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THE MODEL PROBATE CODE: A CRITIQUE

MAX RHEINSTEIN

I.

After a long period of neglect, the law of decedents' estates in recent decades has begun to attract the attention of legal scholars, reformers and legislatures. A comprehensive revision was undertaken in New York in 1929 and since then at least eight states have enacted new probate codes.¹ Further reform plans are currently under consideration in other states. In order to give to this work new impetus, direction, and guidance, the American Bar Association's Section of Real Property, Probate and Trust Law, at its 1940 Meeting, decided to follow a proposal of Professor Atkinson, who, in a series of remarkable articles,² had suggested the compilation of a Model Probate Code as an aid to further action by state legislatures. A committee was appointed with Mr. R. G. Patton of Minneapolis, Minn., the well-known authority on the law of real estate titles, as chairman, and such prominent experts on probate law as Professors Atkinson and Simes as members. Through the latter, contact was established with the Law School of the University of Michigan, at which, under Professor Simes' guidance, a number of research projects on probate law were already being carried on. Under an effective scheme of joint action, the work on the Model Probate Code was established as a common enterprise of the Bar Association Committee and the University of Michigan, the results of which have now been made available in a stately volume containing the Model Probate Code as well as extensive studies supplementary thereto.³

In its totality, this work constitutes not only a well documented presentation of the suggested future law but also a reliable and critical guide to the existing American probate law. In all its parts, the work appears as an impressive document of painstaking and creative scholarship whose very exist-

1. *Adopted in 1931*: CAL. PROB. CODE ANN. (1944); OHIO CODE ANN. §§ 10500-10512 (1940); *Adopted in 1933*: FLA. STAT. ANN. §§ 731-736 (1941); *Adopted in 1935*: MINN. STAT. §§ 525.01-525.90 (Henderson, 1945); *Adopted in 1939*: ILL. REV. CODE c. 3, §§ 151-501 (1947); KAN. GEN. STAT. ANN. §§ 59-1-59-2602 (Cum. Supp. 1945); MICH. COMP. LAWS § 16289-1-16289-13 (Mason Cum. Supp. 1945); *Adopted in 1941*: NEV. COMP. LAWS §§ 9882.01-9882.326 (Supp. 1941).

2. Atkinson, *Organization of Probate Courts and Qualifications of Probate Judges*, 23 J. AM. JUD. Soc'y 93 (1939); *Old Principles and New Ideas Concerning Probate Court Procedure*, 23 *id.* 177 (1940); *Wanted—A Model Probate Code*, 23 *id.* 183 (1940).

3. Michigan Legal Studies, *PROBLEMS IN PROBATE LAW* (1946); cited herein as MODEL PROBATE CODE. This volume in which the Code is published includes reports by Mr. Patton and Professor Simes, an introduction to the Code, and extensive statutory notes on existing law, mostly written by Miss Elizabeth Durfee, research assistant of the University of Michigan Law School. Also included are incisive monographic studies on various important phases of probate law by Professor Simes and Mr. Paul E. Basye, formerly research associate of the University of Michigan Law School and now a member of the San Francisco Bar.

ence will be a stimulus to the undertaking of reforms which have long been overdue in numerous states. A legislative draft of the magnitude of the Model Probate Code, however, must, of necessity, contain numerous points with respect to which a critical observer might raise queries or observations as to policy, technique or mere wording. Some observations of this kind will be offered in the following, not for the purpose of criticizing the draftsmen's eminent work but to be of assistance to the legislatures who will have to pay serious attention to the well considered proposals and formulations of the Code. Some of these observations may seem to be picayune, but in legislation the wording is as important as the substance.

II.

The draftsmen's principal aims appear to have been to establish a consistent and coherent system of substantive and procedural law for the speedy and proper winding-up of decedents' estates and the administration of estates of persons under guardianship; to do away with cumbersome relics of bygone ages; and to provide for a reliable method of keeping real estate titles free of unnecessary complications. In dealing with decedents' estates clarity and simplicity of the proceedings are sought to be achieved by the consistent adherence to the idea that all steps from the first application for probate or letters to the decree of final distribution constitute one single proceeding aimed at the speedy and correct distribution of the estate to the persons entitled thereto and including the decision of all preliminary or incidental issues.

Probate Court Personnel

In order to achieve these purposes, the draftsmen properly emphasize the overriding importance of the judicial personnel by whom probate matters are to be handled. In contrast to the system still obtaining in approximately one half of the states,⁴ the Code contemplates probate judges whose training, tenure and salary is to be the same as that of judges of courts of general jurisdiction. As the best way to achieve this result, the authors envisage that probate jurisdiction be given to the general trial courts. "There is no more reason for separate probate courts in most localities than there is for separate criminal courts".⁵ The experience of such states as California⁶ and Washington⁷ seems to prove the wisdom of this proposal. Prudently, however, the pertinent sections of the Code⁸ have been formulated so as also to permit a

4. *E.g.*, ALA. CODE ANN. tit. 13, § 273 (1940); COLO. STAT. ANN. c. 46, § 120 (1935); N. M. STAT. ANN. §§ 16-402-3 (1941); R. I. GEN. LAWS c. 568, §§ 1, 3. See MODEL PROBATE CODE, p. 469.

5. MODEL PROBATE CODE, p. 15 (Introduction).

6. CAL. CONST. Art. VI, §§ 5, 6 (1849). See MODEL PROBATE CODE, p. 423.

7. WASH. CONST. Art. IV, 6; see MODEL PROBATE CODE, p. 427.

8. MODEL PROBATE CODE §§ 4-10.

separate probate court if a state should prefer to retain the traditional system.

