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THE UNIFORM PROBATE CODE AND THE PRACTICE OF LAW IN OHIO

ROBERT M. BRUCKEN*

The author, an active probate lawyer, believes much of an attorney's time is wasted in present probate practice. Too much time is spent in attempting to cut the red-tape requirements of "make-work" probate procedures that serve no purpose in all but a very few cases. Therefore, it is worthwhile to call to the attention of the practicing bar the need for probate reform, and the attractive vehicle for reform which is now available.

This vehicle, the Uniform Probate Code, was prepared as a seven-year project of the National Conference of Commissioners on Uniform State Laws, with the assistance of the Real Property, Probate and Trust Law Section of the American Bar Association. Its final version was approved by the Commissioners and endorsed by the American Bar Association in August, 1969, over four years ago, and is part of the legislative program of the Commissioners for submission to the legislatures of the 50 states. It is now in effect in Alaska and Idaho; it has been adopted and will soon be in effect in Arizona, Colorado and North Dakota; and its more important provisions have been adopted in Maryland and Wisconsin. Its more important provisions have also long been in force in New Jersey, Pennsylvania, Texas and Washington. Thus, there are now 11 states, both large and small, urban and rural, where its substance has found legislative approval.

The availability and attractiveness of the Uniform Probate Code has been publicized by no less a lay-oriented publication than The Reader's Digest. If clients are becoming aware of this vehicle for reform, should not practitioners be one step ahead?

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1 The Uniform Probate Code [hereinafter cited as U.P.C.] became effective in Idaho, July 1, 1972 (S.L. 1971, ch. 111, and S.L. 1971, ch. 126 and 201) and in Alaska, January 1, 1973 (S.L. 1972, ch. 78). It has been adopted in 1973 legislative sessions in Arizona, Colorado and North Dakota with delayed effective dates to permit continuing legal education programs to familiarize practitioners with its provisions. Its more important provisions became effective in Maryland in 1970 (S.L. 1969, ch. 3), and were adopted in 1973 in Wisconsin after a well-publicized initiative petition on probate reform was presented to the Legislature.

2 Bloom, At Last: A Way to Settle Estates Quickly, Sept. 1972, The Reader's Digest at 193, noting the substantial reduction of time and expense of estate administration in Idaho under the U.P.C.
Probate reform has been a popular topic in the past few years. Prompted by Norman Dacey of *How to Avoid Probate*\(^3\) fame and others, state legislatures have busied themselves with the subject. The Ohio experience is typical. Responding to such pressures, the Ohio State Bar Association appointed a Special Committee on Probate Matters. Its report\(^4\) contained modest proposals for tinkering with the Ohio Probate Code, none of which addressed the real issue. Even these modest proposals were reduced in scope in the Probate Reform Bill introduced in the General Assembly,\(^5\) and final enactment\(^6\) dropped much of the bill as introduced.

However, the Uniform Probate Code is still a live issue in Ohio. It is pending before both the Senate and the House Judiciary Committees,\(^7\) and hearings on it have already begun. It has been endorsed in principle by the Bar Association of Greater Cleveland, in which a quarter of the lawyers in Ohio hold membership, after a three-year study by its Probate Court Committee.\(^8\) There is opposition to its more important provisions by lawyers in some other parts of Ohio, and the Ohio State Bar Association is on record as being opposed to many of its more important provisions.\(^9\)

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\(^4\) 41 Ohio State Bar Ass'n Rep. 1313 (1968). The Committee recommended that appraisals by court-appointed appraisers be permissive, not mandatory, that requirements for release of assets without administration be liberalized, that attorney fee schedules be reviewed, that various time limitations in probate procedure be reduced and that several other matters be studied.

\(^5\) S.B. No. 185, as introduced in 1969. Id., effective January 1, 1971. Editor's note: For current piecemeal reform in Ohio see H.B. 566 amending § 2117.02 of the Ohio Rev. Code which provides for a hearing by a Probate Court when an executor presents a claim of $500 or more against the estate. This bill becomes effective November 22, 1973. See also, Am. S.B. 25 increasing from $5,000 to $10,000 the amount of an estate which may be distributed without administration. This bill becomes effective November 21, 1973. Finally, the Senate Judiciary Committee has announced plans to hold hearings in the near future on S.B. 23, the Uniform Probate Code, and S.B. 399, which was proposed as an alternative to the Uniform Probate Code.

\(^6\) 110th General Assembly S. Bill No. 23, sponsored by Senators Mottl, Hall, Bowen, Jackson and Novak. And H. Bills Nos. 101, 102, 189 sponsored by Representatives Celebrezze, Heistand and Harley respectively.

\(^7\) Endorsed by the trustees of Bar Association of Greater Cleveland March 29, 1973. The endorsement resolution is found at 44 Clev. B.J. 178 (1973).

