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Ann Bradford Stevens

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UNIFORM PROBATE CODE PROCEDURES: TIME FOR WYOMING TO RECONSIDER

*Ann Bradford Stevens**

I. INTRODUCTION

In 1939, the Section of Real Property, Probate, and Trust Law of the American Bar Association undertook the task of modernizing and creating uniformity among state probate codes.¹ This resulted in the Model Probate Code which was published in 1947.² The Section began to review the Model Code in 1962.³ In 1963, the National Conference of Commissioners on Uniform State Laws got actively involved.⁴ A stated goal was to bring reason and flexibility to the probate process.⁵ The

* Ann Bradford Stevens is a Professor of Law, University of Wyoming College of Law. J.D. 1976, Yale University; L.L.M. in Taxation, 1997, University of Washington. This article was supported in part by the George Hopper Faculty Research Fund. The author would also like to thank Gay George, Mistee Godwin, and Erika Olson for their valuable research.

1. *Uniform Probate Code Approved by Council*, 4 REAL PROP. PROB. & TR. J. 206, 207 (1969).

2. *Id.*

3. *Id.*

4. *Id.*

5. Richard V. Wellman & James W. Gordon, *The Uniform Probate Code: Article III Analyzed in Relation to Changes in the First Nine Enactments*, 1975 ARIZ. ST. L.J. 477, 478.

drafting process consisted of

[n]ine reporters, all law teachers with considerable practice experience . . . supervised in the drafting effort by a joint committee of about 25 lawyers who voted on every policy and on many issues of language The product was given repeated line-by-line readings in the National Conference of Commissioners on Uniform State Laws, an organization where practitioners outnumber law teachers by a considerable margin. The drafting and discussion process was aided also by comments from outside groups that studied the emerging recommendations and sent criticisms and suggestions to the draftsmen. By this process, the views of bankers, title companies, Internal Revenue Service, some state and local bar associations, and others were included.⁶

The drafters always looked for tested models that added simplicity and studied these carefully.⁷ After seven years of study and drafting,⁸ the Uniform Probate Code (U.P.C.) was approved by the National Conference of Commissioners on Uniform State Laws in 1969.⁹ The American Bar Association (ABA) House of Delegates approved the U.P.C. later that year.¹⁰

Soon after ABA approval, a number of western states quickly adopted the U.P.C., including Idaho, Colorado, Montana, Nebraska, North Dakota, and Utah.¹¹ The Wyoming Legislature passed the U.P.C. in 1975.¹² However, the Act was vetoed by Governor Ed Herschler on March 14, 1975. In his letter announcing the veto, the governor stated

6. Richard V. Wellman, *Lawyers and the Uniform Probate Code*, 26 OKLA. L. REV. 548, 551 (1973) (footnote omitted) [hereinafter Wellman, *Lawyers*]; see also Malcolm A. Moore, *Estate Planning Opportunities Which May Be Possible Under the Uniform Probate Code*, 1 ESTATE PLANNING 83, 88 (1974). See generally Wellman, *Lawyers*, *supra*, at 551 n. 10 for additional sources on the evolution of the Uniform Probate Code (U.P.C.).

7. Wellman & Gordon, *supra* note 5, at 486.

8. Richard V. Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453 (1970) [hereinafter Wellman, *Blueprint*].

9. UNIF. PROBATE CODE § 1-101 historical notes (amended 1999), 8 U.L.A. Part I 1 (1998) [hereinafter U.P.C.].

10. *Association's House of Delegates Meets in Dallas, August 11-13*, 55 A.B.A. J. 970, 976 (1969).

11. U.P.C. § 1-101 tbl. (amended 1999), 8 U.L.A. Part I 1 (1998) (indicating that the U.P.C. was adopted by Idaho in 1971, Colorado and North Dakota in 1973, Montana and Nebraska in 1974, and Utah in 1975).

12. H.B. 44, 1975 Leg., 30th Session (Wyo. 1975).

his belief that the existing Wyoming code was firmly established and one of the finest in the country. He also stated that the amendments to the U.P.C. just adopted by the Wyoming Legislature defeated the goal of uniformity with the codes of other states. He also cited the lack of participation of the trust profession in drafting the legislation, and the courts and clerks' concern about additional burdens imposed on them.¹³

Though the governor had rejected the U.P.C., in 1979, Wyoming made substantial changes to probate procedures.¹⁴ Then, in 1980, finding substantive and technical problems with the 1979 law, the Wyoming Legislature enacted the Wyoming Probate Code of 1980.¹⁵ Though many provisions were not changed by either the 1979 or 1980 Code, the numbering changed, as the 1980 Code substantially reorganized the prior law.¹⁶ The 1980 Wyoming Code was the last general review and recodification of probate law in Wyoming.

The Wyoming Probate Code still requires a full court administration in almost all estates, even small, uncontested estates. The 1979 and 1980 changes and additions to the probate provisions came mainly from the Iowa Probate Code and the U.P.C..¹⁷ However, the limited changes in probate administration came almost exclusively from the Iowa Probate Code.¹⁸ Certain discrete parts of the articles in the U.P.C. other than the procedure article were included.¹⁹ The U.P.C. provision permitting cer-

13. Letter from Hon. Ed Herschler, Governor of Wyoming, to Hon. Thyra Thomson, Secretary of State of Wyoming 1-2 (Mar. 14, 1975) (on file with Wyoming Secretary of State's Office). The Wyoming Legislature passed the Uniform Probate Code again in 1977. Senate File 10, 44th Legislature, 1977 Session. Governor Ed Herschler again vetoed the Act. *See* Letter from Hon. Ed Herschler, Governor of Wyoming, to Honorable President and Members of the Senate, Forty-Fourth Legislature (Feb. 26, 1977) (on file with Wyoming Secretary of State's Office). The attempt in the Senate to override the veto failed on a vote of 18-12. Wyoming Digest of Senate Journal, 44th State Legislature, p. 32 (1977).

14. Probate Code, 1979 Wyo. Sess. Laws 142.

15. Probate Code, 1980 Wyo. Sess. Laws 54.

16. Lawrence H. Averill, Jr., *The Wyoming Probate Code of 1980: An Analysis and Critique*, 16 LAND & WATER L. REV. 103, 106 (1981).

17. *Id.* at 108.

18. *See id.* app. I at 392-94 (indicating in all but two of the 1980 changes to WYO. STAT. ANN. title 2, chapter 7—which contains the bulk of probate administration statutes—that the source of the change was the Iowa Probate Code).

19. *Id.* app. I at 389-94. For example, the 1980 Code included the self-proving affidavit section from the U.P.C. *Compare* WYO. STAT. ANN. § 2-6-114 (LexisNexis 2001) with U.P.C. § 2-504 (amended 1999), 8 U.L.A. Part I 148 (1998). The 1980 Code also contained the U.P.C. provision on half-blood intestate heirs. *Compare* WYO. STAT. ANN. § 2-4-104 (LexisNexis 2001) with U.P.C. § 2-107 (amended 1999), 8 U.L.A. Part I 87 (1998). It further included, with modifications, the antilapse statute for will bequests from the U.P.C. *Compare* WYO. STAT. ANN. § 2-6-106 (LexisNexis 2001) with U.P.C. §

tain small estates to completely avoid probate was included. This affidavit procedure for transferring title to personal property in small estates was adopted with minor changes.²⁰ However, basic principles of the U.P.C. were not included in the Wyoming Code. As Averill said regarding the 1980 Code,

Unfortunately, for the larger estate, the new [1981] code does not offer a much improved administration procedure than existed under prior law. The new Code's procedure is still based primarily upon continuous court involvement and supervision throughout the proceedings. This involvement is not altered even though the successors are in agreement and the creditors have been satisfied. Consequently, the time, effort, and expense of administration will continue to be at approximately the same level as existed under prior law

. . . .

