interested parties. With these documents the assets are collected. Creditors may demand a separation de patrimoines in the case of an insolvent heir which are then not within reach of the heir's own creditors until the estate creditors have been satisfied.

In West Germany there is a form of probate before the Amtsgericht sitting as court in charge of the estate. The will is "opened" in the manner similar to the opening of the will before the magistrate in the late Roman system. The Universalsukzession is recognized. Title to both real and personal property passes directly to the heir and there is no administration in the American sense of the term.

Liability of the heir for the debts of the estate is personal and unlimited unless the heir limits this responsibility by obtaining an order for administration of the estate or by obtaining an order opening bankruptcy proceedings for the estate. If neither of the procedures to limit responsibility of the heir is pursued, the estate of the heir and the estate of the decedent are treated as a single estate with the heir's creditors able to reach the property of the decedent. The heir can sue anyone in the possession of estate property.

When an administrator (Nachlassverwalter) is appointed on the petition of an heir or creditor (thus relieving the heir of his unlimited responsibility for debts), the administrator is a public officer, being responsible to the court and to the creditors and not to the heir. The Amtsgericht in this case has direct supervisory responsibilities over the administration. Similarly the court may appoint a curator of assets (Nachlasspfleger) before the heir is determined. But when an executor (Testamentsvollstrecker) is named in the will of the testator, the executor having functions principally with regard to division among multiple heirs or the management of complex assets, the Amtsgericht has little control over the administration although it may dismiss the executor for special reasons and may also issue a certificate of executorship under certain circumstances. The Amtsgericht usually issues an Erbschein (certificate of inheritance) to the heir. This certificate establishes a prima facie presumption that the heir named in it actually has that status. Those relying upon the certificate in good faith are protected. The heir uses the certificate in collecting debts due the decedent, for establishing his title on the land register and for similar purposes. The Amtsgericht may also deal with dis-

claimer by the heir and notification of successor. But the role of the Amtsgericht in other noncontentious aspects of the winding up of the estate is minimal, advocates, and also unlicensed lawyers admitted to practice before the Amtsgericht, usually representing the heirs and doing much of the estate work. Procedures before the Amtsgericht are informal, petitions being in writing or verbally in the office of the court and there being much informal advice and assistance given heirs by court officers. The Amtsgericht proceeds by informal orders in estate matters and issues no formal judgments. Contentious matters are handled in the Landsgericht.

Under the current British system the procedure for probate and administration is simple. There is a Principal Probate Registry in London with District Probate Registries in other areas of the country.

An uncontested application for a grant of probate or for letters in an intestate estate is made in one of these Registries. In small estates the application also can be made at a custom and excise office.

The applicant presents the certificate of death; the will (if the application is for letters testamentary); and takes oath that the will in his belief is the last will, that he is executor, that he will administer the estate according to law, and that he will produce an inventory and account if requested. For an administrator of an intestate estate a bond is required with two individual sureties or one corporate surety.

Applications are examined in the District Probate Registry. These applications include those filed in the custom and excise offices which are forwarded to the nearest District Registry. A clerk in the District Registry examines the will and any other papers to see if these appear

regular, completes a grant of probate or administration and, for a probate, attaches a copy of the will to the grant, retaining the original in the Registry. A Registrar then signs the grant, affixes the seal of the Registry and mails the grant to the applicant. The Central Probate Registry is notified and is provided with a copy of the will. No public notice, except in minor instances not important here, is given in this process.

After this grant there are usually no further judicial proceedings, the revenue forms being completed at the time of application and there being no supervised administration. A personal representative can avoid personal liability to creditors when he distributes the property by published notices prior to distribution calling upon them to file their claims. This publication does not bar creditors from recourse to the property in the hands of the distributees.

If the personal representative is confronted with major problems, perhaps facing major diverse litigation or experiencing special difficulties in winding up a business, an order for administration may be issued. Actions against the personal representative are consolidated, creditors must file their claims in court and court authority is required for actions of the personal representative.

Jurisdiction in contentious proceedings is in the Chancery Division of the High Court of Justice. These are commenced by writ in the Principal Probate Registry and are tried in London or on circuit. Noncontentious matters reaching the High Court (which are few, requiring an executor to produce an inventory being an example) are within the jurisdiction of the Family Division (formerly Probate, Divorce and Admiralty).

The solicitor is the key to the success of unsupervised administration in England. If the estate is of significance, the personal repre-

sentative seeks the aid of the solicitor. The latter conducts the administration, referring to his client from time to time when instructions are needed or when a signature is required.

There are marked differences from the Uniform Probate Code in probate and administration in countries not significantly influenced by Roman law. In Scandinavian countries, for example, the probate court not only probates the will but administers the estate. It is only when the heirs jointly and severally accept liability for the decedent's debts that an unsupervised administration is permitted. If an heir is a minor, disabled or absent the court administers the estate and rejects the appointment of an executor. In Israel the District Court may administer an estate directly as in Scandinavia but this excludes Moslem estates which are handled in Moslem religious courts. Rabbinical courts also have probate jurisdiction as do the courts of ten different Christian religious communities.

The Uniform Probate Code, blending as it does the ex parte--inter-partes inheritance from the English Church Courts with the unsupervised winding up of an estate on an optional basis derived from Roman law, offers a flexible scheme superior to its European counterparts and, as will be seen, incomparably better than a number of probate systems in the United States, a number of which it has superseded. The Uniform Probate Code is now in force in eleven states (Alaska; Arizona; Colorado; Hawaii; Idaho; Minnesota; Montana; Nebraska; New Mexico; North Dakota; Utah). Delaware, Florida, Indiana, Maryland and Oregon have probate codes based on early drafts of the Uniform Probate Code. Pennsylvania has a probate code much influenced by the UPC as does Wisconsin.