If the probate court is staffed with judges equal in training and quality to those of the general trial courts, it will no longer be necessary to exclude from the probate court's jurisdiction any of the matters which must be dealt with in the course of the administration of an estate, or to subordinate the probate court to the trial court, or to grant a right to a trial de novo in matters where no such right exists in cases originating in the general trial court. The authors also seem to believe that, with the suggested improvement of personnel, all reasons will disappear for excluding land from ordinary administration proceedings.⁹ With respect to real estate, executors, administrators and probate courts would thus have the same powers and duties as they have with respect to personalty. Both types of assets would be treated in exactly the same way; all the ancient differences would disappear and the court's decree of final distribution would settle all questions of title to both real and personal assets.

Appointment of Personal Representative

In accordance with the traditional English practice of probate in the common form¹⁰ and also with the practice successfully prevailing in a considerable number of states,¹¹ probate as well as the appointment of a personal representative is to be obtainable under the Code without prior notice to interested parties.¹² Much unnecessary delay and expense can be saved in that way and interests of adverse parties, including creditors, appear to be sufficiently safeguarded by the requirement of notice after probate. Any interested party may subsequently file his objections to the probate of the will,¹³ whereupon, after notice to all other interested parties, a hearing will be held at which the issue of the admissibility of the alleged will is to be disposed of finally, subject to an ordinary appeal to the general appellate court but without a trial de novo. It is to be assumed that a similar opportunity to raise objections also exists under the Code with respect to the appointment, without hearing, of an individual executor or administrator. However, nothing is stated specifically on this point and an *argumentum a contrario* might even be derived from Section 98, in which the lack of legal justification for the appointment of a personal representative without hearing is not mentioned among the grounds for which a personal representative may be removed. The point would seem to be sufficiently important to deserve clear and express regulation.

9. *Id.* at 16-17.

10. *Id.* at 16.

11. *Ibid.*

12. *Id.* § 68.

13. *Id.* §§ 72, 73.

Necessity of Administration

Under the scheme of the Model Code practically every decedent's estate, with a few exceptions,¹⁴ has to go through the full course of administration, from the initiating application for the appointment of a personal representative to the decree of final distribution. Until a personal representative has been appointed, nobody is in a position effectively to dispose of the assets or to give an effective receipt for payments. Unless the will disposes to the contrary, nobody can be appointed executor or administrator without having given bond, and the bond thus given has to remain in effect until the personal representative is discharged by the court.¹⁵ Apart from cases requiring the appointment of a successor, no discharge can be granted to the personal representative until he has distributed the assets in accordance with the court's decree of final distribution¹⁶ and no such decree can be made until the estate has been inventoried and appraised, the assets have been collected, the claims against the estate have been ascertained and the rights of all persons claiming as distributees have been determined. Whenever it is necessary to obtain an official certificate identifying the person empowered effectively to deal with the assets, it is thus necessary not only to probate the will or to obtain the appointment of an administrator, but to obtain and maintain the bond until all steps of administration are completed in exact compliance with the provisions of the Code. It is in this respect that legislatures may wish to consider alternatives.

It has already been stated that under the system of the Code the complete administration is to constitute one single proceeding. The scheme has the undoubted advantage that it dispenses with the unnecessary requirement of repeated notifications. It seems to have obscured, however, the natural division of the proceedings concerned with the settlement of a decedent's estate in two separate and distinct stages, each of which has its peculiar functions. The first stage, probate and issuance of letters, is concerned with the official certification of the person or persons who have the power effectively to deal with the assets of the estate. This stage is indispensable whenever there are assets which cannot be safely acquired by a third party without such a certificate. The bank must know whom it can allow to make withdrawals, a prospective purchaser of the decedent's car, furniture, or land must know from whom he can obtain a good title, and the corporation of which the decedent was a stockholder must know to whom it is to pay the dividends. Under the system presently prevailing in the majority of the states this "identification function" is served as to personal property by the issuance of letters testamentary or letters of administration and as to real property by the probate of the will or a certifi-

14. See *infra* p. 539-40.

15. *Id.* §§ 106, 107.

16. *Id.* § 193.

cate of heirship. There are still some states where no such certificate is obtainable with respect to real estate descending intestate.¹⁷ This disturbing gap will be closed by the Model Code.¹⁸ But why should it be necessary for that purpose to wait for the final decree of distribution? Why should the court not be empowered to issue a certificate of heirship at the stage at which probate is given in the case of a will? Why also should the decree of distribution be spread over the record of the land rather than the decree of probate? The reason for this provision of the Code is the desire of its draftsmen to subject to complete administration every estate, or at least every estate surpassing certain minimum amounts.

However, the second phase of the proceedings, administration proper, is necessary only in certain special situations. Conservation of the assets is required where there is nobody presently available to exercise proper care. Impounding of the estate in the interest of creditors or tax authorities is necessary where the estate is insolvent, or where there exists the danger of premature dissipation. A need for impounding in the interest of distributees exists in similar situations. But why should an estate have to go through all the steps of administration where there does not exist any danger of deterioration or dissipation, where the payment of taxes and debts is not endangered and where there is no controversy among claimants to a legacy, devise or distributive share?

The countries of the continent of Europe are usually regarded as being fond of paternalistic governmental interference with private affairs, while in this country the traditional hostility to governmental meddling has tended to keep state supervision of private matters at a minimum. Yet, with respect to the transfer of property upon death, the roles are curiously reversed. While in Europe judicial or judicially supervised administration of decedents's estates constitutes a comparatively rare exception, it is in this country, at least theoretically, required in every case.¹⁹ Actually, there have been developed in most states of this country various practices of dispensing with administration, thus reducing the already considerable cost of dying. Under the European system no "administration" takes place unless it is applied for by a creditor, a distributee, or the person charged with the winding-up of the estate by the testator. The creditors' safeguard consists in the personal liability of those persons into whose hands the assets have come. The holders of the assets can free themselves of this personal liability by subjecting the estate to judicially supervised administration. If they prefer not to do so, administration may also be initiated by any creditor who is able to show that otherwise his interests

17. *E.g.*, Illinois, Iowa, New Jersey, Ohio.