The failure to enact an independent administration procedure for estates of all sizes and comprehensive powers provisions for all personal representatives [sic] are the most unfortunate failures of the new Code. Until these concepts become the law in Wyoming, the administration of many estates will continue to be inefficient, overly time consuming, and expensive.²¹

Both independent administration and comprehensive power for the personal representative are basic features of the U.P.C. Other states

2-603(b) (amended 1999), 8 U.L.A. Part I 165 (1998). Also, Wyoming has adopted some additional provisions from the U.P.C. since 1980. For example, in 1987, the Wyoming Legislature added WYO. STAT. ANN. § 2-6-124 (LexisNexis 2001), authorizing a written statement on personal tangible items that can be changed without changing the will, taken from U.P.C. § 2-513 (amended 1999), 8 U.L.A. Part I 158 (1998). And in 1993, the legislature adopted the Uniform TOD Security Registration Act, WYO. STAT. ANN. §§ 2-6-101 to -112 (LexisNexis 2001), from the U.P.C. §§ 6-301 to -310 (amended 1999), 8 U.L.A. Part II 449 (1998).

20. See discussion *infra* Part II.B. This provision was recently amended, 2002 Wyo. Sess. Laws 60. Compare WYO. STAT. ANN. §§ 2-1-201 & -202 (LexisNexis 2001) with U.P.C. §§ 3-1201 & -1202 (amended 1999), 8 U.L.A. Part II 307 (1998).

21. Averill, *supra* note 16, at 178-79. Few significant changes have been made since Averill wrote this in 1981. See *infra* note 114. Lawrence H. Averill, Jr., was formerly on the faculty of the University of Wyoming College of Law and is the author of Uniform Probate Code Nutshell (5th ed. West Group) and many other articles on the U.P.C.

that have not adopted the U.P.C., such as Washington and Texas, have more flexible probate procedures than Wyoming that include these features.²² The U.P.C. has been in effect in the states that border Wyoming, other than South Dakota, for twenty-five to thirty years.²³ I believe it is time for Wyoming to take another look at U.P.C. probate procedures and consider adoption of at least the procedure articles.

Richard Wellman was the Chief Reporter for the U.P.C. and has written extensively about it. As the devil's advocate, he makes the case for not changing the existing probate law:

Many lawyers and judges are skeptical of any proposals that purport to 'reform' settled areas of law. To them, occasional complaints about the workings of present systems are inevitable. They doubt that any new system can offer advantages that will outweigh its ambiguities and the turmoil of change. They resent the criticism of law and lawyers that goes with change, and worry about erosion of familiar sources of lawyer income.²⁴

Referring to the entire U.P.C., he goes on to point out that it is "easy to throw a monkey wrench into any 150-page package of proposed new laws"²⁵

However, Wellman is a strong advocate of the U.P.C. He points out that the U.P.C. system for probate was not a radical new system of probate even when it was drafted. The U.P.C. system of independent administration, unless interested persons seek intervention, had existed for 200 years in Pennsylvania.²⁶ It was also in use where the will permitted it, in Texas, Georgia and Washington.²⁷ Of the provisions that

22. See Appendix for brief description of those in Washington and Texas.

23. *Supra* note 11. The U.P.C. has been effective in South Dakota for seven years. *Infra* note 79.

24. Wellman, *Lawyers*, *supra* note 6, at 548. The report of the Maine Probate Law Revision Commission to the legislature, when it recommended adoption of the U.P.C., noted the change in attitude of the Commissioners "from one of early skepticism about the Uniform Probate Code to one of acceptance and enthusiastic endorsement." Maine Probate Law Revision Commission, Report to the 109th Maine Legislature and Summary of the Commission's Study and Recommendations Concerning Maine Probate Law 5-6 (Sept. 1978) (unpublished report, on file with author).

25. Wellman, *Lawyers*, *supra* note 6, at 549.

26. *Id.* at 554.

27. *Id.* According to the Practice Manual,

[T]he UPC largely draws upon the more useful tools found in the laws of the varying states (and in some instances, the law of England) [I]t is by and large a composite of what the Commissioners and Reporters found to be the better procedures and

dropped traditional notice requirements, Wellman said the draftsmen sought "tested models for every device that seemed to contribute to the goal of simplification."²⁸ Wyoming lawyers and the Wyoming Legislature should consider the longevity of these systems before they conclude it is appropriate to continue the Wyoming system of extensive court involvement. As Wellman put it, the probate offices in Pennsylvania "constitute a standing contradiction to any assumption that a modern state must interpose a powerful court between survivors and the estates they would claim."²⁹

The entire U.P.C. consists of nine Articles. The focus of this writing is Article III, Process of Administering an Estate, the largest division of the Code.³⁰ When it comes to inheritance, probate procedure is "the heart of the matter,"³¹ though it is a small part of law school courses on Trusts and Estates, and does not get much attention from academics.³² This article will describe the Article III procedures and provide a comparison to the current Wyoming probate code.³³ It will also discuss

tools available to practitioners in different states, unified in such a manner as to constitute an interrelating, workable Code.

Robert R. Wright, *Preface to the First Edition of 1 UNIFORM PROBATE CODE PRACTICE MANUAL*, at xi, xii (Richard V. Wellman ed., 2d ed. 1977).

28. Wellman & Gordon, *supra* note 5, at 486 (footnote omitted).

29. Wellman, *Blueprint*, *supra* note 8 at 463. In Pennsylvania, a limited power magistrate can initiate administration and it does not need to be closed by court order. *Id.* at 466. The Pennsylvania personal representative has no duty to return to the magistrate and has obligations like those of a trustee. *Id.* at 471. New Jersey also had a "generous" opportunity for independent administration at the time the U.P.C. was drafted. *Id.*

30. Wellman & Gordon, *supra* note 5, at 525. By pages, Article III is forty percent of the Code, with comments. *Id.* The other general categories covered by the U.P.C. are *Property Protection for Disabled Persons*, *Non-Probate Transfers at Death*, and *Jurisdiction of Trusts*. Wellman, *Lawyers*, *supra* note 6, at 551. Other aspects of transfer of property at death covered by the U.P.C. include intestate succession rules, elective share, exempt property, and wills (formation and interpretation), all in Article II. U.P.C. art. II (amended 1999), 8 U.L.A. 76 (1998).