The current trend, influenced by the Uniform Probate Code, although the Code does not specify that its probate court be a court of general jurisdiction, is to place probate jurisdiction in courts having general civil and criminal jurisdiction. The court might then be organized with a probate division or it may "sit in probate." Separate probate courts with broad jurisdiction and structured on the level of general trial courts are becoming rarities, the salient examples being the very efficient Surrogate's Courts of New York and the Probate Courts of Massachusetts.

There is also a trend in the United States to distinguish between contentious and non-contentious matters in probate. In Virginia, for example, the clerk of the circuit court and deputy clerks have ex parte probate jurisdiction with an appeal from entry of the clerk's order to the court of general jurisdiction within six months or a bill in equity to impeach or establish the will brought within one year after entry of the order. As an uneconomical variation of this model, some states retain an inferior probate court which is nevertheless a court of record. An initial contentious hearing may be had before the probate judge followed by a possible appeal with a trial de novo in the court of general jurisdiction.

Variations from the Court of General Jurisdiction Model

One of the more awkward systems using the trial de novo is in West Virginia. Here there is ex parte probate jurisdiction in the clerk of the county court but his order is subject to confirmation by the county court when that court goes into its quarterly session. The county court, which has numerous duties other than probate, is the court of first instance in probate matters. The county court tries

contested probate proceedings (although without a jury) in one of its four regular sessions. There is an appeal to the circuit court, each circuit consisting of several counties. The circuit court tries the case de novo and empanels a jury if necessary to determine disputed issues of fact. Rather than by appeal from the county court, the issue devisavit vel non may be brought directly before the circuit court.

The circuit and county courts have concurrent jurisdiction in certain probate matters and the circuit court has exclusive jurisdiction in others. Circuit courts construe wills, for example, and not the county courts. The determination of heirship to land also is a matter for the circuit courts.

The administration of the estate is handled by commissioners of accounts, as in Virginia, these commissioners reporting to the county court. After probate or a determination of intestacy, the clerk refers the estate to the commissioner who receives the inventory and advertises for claims. An appraisal is required. Not later than 10 months from the qualification of the personal representative, the commissioner prepares a report of claims allowed and disallowed, the assets of the estate, how these have been applied to settlement of claims, and identifies those entitled to share in the estate. Notice of this report must be given to interested parties who can except to the report. The commissioner then reports to the county court showing any exceptions and the county court has a hearing on the claims. Exceptions can be taken in the county court also. The matter may be referred back to the commissioner for taking of further proof. There is an appeal from the decision of the county court to the circuit court. After the report is confirmed by the county court and within one year after qualification by the personal representative, the latter pays the claims in the order required.

The personal representative also must file accounts with the commissioner within four months after the end of the first year of his qualification and within any succeeding year. For the final settlement of the personal representative, public notice is required and exceptions may be taken as on the report of claims. The commissioner then reports the settlement to the county court in which exceptions to the report again may be taken. The county court confirms the report, corrects it, or recommits it to the commissioner. There is an appeal from its determination to the circuit court. When the settlement is confirmed without appeal, it is binding on creditors of the estate and on beneficiaries.

Neither the judges of the county court nor the commissioners who supervise administration are required to be lawyers in West Virginia. The judges of the county court are three county commissioners, two of whom constitute a quorum. Lawyers are not usually found on the county courts. More lawyers obtain appointments as commissioners of accounts.

The review de novo is understandable in West Virginia since laymen are deciding contested will cases in the first instance. But where the review de novo is used there is, from a public perspective, unnecessary expense and loss of time. Lawyers tend to use the first proceeding to marshal and test their evidence. Certainly de novo proceedings delay the resolution of issues which, in the public interest, should be resolved expeditiously. The review de novo may stimulate litigation in probate matters, there being some suggestion of this in other states using the system, although not in West Virginia where the relatively small population means that few probate issues are litigated.

While the administration of an estate in West Virginia seems closely supervised, the probability is, as in Virginia where the commissioner system also is used, that the supervision may be formal rather than effective between the filing of the inventory and the final settlement. In view of the many duties of the county court in West Virginia, it is likely in most cases that its reviews of the commissioner's reports are perfunctory.

The intense localism flourishing in the legal administration of probate and related matters has been mentioned earlier in this memorandum. Connecticut and Alabama are excellent illustrations.

In Connecticut there are 125 probate districts, each having its own judge. The judge is elected for a four year term. His clerk tends to be his understudy and will succeed him (if the clerk can muster sufficient popular support) when the probate judge resigns, retires or dies. A judge is seldom defeated in elections.

Some Connecticut probate judges work part time and others full time. They are paid under a statutory fee schedule, some of this income being returnable to the state. There are major differences in the courts, their work loads, the qualification of the judges (about half being laymen) and their fee compensation. Some judges have no place to hold court, using instead their homes or offices.

While some coordination of the work of the Connecticut probate judges is attempted, there being a Probate Administrator charged with supervision of the courts, the major coordination apparently is fiscal and accounting, there being local differences in procedures and forms.

The jurisdiction of the Connecticut probate courts includes the establishment or disallowance of wills, estate administration, trust

accounting, adoptions and matters pertaining to minors and incompetents. Contentious proceedings are held before the probate judges with appeals to the circuit courts (courts of general jurisdiction). These hear the matters de novo.

In the administration of estates, supervision may be little or great depending upon the probate judge. Particularly in small districts, the probate judge may do some of the work for the personal representative in preparing papers for filing. Informal advice may be given the personal representative and diplomatic skill may be exercised to aid in settling family disputes before these burgeon into litigation. Connecticut has a relatively low litigation rate in probate matters considering the size of its population.