\(^8\) Action of executive committee of Ohio State Bar Association March 17, 1973. Some Ohio attorneys have described the Uniform Probate Code as the probate law equivalent of "no-fault insurance," perhaps forgetting that the Code has been prepared and endorsed by lawyers, not by insurers or other lay agencies. The American Bar Association Assembly rejected such a challenge to ABA sponsorship and endorsement of the Code in August, 1973.
Presumably the 1974 legislative session will produce both heat and light on the real issue raised by these somewhat controversial provisions.

This real issue is, will estate and trust administration always be supervised by our courts, or will the courts intervene only when actual disputes develop? As long as mandatory court supervision is retained, no real reforms are possible. Unlike the typical 1970 Ohio legislation, the Uniform Probate Code squarely meets this issue. It is framed on the theory that we do not ask our courts to supervise our personal affairs, and should not require them to supervise routine, uncontested administration of estates, trusts and guardianships.10

A concise summary of the manner in which the Uniform Probate Code meets this issue, compared to present Ohio law, is worthy of review:

**Spouse's rights.** Dower would be completely abolished. A surviving spouse of an intestate would receive the first $50,000, and share only the balance with the children. A surviving spouse electing against the will would be entitled to share in all revocable trusts, joint property, etc. *(Smyth v. Cleveland Trust Company)*11 would be obsolete), but would be required to offset against her gross share all property received by her from the decedent, such as lifetime gifts, life insurance, trusts, joint property, etc.

**Probate of Wills.** Probate would be permitted on simple affidavit only, without producing the witnesses and without notices.

**Administration of Estates.** Each executor or administrator would by statute have all the powers customarily granted in wills, and would exercise these powers without court supervision. No formal appraisal would be required (except for death tax purposes), and inventories and accounts could be waived by the interested parties.

**Ancillary Administration.** Ancillary administration is generally unnecessary now in Ohio, and the Code would extend our simplified procedures to property of our residents located in other states.

**Guardianships.** Guardians of both minors and adults would also be granted broad administrative powers and would exercise them without court supervision. Powers of attorney could be framed to survive incompetency.

**Trusts.** Court filing of accounts of testamentary trustees would no longer be required. Disputes concerning *inter vivos* trusts would also become eligible for the simplified procedures of the Probate Court. In general, distinctions between testamentary and *inter*
vivos trusts would be abolished, so that it would no longer be necessary to set forth trusts in documents separate from wills to obtain economy of administration. 12

While these reforms may appear attractive when viewed in the abstract, their value to both practicing lawyers and their clients is more clearly revealed in the results they achieve. This article will illustrate some of these results.

THE EFFECT OF UNIFORM PROBATE CODE ON PREPARATION OF WILLS AND TRUSTS

The first step in the probate cycle is estate planning, as the term has been popularized by the insurance industry. To lawyers, it may be described as the determination of the proper content of wills and trusts and their preparation. Let us consider how this determination and preparation is simplified by the Uniform Probate Code, with resultant savings in lawyers’ time and in fees paid by clients.

Fewer People Will Need Wills. Today every married man or woman needs a will—that is, all but the few who really intend that the surviving spouse receive only a portion of what they properly consider “our” property. Absent a will, intestacy statutes split the spouse’s property among the spouse and children or parents. 13 The Uniform Probate Code recognizes this modern phenomenon of the testamentary gift of all to the surviving spouse, by conforming intestacy law to it. 14 Accordingly, a couple of modest means no longer need wills to protect the survivor’s rights to their modest wealth. A recent Cleveland study suggests that

13 E.g., OHIO REV. CODE § 2105.06, dividing an intestate’s estate one-third to the surviving spouse and two-thirds to two or more children, or equally between a surviving spouse and only child. If there are no lineal descendants, the estate is divided three-fourths to the surviving spouse and one-fourth to the parent or parents.
14 U.P.C. § 2-102, giving the surviving spouse the first $50,000 in its entirety (plus one-half of the balance) if the surviving children of the decedent are also children of the surviving spouse.
by this simple reform over 40 per cent of all wills now being prepared will probably be unnecessary.15

Nevertheless, a modern will does more than designate beneficiaries. Everyone leaving assets for disposition at his death needs a will to grant adequate powers to his executor and thus avoid unnecessary and unwanted court intervention in the administration of his estate, and to waive unnecessary and expensive bonds. The Uniform Probate Code also makes these testamentary provisions unnecessary by granting adequate powers to the executor or administrator16 and by omitting most bond requirements.17

The result of these three basic reforms in intestacy pattern, administrative powers and bond requirements, is that clients whose dispositive desires are reflected in the new intestacy law can safely remain intestate. Consequently, the will-drafting activity of lawyers need no longer be aimed in part at routine and nonproductive preparation of “simple” wills. Rather, undivided attention may properly be directed to the more complex dispositions necessary when a client wishes to depart from the usual testamentary pattern or where his wealth requires more complex arrangements to lighten the touch of the death tax collectors.18 Both our pocketbooks and those of our clients will benefit, but, more importantly, legal efforts will be directed to situations where there are real, not just imagined, problems to resolve.