31. Wellman & Gordon, *supra* note 5, at 553.

32. Wellman, *Blueprint*, *supra* note 8, at 472 & n.70.

33. This article does not discuss one part of Article III, Universal Succession. In 1982, the U.P.C. was amended to include this informal process in which intestate heirs, or residuary beneficiaries of a will, together apply to the Registrar and agree to be personally liable to creditors, and for proper distributions. U.P.C. §§ 3-312-22, 8 Part II U.L.A. 5 (1998). If the application is approved, a statement is issued that is evidence of title. U.P.C. § 3-315, 8 U.L.A. Part II 70 (1993). The procedure was taken from civil law. Prefatory Note, Succession Without Administration, 8 U.L.A. Part II 65 (1998). So far, no states have adopted these provisions. 8 U.L.A. Part II 5 (1998). The Wyoming summary procedure where the executor is also the only heir is somewhat like Universal Succession, in that the administration ends at an early stage and the heir assumes liability. However, the Wyoming procedure involves notice, bond, inventory, appraisal, and a

Article IV.³⁴ Article IV, Foreign Personal Representatives and Ancillary Jurisdiction, along with parts of Article III, deal with ancillary probate, an important part of probate procedure.

A. Basic Advantages of the Probate Procedures in the Uniform Probate Code

The hallmark of the U.P.C. is flexibility, which is carried out through Article III. Central to the U.P.C. is the:

[I]dea that probate is basically a non-adversary proceeding in which the court should have a very limited role unless the parties desire the court's help and supervision, in which case such assistance can be obtained It provides that supervision can be had with respect to some aspects of the administration without involving the court in other aspects of the probate.³⁵

As the Official Comment states, Article III is designed to provide "persons interested in decedents' estates with as little or as much by way of procedural and adjudicative safeguards as may be suitable under varying circumstances."³⁶ As one commentator put it, "[t]hose interested in the estate can thus purchase as much or as little administration as appears necessary and proper."³⁷

The U.P.C. provides for varying degrees of notice and court involvement, the degree being determined by those with an interest in the estate. Unless an interested party seeks a more formal process, informal procedures can be used. In other words, the level of formality is determined by the concerns of the interested parties, not by the size of the estate. Even if the administration of the estate is informal, an interested party, heir or creditor, who believes he or she needs more protection, can file a demand for notice and receive notice of steps in the proceeding.³⁸

court hearing. *See infra* text accompanying note 130.

34. I will also describe parts of Article I, which includes a few general provisions and definitions that are essential to Articles III and IV.

35. *See Moore, supra* note 6, at 87. To Wellman, the root of probate complications is that routine probate is seen as the business of the court. Wellman, *Blueprint, supra* note 8, at 462.

36. U.P.C. § 3 Gen. Cmt., 8 U.L.A. Part II 26 (1998).

37. Terry L. Crapo, *The Uniform Probate Code—Does It Really Work?*, 1976 BYU L. REV. 395, 398 (1976). As Wellman put it, the procedure provisions of the U.P.C. allow survivors and their lawyers to "select among several available settlement procedures with an eye to finding the desirable balance of safety and efficiency." Wellman, *Blueprint, supra* note 8, at 476.

38. U.P.C. § 3-204, 8 U.L.A. Part II 53 (1998) (amended 1999).

Then she can take various actions to protect her interests.³⁹ The U.P.C. makes the probate process more like other legal processes in that the court is involved only to resolve disputes raised by the parties.⁴⁰ However, if an interested party seeks a fully court-supervised administration, and the court agrees that it is appropriate, supervised administration is an option under the U.P.C.⁴¹

A related basic advantage of the U.P.C. is the powers given to the personal representative. These provisions make the probate process more like what happens after death under a typical revocable living trust. As Wellman states, "After obtaining letters, the person or persons appointed assume a role very much like that of trustees of a well drawn revocable inter vivos trust who are directed to distribute trust estate remaining after the settlor's death after first satisfying all of his creditors."⁴² The personal representative "becomes in effect a statutory trustee."⁴³ He can collect assets, sell assets as needed, pay claims, and distribute assets without further court orders.⁴⁴ As with revocable trusts, he, or an interested party, can seek the isolated adjudication of a particular question, if needed. The court has broad jurisdiction to decide such isolated issues when presented, under the U.P.C.⁴⁵

Both of the basic advantages I have just described, informal processes and increased power for the personal representative, appear on their face to reduce protections for those with interests in the estate. However, in comparing the U.P.C. to the current system of probate in Wyoming, one should consider the possibility that the protections are really illusory. It should not be assumed that current court-supervised administration offers much real protection to heirs and beneficiaries. In many areas, the apparent protection of court supervision is deceptive.⁴⁶

39. See *infra* U.P.C. Section Part E, Protections.

40. James W. Gordon, Note, *Flexibility, The Uniform Probate Code's Procedural Article, and Some Comparisons with Kentucky Statutes*, 62 KY. L.J. 1083, 1087 (1974).

41. U.P.C. § 3-501, 8 U.L.A. 302 (1993).

42. Wellman, *Blueprint*, *supra* note 8, at 494. Thus, the administration can be as efficient as transfer at death through a revocable trust. *Id.* at 488. He points out two differences that give greater protection to interested parties in a U.P.C. informal probate than in a revocable trust. First, the personal representative's authority is a matter of public record, and second, the personal representative submits to the court's jurisdiction. *Id.* at 494.

43. *Id.* at 492. U.P.C. § 3-712 makes a direct analogy to a trustee. U.P.C. § 3-712, 8 U.L.A. Part II 37 (1998).

44. See *infra* text accompanying notes 204-208.

45. U.P.C. § 3-105, 11 U.L.A. 257 (1993).

46. Wellman, *Blueprint*, *supra* note 8, at 469. It may be that in some states when property has been distributed and the recipients are satisfied, probate procedures, such as formal closing, are simply ignored. *Id.* at 471-72. A local example of apparent pro-

The court is not providing the protection that the process purports to give.⁴⁷ The person with letters of administration has “full practical control of the decedent’s liquid assets, notwithstanding the degree of ‘supervision’ exerted by the court following appointment.”⁴⁸ Some probate officials are reluctant to act unless a written complaint prepared by a lawyer is made.⁴⁹ Even the required notices may not be effective since, “[t]he routine which the statutory notice requirements create also tends to defeat the purpose of notice by making every warning paper ordinary.”⁵⁰

B. Many Revocable Trusts Will Not Be Needed if the Uniform Probate Code is Adopted

Adoption of the U.P.C.’s procedural provisions would probably reduce the use of revocable trusts in the state, because the U.P.C. procedures offer many of the advantages of such trusts.⁵¹ Living trusts are being used by many whose goal is to avoid probate.⁵² Those who promote revocable trusts at public meetings state that probate avoidance is the primary goal.⁵³ In a state with a probate procedure like Wyoming’s, avoiding probate is likely to be a significant benefit. However, one would not need to avoid the probate process if it could be done with little court involvement, and thus was less expensive and less time consuming. In one U.P.C. state, Colorado, with an inexpensive and quick procedure

tections in the statute that are not real is the requirement of a hearing before a will is probated. The statute says the clerk or court “may hear [the petition] forthwith” and the section is headed “Hearing Upon Petition” WYO. STAT. ANN. § 2-6-203 (Lexis 2002). Despite this, I understand that at least in Albany County no hearing is generally held.

47. Wellman, *Blueprint*, *supra* note 8, at 469. Wellman describes it as the court “adding its blessing” to what lawyers and personal representatives do. *Id.*

48. *Id.* at 498.