There is nothing peculiar to Connecticut in this pattern of informal administrative activity. A "substructure of informal administrative action" characterizes courts close to the people. This is not to suggest that "hand holding" does not occur when probate is in courts of general jurisdiction but here the "hand holding" is done by officials of the court rather than by persons who have the added sanction to persuasion of formal decision making authority.

Efforts to reform systems such as the probate system in Connecticut or, for example, the somewhat better organized de novo systems of South Carolina or Georgia, quickly encounter the phenomenon that these courts are rooted in the "folk law" of the community. This "folk law" may best be described as local, unwritten community understandings of how things should be done. Moreover, stemming from this rooting in the folk law is major political influence. Of course the elective status of the judge makes a politician of him. But, except in large urban communities, the probate judge knows and performs "folk law" services for all the successors of decedents

within his jurisdiction--and this means, if the probate judge lives long enough, virtually everyone in his community. The political power of the probate judge tends to increase with age.

The Alabama probate system illustrates the power of the probate judge stemming from his role in the "folk law" as well as the localism often associated with this office. In this state the constitution forbids the abolition or consolidation of probate courts. The office of probate judge is elective in each county for a six year term. The chief clerk, appointed by the probate judge, has ex parte probate jurisdiction. The judge hears contentious matters (except in four counties) and can empanel a jury to determine contested issues of fact. Upon written motion the case can be transferred to the circuit court for trial. If there is a decree in the probate court, this decree is appealable to the circuit court or to the supreme court. Neither the judge of the probate court nor the chief clerk are required to be lawyers.

One striking feature of the Alabama probate court is its diverse jurisdiction which varies from county to county. Thus, in addition to the usual estate, administration and guardianship matters, the court handles land partitions, grants name changes, conducts adoption and eminent domain proceedings, establishes water management districts, hears certain contested election appeals, grants writs of habeas corpus and paroles and pardons in certain cases and legitimates bastards. Some of these powers are denied the court in certain counties. In other counties responsibilities are added.

Selection and Pay of Probate Judges and Court Officers

Probate judges are usually elected for a typical term of four to six years. The governor appoints the judges in Delaware, New Jersey, Massachusetts and New Hampshire. When general trial judges exercise probate jurisdiction, these judges have sometimes been appointed by the governor but usually are elected. In Virginia the circuit judges are elected by the state legislature.

A substantial tenure as probate judge will attract persons of ability to that office and, where judges are elected, to reduce the temptation to diverting political campaigning. Moreover, when laymen are named as probate judges there will often be a period of on-the-job training before they perform with full effectiveness. This is particularly true when the probate court handles contentious matters. If the pattern in the state is for the clerk as understudy to succeed probate judge, the "on-the-job training argument" for tenure is less important.

The trend is to place probate officers on a salaried basis. This salary usually varys from locality to locality based upon the amount of business and consequent responsibilities of the judge. A fee basis is used for compensation in some states or perhaps a salary supplemented by fees or a proportion of them. In Connecticut the fee system is used but the judge must pay to the state fees over a designated amount. Compensation may be increased in certain cases for special services. For probate courts with general jurisdiction the salary tends to be the same as that for trial judges.

Officers of a probate court other than the judge are usually appointed by the judge but may be elected. The registers in Delaware, Maine, Maryland and Pennsylvania are elected, for example, as is the

clerk of the circuit court in Virginia. But whether the particular officer is appointed or elected has little apparent bearing upon his formal authority. The registers have ex parte probate jurisdiction, as does the clerk in Virginia; ut so does the chief clerk in Alabama and the referee in Arkansas, both of whom are appointed by the court. In Connecticut the probate judge may not have a clerk or he may have numerous clerks who virtually run his office. The clerks of the Superior Court in North Carolina, who is elected. is the probate judge. Some of the clerks or registers who have probate jurisdiction have this jurisdiction only during vacation, their orders being subject to confirmation by the court. The clerk or other officer may serve as a judge pro tem during a vacancy in the office of the probate judge in a few states.

In states in which probate is in courts of general jurisdiction or, as in New York, in courts with broad powers over matters within their cognizance, the clerks' formal authority often is limited. Nevertheless, a lawyer working in these courts quickly discovers informal practice in which clerks, particularly those who enjoy the confidence of the probate judge, exercise much de facto probate authority. For example, the clerk may review the will and the judge accept his recommendation in uncontested proceedings.

C. Summary

The trend is to place probate jurisdiction in courts of general trial jurisdiction, using the Uniform Probate Code court as an excellent current model. But this trend proliferates a number of problems. To some of these problems we have ready solutions. To other problems the solution is not quite so apparent.

1. Removing probate jurisdiction from separate and inferior probate courts and placing this jurisdiction in courts of general trial jurisdiction avoids the creation of new courts and offers some assurance that probate and administration matters will be handled by a trained lawyer.

   A. But a judge of a general trial court tends either to become bogged down in administrative detail in probate matters or to postpone these probate matters to deal with contentious cases. In the first situation the judge's special skill is not fully utilized. In the second situation decision making in non-contentious probate matters may pass de facto to a clerk or other officer who lacks formal responsibility for the decisions made. Moreover, the judge of the general trial court may be unable to perform the informal counselling function in probate and administration by which creditor and family disputes are resolved and future litigation avoided.

   B. One obvious step to relieve the judge of his non-contentious administrative burdens is to confer non-contentious ex parte probate jurisdiction upon a court officer and jurisdiction to supervise administration, if administration is to be supervised, also upon this officer or upon some other delegate. If these delegations occur then:

      i. A question arises concerning the best method for selection of the delegate and requirements

for his training. This officer or these officers will deal directly with the public and will handle 90% of all probate matters and all administrations.

ii. A question arises also as to the best method to avoid "judicial creep" in the handling of these administrative responsibilities. "Judicial creep" is the tendency of an administrative officer to assume judicial functions. This accounts for the multi-level probate courts found in some states currently. It is well known, for example, that the English common law and prerogative courts began as administrative bodies.