15 M. SUSSMAN, J. CATES & D. SMITH, THE FAMILY AND INHERITANCE (1970). The survey covered a random sample of five per cent of the estates closed in Cuyahoga County (Cleveland, Ohio) in a nine-month period spanning 1964-1965 (p. 45). Of the total of 659 estates surveyed, 422 were effectively testate (p. 83). In 194 of these testate estates (46 per cent), the testator indicated his or her dissatisfaction with present Ohio intestacy laws by leaving all to the surviving spouse, even though lineal descendants or parents who would take by intestacy also survived (p. 89). The survey does not show how many of these 194 testators left more than $50,000 net to the surviving spouse, but we can assume that few did so since only 46 of the 422 testate estates (11 per cent) grossed over $60,000 (p. 292), and these more wealthy testators included many of the other 32 testators who were survived by a spouse and lineal descendants or parents and who did not leave all to the surviving spouse, perhaps for tax reasons (p. 90). The survey also does not show how many of these disinherited lineal descendants were not lineal descendants of the surviving spouse (the second marriage situation), though only 28 of the testators had remarried (p. 91). These are also special cases under U.P.C. § 2-102, which divides the estate of a remarried testator between the spouse and lineal descendants. Reducing the above 46 per cent where present intestacy laws were not satisfactory to allow for these two special cases, it thus appears that over 40 per cent of the wills, the ones leaving all to the surviving spouse to the exclusion of lineal descendants and parents, where the net to the surviving spouse did not exceed $50,000 and the lineal descendants were also lineal descendants of the surviving spouse, would have been unnecessary under the U.P.C.

16 U.P.C. §§ 3-704, 3-711, 3-715.

17 Id. § 3-603. However, under U.P.C. § 3-605 anyone with a $1,000 interest or a creditor of $1,000 can require bond.

18 No probate code can or should attain the complexity of modern “marital deduction” wills and other tax-saving devices, but these devices are not needed by the average client.
Wills and Trusts Can Be Simplified. Many of the complications of modern wills and trusts arise from the natural desires of clients to protect their young children or grandchildren through the creation of trusts (thus avoiding guardianship), and to sever the ties that bind testamentary trusts to our courts. These desires have spawned the life insurance trust, the nominal corpus trust, their poor cousin—the contingent trust, and their companion—the mysterious pourover will. One purpose and effect of the Uniform Probate Code is to make these modern monstrosities obsolete.

The Uniform Probate Code attacks the modern propensity for complex trust arrangements by promulgating two basic but giant alterations. First, a testamentary trust is freed from the ties that bind it to our courts and is administered in the same manner as a living trust, that is, privately. Second, a guardianship is equated with both the "new" testamentary trust and the "old" living trust, and it also is administered privately. There is no longer great incentive to free a trust of court control through the device of a life insurance trust, nominal corpus trust or contingent trust and companion pourover will. Further, there is no longer great incentive to create a trust of any kind to avoid guardianship arrangements for minors.

Consider an everyday example. An average client probably has a wife and one or more children. If he is perceptive, he will consult with an attorney to have his will drawn upon marriage, or at least as soon as he has become a father. Of course, he wants everything to go to his wife, and much of it may even be held jointly. If she doesn't survive him, he wants everything to go to his children.

How does a practicing attorney advise his client to accomplish the gift to his minor children? Does the lawyer labor long over the drafting, explanation and execution of a contingent life insurance trust agreement (where a trustee is named as contingent beneficiary of his life insurance and holds the proceeds in a court-free trust) and the accompanying pourover will? Does he set up a contingent trust for the children in the will? Or does he simply give the property "to my children," with no trust provisions set forth in the will?

Each of these three plans has its drawbacks under current law. In inverse order, the simple gift "to my children" is simple only in the drafting of the will, for it means guardianship, a word currently capable of terrifying the most self-assured client. Of course, the court having jurisdiction can rightly be expected to appoint the proper relative or bank as guardian, for the court has proven its expertise in this area. However,
because the guardian himself may or may not have the same expertise, he will be required to furnish an expensive bond, will be limited in his choice of investments, and will be hobbled by the requirement of prior court approval for every distribution.\\footnote{22}

Alternatively, the lawyer may advise his client to avoid the foregoing restrictions by setting forth a trust for his children in his will. While the will may be a more expensive document, it still may not answer all of his wishes. What happens when a California relative or bank is appointed trustee and the closest relatives (who will raise the children) live in Los Angeles?\\footnote{23} Why burden relatives with biannual court accounting requirements?\\footnote{24} If counsel wants this client to have the latest and best model, which will also avoid these additional problems, he should recommend the contingent life insurance trust agreement and pourover will.

By the time these documents have been prepared, explained, the battle of forms with each life insurance company has been fought and the signatures of various parties obtained on a mounting pile of red tape, the legal fees at a normal hourly rate would be practically prohibitive.