49. *Id.* at 469.

50. *Id.*

51. Soon after the ABA adopted the U.P.C., one commentator predicted that the use of revocable trusts and other probate avoidance devices would decline and the use of wills and probate would increase after adoption of the U.P.C. Moore, *supra* note 6, at 83. He predicted that the devices will only be used when they have another purpose. *Id.* at 87. I found no data on whether this has actually happened where the U.P.C. has been adopted, though it is clear revocable trusts are still used by many.

52. Fredrick J. Tansill, *Are Revocable Trusts Oversold and Overused? Practical Nontax and Tax Considerations in the Use of Revocable Intervivos Trusts—Part 1*, 23 TAX MGMT. EST. GIFTS & TR. J. 239, 243 (1998). Judy Lee, *New Hawaii Uniform Probate Code*, HAW. B.J. *6 (March, 1998). Also, problems are created with do-it-yourself probate avoidance. Wellman, *Lawyers*, *supra* note 6, at 555-56.

53. Clinton B. Kruse, Jr., *Twenty-Six Reasons for Caution in Using Revocable Trusts*, 21 COLO. LAW. 1131 (1992).

for probate, probate avoidance has "lost its importance."⁵⁴ Also, probate is often required anyway, even where the decedent has a revocable trust.⁵⁵

Another advantage that is often touted for using revocable trusts is that the settlor can keep the details of the trust private.⁵⁶ The will must be filed with an informal probate application under the U.P.C.⁵⁷ However, in most cases, the details in the will are not so personal that they require privacy.⁵⁸ The probate administration under the U.P.C. preserves confidentiality in many circumstances, unless conflict leads an interested party to seek court involvement. It is certainly much more likely that the details of a probate process will be confidential under the U.P.C. than under the current court-supervised probate procedures in Wyoming. If the informal procedures in the U.P.C. are used, the will, the applications for informal probate and for appointment of a personal representative, the appointment, and a closing statement, will probably be all that is available for public review.⁵⁹ The inventory must be sent to persons interested in the estate who request it.⁶⁰ However, the personal representative is not required to file it with the court.

Of course, an interested party may petition for a formal probate and supervised administration under the U.P.C. that would then make much more information public. However, this is also true with revocable trusts. An unhappy party can bring suit against the trustee and thus make the trust and actions of the trustee part of the public record.

Another of the proffered advantages of the revocable trust is

54. *Id.* He points out that Colorado probate is an office procedure very similar to revocable trust administration. *Id.*

55. Howard B. Solomon, *Revocable Trusts—A Contrarian's Viewpoint*, 68 N.Y. ST. B.J. 34, 35 (1996). Revocable trusts will not likely shorten the total duration of the process of winding up the decedent's affairs in an estate that is subject to estate tax. The closing letter from the IRS will likely not be received for a year to two years after the death, whether the assets are distributed from a formerly revocable trust or through a will. *Id.* at 36. From personal experience, another problem is with settlors who do not understand what they have done when they create revocable trusts, and proceed to transfer assets without doing so in the name of the trust.

56. Tansill, *supra* note 52, at 241. Tansill contends that the vast majority of clients do not care about confidentiality. *Id.* He advises attorneys not to presume that confidentiality is important to the client. *Id.*

57. U.P.C. §3-301(a)(2)(i), 8 U.L.A. Part II 56 (1998).

58. Solomon, *supra* note 55, at 36.

59. U.P.C. §§ 3-301, 8 U.L.A. Part II 55-6 (1998); U.P.C. §§ 3-1003(a), 8 U.L.A. Part II 56 294-95 (1998). The sworn statement closing the estate states that the personal representative has performed his duties, but does not require details particular to the estate. *Id.*

60. U.P.C. § 3-706, 8 U.L.A. Part II 152 (1998).

avoiding ancillary probate.⁶¹ Ancillary probate will probably not be needed if the U.P.C. probate procedures are adopted because of their broad recognition of the domiciliary probates of other states.⁶² The ability to manage and transfer decedent's assets immediately after death is another of the revocable trust's touted virtues. With a revocable trust, the successor trustee can take over the management of the trust assets immediately on the settlor/trustee's death. In contrast, the appointment of a personal representative will take time. However, the personal representative can be informally appointed under the U.P.C. as early as 120 hours after the death, and no hearing is required.⁶³ Also, since bond is not required unless an interested party seeks it, posting of bond will not delay the personal representative's appointment in most circumstances.⁶⁴

Non-lawyers are often drawn to revocable trusts due to two common misperceptions.⁶⁵ Such trusts do not save income or estate taxes, nor do they protect the settlor's assets from her creditors. Assets in a revocable trust are included in the value of the gross estate, for estate tax.⁶⁶ Their income is taxed to the settlor, under the grantor trust rules.⁶⁷ Secondly, the settlor's creditors generally have access to assets in the trust.⁶⁸ In contrast to probate administration, the decedent's credi-

61. JOHN R. PRICE, *PRICE ON CONTEMPORARY ESTATE PLANNING* § 10.12, at 1079 (2d ed. 2000).

62. *See infra* notes 302-13 (comparing U.P.C. and Wyoming Statutes).

63. U.P.C. § 3-302 8 U.L.A. Part II 58 (1998).

64. *Id.* § 3-306. Of course, the possible shorter administration of the U.P.C. processes depends on the estate having good legal counsel on how to proceed. *See* Tansill, *supra* note 52 at 243. Revocable trusts are often advocated as a way to plan for your possible disability. Even for this purpose, another devise may be preferable. A durable power of attorney, that authorizes the creation of a revocable trust if necessary, may be a better option. *Id.* at 242-43. If the person is competent until death, the revocable trust will not go into effect, nor will property be transferred to it. Even if the client becomes incompetent, if the durable power of attorney is accepted by third parties as authority for the holder to act on behalf of the incompetent person, the revocable trust may not be needed. The holder can simply act under the durable power of attorney. *Id.*

65. Kruse, Jr., *supra* note 53.

66. 26 U.S.C. § 2038 (1994).

67. *Id.* § 671-679.

68. Any trust interests of the settlor are available to creditors, to the extent the trustee could pay them to the settlor or for his benefit. RESTATEMENT (SECOND) OF TRUSTS § 156(2) (1987). The power to revoke is sometimes equated to ownership of the corpus of the trust in applying the beneficial interest rule of the restatement. OHIO REV. CODE ANN. § 1335.01; *see also* KAN. STAT. ANN. § 58-2414 (2001). The majority of states that have ruled on this issue also apply this restatement rule after death. *Phillips v. Roe*, 580 N.W. 2d 810, 812 (Iowa 1998). *See also* IOWA CODE ANN. § 633.3104(1)(West 2000). The comment to the draft of the Restatement (Third) of Trusts states, regarding revocable trusts, "property held in the trust is subject to the claims of creditors of the settlor or of the deceased settlor's estate if the same property belonging to the settlor or

tors seeking assets of a trust are not cut off by nonclaim statutes, nor may their claims be set aside due to exemptions unique to probate.⁶⁹