2. If a separate probate court is used (perhaps on the New York or Uniform Probate Code models) the court should have cognizance at a minimum over probate, will construction, guardianship and matters pertaining to the administration of estates. The court should have general equity powers and power to empanel a jury. In many states, considering the amount of contentious litigation, one court might function effectively on the English model with probate registries in various cities and towns exercising ex-parte probate jurisdiction.

3. De novo review of contentious probate cases is the most wasteful procedure now used in the United States. De novo review stems from relegation of contentious matters to untrained judges in the first instance.

4. The flexible scheme for supervised or unsupervised administration contained in the Uniform Probate Code will relieve the courts of many administrative and time consuming duties, probably permit estates to be handled at less cost than under supervised systems, and expedite the winding up of estates. With increasing burdens being placed upon the personal representatives of decedents and trustees under the Federal tax laws, compensation by reducing the amount of state regulation of the fiduciary should be welcome generally. Unsupervised systems have been used in a number of states with success and, as pointed out, have been used in Europe since Roman days. The Uniform Probate System, permitting as it does flexibility in the degree of court supervision, is superior to comparable systems. Nevertheless, there are problems raised by unsupervised administrations.

   A. What techniques are available in the unsupervised administration to assure that the testator's intent in a will is carried out? We have the notoriety functions of execution and probate of the will. Also under the Uniform Code there is no administration unless a personal representative is appointed. But the will can be probated or an intestacy determined without the appointment of a personal representative. Moreover, when a personal representative is appointed, there may be no public record of an inventory (so that persons can discover with ease what is in the estate) and no public record and court approval of the final

settlement (so that anyone can determine that the executor did what the testator told him to do). The answer to our problem may be that we really do not care about this absent principal party's wishes -- that the survivors' wishes are those important. But this leads us to the importance of probate of the will initially, and to the further question whether a property owner should be encouraged or permitted to dispose of his property by will.

In France, for example, the issue of the deceased property owner's intent in unsupervised administration is not a significant issue, the French tax system not encouraging the making of wills, the "reserve" placing substantial property beyond the testator's control and the intestate law being quite fair. The average Frenchman is content to die without a will and no great harm results.

The Uniform Probate Code depends upon individual interest to bring the court into administration in appropriate cases, but this presupposes information to persons in sympathy with the testator's intentions. The California "Declaration of Independent Administration" is addressed to the need for an inventory and controlled settlement in an administration which otherwise is unsupervised.

B. A second, and perhaps more important problem, concerns the informal consultative function now performed by probate judges and court officers involved in supervised or partially supervised administrations. Wills are notorious wreckers of families and as has once been remarked: "an estate plan is much like a foreign

policy, probate is sometimes like warfare and * * * in administration we have a peace conference structured before the war begins." Some probate judges and court officers play the role of diplomat in family controversies -- others do not -- but death is the great teacher and administration is a time when much potential litigation burdensome to the courts and destructive to the relationships of the litigating parties can be warded off. In France the notary serves the advisory function. In England the solicitor is the advisor. Wisconsin, in its version of the Uniform Probate Code unsupervised administration, repealed its earlier requirement of legal counsel in all administrations. Perhaps counsel should be required in unsupervised administrations and not in others. At a minimum there should be a public role in the initial decision concerning unsupervised administration with an inventory and reasonable notice of the inventory to parties in interest.

IV

PERFORMANCE OF THE PROBATE COURTS

As the organization and procedures of the probate courts were considered in Part III of this memorandum, the major emphasis was upon non-contentious matters and how courts dealing with contentious matters might be relieved of these, although the problem of de novo review of contentious matters was considered in this context. If a court has its docket cluttered with matters of clerical nature, this is a feature of its performance as a court. In Part IV, however, the emphasis is entirely upon the work of the court in con-

tentious matters.

There being no statistical information of general scope (nationally) concerning the nature of cases handled in the first instance in probate, a review instead was made of contentious cases reported on appeal for the ten years preceding the date of this memorandum. These appellate cases are a small proportion of the contentious cases in probate courts. The cases of both intermediate and supreme appellate courts were considered. The cases were broken down for each state, a rough comparison being made of the number and types of cases in relation to the population of the state and in relation to the court organization and procedure used.

A. General Observations on the Topics and Frequency of Probate Litigation

As one might expect, the greatest number of cases in all categories reaching the appellate courts are in states in which most of the people with most of the money live and die. These are New York, California, Illinois, Florida and Texas.

Nothing in the cases suggests that adoption of the Uniform Probate Code has affected the volume of litigation. However the Code has, for the most part, been adopted in Western states with small populations and a low rate of litigation and in all states in which it has been adopted the application of the Code is so recent that it would not likely have effect in cases now reaching the appellate level. The Code may well forestall much litigation. Any litigation it is likely to stimulate may stem from unsupervised administrations. Litigation in the area of administration of estates is episodic, developing usually about two to three years after recessions throw fiduciaries into disarray. It is thus

unlikely that any impact of the Uniform Code will be observed in this area for many years.

The reports do suggest (mildly) that states having a de novo system of review of contentious probate cases experience more litigation in relation to population than other states. Georgia and Texas are examples. On the other hand, the presence of an intermediate appellate court also could account for an increase in reported litigation as could the rapid increase of population and wealth in both states. Any judgment that there is a relationship between de novo review and the amount of litigation in probate is "not proven" although the matter deserves further study.