18. MODEL PROBATE CODE, § 195(d).

19. See Rheinstejn, *European Methods for the Liquidation of the Debts of Deceased Persons*, 20 IOWA L. REV. 431 (1935).

might be jeopardized. For centuries this system has worked well. A similar scheme has been in operation in England where a person dealing with assets outside of administration is held personally liable as executor de son tort.²⁰ Under the English system, judicial administration is carried on in the Chancery rather than in the Probate Division of the Supreme Court of Judicature, and intervention of the court is not applied for except in cases of special need. In this country, Texas has developed an analogous system which also does not seem to have resulted in inconveniences or irregularities.²¹ But, unlike the rest of the world, the majority of the states of this country have developed a system under which judicially supervised administration constitutes the rule rather than the exception. This system has been tolerable solely because it is not being followed in large numbers of cases. The will is submitted for probate, letters are taken out by somebody and then, in the majority of normal cases, such debts as there are seem to be paid and the assets to be distributed without any further intervention of the court. There is not enough factual information available to justify definite statements, but the few studies that have been made seem to justify the statements just made at least for the narrow regions covered by these inquiries.²²

The fact that probate court files are kept open without showing a formal closing of the estate may well appear unsatisfactory to the orderly mind of a systematic scholar or administrator. There may also be an occasional member of the bar who deplores the loss in fees. But why should the public be compelled in all cases to pay for legal services for which there is no need? The elaboration of doubtful practices tending to supplant succession upon death by ingeniously designed inter vivos transactions has been a rather undesirable result of the public's eagerness to save these unnecessary expenses.

The Model Code undoubtedly presents a neat and consistent system; all steps of both the first and the second stage of the handling of the estate interlock with each other and, with only a few narrow exceptions, all steps must be gone through, irrespective of whether or not they are desired by those whom they are meant to protect. Administration can be dispensed with under the Code only in those cases in which there is no need for the normal procedures of the identification stage. If the estate, not including homestead and exempt property, does not exceed \$1,000, assets can be collected by the distributees, without probate and without letters, upon a simple affidavit setting forth the necessary conditions and to be handed to the obligor as a

20. See RHEINSTEIN, *CASES AND MATERIALS ON THE LAW OF DECEDENTS' ESTATES*, 1057 (1947).

21. *TEX. REV. CIV. STAT.* §§ 3355-56 (Vernon, 1925).

22. See RHEINSTEIN, *CASES AND MATERIALS ON THE LAW OF DECEDENTS' ESTATES*, 791-793 (1947).

receipt.²³ If the estate, not including homestead and exempt property, does not exceed \$2,500 and does not exceed the amount of the family allowance, the court may make a revocable order that no administration be had, which order will then serve as the necessary certificate of identification for the person or persons, ordinarily the surviving spouse, who is to collect and dispose of the assets.²⁴ Special summary proceedings may also be had whenever, after inventorization and appraisal, the estate, exclusive of homestead, other exempt property, and family allowances, turns out to be insufficient to make any payments to non-preferred creditors.²⁵ On the compromise of contests and controversies, the Code contains provisions which are so skilfully phrased that they will considerably facilitate the making of amicable settlements;²⁶ but it seems that even after a settlement the personal representative and his bondsman are not to be discharged without special judicial decree.

A more radical method of dispensing not only with administration but also with probate seems to be opened by the remarkable provision of Section 84, under which title to the assets passes directly to the heirs or devisees, subject only to the personal representative's right of possession and powers of management and disposition. Unless a debtor of the estate or a possessor of assets insists upon his protection against the danger of double demand, it is possible that heirs may be able to collect on outstanding claims and assets immediately after the death. It is certain that they may collect five years following the death, because after that time no will can be received for probate and no application for administration can be granted.²⁷ After the expiration of the five years, the heirs may even obtain a conclusive certificate of heirship which, as to real estate, has the attributes of a recordable muniment of title.²⁸

Devisees are in the same position if no personal representative has been appointed within the five years after the will has been admitted to probate.²⁹ However, whether the certification of probate can be recorded is doubtful in view of Section 183 (d), which provides for the recording of the decree of distribution. The Comment to this section reads as follows: "Under the provisions of this Code, the decree of final distribution, and not the will, is the significant muniment of title. Hence, if real estate is involved, provision is made for recording a copy of the former, but not of the latter. If this is done, no one should, or is likely to, purchase real estate in reliance on the will, even though it has been admitted to probate; but he will rely solely on the recorded, certified copy of the decree of distribution."

23. MODEL PROBATE CODE, §§ 86-87.

24. *Id.*, §§ 88-91.

25. *Id.*, § 92.

26. *Id.*, § 93-95.

27. *Id.*, § 83.

28. *Id.*, § 195a.

29. Petition for probate may be made without simultaneous petition for the appointment of a personal representative. See MODEL PROBATE CODE §§ 64, 65 (g).

For the majority of the states where real estate is now not subject to administration, this scheme would constitute a marked innovation, which, because of the additional delay and expense, will hardly be greeted with unanimous approval in spite of the undoubted increase in the security of titles. Because of this welcome effect, recordation of the decree of distribution should certainly be made available to parties who wish to obtain such a decree. But whether or not a decree of distribution should be made compulsory is another question.

Under the Code, as it now stands, distributees are faced with a difficult choice, the implications of which may not always be obvious to them. They may entirely forego the official certification of a person who is empowered to collect and dispose of the assets of the estate, and thus incur all resulting inconveniences; or they may pay all the expenses of a complete administration down to the issuance of a decree of final distribution and the formal discharge of the personal representative and his bondsman. The only situation in which they are relieved of this necessity is where the testator has provided for administration without bond and the court has seen no reason to overrule such provision.

While the Code thus opens opportunities for dispensing with administration, it does not seem to go far enough. It is recognized in the Code that the primary function of administration is the protection of the creditors; hence, ordinary administration is declared to be dispensable if the need for creditors' protection is excluded by the complete lack of non-exempt assets.³⁰ Yet, the situation in which there is a lack of non-exempt assets is not the only one in which creditor protection through administration is superfluous. An estate may be large but free of any debts to speak of; or, even if there are debts, the principal distributees may be so solvent and so reliable that the creditors need no special protection.