Revocable trusts as a vehicle for property succession have two disadvantages. The legal costs of preparing a revocable trust and will are somewhat higher than those for preparing a will only, even a will that contains a trust.⁷⁰ As one experienced lawyer put it,

what is saved by the revocable trust is, in many cases, the cost of the Executor having to marshall the assets of the estate. To a great extent this saving is offset by the increased cost of doing the estate plan, which still includes a Will (albeit a pour-over Will) and a Durable Power of Attorney, but which now includes an additional document, the revocable trust. And because the trust contains provisions involving life and death, it is most complex. This coupled . . . with transferring the assets to the trust . . . [means] the net cost can be many times that of a conventional Will. In effect, the client is prepaying during life what would otherwise be payable after death.⁷¹

Also, revocable trusts require attention after they are created, in transferring property into and out of the trust, and in record keeping.⁷²

From a public policy perspective, another problem with revocable trusts is that the legislative protections for a decedent's spouse and

the estate would be subject to the claims of the creditors, taking account of homestead rights and other exemptions. This result is not dependent on the trust being 'illusory' or 'testamentary,' or on the transfer being a fraudulent conveyance, but is based on the sound public policy of basing the rights of creditors on the substance rather than the form of the debtor's property rights." RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. to subsection 2, (e) (Tentative Draft no. 1, 1996). In 1998, a section was added to the U.P.C. making nonprobate transfers liable to creditors, including transfers that are effective at death from trusts, if the estate is not sufficient to meet creditors' claims. U.P.C. § 6-102, 8 U.L.A. Part II 133 (Supp. 2001). Transfers to a revocable trust can also be invalidated as fraudulent transfers. RESTATEMENT (SECOND) OF TRUSTS § 63(1) (1987). Wyoming has adopted the Uniform Fraudulent Conveyance Act. *See* WYO STAT. ANN. §§ 34-14-101 to 34-14-113 (LexisNexis 2001). Under this Act, transfers that cause insolvency, or that were intended or expected to defraud creditors or cause insolvency, can be set aside. *Id.* §§ 34-14-105, 34-14-107, 34-14-108.

69. Kruse, *supra* note 53, at 1132.

70. Price, *supra* note 61, § 10.15, at 1082. This difference in cost may be partly offset by the deductibility of the fees for creating the trust. *Id.*

71. Solomon, *supra* note 55, at 35.

72. Price, *supra* note 61, § 10.13, at 1080-81.

other family members often are not applied to revocable trusts.⁷³ Revocable trusts, as well as other probate avoidance techniques such as joint tenancy, transfer property at death without such statutory protections as the elective share and the homestead allowance.⁷⁴ Property passed in this way is not in the probate estate, so these statutory protections do not apply. For example, the Wyoming elective share applies when a decedent "by will" deprives the spouse of more than the elective share of property "which is subject to disposition under the will."⁷⁵ Those using the probate avoidance techniques may intend to avoid the statutory protection for spouses and children, and revocable trusts and joint tenancies will be available in Wyoming even if the procedure section of the U.P.C. is adopted.⁷⁶ However, if Wyoming adopts the informal procedures available under the U.P.C., perhaps probate avoidance devices will not be used so routinely, and the public policy that these protections embody will not be so regularly evaded.⁷⁷

C. Other Advantages of the U.P.C.

If Wyoming adopted the probate procedures of the U.P.C., and thus fewer people were motivated to avoid probate, one questionable probate avoidance device used in Wyoming might not be used in the future. In Wyoming, individuals often execute deeds but do not deliver or record them before death, attempting to transfer title to real property without going through probate. The validity of such transfers is not clear, because a court may conclude that the gift was not completed before death. Also, the deed does not comply with the execution require-

73. Nathaniel W. Schwickerath, Note, *Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes*, 48 DRAKE L. REV. 769, 803 (2001). See also Van Foreman McClellan, Note, *Inter Vivos Transfers: Will They Stand Up Against the Surviving Spouse's Elective Share?*, 14 OKLA. CITY U. L. REV. 605 (1989).

74. Schwickerath, *supra* note 73, at 803.

75. WYO. STAT. ANN. § 2-5-101 (LexisNexis 2001). The Wyoming Supreme Court declined to decide whether the elective share should apply to revocable trusts. See *Briggs v. Wyo. Nat'l Bank*, 836 P.2d 263, 265. (Wyo. 1992). The dissent believed the court should have decided the issue. *Id.* at 267. Colorado, through its version of the U.P.C., provides that the elective share applies to revocable trusts, even those executed in other states. COLO. REV. STAT. § 15-11-201, 15-11-202 (2001).

76. Two frequent promoters of revocable trusts advocate their use as a device to avoid the spouse's elective share in some jurisdictions. ROBERT ESPERTI & RENNO L. PETERSON, *THE LIVING TRUST REVOLUTION: WHY AMERICA IS ABANDONING WILLS AND PROBATE*, 221-25 (Viking 1992).

77. The U.P.C. addresses the problem of revocable trusts being used to avoid the possible elective share, in Article 2. U.P.C. § 2-205(2)(ii) 8 U.L.A. Part I, 106 (1998). It adds the trust assets to the augmented estate, the amount used to determine the elective share. *Id.* § 2-202(a).

ments to effect a transfer after death.⁷⁸ Such “revocable deeds” are not a trustworthy method of transferring property at death. Hopefully, the informal probate processes of the U.P.C. would eliminate their use.

Uniformity would be another significant benefit, if Wyoming adopted the U.P.C. Its probate law would then be much more similar to that of surrounding states. Uniformity is a real opportunity for Wyoming because all of the surrounding states have adopted the U.P.C.⁷⁹ In the surrounding states, except for South Dakota, the U.P.C. has been in place for 25 to 30 years, and has not been repealed.⁸⁰

It is true that those states that have adopted the U.P.C. have changed some of its provisions. Wellman and Gordon studied the changes made in Article III by the first nine states to enact the U.P.C., Montana, Utah, Idaho, Colorado, Arizona, Nebraska, Alaska, North Dakota and South Dakota. This includes all states contiguous to Wyoming. They concluded that none of the changes:

[P]osed any serious threat to the Code’s goal of facilitating non-court settlement of decedent’s estates The enactments in Idaho, Alaska, North Dakota and South Dakota are free from any obvious statutory impediment to the functioning of [Article III] as intended by the national draftsmen, and the Colorado and Arizona deviations are so slight that they should not cause serious problems. The future for the Code in Montana, Nebraska, and Utah is more difficult to predict, but these statutes, like the others studied, clearly enable practitioners to reduce probate delays and cost significantly if they choose to do so.⁸¹

Since this study, many of the problematic changes made by

78. ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY*, § 11.3 (2d ed. 1993). Wellman points out that the burdens of traditional probate encourage the use of secret arrangements to redistribute property after death. Wellman, *Lawyers*, *supra* note 6, at 555-56.

79. *See supra* note 11. South Dakota adopted the U.P.C. in 1975 but then immediately repealed it on July 1, 1976. 76 S.D. Laws House Bill No. 705 (1st Sess.); *see also* Wellman & Gordon, *supra* note 5. South Dakota adopted the U.P.C. again in 1994, which became effective in 1995. S.D. Codified Laws §§ 29A-1-101 through 29A-8-101 (Michie 2001). Other states that have adopted the code are Alaska, Arizona, Florida, Hawaii, Maine, Michigan, Minnesota, New Mexico, North Dakota and South Dakota. U.P.C., 8 U.L.A. Part I, 79 (1998).