The probate matters most often litigated are "will construction" issues. The courts are attempting to determine what the deceased testator meant by ambiguous expressions in his will. The question may be the identification of legatees, devisees or property in an ambiguous description. Or the problem may extend into the recondite area of future interests (actually future possessions). A heavy concentration of construction cases will be found in New York, California, Illinois, Florida, Texas and Georgia. In other states, construction cases are distributed rather evenly, including the Western states which have little other probate litigation.

Cases involving the factum of the will are unevenly distributed. The major points pressed are undue influence and testamentary incapacity. Of these two issues, undue influence is most litigated, being pressed with particular consistency in New York; Wisconsin; the retirement states of Florida and Arizona; and, despite the lesser density of population, but where testators apparently receive much advice, in Missouri, Nebraska and Oregon. New York; Georgia; Louisiana; Oregon; Massachusetts and Texas have high litigation

rates on testamentary incapacity. Contracts to make wills are the third most frequently litigated; with revocation of the will fourth and execution of the will a poor fifth. There is little litigation concerning fraud and almost none concerning mistake. Issues concerning protection of the family are much litigated in Louisiana where civil law protective doctrines prevail but these issues do not figure prominently in other states. Litigation concerning personal representatives is not great in any state within the past decade.

A few states have notably low levels of will litigation concerning either the factum of the will or construction. These include Virginia, which probates wills in courts of general jurisdiction, using clerks with ex parte jurisdiction and commissioners of accounts to supervise administration; and Connecticut, which has the highly localized probate court system previously described with a trial de novo on probate issues.

B. Court Performance in Selected Areas

In the handling of contentious litigation in probate, especially in matters of will construction and the factum of the will, probate courts tend towards inquisitorial procedure. While this may be due to the Roman law influence in this area, the more important reason is that the absent testator often has no other advocate; the executor, pressed by the parties, assuming a neutral stance. The major problem is to discover and test evidence possibly disclosing the deceased absentee's intent. This evidence often is not produced or is produced in a manner wich will offer little assistance to the court.

This is not to say that the adversary process is denied a major role in probate. Indeed, one might describe the process

as party dominated, with a bargaining model of interaction which, were it not for the testator's intent intruding into the transaction, if given full rein would achieve pareto optimality [See M. Lea and L. Walker, "Efficient Procedure," 59 North Carolina L. Rev. 361 (1971) where these economic concepts are clearly discussed]. But as things now stand there are many imposed solutions in probate (because the testator wanted them imposed) -- which means that the testator cannot be benefitted in an economic sense because he is dead; the needs and desires of society are not maximized because society does not care (or at least does not care very much) whether the testator's wishes are carried out or not; and there could be allocations of resources which could increase the welfare of one person without detriment to another but which are not made. To develop a bargaining model in a full sense in probate, the testator must be exorcised: and about the only way this can be done is to prohibit wills and have all persons die intestate.

There are areas in probate in which the free market philosophy finds expression. Examples are the optional element for court supervision in administration and the options for formal or informal probate with or without the grant of letters permitted by the Uniform Probate Code. But once the contentious issue is presented, the disputing parties do not have the opportunity to "choose a decision-making model that best fits the characteristics of their particular controversy" (Lea and Walker, 361) and in this sense we have a probate procedure with virtually inescapable inefficiency.

Upon the assumption that we will never operate at full efficiency in probate so long as we premise the process as one carrying out a dead man's wishes, the courts nevertheless do very well in almost all areas. In will construction the courts have made heavy

use of presumptions (reflecting frustration with the inquisitorial method and reluctant reliance upon the adversary process) without, in many instances, attempting to modify presumptions keyed to earlier and different social and economic patterns.

A presumption of intention should reflect the probable intention of most testators. Once this probable intention is established, the adversary whose position conflicts with the presumption is invited to produce evidence to rebut it. If this evidence is not forthcoming, then the presumption of intention may prevail.

We still encounter the presumption that reference to children of another does not include adopted children (even though adoption is now routine) and that testators intend to vest interests early (even though there are tax and other reasons today which a testator might wish these interests to be contingent). The old irrebuttable presumptions, such as Shelley's Rule, have for the most part been swept into oblivion; but we still see much of the irrebuttable presumption (in applying the rule against perpetuities) that a person is capable of having a child no matter how young or old that person may be.

Evidential difficulties in will construction stimulate reliance by judges upon the inquisitorial process. Evidence presented by the adversaries may be virtually ignored. The courts are concerned that counsel not introduce informal statements of the testator. The "wills act" policy must be considered. There also is much danger of innocent misrepresentation of a testator's words and actions by the parties as well as the chance of fraud. The courts also are aware that when they construe wills other than holographic wills they deal with evidence of a secondary nature--the draftsman's version of the testator's

intent even though the testator has authenticated the instrument. In typical cases there may be a dearth of evidence coupled with slipshod handling by counsel of the evidence available.

There is a general discontent among judges in will construction matters, both with the work of counsel and with the work of each other. Will construction cases on the trial level are easy to reverse, appellate precedents concerning unique wills serving as no firm guide to the trial judge, and each judge tending to read his own predispositions into the will as he tries to ascertain the testator's intention. This is not to suggest that in will construction matters the same constructional approach is taken as in the handling of statutes and constitutions. The will, as an individual direction with limited and substantially immediate application on the death of the testator, is construed in the light of facts as the testator might have observed them when the will was executed and also shortly before he died. The French or German judge tends to stress the facts when the will is executed. The American or British judge tends to stress facts at the testator's death. But all judges in will construction seem to agree that facts <u>after</u> the testator's death which he could not have observed should have no bearing on the construction of the will. There is no tendency, as many judges are prone to do with constitutions, to treat the will as a "living instrument" which may be reconstrued to fit current needs.