Remedies for the inconveniences here discussed can easily be fitted in with the Model Code without impairing the coherence of its structure. The simplest way would be that of amending Section 106 so as to limit the necessity for an executor's or administrator's bond to those cases in which it is especially applied for by a creditor or other claimant, or in which it is regarded as necessary by the court for some exceptional reason. In all the ordinary cases, however, letters should be obtainable without bond. If that is done, parties would be in a position to wind up the estate without any cost and formalities. Creditors and distributees are protected by the personal liability of the executor and administrator to which he is subject by virtue of his "failure" to give public notice or to comply with other "requirements" of administration. His liability might be supplemented by the personal liability of any distributee

30. MODEL PROBATE CODE, §§ 86, 88.

or any other holder of assets, or both, patterned upon the old liability of an executor de son tort. A personal representative or distributee wishing to free himself of such liability may do so by seeing to it that administration is carried on in accordance with the provisions of the Code, especially that a bond is posted. In that way initiative and responsibility will be left with those to whom it belongs. With respect to the amount of the bond, the Code already contains the commendable provision that "in the absence of special circumstances, the court shall fix the bond in the amount of the value of any part of the estate which it can determine from examination that the personal representative might easily convert during the period of administration plus the value of the gross annual income of the estate."³¹ For the sake of clarity this latter provision might be so rephrased as to make it clear that the bond need not cover the entire annual income of the estate but only that part of it which "the personal representative might easily convert." If so phrased and if properly applied, no bond would have to be posted for that part of the net estate as to which the personal representative himself has a clear right or as to that part to which other distributees who do not regard their shares as endangered have a right.

If this minor amendment is made to Section 106 and if, in addition, it is made clear that a certification of probate is as recordable as a decree of final distribution, the adoption of the Code can be recommended even to a legislature which might otherwise hesitate to require full administration proceedings for every estate. Such a legislature might furthermore consider the possibility of the issuance of a certificate of heirship before the expiration of five years after the death, which, until the end of the period, should have the same provisional effects as a certification of probate issued without a hearing. Persons dealing with a self-alleged next-of-kin or heir would then have provisional certification not only of the fact of intestacy as expressed in the issuance of letters of administration without a will annexed but also of the identity of the distributees.³²

Expenses of Administration

In several places expenses of administration are treated as claims against the estate.³³ Strictly speaking, expenses which arise in the course of administration do not give rise to a claim against the estate but result in a personal liability of the personal representative, for which he is entitled to reimbursement out of the estate upon allowance as proper by the probate court. Quite properly, the Code gives the party to whom the personal representative is in-

31. *Id.*, § 106.

32. This effect could be achieved by amending MODEL PROBATE CODE § 72 or § 195, or both.

33. MODEL PROBATE CODE §§ 3(b), 143(a). See also § 135(a).

debted the possibility of direct enforcement against the estate. If the claimant wishes to avail himself of this possibility, it is proper to require him to file his claim in the way prescribed for the filing of claims which were already directed against the decedent. But, if the administration claim is not filed in that way, shall the creditor then be barred? Section 135 (a) expressly precludes this result. But it is not made sufficiently clear whether the personal representative is entitled to reimbursement when he pays an administration expense for which no claim has been filed.

Abolition of Dower and Curtesy—Indefeasible Share of Surviving Spouse

The Code contains another proposal which would constitute a far-reaching innovation for many States, the implications of which ought to be considered by state legislators with care. In accordance with a few recent codifications,³⁴ the Model Code abolishes common law dower and curtesy³⁵ and limits the surviving spouse to a generously determined indefeasible share.³⁶ This grave step is justified by the following brief comment:

"Estates of curtesy and dower tend to clog land titles and make alienation more difficult. Moreover, at the present time, when so much of the wealth of a decedent is likely to be held in the form of bonds and shares, these estates do not make adequate provision for a surviving spouse."³⁷

This concise statement falls short of providing a legislature with all the information necessary to enable them to make a reasonable decision. Of course, dower and curtesy³⁸ do not protect the surviving spouse with respect to moveable wealth, since they are applicable only to realty. The dower states have therefore supplemented dower by an indefeasible share in the personal estate. While it is certainly true that at the present time much of the wealth of a decedent is likely to be held in the form of stocks and bonds, real estate, both urban and rural, is still an important form of wealth. The incorporation of farms or dwelling houses is still an unusual exception. For a land-owning, and especially a farming family, dower may be valuable, however, not only as a protection of the surviving spouse against disinheritance but also as a protection against financial ruin for both the surviving spouse and the entire family. In addition to its indefeasibility by alienations by the husband, dower also has the characteristic of priority over creditors. This characteristic is important not only after the husband's death but also during his lifetime. If his land is sold at a sheriff's sale or in bankruptcy, the wife's interest of dower inchoate

34. See Statutory Note to MODEL PROBATE CODE § 31 at p. 256.

35. *Id.* § 31.

36. *Id.* § 32.

37. MODEL PROBATE CODE p. 68 (Comment to § 31).

38. Dower alone will be mentioned in the following discussion, because it is of greater importance than curtesy and because in most states curtesy has been completely assimilated to it.

must be bought in by a payment to be made to her. As to the computation of the value of this interest, many statutes make very generous provisions, especially those which state that the husband shall be regarded as having died at the time of the sale or of the application for the appraisal of the value of the dower interest.³⁹ There may thus be salvaged out of the family's financial shipwreck an amount sufficiently large to enable it to make a new start in life.⁴⁰ It is exactly this priority over creditors inherent in dower, both inchoate and consummate, which has endeared it to the farmer dominated states of the South and Middle West. Even such states may feel that the hampering effect of dower rights upon land titles is too high a price for the debtor protection resulting from it. But the decision ought to be made in full awareness of the interests at stake.