80. *See supra* note 11.

81. Wellman & Gordon, *supra* note 5, at 526.

Montana and Utah that the study identified have been themselves changed back to provisions identical to the U.P.C. or very similar. For example, Montana has removed its provision requiring the clerk to publish notice to creditors.⁸² Montana has also removed its provision that all claims on which the personal representative has not acted within sixty days are deemed rejected, and thus have to be litigated by the creditor.⁸³ The provision now deems such creditors' claims to be allowed, like the U.P.C. Utah has removed its percentage court-approved statutory fee.⁸⁴ It has also removed the general requirement of a bond for the personal representative that was in its original version of the U.P.C.⁸⁵ Finally, Utah removed a provision that only family allowances approved by a court were exempt from creditors' claims.⁸⁶ In one area, the amendment went the opposite direction. The U.P.C. was amended and is now like the variations adopted by Nebraska, Montana and Utah. The U.P.C. was amended in 1993 to permit a probate later than three years after the decedent's death for the sole purpose of transferring title to property, similar to the provisions of these three states.⁸⁷

Finally, the unnecessary delays and costs of probate have made a significant contribution to the bad reputation of lawyers. Popular publications have given credence to this.⁸⁸ Wellman noted, "Sadly, the probate system is so patently vulnerable to criticism that no amount of favorable and reassuring talk by loyalists is going to satisfy the public."⁸⁹ In his view, the U.P.C.'s "major purpose is to reestablish public confidence in inheritance law."⁹⁰ However, limited data indicates that the U.P.C. procedures have not restored such confidence in states where it has been adopted. An Idaho study concluded "society's pervasive distrust of the probate system has not been altered appreciably by the implementation of a modern probate code."⁹¹

82. MONT. CODE ANN. § 72-3-801 (2001).

83. *Id.* § 72-3-805 (2001).

84. UTAH CODE ANN. § 75-3-718 (2001).

85. *Id.* § 75-3-603.

86. *Id.* § 75-2-404.

87. U.P.C. § 3-108 & amendment note; 8 U.L.A. Part II, 42-43 (1998). NEB. REV. STAT. ANN. § 30-2408 (Michie 2001); UTAH CODE ANN. § 75-3-106 (2001); MONT. CODE ANN. § 73-3-129 (2001).

88. Wellman, *Lawyers*, *supra* note 6, at 549 (noting N. Dancy, *How to Avoid Probate* (1965) and other publications).

89. *Id.* at 550.

90. *Id.* at 551.

91. Terry L. Crapo, *The Uniform Probate Code – It Still Works in Idaho*, 1979 BYU L. REV. 343, 361 (1979).

D. The Uniform Probate Code Has Been Well-Received by Lawyers and Trust Officers

The response of probate lawyers and trust officers to the U.P.C., a few years after it was adopted, was very positive in Idaho. In 1971, Idaho became the first state to adopt the U.P.C. in its entirety.⁹² Based on surveys of lawyers, and surveys and interviews of trust officers, "Idaho's experience demonstrates that the U.P.C. works well in practice and has no basic substantive defects."⁹³ Further, "[c]ode provisions permitting speed and flexibility in disposing of estate assets have proven particularly advantageous."⁹⁴ Sixty-eight percent of attorneys who returned a 1975 survey believed that the U.P.C. was a benefit to them in meeting their client's needs.⁹⁵ Younger attorneys were more likely to see the benefits of adopting the U.P.C. Eighty-five percent of those who had practiced less than 10 years found the U.P.C. beneficial, and 58% of those who had practiced more than ten years did so.⁹⁶ After six years of applying the Code, trust officers "uniformly favored the Code's adoption."⁹⁷ I found no data outside Idaho on how Articles III and IV of the U.P.C. have been received by lawyers in the states in which the U.P.C. was adopted. However, it speaks well for the U.P.C. that it has not been repealed in any state where it has gone into effect except South Dakota, where it was reenacted.⁹⁸

I also found little data on whether the U.P.C. probate process has met its promise of expedited probate administration. The Idaho study did show more efficient probate administration, soon after the U.P.C. was adopted.⁹⁹ In the 1975 survey of Idaho attorneys, 60% believed that the U.P.C. had generally reduced the time required to administer an estate.¹⁰⁰

92. 1971 IDAHO SESS. LAWS ch. 111 at 233-34, codified at IDAHO CODE § 15 (Lexis 2001).

93. Crapo, *supra* note 91 at 361.

94. *Id.*

95. Crapo, *supra* note 37, at 398.

96. *Id.* at 399.

97. Crapo, *supra* note 91 at 360.

98. *See supra* notes 11 and 79.

99. Crapo, *supra* note 37, at 406. The benefits are not because Idaho had a very restrictive probate procedure before it adopted the U.P.C.. Crapo describes prior Idaho probate process as a "reasonably modern probate system." *Id.* For example, it included a summary process to resolve estates in three situations, where the decedent had died over two years ago, where the only heir was a surviving spouse, and where the estate had a value of under \$1500. *Id.* at 396 n.3.

100. Crapo, *supra* note 37, at 398. In this survey, 470 questionnaires were sent out after trying to eliminate those of the 1015 attorneys registered with the Idaho bar who probably do not do probate. The survey had a return rate of 58.5%, or 275. *Id.* at 396 n.4. The survey showed an age differential similar to the one just described in the text

This is not surprising since, soon after the U.P.C. was adopted in Idaho, court-supervised administration was only being used in a small percentage of the probates.¹⁰¹

The Idaho study also shows a reduction in personal representative and attorney fees. Prior to adopting the U.P.C., Idaho had a statutory fee schedule for personal representatives, as Wyoming still does.¹⁰² It was 3% of the estate value over \$10,000. The statutes did not include a fee schedule for lawyers, though the bar had a voluntary fee guideline, which, in 1971, listed a 3% fee for community property up to \$10,000 and all property over \$10,000.¹⁰³ Based on probate files, it appears that lawyers relied on that bar schedule before the U.P.C. was enacted.¹⁰⁴ On the other hand, the U.P.C. fee provision, adopted in Idaho, allows the personal representative to set a reasonable fee for herself and the lawyer, subject to review by the court if an interested party seeks review.¹⁰⁵ Based on data in the surveys, and from inheritance tax filings and probate files, the study concludes that "in most estates [the U.P.C.] continues to hold probate costs significantly below pre-UPC levels."¹⁰⁶

Idaho lawyers perceived that the amount of their fees for similar estates was declining, and more objective data also supports this perception.¹⁰⁷ The median of the fee reduction these lawyers estimated was 30%, and other data bore this out.¹⁰⁸ Personal representatives' fees showed an even greater drop.¹⁰⁹

on the question of whether the U.P.C. reduced the administration time. *Id.* at 399. Administration time may be measured in two different ways. For example, Crapo pointed out that administration of taxable estates may require less hours, though the final closing may not occur sooner, since the estate tax liability must be settled first. Crapo, *supra* note 91, at 358.