Even when power is recognized in courts to make changes in testamentary trusts; for example authorizing administrative deviations from the testator's directions when the trust will be faced with loss if the trustee adheres to them, or exercising the <u>cy pres</u> power to

designate a new charitable purpose when the described charitable purpose fails; courts are careful to adhere to the intent as they find it expressed in the will.

Thus, in Evans v. Abney, 396 U.S. 435 (1970), a testator devised land for use as a racially segregated park before the Fourteenth Amendment was reconstrued to prohibit this. Although the devise was charitable, the Georgia court would not exercise the cy pres power to remove the racial restriction. The court would not read the will as the testator might have written it had he been aware of the constitutional changes produced by reinterpretation of the Fourteenth Amendment. The will was read in the light of the facts as the testator might have seen them when the will was executed and at the time of his death. The testator was found to intend to give the land only for the racially restricted purpose, the devise in trust was held to fail, and there was a resulting trust (similar in this case to a possibility of reverter) to the successors in interest of the testator. The will was so construed despite the public loss, including public investment in the property, and despite the fact that the testator could not have known the ultimate recipients of his devise.

From time to time a court construing a will finds the testator intended an illegal purpose or condition. Possibly the most frequent finding of illegality is in the remote vesting of an interest violating the common law rule against perpetuities or a statutory variation of this rule. In rare cases, the courts have ignored the testator's intent by cutting down the limitation to meet the restrictions of the rule on the theory that his paramount intention is to pass the interest to the contingent takers if his special time restriction cannot be implemented. But usually the court will read the will quite

literally, the question then remaining as to the effect of the void interest on the remainder of the instrument. Usually this issue is resolved by the testator's intent to link the void provisions with other portions of the will (similar to the severability rule in statutory construction--in this context often called "infectious invalidity"). If the void provision cannot be severed without distorting the intention of the testator, those provisions found linked to it fall as well.

When the courts deal with alleged illegality issues other than in such familiar contexts as "remoteness of vesting," the severability issue is preceded by the usually difficult process of determining illegality of the condition or other questioned element of the testator's disposition. Judicial determinations of illegality tend to differ through time (so that precedents may not be helpful); geographically, courts in one part of the country regarding a provision as illegal while others sustain it; and upon the predisposition of the judge deciding the particular case. Much the same process appears to be involved as determining whether or not a gift is charitable. In this case the public concession sought is weighed against the public benefit derived. For illegality, the public concession sought is weighed against the public detriment resulting if the concession (perhaps enforcement of a condition restraining marriage) is granted.

Severability issues often are more complex when illegal conditions other than those in remoteness of vesting are presented. An illegal condition subsequent (one only defeasing an interest in another) is deleted without apparent difficulty. But if the condition is one which is precedent to the vesting of the interest, a court may be aware

that any action it takes or does not take will be slightly wrong. If it fails to delete the condition, illegality is promoted. If it deletes the condition and the legacy dependent upon it, the illegal purpose of the testator is partially promoted and a bad example perhaps set for other testators inclined to experiment with conditions of a similar character. If the condition only is deleted, the testator's legatee takes in defiance of the testator's wishes. The Gordian Knot usually is cut in these cases by ignoring the public lesson possibly taught by the case, ignoring the specific intent of the testator, and by distributing the property as the court thinks the testator should have distributed it--usually, if a close kinsman, to the legatee who was subject to the illegal condition.

Matters Pertaining to the Factum of the Will

While it is comforting to think that in matters of will construction the courts use established techniques consistently and, by and large, are producing acceptable results--at least so long as the public accepts the premise that the intention of the testator should be the guideline in construing a will, the work of the courts in handling issues dealing with the factum of the will is not equally reassuring. This is not due to any lack of ability or effort on the part of the judges but because in dealing with certain issues the task is impossible of accomplishment effectively due to evidential limitations imposed by the death of the testator.

Undue Influence

Undue influence is by far the most frequently litigated probate issue and also the probate issue least productive for the contestant of the will. Cases involving undue influence are generated principally

in states with an aging and wealthy population. An aging person whose weaknesses are becoming manifest is a frequent target for advice. His wealth, which he will soon vacate, is an obvious topic for discussion. With a population aging generally in this country (although not necessarily increasing in wealth) the probability is that undue influence litigation will increase above its currently high level.

The concept of undue influence is not clearly stated in the cases. Many courts make it clear that there is nothing wrong in giving advice to an old or otherwise susceptible person. Indeed, there is nothing legally wrong in begging him for his money. What is required in a probable majority of states is clear and convincing evidence that the testator's will has been superseded by the psychological or physical pressure of another. Other courts, however, have stressed the element of fraud or "unfairness" in the transaction. No will is entirely that of the testator--just as many of his non-testamentary acts are not fully voluntary. As stated in Ginter v. Ginter, 9 Kan. 721, 726, 101 Pac. 634, 640 (1909):

> "A testator's favor expressed in a will may be won by devoted attachment, self sacrificing kindness, and the beneficent ministrations of friendship and love. These influences are not undue. We expect partiality to accompany them. They bring preferment as their natural reward, and they do not become unrighteous, although they establish a natural ascendancy over the testator leading him to find comfort and pleasure in gratifying the wishes and desires of the persons exercising them. * * * It is not improper to advise, to persuade, to solicit, to importune,

> to entreat to implore. * * * His views may be radically changed, but so long as he is not overborne and rendered incapable of acting finally upon his own motives, so long as he remains a free agent, his choice of a course is his own choice, and the will is his will and not that of another."