In despair some clients may even select a fourth alternative, namely, bypassing their children in favor of adult relatives who, hopefully, will use the funds involved for the benefit of the children, but without the legal restrictions or red tape to which they are now subjected.

The revolutionary change introduced into this probate muddle by the Uniform Probate Code is simply this: a guardianship becomes similar to a trust. In other words, to create a trust for these minor children, and avoid the restrictions cited above, the draftsman need not create a contingent life insurance trust, or even draft lengthy trust provisions in the client’s will. The will may safely and simply leave everything “to my children,” for the law itself supplies the necessary trust provisions. Note that the revolutionary change is only procedural; you get the same results achieved by a new route. Clients need not expand a fortune (or be subsidized by the attorney) for their will, and the children need not overpay to have their inheritances administered. Unmistakably, the attorney, the client and the children benefit.

\\footnote{22} E.g., \textit{Ohio Rev. Code} $\S\S$ 2109.04 (Page, 1971) (bond), and 2109.37 and 2109.371 (investment restrictions). Since there is generally no express statutory authorization of distributions without court approval, such approval is required by the courts when they audit the guardian's biannual accounts.

\\footnote{23} E.g., \textit{Ohio Rev. Code} $\S$ 2109.21 (Page, 1971) permits a court to refuse to appoint a named testamentary trustee if he is a nonresident. Out-of-state banks are generally disqualified as testamentary trustees, either by express statute or (in Ohio) by expensive security deposit, licensing and reporting requirements that duplicate the protections afforded by the laws of their home states. \textit{See Ohio Rev. Code} $\S\S$ 1109.17, 1109.18.

\\footnote{24} E.g., \textit{Ohio Rev. Code} $\S$ 2109.30 (Page, 1971) through 2109.35 inclusive.
This example illustrates the manner in which the Uniform Probate Code successfully attacks the length and complexity of modern wills and trusts. In summary, by eliminating fiduciary residence requirements, court control and most court accounting requirements, and thus equating guardianships and testamentary trusts with living trusts, the U.P.C. restores the will to its former status as the efficient instrument for testamentary dispositions. It also reduces the need for creation of trusts, even by will. By application of the U.P.C. today's will containing complex trust provisions along with today's pourover will and unfunded trust become tomorrow's "simple" will.

In addition, even the resultant "simple" will is more simplified than today's model. Much of today's model is cluttered with boilerplate powers, which no longer need be set forth in a will under the new law. Thus, a Uniform Probate Code "simple" will need only name the executor, and state the client's desired disposition of his estate, to the extent it differs from the statutory intestacy pattern.

There is a further advantage obtained when trust provisions are no longer necessary. In the example above, since the desired contingent gift to children parallels the intestacy pattern, and need not be in trust, there is no need for any will to affect either the primary gift to the spouse or the contingent gift to the minor children. Thus, elimination of the trust provisions has also enlarged the class of clients who will not need wills.

Some clients will not be satisfied with any standard intestacy pattern. Not only may they want to vary it as to persons or portions, but they may also want to vary it as to details such as the age of distribution to their children. In order to vary the age of distribution, by delay of lump sum distribution from age 18 or 21 with a guardianship to age 25 or 30, for example, will still require use of trusts instead of reliance on guardianships. However, under the Uniform Probate Code the trust may be a simple testamentary trust rather than a separate contingent trust withpourover will, and the resultant will may still be more simple than the current model because the boilerplate powers may be omitted.

25 U.P.C. § 5-410 (guardianship), § 7-105 (testamentary trusts).
26 U.P.C. § 5-424 (granting standard trustee's powers to guardians, exercisable without prior court authorization), § 7-201 (testamentary trusts).
27 U.P.C. § 5-419 (guardianship), § 7-303 (testamentary trusts).
28 U.P.C. § 3-715 (executors and administrators). Testamentary trustees receive the same broad statutory powers under the Uniform Trustees' Powers Act, approved by the National Conference of Commissioners on Uniform State Laws in 1964 and intended for adoption as part of the U.P.C. package.
THE EFFECT OF UNIFORM PROBATE CODE
ON ADMINISTRATION OF ESTATES

The second or final step in the probate cycle is administration of the estate after death. This consists of admission of the will to probate, followed by appointment of the executor and his administration of the estate. Let us consider how each of these procedures is simplified by the Uniform Probate Code, with savings in lawyers' time and in fees paid by clients.

Probate Is Simplified. Let us assume the above mentioned client has died, who was a resident of Ohio, a state which has not yet adopted the Uniform Probate Code. From the point of view of the family lawyer, the late client left a widow, several minor children and an "estate" consisting of joint checking and savings accounts, life insurance, a pension plan interest, social security benefits, a car and his undivided one-half interest in the family home which is subject to a whopping mortgage. He also left a will, which names his wife as sole beneficiary and nominates her as executrix.