101. Crapo, *supra* note 37, at 412.

102. IDAHO CODE §15-1107 (Michie pre-U.P.C.). See Crapo, *supra* note 37, at 395, n.2, for the fee schedule.

103. Crapo, *supra* note 37, at 402 n.17 (citing the Idaho State Bar Deskbook (July 1971)).

104. Crapo, *supra* note 91, at 348.

105. U.P.C. §§ 3-715(18)-(21), 8 U.L.A. Part II, 170, § 3-721, 8 U.L.A. Part II, 204-05 (1998). This means that the fees will often not be part of the court record, which makes it difficult to study them. Lee, *supra* note 52, at 5.

106. Crapo, *supra* note 91, at 344. For his data on fees, Crapo relies on Kinsey, *A Contrast of Trends in Administrative Costs in Decedent's Estates in a Uniform Probate Code State (Idaho) and a Non-Uniform Probate Code State (North Dakota)*, 50 N.D. L. REV. 523, 524-25, 527 (1974).

107. Crapo, *supra* note 37, at 404. Fifty seven point six percent of lawyers believed that fees had been reduced due to the U.P.C. procedures. *Id.*

108. *Id.* See Crapo, *supra* note 91, at 348. For 1974-77, the average attorney fee was 2.4% of the estate, for the 844 estate accountings examined. *Id.* at 346 Table-1.

109. *Id.* at 348. For 1974-77, the average fee was 51% below the average fee in

Looking at the process from the lawyer perspective, Wyoming lawyers practicing probate may be concerned that they will lose income if the probate process is streamlined. However, it is possible that the volume of probate business may increase, as fewer clients seek to avoid probate by using joint tenancies and revocable trusts.¹¹⁰

The remainder of this article will describe the Wyoming probate administration procedures, and compare them to the U.P.C. procedures.¹¹¹ I will also discuss the fee provision in both Wyoming and the U.P.C. Then, I will address the protection the U.P.C. provides for beneficiaries and creditors who seek it, and the protection it provides to personal representatives. Finally, I will compare the ancillary probate procedures under both the Wyoming Code and the U.P.C.

II. WYOMING PROCEDURES FOR ADMINISTRATION OF ESTATES

Wyoming's first Legislature enacted the Probate Procedure Act in 1891.¹¹² "Comparatively few and no truly significant alterations" were made to that Act prior to the 1979 and 1980 changes described in the first section of this article.¹¹³ Few significant changes have been made since then.¹¹⁴ I will describe the current Wyoming law on the passing of

1971. *Id.*

110. Wellman, *Lawyers*, *supra* note 6 at 555. Wellman also points out that lawyers' overall probate revenue may go up because they are receiving a reasonable fee for small estates. See *infra* text accompanying notes 267-273.

111. I hope the article can also serve as a partial reference on changes made to Article III of the U.P.C. by states adopting it. The Uniform Laws Annotated expressly does not attempt to provide that information. Variations from Official Text, 8 U.L.A. Part I, 24 (1998). The only resource with significant such information that I found was the Wellman & Gordon article, which was published in 1975! Wellman & Gordon, *supra* note 5.

112. 1890-91 Wyo. Sess. Laws 70 at 243-304. (Lawrence H. Averill, *Wyoming's Law of Decedent's Estates, Guardianship and Trusts: A Comparison with the Uniform Probate Code—Part 1*, 7 LAND & WATER L. REV. 169, 173 n.20 (1972)).

113. Averill, *supra* note 16, at 173.

114. For example, in the most important chapter for this article, Chapter 7, Administration of Estates (which is 43 pages in the current annotated code), the only significant changes since the 1980 Code are a 1981 shortening of the time to file an inventory when the elective share is involved, WYO. STAT. ANN. §2-7-403 (LexisNexis 2001); a 1981 provision allowing the court to close an estate on its motion, WYO. STAT. ANN. § 2-7-815 (LexisNexis 2001); a 1981 and 1985 loosening of the appraisal requirements, WYO. STAT. ANN. § 2-7-404 (LexisNexis 2001); a 1987 provision to allow additional fees to the personal representative and the attorney when the statutory fees are "not equitable", WYO. STAT. ANN. § 2-7-803 to 804 (LexisNexis 2001); 1989 changes in notice to creditors, WYO. STAT. ANN. §§ 2-7-205, 7-703 (LexisNexis 2001); and a 1989 prohibition of the discharge of a personal representative until takes are paid and certain evidence of that is presented, WYO. STAT. ANN. § 2-7-812 (LexisNexis 2001).

decedent's property, beginning with what happens if no action is taken, and ending with the general, court-supervised probate.

A. Do Nothing

In Wyoming, the passage of time will eliminate unsecured creditor's claims and protect purchasers of decedent's property from such creditors if the decedent dies intestate. Creditors have two years from the decedent's death to seek appointment as the personal representative.¹¹⁵ If no letters are issued within that time, "all claims of creditors are forever barred and the purchasers of the property of the decedent from the heirs of the decedent shall take the title free from any claim of creditors."¹¹⁶ Secured creditors are not barred.¹¹⁷

If the decedent dies with a duly executed will, there appears to be no time limit for probating the will, and presumably the regular statute of limitations for the type of creditor's claim would apply to the claim.¹¹⁸ While the Wyoming code declares that property "passes" to heirs or will beneficiaries, the provision goes on to say that the property is subject to the control of the court.¹¹⁹

Wyoming also has procedures that eliminate probate entirely, or provide a less cumbersome process than regular probate, which I will now describe. However, they apply in very narrow circumstances.

B. Distribution by Affidavit

For personal property in probate estates whose total value is \$150,000 or less, an affidavit procedure permits title to a decedent's personal property to be transferred, without any court filing.¹²⁰ This non-

115. WYO. STAT. ANN. § 2-4-211 (LexisNexis 2001).

116. *Id.* § 2-4-212. This is a special statute of limitations and an absolute bar to creditors claims. *Kuntz v. Kinne*, 395 P.2d 286, 288 (Wyo. 1964).

117. WYO STAT ANN § 2-4-212 (LexisNexis 2001).

118. For example, if the creditor had a written contract with the decedent, the statute of limitations is ten years after the cause of action accrues. WYO. STAT. ANN. § 1-3-105(a)(i) (LexisNexis 2001). Any custodian of a will must file it with the clerk of court within ten days after he knows of the death. WYO. STAT. ANN. § 2-6-119 (LexisNexis 2001). The apparent requirement in the Wyoming statute that the personal representative petition for probate of the will within thirty days of knowledge of the death and knowledge that he is executor, simply permits someone else to file, if the personal representative does not act. WYO. STAT. ANN. § 2-6-202 (LexisNexis 2001)

119. *Id.* § 2-7-402.