The effectiveness of the protection afforded by the indefeasible share in personalty to which the surviving spouse is now entitled in all states and which is to be the sole protection against disinheritance under the Model Code, may well be questioned. Where the husband has disposed of his entire property by gifts inter vivos the indefeasible share of the widow is zero, even though the statute may award the surviving spouse a generous portion of the estate. The problem of how to protect the surviving spouse against inter vivos gifts of the predeceasing spouse has not yet been satisfactorily solved by the courts⁴¹ nor is it satisfactorily solved by the Model Probate Code. Section 33 of the Code provides that:

"(a) Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration, and applied to the payment of the spouse's share, as in case of his election to take against the will.

(b) Any gift made by a married person within two years of the time of his death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary."

In the Comment accompanying this section, it is said that there is no "attempt to define the expression 'in fraud of marital rights'" because "only by judicial decision can that be done."

Experience seems to indicate that the courts will be equally unable to fulfill that task. In common law countries, the indefeasible share is an institution of recent origin. The Civil Law, on the other hand, has been using it for almost two thousand years. Civil jurists have had ample opportunity

39. See, *e.g.*, ILL. REV. ST. c. 110 § 38 (1939).

40. If the value of the land is \$90,000 and the wife is thirty years old at the time her inchoate dower right is bought, under the method of computation employed in statutes similar to that of Illinois, she is entitled to about \$20,400.

41. See 44 MICH. L. REV. 151 (1945).

to grapple with the problem of how to prevent the defeasance of the indefeasible share by inter vivos gifts. It is significant that they have found no other way than that of declaring invalid, as against the person entitled to the *legitim*, every gift made by the decedent either at any time,⁴² or within a specified period before his death,⁴³ without any regard to intent, and excepting only certain routine gifts of a negligible character. The rich experience of the Civil Law⁴⁴ might well be utilized also with respect to other problems which are bound to arise in connection with the institution of the indefeasible share and which have not yet been given sufficient attention in American legislation.⁴⁵

According to Section 37, "The right of election of the surviving spouse is personal to him; but if the surviving spouse is incompetent, the court may order the guardian of his estate to elect for him." This latter provision is again a very practical one; but which court shall have this power, the court in which the decedent estate is administered or the court which generally supervises the guardian? It seems that the provision refers to the former; but would it not be more appropriate to give the power to the latter, because it is the judge of that court who is familiar with the personal circumstances and needs of the incompetent?

Right of Election by the Beneficiary of an Annuity

Section 190 deals with the controversial problem of whether or not a person for whom the will directs the purchase of an annuity has the right to elect

42. E.g., FRENCH CIVIL CODE, arts. 913 *et seq.*

43. See GERMAN CIVIL CODE, § 2325 (ordinarily ten years).

44. *Querela inofficiosae donationis*; as to modern law see FRENCH CIVIL CODE, arts. 913, 920, 930; GERMAN CIVIL CODE, §§ 2325-2332.

45. The provisions of the German Code cannot, of course, be taken over literally into an American Probate act. They are reproduced here, nevertheless, for the purpose of indicating the problems which good legislation should consider, and of demonstrating the solutions constituting the product of an experience of many centuries:

"§ 2325. If the decedent has made a gift, the person entitled to a legitim may claim that his legitim be supplemented by that amount by which his legitim would be increased if the subject-matter of the gift would constitute an asset of the estate.

The value of consumable goods shall be computed as of the time the gift was made; the value of other goods shall be computed as of the death unless the value was smaller at the time of the gift, in which case such smaller value shall be taken.

There shall not be considered a gift if ten years have passed since the delivery of its subject-matter; if the gift was made to the spouse of the donor, the period does not begin to run before the termination of the marriage. [This latter provision is necessary because under German law the right of legitim may also belong to the descendants or parents of the decedent.]

"§ 2327. If a gift was made by the decedent to the person entitled to the legitim, the value of such gift shall be added to the estate in the same way in which there is added thereto the value of the gift made to a third person and such value shall be deducted from the amount of the claim of the person entitled to the legitim. . .

"§ 2328. . . . The person entitled to the legitim can claim from the donee the restitution of his gift up to the amount to which he is entitled and in accordance with the provisions concerning the restitution of an unjust enrichment.

Instead of making restitution in kind the donee may pay the value.

As among several donees, a prior donee is bound only insofar as a later donee is not bound.

in lieu of the annuity the capital sum directed to be used for the purchase. In England, Massachusetts and a few states the beneficiary has such an election,⁴⁶ but not in New Jersey or New York.⁴⁷ The English solution is consistent with the attitude expressed in *Saunders v. Vautier*,⁴⁸ under which the beneficiary of a trust entitled to the income for a certain period and then to the capital can demand the termination of the trust before the time set by the settlor. Under the leadership of Massachusetts,⁴⁹ the home of the spendthrift trust, the prevailing American opinion has come to accept the opposite solution.⁵⁰ In order to bring about uniform consistency, the Model Code seeks expressly to eliminate the right of election of the beneficiary. The wisdom of all the rules tending to strengthen paternalistic care by a dead ancestor for the living beneficiaries of his bounty has been questioned ever since the days of John Chipman Gray's attack on the spendthrift trust. Some American courts have carried their respect for the dead man's rule over the living to extreme lengths.⁵¹ The attempt to perpetuate this trend through express legislation intended to be adopted by as many states as possible might be dangerous. A great many problems of construction and stop-gap law have been wisely left out of the Model Code, perhaps too many. There does not seem to exist any compelling reason why the highly controversial problem of the annuitant's right of election should require express treatment in the Model Code. Section 190 (b) might thus have better been omitted.

Family Allowance

Section 44 grants to the surviving spouse and minor children of a decedent "a reasonable allowance in money out of the estate for their maintenance during the period of administration according to their previous standard of living." While it is stated expressly that this family allowance is to be "in addition to the right of homestead and exempt property", it is not said

"§ 818. The obligation to make restitution [of an unjust enrichment] extends to profits acquired by the obligor as well as to that which the obligor has obtained by virtue of a right unjustly acquired by him or of that which he has acquired as compensation for the destruction, impairment or dispossession of the object unjustly acquired by him.