The joint checking and savings accounts pass directly to the surviving spouse, as do the life insurance proceeds, pension plan payments and social security benefits—including the children’s portions of the social security benefits. All she has to do is sign several forms, such as new signature cards for the bank accounts and printed claim forms for the other benefits.

The car and the home are a different matter. The wife's lawyer must first advise her to probate the will in order to begin the chain of events that will ultimately establish her title. The procedure is as follows:

1. She must sign a printed application for probate of the will, go to the local probate court and file the application and the will with the court.

2. Set the matter of probate for hearing at a future date. How far in the future depends on the next two steps.

3. Arrange to serve printed notices of this hearing personally on the minor children and file proof of service with the court. Being minors, the children cannot waive these notices, even though the notices will serve no useful purpose, as the children will not understand them. Considerable delay may occur if any of the children are away at college or in military service.  

29 Ohio Rev. Code § 2107.13 (Page 971). The Ohio Supreme Court once proposed that a parent could waive such a notice for the minor, by O.R.C.P. 4(D) and 73(F) as proposed on January 15, 1971, and printed at 44 Ohio St. B. Ass'n Rep. 191 (Feb. 15, 1971). As finally effective July 1, 1971, these Rules permit no such waiver, so that the minor himself must be served—but only if he has attained age 16, see O.R.Civ.P. 4.2.
4. The attorney must persuade two of the witnesses to the will to drop everything and go downtown to the probate court (but only during business hours, when they are probably at work or at home caring for their own children) to identify their signatures on the will. This step can become very complicated if the witnesses are away on vacation, or have moved out of town. If they have moved several times, it may be several months before they are found and the lawyer can arrange for a commissioner to take their testimony. If fortunate, the search may show that they have died, allowing local residents to identify their signatures for them. This procedure is required even though no interested party questions the authenticity of the will. In fact, the surviving spouse was probably present when the will was signed, and signed her own will at the same time, before the same witnesses. 30

5. Finally, the appointed day arrives. The notices have been served and proofs filed, and the witnesses have appeared. The attorney again appears at the local probate court on the hearing date, and a deputy clerk stamps the file “admitted to probate.”

This procedure is neither necessary nor useful. In many states most of it has been obsolete for many years. Accordingly, the Uniform Probate Code has been designed to continue the simplified procedure in those states where it is now available, and to extend the simplified procedure to states such as Ohio where it is not now permitted. This simplified procedure may be familiar in other states under the name “common form” probate. The Uniform Probate Code calls it “informal” probate. If the Uniform Probate Code were now in force in Ohio, the procedure for the above described entanglement would be as follows:

1. The spouse signs the same printed application for probate of the will, proceeds to the same probate court and files the application and the will with the court.
2. Immediately upon filing, the deputy clerk stamps the file “admitted to probate.”

What happened to present Ohio steps 2, 3 and 4? Notices, waivers of notice, witnesses, hearing, waiting have all disappeared! 31 How can this work?

Informal probate will not function if its effect is to fix with finality the rights of the persons interested in the estate. Thus, if the order of probate is conclusive on the issues that could be raised, it should not be entered without notice to all interested parties and without a hearing at

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30 Ohio Rev. Code §§ 2107.14 through 2107.17 inclusive (Page, 1971). It is desirable that the witnesses be lawyers, who will understand when you ask them to sign in at court and who will not move from city to city like the modern corporate nomad.
31 U.P.C. §§ 3-301 to 3-306.
which the formal testimony of the witnesses is received, and all other pertinent evidence is introduced accompanied by arguments of counsel.

The inconsistency of current probate procedures, of which the foregoing Ohio procedure is an example, is that on the one hand they contain only some of these safeguards, but on the other hand they are only partially conclusive. Thus, in Ohio notice must be served on some persons (heirs who happen to be Ohio residents) but not on others (heirs who live outside of Ohio or beneficiaries under the will). The witnesses must testify, but generally only by signing printed forms, and most other evidence is excluded even at a formal hearing. These formalities may be justified because admission of the will to probate in Ohio shifts the burden of proof of its invalidity to the contestant in a subsequent will contest. However, the will may still be contested by separate action filed in the Court of Common Pleas within six months after probate of the will.

The Uniform Probate Code avoids this inconsistency, and its attendant duplication and delay, by establishing the following rules:

1. The burden of proof of invalidity is always borne by a contestant, whether or not the will has previously been admitted by informal probate. To be more specific, the proponent must always prove due execution, and the contestant must always prove lack of testamentary capacity, undue influence, fraud, mistake, etc. The important point is that admission to informal probate is not conclusive (or even relevant) on any of these issues. Thus, there is no need for red tape in informal probate, as no one's rights are concluded by it alone.

2. For those proponents who want a conclusive order of probate, and for contestants, a formal testacy proceeding is available. This proceeding is parallel to the present Ohio will contest action, except that informal probate is not a prerequisite to a formal testacy proceeding and (as stated above) is not relevant to the issues in such a proceeding.