But who can shed much light on any of these issues other than the testator? The evidence of the adversaries will be biased. The court may not have the basis for an inquisitorial exploration of the facts. There must be a starting point, even for an inquisition. The court is thus likely to fall back upon a presumption of fact. Undue influence probably would not be effective unless it was exercised secretly; and where there is smoke there may be fire. Thus, undue influence is presumed if clear and convincing evidence demonstrates that (1) the testator was susceptible, (2) someone dominated him, (3) the dominant party engaged in activity with respect to the will and (4) a gift in the will was made to the dominant party or to someone in whom that dominant party had an interest. The proponent of the will can rebut the presumption by showing that the testator received competent and independent advice concerning the will between the last act of influence proven and the date the will was executed. If the proponent fails to produce this evidence, the presumption stands and the will is disallowed. There is a certain pleasing symmetry in this presumption and in the form of the evidence to rebut it. But it is also clear that contestants seldom marshal the evidence to raise the presumption, having difficulty in showing activity related directly to the will.

No doubt many meritorious will contests are lost because the presumption cannot be raised. But from a public perspective there is invited a fruitless exercise, wasteful of judicial time, and, as in all litigation, disruptive to the relationship of the parties.

A shift in the handling of undue influence would reduce the burden of probate courts in contentious matters by at least 10%; a burden possibly further reduced by prudent advice to the parties, informally before the lines for litigation are drawn, and by counsel when the evidence in a case is marshalled and assessed.

Testamentary Incapacity

Second in frequency of litigation to undue influence, and second to it also in the perplexities in handling the issue, is testamentary incapacity. The major feature of the problem, as in undue influence, stems from the absence of the testator when the issue is tried.

In criminal litigation when a capacity issue is presented, and the defendant's mental state at the time of the crime is relevant, the defendant can testify and psychiatrists can examine him and offer their opinions to the court. An attorney may have had the testator examined by a psychiatrist. A chronic will maker with chronic medical problems, may generate evidence to assist in resolving testamentary incapacity issues. But usually the evidence available shows only a pattern of eccentricity. This evidence may reach a jury unsympathetic to the will and prepared to disallow it upon only a slight pretext.

The major ground for testamentary incapacity is insane delusion. It is well settled that an insane delusion must affect the will to invalidate all or part of it. But a major difficulty is in the archaic

test for the insane delusion used by most courts. This test, formulated prior to the development of psychiatry as a major medical specialty, and designed for ease in handling by a jury, presents the question whether the testator reasoned from observable facts. If he observed facts stimulating his reasoning process, then he does not suffer from a delusion for "wills act purposes." He suffers from no insane delusion by this test even though his reasoning process may be erratic and his mental condition requires psychiatric or other treatment. Some courts have taken a more sophisticated view of this issue, seeking mental disease distorting the testator's ability to make a rational disposition no matter what facts he observed. But the use of the jury dictates a simple test and the jury process leads to verdicts based upon the merits of the will rather than upon the testator's determined mental state. Perhaps the mental incapacity issue could best be handled by a medical board. The Board's determination of mental disease might be binding upon the court. The court might then determine the impact of the mental disease upon the will and the consequences of that impact.

Ante Mortem Probate

But a more productive approach, perhaps in combination with statutory changes in the doctrine applied to post mortem transactions, would be a shift to ante mortem probate to resolve during the lifetime of the testator execution, undue influence and testamentary capacity issues. Ante mortem was suggested by a number of distinguished writers about 40 years ago; was considered by the draftsmen of the Uniform Probate Code but rejected; and has been discussed by a number of writers recently and adopted in North Dakota (N.D. Code § 30.1-08.1, Supp. 1978). An earlier attempt in Michigan to use ante mortem probate

(1883) failed on constitutional grounds; but American Indians (except the Five Civilized Nations and the Osages) have been entitled to ante mortem probate of wills of allotments of land held in trust by the United States--by one of the more distinguished probate officers--the Secretary of the Interior.

In states having the Uniform Probate Code, a will executed in "self proved" form (UPC § 2-504) precludes questions at probate concerning signature requirements and obviates the requirement that attesting witnesses be produced or accounted for. The "self proved" form before a notary or other officer authorized to administer oaths thus appears to have ante mortem effect to the extent that signature matters are placed beyond controversy. The present proposal is that this be extended to undue influence and testamentary capacity at the option of the testator by, in effect, combining the execution of the will with an ante mortem probate or by permitting an ante mortem probate after the will is executed. While this may be attended by some loss of privacy, as the draftsmen of the Uniform Probate Code have commented, the testator should nevertheless have a choice between privacy and the risk of post-mortem attack upon his will, cost to his estate and possible denial of probate to the instrument.

In North Dakota a declaratory judgment is used in ante mortem probate with all the beneficiaries in the will and the intestate successors named as parties. The facts found are binding only as to the particular will; but if the judgment is in favor of the will, the will is declared valid by the court and filed. The extent to which the North Dakota decree will be given credit in other states which regard death as jurisdictional to probate remains to be seen.

Since the statute has been in force only since 1977, it is too early to determine how frequently the procedure will be used or whether it will reduce the rate of undue influence and testamentary capacity litigation.

As an alternative to the North Dakota procedure, the parties could file their objections by affidavit and could then be examined privately by the court or a commissioner. If ante mortem probate was denied this would not preclude offering the will post mortem for probate. The advantage of having the testator available for private examination by the court concerning undue influence and capacity is obvious. Certainly if the procedure became popular much post mortem probate litigation would be eliminated and proceedings involving undue influence and testamentary capacity relieved of their many uncertainties.

Estate Administration

A single problem in estate administration tends to produce most of the criticism of court activity in this area. As mentioned earlier in the memorandum, this activity is episodic, the last large group of cases having been produced by the depression commencing in 1929.

The "prudent man standard" which, apart from the directions in the will, is the basic law by which the fiduciary guides his conduct, was applied by the courts erratically in the last large group of fiduciary cases. Since the executor and administrator are liquidators rather than conservators and since their fiduciary terms are usually short, neither representative tends to be exposed to the prudent man standard to the extent of the trustee whose investments may be called into question. Nevertheless, acts by executors and administrators which are unimpeachable on the ground of such fiduciary duties as loyalty are also measured by the standard of prudence. Moreover the adoption of a plan of unsupervised administration may not diminish the frequency of application of the standard.