Insofar as restitution in kind is impossible because of the nature of the object acquired, or for any other reason, the obligor has to pay the value.

The obligation to make restitution of the object unjustly acquired or to pay its value is excluded insofar as the obligor is no longer enriched [at the time of the commencement of the obligee's action].

"§ 2330. The provisions of Section 2325-2329 do not apply to gifts which were made in pursuance of a moral obligation or of a duty of social etiquette."

46. *Parker v. Cobe*, 208 Mass. 260, 94 N.E. 476 (1911).

47. N. Y. DECEDENT ESTATE LAW, § 47(b); *Berry v. Bank of Manhattan Co.*, 133 N. J. Eq. 164, 31 A.2d 203 (1943).

48. 4 Beav. 115, 49 Eng. Rep. 282 (1841).

49. *Claffin v. Claffin*, 149 Mass. 19, 20 N.E. 454 (1889).

50. 3 SCOTT, TRUSTS § 337 (1939).

51. See, for instance, the refusal of the Supreme Court of Wisconsin to recognize the settlement of a contest of a will in *Dardis' Will*, 135 Wis. 457, 115 N.W. 332 (1908).

whether or not the allowance is also to be in addition to an intestate share, a devise, or an indefeasible share. While it seems that the former meaning might be correct, one might also reach the conclusion that the amount received as allowance is to be deducted from the distributive share. The point is important and would seem to require clarification in the statute itself. One should also consider whether the right to an allowance should be limited to minor children or whether it should not be extended to other persons who were dependent for their livelihood upon the decedent, limited, perhaps, to such persons as were living in his household. Furthermore, should the court not have the power in the case of an insolvent estate to reduce the allowance below the amount needed for the maintenance of the previous standard of living?

Rights of Creditors

While the protection of the creditor of the decedent constitutes the very *raison d'être* of administration, modern American legislation has tended to be rigorous toward creditors who fail to file their claims within the prescribed statutory periods. In many states these periods have been continuously shortened by successive legislation and the sanctions for failure of timely filing have been made increasingly severe.⁵² Under the system which seems to prevail presently in the majority of states, the creditor of any claim other than a contingent claim, who has failed to file within the statutory period, is precluded from participation in the inventoried assets of the estate. While his claim is not destroyed, he is limited to seeking satisfaction out of those assets which may be found after inventorization or, in certain exceptional cases, out of real estate.⁵³ In the Model Code this trend is carried to its full length.⁵⁴ The period of the statute of non-claim is shortened to four months after the first published notice to creditors. The necessity for filing exists as to all claims "other than expenses of administration and claims of the United States; but including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise."⁵⁵ All these claims "shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent."⁵⁶ No exceptions whatsoever are made for persons under disability, persons outside of the United States, or anyone else who is unlikely to obtain timely notice of the death of his debtor. No participation is allowed in any assets, not even those which were unknown at the time of inventorization.

52. See MODEL PROBATE CODE, p. 325 (statutory note to § 135).

53. See the materials assembled in RHEINSTEIN, CASES ON DECEDENTS' ESTATES 1076-1100 (1947).

54. MODEL PROBATE CODE § 135.

55. *Id.* § 135(a).

56. *Id.* § 135(a).

Is such extreme rigor really necessary? In the Comment to Section 135 it is sought to be justified by the observation that:

"Death of a debtor is a hazard which all creditors should assume, and if the creditor seeks to avoid it, he can do so by seeking security for his claim."

The latter part of this statement was proper in that economy in which it was possible to maintain the rule that the debt dies with the debtor. But in our present economy the demand of security and the possibility of obtaining it is determined by considerations other than that of the debtor's death. In an economy in which credit constitutes the very foundation, the consequences of the debtor's death must be minimized as far as is humanly possible. On the other hand, we have to consider the interests of the personal representative and of the distributees as well as the interest of the community in the speedy return of a decedent's assets to productive use. A distributee, in particular, must be safe when he invests or expends his distributive share. This interest can be adequately safeguarded, however, even when the distributee's share is declared liable for the decedent's debts, provided his liability is limited to the value of those assets and those objects obtained in exchange for them which are still in his hands when he first obtains notice of the creditor's claim. It will never be easy for a tardy creditor to prosecute his claim against a multitude of distributees; but why should he not be allowed to do so provided that the defense of change of position is permitted?⁵⁷

Rights of Devisees Under an After-Discovered Will

The desire to reach a final and complete settlement of the estate as speedily as possible has also resulted in harsh treatment of the devisees under an after-found will. Such a will must be offered for probate before final distribution of the estate is decreed and in no case later than five years from the death of the decedent.⁵⁸ According to Section 85, "no will shall be effective for the purpose of proving title to, or the right to the possession of, any real or personal property disposed of by the will until it has been admitted to probate." Whether or not this provision excludes the use of an unprobated will in an action of tort or unjust enrichment, is not clear. If it does, as may well be held, the devisees under a will found after final distribution has been decreed are without any remedy not only against bona fide distributees under the probated will or a certificate of heirship, but even against one who has fraudulently suppressed the after-found will. There is no reason why, at least in the hands of such a person, the assets shall not be impressed with a constructive trust, and even against a bona fide distributee relief would not be inappropriate

57. See RESTATEMENT, RESTITUTION AND UNJUST ENRICHMENT § 62 Tent. Draft No. 1, 1936. See also GERMAN CIVIL CODE § 818, note 45 *supra*.

58. MODEL PROBATE CODE §§ 73, 83.

if it were limited in the same way as that just proposed for the right of action of a tardy creditor against a distributee. The remedy should not be available against any purchaser from the distributee. Furthermore, it should be for the value of the distributive share received rather than for the specific assets. If granted in this form, the remedy neither delays the settlement of the estate nor endangers a bona fide distributee or purchaser. There would then be no reason why the period for applying for the probate of an after-found will should not be extended beyond the short period of Section 73.