Let us return to the surviving spouse in our example. She probably does not care whether admission of her husband's will to probate is conclusive by law, because it will be conclusive in fact. What she really wants

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33 Id. § 2107.14 through 2107.181 inclusive.
34 Id. § 2741.05 (order of probate is prima facie evidence of validity of will).
35 Id. § 2741.01 through 2141.09 inclusive.
36 U.P.C. § 3-407.
37 Id. § 3-301.
38 U.P.C. § 3-401 et seq. The formal testacy proceeding must be commenced within the later of 12 months after informal probate or three years after death, U.P.C. § 3-108. Thus, if the proponents are unwilling to wait until the end of this period, when informal probate becomes conclusive, they may themselves commence a formal testacy proceeding, either after or in place of informal probate.
is expeditious and inexpensive transfer to her of title to the car and home. If any of her children later wish to contest the will, she and her family obviously could have more problems than those which may be resolved by a court in a will contest action. However, if the family situation is an unusual one so that there may be a contest, the spouse may institute a formal testacy proceeding, either after or in lieu of informal probate.

There are additional devices for simplifying the procedure for probate of wills. Hence, some states, including Alaska, Connecticut, Florida, Idaho, New Mexico, New York, Tennessee, Texas and Virginia, have by statute created the “self-proved will”: a will to which is annexed an affidavit of the witnesses reciting due execution. The Uniform Probate Code also provides for use of such an affidavit and includes a statutory form. Upon death, the affidavit is filed at the court with the will in lieu of current in-person testimony of the witnesses. In states which still require testimony of the witnesses for probate of a will, substitution of the affidavit bypasses the requirement. The Uniform Probate Code extends the effect of the affidavit to make it conclusive on the issue of due execution of the will in the event the will is challenged. Thus, lawyers practicing under the Uniform Probate Code will want to annex the affidavit to wills which they prepare, to assure each client that his will has become virtually incontestable as to due execution.

**Administration Is Expedited.** The Uniform Probate Code not only permits informal probate of a will, but also permits informal administration of the decedent’s estate. Let us follow the course of administration.

1. **Appointment of Executrix.** At the same time the deputy clerk of the local probate court admitted the deceased’s will to probate, he also appointed the decedent’s spouse as executrix. A single piece of paper should serve as the application for both probate and appointment.

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40 U.P.C. § 2-504. Anticipating adoption of the U.P.C. by most states, we may now annex this form of affidavit to each will we prepare. It will probably also qualify under the existing self-proved will statutes. (Ohio H. Bill No. 120 is close to final enactment and if enacted will validate the self-proved will in Ohio).

41 U.P.C. § 3-406(b).

42 U.P.C. Practice Manual (1972), published by Association of Continuing Legal Education Administrators for use under U.P.C., Form 21, a simple form that will make sense to most laymen.
2. Bond. None, even if the decedent’s will forgot to waive it.\textsuperscript{43} Thus, letters testamentary are issued to the executrix on the spot.

3. Notice to Beneficiaries. Within 30 days after her appointment as executrix, she (or the lawyer) should send a brief informal notice to any other heirs or beneficiaries under the will. The notice, which may be delivered in person or mailed by ordinary mail, must disclose the death of her husband and her appointment as executrix, state her address, indicate that the recipient may have some interest in the estate, disclose that no bond has been posted and identify the court where proceedings have been filed.\textsuperscript{44}

4. Notice to Creditors. After her appointment as executrix, the wife should publish a brief notice to creditors in the local newspaper.\textsuperscript{45} This should be done promptly, as creditors’ claims must be filed within four months after the first of three weekly publications or their claims are barred.\textsuperscript{46}

5. Inventory. Probably none! In theory, the executrix is required to prepare an inventory within three months after her appointment, but she need not file it with the court. If there had been other beneficiaries, she would have been required to send copies to them, and if they were numerous she could simplify the mailing of copies by filing the inventory with the court instead of mailing copies to each beneficiary. But, the court merely receives and files the inventory, and does not review or act on it.\textsuperscript{47} Note that no “official” appraisers are involved. If appraisal is required for death tax purposes, the executrix herself hires the appraisers, and pays them as she pays any other expert she hires to assist her with the estate.\textsuperscript{48} Note also that since (in most cases) the inventory is not filed with the court, there is a welcome lack of publicity as to the size and composition of the estate.

6. Sales. The executrix may sell estate assets, both realty and personalty, as she would sell her own property.\textsuperscript{49} No court order is required, nor is a power of sale required in the will.\textsuperscript{50} Thus, she

\textsuperscript{43} U.P.C. § 3-603. There is no bond unless the will affirmatively requires it, or unless a beneficiary or creditor files a written demand for bond under U.P.C. § 3-605 either before or after the executor or administrator is appointed.