It is clear in the cases that the standard is that of a non-fiduciary and not a fiduciary. The rule is also clear that a fiduciary cannot speculate with funds under his control--but beyond this there is much vagueness. Will the standard be individualized to the case of the fiduciary, with his special problems considered by the court? Will the court compare him with other fiduciaries?

In the mid-Nineteenth Century when fiduciaries in almost all states were under close court control, the trial court (usually a court of chancery) which might try the issue of prudence also would advise the fiduciary in advance concerning the probable prudence of his actions. Understandably there was no great enthusiasm for review of the issue when the fiduciary obediently followed the court's advice. There was also a tendency to individualize the prudent man standard, especially in the aftermath of such general catastrophes as the War Between the States, when reliance on the word of another was often taken as an adequate excuse for a fiduciary loss. But in the aftermath of the 1929 depression a harsher rule emerged. A generalized standard was developed based upon an hypothesized prudent man. It was contended that many judges tended to apply a standard slightly higher than they would have applied to their own conduct--perhaps a human characteristic--but especially to the disadvantage of the unfortunate fiduciary in view of the ex post facto nature of these judicial decisions. Could the judge effectively view past facts in the way the fiduciary might or should have seen them four or five years earlier?

The process of applying the prudent man standard clearly is a difficult one. There is not the slightest suggestion that the standard will be abandoned and, if it should be, it would be difficult to suggest a standard to replace it. A higher standard might under-

standably be applied to the corporate fiduciary which advertises its services. When the next group of fiduciary cases are presented following the next major depression, the only answer for the plight of the fiduciary may lie in insurance. The bond protects the beneficiary but the surety has recourse against the fiduciary. There will be no way to circumvent the ex post facto nature of judicial decisions or the tendency to hold others to rather strict account.

V.

INTERNAL REFORM AND VARIOUS ALTERNATIVES

In the course of discussion of the various matters considered in this memorandum suggestions have been made for improvements in the probate system which will reduce the administrative burdens of courts dealing with contentious matters. There seems no realistic possibility that contentious matters can be relegated to arbitration so long as the intention of a testator is to play a decisive role. Some of the most complex problems in our legal system are presented as will construction issues and this seems to call for the work of an able judge. Even when parties settle these cases through bargaining, there is typical unease concerning failure to implement the testator's wishes. Evidential problems, in particular, lead to inquisitorial techniques foreign to the adversary bargaining of arbitration. The major steps that should be taken are to discriminate carefully between contentious and non-contentious matters, placing the latter under administrative cognizance rather than in the courts, and developing institutions tending to reduce the number of contentious cases. Recommendations which implement these premises are as follows:

1. The Uniform Probate Code establishes a superior system of probate and administration. Its procedural provisions discriminate clearly between contentious and non-contentious matters while also affording maximum latitude of decision by the parties concerning the degree of court participation in the devolution of property. In addition the Code frees the court from the burden of dealing with many intervivos transfers that may be testamentary; establishes a comprehensive system for the representation of minors and disabled persons; presents reasonable schemes for intestate succession and protection of the surviving spouse and offers numerous other substantive provisions of values. Its adoption is recommended.
2. Although the current trend is to place probate in courts of general jurisdiction, a more efficient system is to place this jurisdiction in a separate court, following the New York or Uniform Code models, with general jurisdiction in the court over matters within its cognizance, including general equity powers and the power to empanel a jury.

   Ex parte jurisdiction to probate wills should be in an administrative officer or officers of the court and, to the extent administration is to be supervised, this supervision also should be in the hands of an administrative officer.

   There should be no de novo review of decisions of the court but only an appeal in the regular course to an intermediate appellate court or the high appellate court of the state. In many states there could be one such specialized court with probate registries with ex parte probate jurisdiction in various counties and towns following the English

model.

The advantage of the specialized court, in addition to relieving the burden of the general trial courts, lies in the development of judges with great expertise in probate matters. Many of the issues presented are complex and the judges of trial courts often lack the experience to deal adequately with them.

3. If an unsupervised administration is to be permitted, and this will be advantageous, there should be a public role in the initial decision whether an unsupervised administration is to be conducted and there also should be an inventory of the estate of which parties in interest have notice.
4. There should be an option for ante mortem probate to resolve issues of execution, undue influence and mental capacity. If the will is offered for ante mortem probate and denied, this should not bar post mortem probate. If the will is admitted to probate ante mortem, further litigation on the issues of execution, undue influence and testamentary capacity should be foreclosed other than by appeal.
5. If the number of wills can be reduced, this will reduce the work burden of the courts. Consequently attention should be given to the intestate law to insure that it establishes a reasonable system for distribution.

Moreover the possibility of enacting multiple intestate laws (perhaps three) with different plans should be considered. A property owner might be permitted to accept one of the plans by an affidavit filed with the appropriate officer of the registry or probate court. Alternatively he could incorporate

a particular plan into a brief will by reference. A will form intermediate between the present will forms and the intestate law thus could be provided.

The basic intestate law which would operate, if the property owner made no selection by affidavit or will as indicated, should provide for succession by the wife to at least $250,000 and, if the estate exceeds $500,000, then at least one-half of the estate whether or not children or other descendants of the decedent survive. The death tax burden should be removed from the spouse's interest by statute if other estate assets exist to pay death taxes. In this basic intestate law the spouse in almost all estates will take the entire estate. In large estates the marital deduction may be overfunded; but if this possibility is presented, the property owner can well afford to pay for a carefully drafted will.

END