Direct Devolution of Property

In one of its most important provisions, Section 84, the Code states that:

"When a person dies, his real and personal property, except exempt property and homestead interests, passes to the persons to whom it is devised by his last will or, in the absence of such disposition, to the persons who succeed to his estate as his heirs; but it shall be subject to the possession of the personal representative and to the election of the surviving spouse and shall be chargeable with the expenses of administering the estate, the payment of the claims and allowances to the family, except as otherwise provided in this Code."

If real estate is to be subject to administration, the direct devolution of the estate to the distributees rather than to the personal representative is, indeed, indispensable;⁵⁹ direct devolution will also facilitate dispensing with administration in proper cases. However, if direct devolution is to take place, it is impractical to say in Section 22, the basic provision on intestacy, that only "the *net* estate of a person dying intestate shall descend and be distributed" in accordance with the intestacy rules of the Code. In whom is there vested the title to the portion needed for the payment of claims, taxes and expenses? There exists a contradiction between Sections 84 and 22, which can be easily eliminated by deleting the word "net" in the latter.

Though under Section 84 the estate passes directly to the distributees rather than to the personal representative, it is subject to the latter's possession. In the interest of completeness the personal representatives' powers of management and disposition should be provided for in the Code itself. It should be stated on the other hand, however, that all these rights and powers of the personal representative, and quite particularly his right of possession, shall not be exercised if they do not appear necessary under the circumstances. An analogous provision seems to have worked well in Texas,⁶⁰ without it administration might unnecessarily be imposed upon unwilling parties by a "personal representative", for instance a public administrator, for no reason

59. Otherwise there would be necessary a formal conveyance from the personal representative to the heir or devisee. Since parties would frequently be unaware of this necessity or would be unwilling to comply with it, confusion of land titles would be the inevitable result.

60. TEX. REV. CIV. STAT. § 3450 (Vernon, 1925).

other than his desire to "earn" a fee. If Section 84 is amended in the sense just indicated, an analogous change ought to be made in Section 124, which prescribes that "every personal representative shall have a right to, and shall take, possession of the real and personal property of the decedent except the homestead and the exempt property of the surviving spouse and minor children."

Nuncupative Wills

Section 49 still maintains the ancient institution of the nuncupative will, but limits it to personal property of an aggregate value of one thousand dollars or, "in the case of persons in active military, air or naval service in time of war, of ten thousand dollars." Furthermore, a nuncupative will is ineffective, as Section 49 (c) provides, to revoke or change an existing written will. The formalities for the execution of an ordinary will are so simple that the need for a special emergency form is questionable. But if the nuncupative will is to be maintained at all, it should not be subject to such narrow limitations, which are unlikely to be known to a testator finding himself in such an emergency that he cannot make any disposition other than by nuncupative will. Moreover, how is the maximum limit to be understood? Is the will entirely ineffective if it disposes of more than the permissible amount? If not, which provisions shall be valid and which invalid? The nuncupative will is obsolete and its complete abolition would save disappointment and litigation. The special needs of military and naval personnel would best be taken care of by a federal statute providing for the orderly execution of attested wills before summary court martial officers, legal advice officers or similar military or naval officials.

Revocation of a Will

Section 51 (a) provides for the total or partial revocation of a will "by a written will." Similar provisions in statutes have given rise to doubt whether a will can be revoked by an instrument which does not contain any dispositive provisions. It might thus be preferable to say that a will can be revoked by "an instrument in writing executed in the manner prescribed for the execution of a will." According to the text of Section 51, a will may also be revoked *in part* "by being burnt, torn, cancelled, obliterated or destroyed. . . ." Under the English Wills Act, 1837,⁶¹ partial revocation by such means is not possible unless the portions attempted to be revoked are completely obliterated or destroyed. The possibility of mere cancellation without obliteration may give rise to factual doubts. Was the unwitnessed cancellation really made by the testator? In order to dispose of such doubts,

61. 1 Vict. c. 26, § 21.

the courts have resorted to presumptions which may or may not correspond with reality. Difficult cases will arise whichever solution is adopted in the statute, but the scheme of the English Wills Act seems to be more likely to prevent litigation than that of the Model Act.

Guardianship—Minors and Mental Incompetents

Guardianship is treated in the Model Code in a very comprehensive sense. Indeed, there seems no reason why the protective devices designed for minors and for mentally incompetent persons should be organized along divergent lines. On the other hand, there seems to exist a difference between the needs of minors enjoying the care of their natural or adoptive parents and minors who are not enjoying such care. Traditionally, a distinction has been made between parental power and guardianship. Unfortunately, this distinction has at times become obscured by the occasional usage of referring to the parent as the natural guardian. In the Model Code the distinction seems to be completely obliterated. While under the common law as well as under statutes⁶² the parent as such is not entitled to the management of the child's property, it has always been taken for granted that he has both the right and the duty to take care of the child's person. This very right and duty constitutes parental power, which power arises from the very fact of the parent-child relationship without any judicial appointment of the parent as his child's guardian. It is thus surprising to find in Section 202 of the Code the statement that "a parent shall not be denied appointment as guardian of the person of a minor ward by reason of such parent being under the age of twenty-one", and in Section 203 that "The parents of an unmarried minor, or either of them, if qualified, shall be preferred over all others for appointment as guardian of the person." In Section 196 (c)(1) the term "incompetent" is defined as including "any person who is under the age of majority" and the Introductory Comment to Part IV states that "court appointment is required for all guardians." One might well conclude, therefore, that even a parent might not be entitled to the care and custody of his child without judicial appointment, which might even be made dependent on the posting of a bond.⁶³ Such a rule would not only constitute a radical break with tradition but would be unworkable and can hardly be imputed to the Code. However, in order to eliminate possible misunderstandings, the Section defining "who may be under guardianship"⁶⁴ should be amended to make it clear that no guardian for the person is to be appointed for any minor who is under parental power. Such an amendment would make it clear that, for a minor whose par-

62. See MADDEN, PERSONS AND DOMESTIC RELATIONS 439, 457 (1931).

63. MODEL PROBATE CODE § 213.

64. *Id.* § 200.

ents are alive, a guardian of the person is to be appointed only where both parents have been deprived of, or have forfeited such power because of neglect, incompetency or other special reason. The passages of Section 202 and 203 referred to above should either be deleted or explained.