\textsuperscript{44} U.P.C. § 3-705. Technically the requirement is that this “information” be given in writing; thus, this is not a formal “notice,” to be formally waived, and there is no requirement that proof of mailing of the notice or of its receipt be filed with the court. The executrix probably will not give this notice to her minor children, for her failure to do so, while a “breach of [her] duty” which subjects her to liability for resultant loss (of which there will be none) under U.P.C. § 3-712, does not affect the validity of her appointment or her powers.

\textsuperscript{45} U.P.C. § 3-801.

\textsuperscript{46} U.P.C. § 3-803.

\textsuperscript{47} U.P.C. § 3-706.

\textsuperscript{48} U.P.C. § 3-707. The appraised values should be shown in the inventory and the appraisers should be identified.

\textsuperscript{49} U.P.C. § 3-715(G).

\textsuperscript{50} U.P.C. §§ 3-704, 3-711.
could sell even if the draftsman of the will forgot to include a power of sale. The purchaser need not inquire as to the existence and scope of a power of sale in the will, as the power of sale is statutory. Most other powers of the executor or administrator are also statutory. This is why wills can be simple and inexpensive.

7. Distribution. The executrix may distribute the estate assets without any court order or other formality. 52

8. Accounts. None. The surviving spouse waits six months from the date of her appointment as executrix, distributes to herself, and files a narrative “closing statement” with the court. The closing statement states that she has published the required notice to creditors, paid all the bills, and distributed all the remaining assets. 53 If there had been other beneficiaries, the executrix would have been required to account to them privately and to send them copies of the closing statement, and they would have had six months after filing of the closing statement to question her administration of the estate. 54

9. Taxes. The Uniform Probate Code does not deal with state death, income, real estate or personal property taxes, and cannot affect the federal estate tax. The requirements of these tax laws remain unchanged and must be satisfied.

10. Summary. In order to administer the estate, the executrix simply had to “notify” her minor children of her appointment (perhaps), publish a notice to creditors, informally pay the bills and pocket the balance of the assets, and six months later file a simple narrative closing statement. The work of the attorney was confined to where the money is, namely, straightening out income and death tax problems.

Of course, not every estate can be administered as efficiently—but the author’s experience is that most can under the U.P.C. The Uniform Probate Code also provides detailed procedures for court supervision of administration of estates, and for issuance of court orders to settle with finality actual controversy and to protect a fiduciary from potential controversy. 55 What it does not do is to impose these detailed procedures, supervision and orders on estates where there is and will be no controversy. In theory, whether there is actual or potential controversy is a question to be decided by the court. As a practical matter, it is a question to be decided by the parties themselves, as the court does not act

51 U.P.C. § 3-715 contains a lengthy list of powers.
52 U.P.C. §§ 3-906, 3-907, which create a preference for distribution in kind and establish procedures for private agreement on proposed distributions.
53 U.P.C. § 3-1003. This is not an account; no dollar figures need appear.
54 U.P.C. §§ 3-1003, 3-1005. Presumably she would have secured their receipts and private releases when she accounted privately to them.
55 U.P.C. § 3-501 et seq. (supervised administration), §§ 3-1001 and 3-1002 (judicial accounting).
and take charge unless someone complains to it.56 The court does not act on its own initiative. Denial of automatic supervisory powers to the court and statutory sanction of private administration without final court orders are the cures provided by the Uniform Probate Code which result in simplified administration of estates.

THE EFFECT OF THE UNIFORM PROBATE CODE ON USE OF FUNDED TRUSTS

The Uniform Probate Code does not directly affect the use of funded trusts. However, since it makes guardianships and powers of attorney attractive alternate devices, it offers clients a choice of useful devices for the administration of property of the young or the senile.

Choices in Gifts to Minors. Continuing our average example, assume that the surviving spouse consults her attorney again, and explains that her parents would like to start a nest egg of investments for her children, their grandchildren. Of course, the grandparents want their daughter to manage and control the fund until the children reach majority.

Should counsel advise a trust created by a living trust agreement, a custodianship under the Uniform Gifts to Minors Act,57 or a guardianship? If he suggests a gift directly to the children, with the mother being appointed by the court as their guardian to manage the gift for them and distribute it to them as needed, she and her parents will be very unhappy when they discover the red-tape burden of court-supervised guardianship. A trust or custodianship will eliminate the guardianship bond expenses, investment restrictions, requirement of prior court approval of all distributions and biannual accounting requirements.58

Unfortunately, tax law has also set up limitations on the usefulness of these trust and custodianship alternatives. The attorney should further advise this client that if she is the trustee of the funded trust, she will be taxable personally for federal income tax purposes on the trust income to the extent that she uses it to support her children while they are minors,59 and if she dies before her children attain majority, the trust property may all be taxable for both federal and state death tax purposes as a part of her estate.60 Furthermore, this widowed spouse is the custodian under the Uniform Gifts to Minors Act; she will still face the same federal income tax problem,61 although she may escape the estate tax trap.62

56 U.P.C. § 3-502.
57 E.g., Ohio Rev. Code §§ 1339.31 through 1339.39 inclusive (Page, 1971).
58 Notes 22 and 24, supra.
Perhaps the estate tax trap for such trusts can also be avoided by requiring that no "support" type payments may be made to a minor child unless his parents are unable to support him, although such a limitation probably forfeits the $3,000 federal gift tax annual exclusion otherwise available for gifts to such trusts, custodianships and guardianships.