All incompetents, other than minors for whom a guardian is to be appointed, are defined as persons suffering from some form of mental disability.⁶⁵ Very properly, the Comment to this Section declares that "No matter how far a person may be incapacitated physically, he can manage his property and care for himself by an agent or servant if his mind is unimpaired" and that "If so, he does not need a guardian." There is, however, one type of person who may need somebody to take care of his property even though he is unimpaired in mind; that is, the absentee. It would thus be advisable to amend Section 196 so as to make it possible to appoint a guardian for the property of a person whose place of abode is unknown or who, although his abode is known, is prevented from taking care of his property. Such a provision might be of special value for persons held as prisoners of war or civilian internees in a country with which communications are interrupted.

Among the most delicate problems of the entire law of guardianship is that of the determination of permissible investments of the ward's funds. In a period in which inflation is looming as a definite possibility, a careful guardian will have to weigh not only the safety of an investment but also the need of maintaining its purchasing power rather than its mere nominal value. In those European countries in which the investment of guardianship funds in government bonds was mandatory, wards were the first to lose their fortunes in the inflations following World War I. Section 225 does not prescribe investment in government bonds as an absolutely invariable rule; but investment in anything other than government bonds, even first class common stock, is permissible only upon express and prior permission of the court. The guardian, it seems, can never be held responsible for the devaluation of the ward's funds if he has invested them in government securities. Such a rule is dangerous in times like the present. Would it not be more practical simply to apply to the investment of guardianship funds the "prudent man" rule, which has recently been adopted in quite a few states and under which the guardian is not only protected if he has invested the ward's funds like a "prudent man," but is also responsible if he has failed to do so? The problem is delicate and calls for legislative wisdom. Legislators should thus carefully weigh the comparative advantages and disadvantages of the present Section 225 and of the "prudent man" rule.

Under Section 226, the purchase of real estate is permissible only "for a home of a ward, or to protect the home of the ward or his interest, or, *if he*

65. *Id.* § 96(c) (2).

is not a minor, as a home for his dependent family." Why should the purchase of a home not also be permissible for the dependent family of a minor? Under existing laws, a minor may well be married and have a family. Moreover, in view of the danger of inflation, a legislature should carefully consider the permissibility of purchases of real estate not only for the purpose of residence but also for that of investment.

Section 225 provides for very simple administration by the guardian of the ward's estate in the case of the latter's death. That scheme is highly commendable, but there does not seem to exist a compelling reason why the period of the statute of non-claim should be shortened from the regular four months to sixty days, especially when one considers the extremely harsh effect which the expiration of the period is to have under the Code for the creditor.⁶⁶

Legitimated Children

Section 3 of the Model Code contains a list of useful statutory definitions. The word "child" is defined in this list as including an adopted, but not a legitimated child. That a legitimated child is not generally included is made apparent in Section 26, third sentence, where it is stated that "When the parents of an illegitimate child shall marry subsequent to his birth, such child shall be deemed to have been made the legitimate child of both the parents for purposes of intestate succession." The institution of legitimation by subsequent marriage of the mother and the reputed father—this formulation is preferable to that which speaks of "marriage of the parents"—now exists in practically all states.⁶⁷ Where it exists with the result of complete conferment of the status of legitimacy, the provision just quoted may produce difficulties. The question might well be raised whether the enactment of the new provision results in a narrowing amendment of the legitimation act. It should also be considered that in the Restatement of Property a legitimated child is deemed to be included in the definition of the word "children" as used in a will or other conveyance, at least, if the child is born "before the effective date of the conveyance, and this legitimation occurs in accordance with the law which existed at the time of the execution of the conveyance and which the conveyor can be reasonably inferred to have regarded as the law regulating such legitimation if it should be made."⁶⁸ Additional difficulties will arise with respect to children legitimated under statutes recognizing the possibility of legitimation by acknowledgement.⁶⁹ It would thus seem to be better expressly to include legitimated children in the definition of Section 3 and to delete the third sentence of Section 26.

66. See MODEL PROBATE CODE § 135(b).

67. See VERNIER, AMERICAN FAMILY LAWS § 243 (1936).

68. RESTATEMENT, PROPERTY § 286 (1940).

69. See VERNIER, AMERICAN FAMILY LAWS § 244 (1936).

III.

With the careful preparation, composition and publication of the Model Probate Code, its learned authors have performed a service of great value, for which they deserve the gratitude of all those who are interested in the improvement of so important a branch of the law. As a matter of fact there are few branches of private law which have such profound influence upon the lives of average citizens. For this very reason a Probate Code needs close study and scrutiny, especially if it is intended for potentially nation-wide adoption. When the Model Codes on criminal procedure, evidence, and juvenile delinquents were prepared by the American Law Institute, the drafts composed by the various reporters and their advisors were not officially published until they had been scrutinized by the Council and adopted by the Annual Meeting of the Institute. The same process was followed with the Restatements. Although in every case the reporters and their advisors were experts, many far-reaching changes were made in the Council and occasionally even by the Annual Meeting. The group of experts by whom the Model Code was drafted constitutes an analogue to the American Law Institutes' reporter-advisors groups. The American Law Institute or the American Bar Association could render a most valuable service if they would provide a machinery which would now subject the Model Code to the same scrutiny to which the various draft model codes and restatements were subjected by the Council and the Annual Meeting of the Institute. If a revised draft were then republished under the authority of either the Institute or the American Bar Association, the chances of its adoption by the states would be considerably enhanced.