The Federal Tax Reform Act of 1969 has added an additional burden, in the case of such trusts. That Act increased the personal exemption and standard deduction and reduced the tax rates applicable to the children for federal income tax purposes, but made no such changes for trusts. Consequently there is less federal income tax incurred if a custodianship or guardianship is used and the income is taxed directly to the children even though it is not paid to or used for them. In addition, upon termination of such trusts, the unlimited throwback rule imposed on trusts by the Act may require more red tape to terminate them for tax purposes.

The revolutionary change introduced into this muddle by the Uniform Probate Code is simply this: A guardianship becomes workable. In other words, to make a gift to a client's children, her parents need not weigh the administrative and tax problems identified above and select a vehicle that solves only some of the problems. A guardianship will do the whole job.

Note that this revolutionary change is in part a tax benefit; the mother can effectively and economically administer the gift and also be better assured of avoiding the federal and state income, estate and gift tax traps described above. It thus appears that one effect of the adoption of the Uniform Probate Code will be a massive return of guardianship business to the probate court in lieu of the establishment of funded trusts.

Choices as Senility Approaches. By now the whole family in our example has tagged the attorney described as a perceptive practitioner who is able to find simple and effective cures for everyday but knotty legal diseases. Accordingly, the executrix's father now consults the above-mentioned attorney on the management of the bulk of his property which he did not give to his grandchildren. He and his wife realize that as they age, they must face the prospect of senility, and must arrange for the proper management of their own financial affairs.

63 Rev. Rul. 69-345, 1969-1 CUM. BULL. 226. The exclusion is otherwise available for such trusts under I.R.C. § 2503(c), and also for custodianships, Rev. Rul. 59-357, 1959-2 CUM. BULL. 212, and for guardianships, Rev. Rul. 59-78, 1959-1 CUM. BULL. 690.

64 INT. REV. CODE of 1954, § 665 et seq. The Final Regulations under these sections, recently released, are even less comprehensible than the typical state probate statutes.

65 Rev. Rul. 56-484, 1956-2 CUM. BULL. 23 (guardianship income taxable to minor); Estate of Jack F. Chrysler v. Commr., 361 F.2d 508 (2d Cir. 1966) (children's property excluded from parent's gross estate); Rev. Rul. 59-78, 1959-1 CUM. BULL. 690 (gift tax exclusion allowable for guardianship gift).
Under current law you may advise creation of a trust, with a bank or other family members as trustee, to manage the family investments, and if they become incapable of handling their checkbooks, to pay their bills. Counsel will advise them that a power of attorney will become invalid in such event, and that the other alternative is guardianship proceedings.

Under the Uniform Probate Code, both the power of attorney and guardianship devices are restored to usefulness. A power of attorney may be drafted to be "durable," and thus survive incompetency, or may even be drafted to be of delayed effect until incompetency. If these parents are willing to trust their affairs to their daughter (the widow), they may each give her such a durable power of attorney, a simple and cheap document, without the necessity of paying for the preparation of a complicated trust instrument, transferring property to a trustee or administering such a trust. As suggested earlier, a guardianship will also be effective because its administration will no longer be tied closely to court supervision, and the grandparents may themselves select their guardians if they have sufficient mental capacity to make an intelligent choice.

There may be compelling reasons for the grandparents to establish a trust. Specifically, they may want a bank or other family members to manage their investments under specialized arrangements. However, in most cases, a durable power of attorney or guardianship will be suitable and satisfactory.

CONCLUSION

This article is captioned "The Uniform Probate Code and the Practice of Law in Ohio." The author's feeling is that the adoption of the U.P.C. will affect a law practice favorably.

The average family exemplified above, and all other client families, ought to inquire why attorneys haven't personally intervened to obtain enactment of the Uniform Probate Code in Ohio. If attorneys' inaction is due to lack of information, this article has not made them an expert, but it may have suggested ways the Uniform Probate Code can help them and their clients.

66 U.P.C. § 5-501. The magic words for inclusion in the power of attorney are, "This power of attorney shall not be affected by disability of the principal." Anticipating adoption of the U.P.C. by most states, we may now add this phrase to each power of attorney we prepare.
68 Notes 25, 26 and 27, supra.
69 U.P.C. § 5-410.
70 See also Curry, Intestate Succession and Wills: A Comparative Analysis of Article II of the Uniform Probate Code and the Law of Ohio, 34 Ohio St. L.J. 1141 (1973).