120. *Id.* § 2-1-201. 2002 Wyo. Sess. Laws 60.

probate process was taken from the U.P.C.¹²¹ The statute protects third parties that make the transfers pursuant to the affidavits.¹²² The dollar limit was recently increased from \$70,000 to \$150,000.¹²³

C. *Probate of the Will Without Administration*

A will can be probated by the judge or a court clerk in Wyoming, after a hearing, without any administration.¹²⁴ The person seeking probate must state that a copy of the will and petition was mailed to all heirs and devisees.¹²⁵ No other notice is required prior to admission of the will to probate.¹²⁶ Under this procedure, the order probating the will shall not appoint an executor.¹²⁷ After the order is entered, admitting the will to probate or denying admission, the order and will are to be sent by certified mail to all heirs and beneficiaries.¹²⁸ To limit the time period for contesting the will, notice must be published.¹²⁹

121. Averill, *supra* note 16, app. I at 389. This was added in the 1980 Code. *Id.* at 157 n.224. In the U.P.C., the limit is \$5,000, though that was approved in 1969. U.P.C. § 3-1201 8 U.L.A. Part II, 307 (1998). Interestingly, the Wyoming dollar limit is much higher than any in the region for transfers by affidavit. Four states have a \$25,000 limit. IDAHO CODE § 15-3-1201 (Michie 2001); NEB. REV. STAT. § 30-24-125 (2001); UTAH CODE ANN. § 75-3-1201 (2001); and S.D. CODIFIED LAWS § 29A-3-1201 (Michie 2001). The limit is \$27,000 in Colorado, COLO. REV. STAT. ANN. § 15-12-1201 (West 2001), and \$20,000 in Montana, MONT. CODE ANN. § 72-3-1101 (2001), and Nevada, NEV. REV. STAT. § 146.080 (2001). The limit is \$15,000 in North Dakota, N.D. CENT. CODE § 30.1-23-01 (2001). All of these except Nevada have adopted the U.P.C. so they have the informal appointment and probate available for small estates. This probably explains why the dollar amount has stayed low in these states. Washington, Oregon and California, states that have not adopted the U.P.C., have limits closer to Wyoming's limit. WASH. REV. CODE § 11.62.010 (2001); OR. REV. STAT. § 114.515 (2001); CAL. PROB. CODE § 13101(a)(5) (West 2001). There is no protection for creditors in these affidavit procedures, which may also explain their low dollar limits in many jurisdictions. Informal probate under the U.P.C. has more protection for creditors and other beneficiaries. See *infra* Part E of the U.P.C. Section.

122. WYO. STAT. ANN. § 2-1-202 (LexisNexis 2001).

123. 2002 Wyo. Sess. Laws 60.

124. WYO. STAT. ANN. § 2-6-122 (LexisNexis 2001). "[T]here shall be no delay in the hearing, unless good cause appears." *Id.* There is also a procedure for simply filing a will which requires a petition and mailed notice, *id.* § 2-6-121, though I do not see its usefulness.

125. WYO. STAT. ANN. § 2-6-122 (LexisNexis 2001).

126. *Id.* § 2-6-203.

127. *Id.* § 2-6-122(c).

128. *Id.* § 2-6-209. Averill discusses the uncertainty about the appeal of such an order. Averill, *supra* note 16, at 168-69.

129. WYO. STAT. ANN. § 2-6-122(d) (LexisNexis 2001). After using this procedure to probate the will and limit any will contest, the beneficiaries could use the affidavit procedure with more confidence, as a way to transfer personal property, if the estate value was \$150,000 or less.

D. Summary Procedures

All other Wyoming procedures require notice by publication and a court decree to transfer title to property. A somewhat shorter procedure than full probate applies if the named executor is the sole beneficiary. After the court sets bond, an inventory and appraisal are filed, and notice by publication is made, the estate vests in the beneficiary, who agrees to be liable for any debts.¹³⁰

Wyoming also has an early distribution and closing procedure for estates where the whole estate consists of exempt property.¹³¹ The personal representative must publish notice of the opening of probate and of a required hearing. An appraisal is also required. At the hearing, the court decides if exemptions cover the whole value of the estate. If so, it sets over the property to those entitled, and the probate administration is complete.¹³²

Two summary procedures apply to transfer title to real property only. The procedure that can be done immediately is limited to probate estates whose value is \$150,000 or less.¹³³ An application must be filed in the district court where the property is located. Notice of the application to distribute the property must be published. A disinterested appraisal is also required. The court may then enter a decree establishing the right and title to the real property. The decree is presumptive evidence of title even if false statements were used to procure the decree.¹³⁴

The other summary procedure for title to real estate has no dollar limit but can only be used when two years have passed since the prior owner's death.¹³⁵ After direct notice to those interested, including credi-

130. *Id.* § 2-11-301. This provision seems to be misplaced. In 1980, it was added to the chapter on Foreign Wills. Averill, *supra* note 16, at 161 n.244. However, the language of the provision is not limited to foreign wills. *See* § 2-11-301. Averill also points out that to qualify to use this procedure, all beneficiaries of an estate other than the residuary beneficiary could disclaim their interests. Averill, *supra* note 16, at 162. However, the residuary beneficiary would have to be the executor named in the will. *Id.*

131. WYO. STAT ANN § 2-7-505 (LexisNexis 2001). This procedure existed before the 1980 Code but was "exposed and revitalized" by that Code. Averill, *supra* note 16, at 160. The main exempt property would be that covered by the \$30,000 homestead exemption. WYO STAT ANN § 2-7-508 (LexisNexis 2001).

132. *Id.* §2-7-505. The U.P.C. has a similar procedure. *See* U.P.C. §§ 3-1203 & -1204 8 U.L.A. Part II, 309-10 (1998) (amended 1999). No notice to creditors is required, and the personal representative may use the informal closing process. *See infra* text accompanying notes 226-32.

133. WYO. STAT. ANN § 2-1-205 (LexisNexis 2001). 2002 Wyo. Sess. Laws 60.

134. *Id.*

135. *Id.* §2-9-201.

tors, heirs and beneficiaries, notice by publication, and a hearing, the court determines the rights in the real property.¹³⁶

E. *Wyoming Regular Probate*

In all other situations, the court in Wyoming is involved in probate administration from the time of appointment of the personal representative until the closing of the estate. This is true whether the estate passes by will or by intestacy. Also, the process is similar, whether the probate is uncontested or involves substantial controversy.

Wyoming statutes prescribe what must be included in the petition for probate of a will.¹³⁷ After it is filed, "the court or the clerk may hear it forthwith or at such time and place as the court or clerk may direct, with or without requiring notice, and upon due execution of the will, admit the same to probate."¹³⁸ The statute goes on to state that notice is not required unless the court finds good cause to require notice.¹³⁹ Wyoming has a similar process for appointment as executor or administrator.¹⁴⁰ A bond must be posted to administer an estate, either testate or intestate, unless the will expressly waives the requirement or the distributees waive it in writing.¹⁴¹ After probate of the will, and appointment of the executor or administrator as personal representative, the personal representative is required to publish notice of the probate and appointment, including the limit on creditors claims, in a local newspaper, once

136. *Id.* §2-9-202 & -203.

137. *Id.* § 2-6-201.

138. *Id.* § 2-6-202. Apparently, in practice, a hearing is not usually required in Wyoming, at least in Albany County.

139. *Id.*

140. WYO. STAT. ANN. §§ 2-4-205-211 (LexisNexis 2001). I am inferring from this statute on appointment in intestate cases that no pre-hearing notice is required, because no requirement is stated. The administrator can be appointed immediately, it appears. Where the decedent dies testate, the appointment of the executor is a part of the petition for probate. *See Id.* §§ 2-6-201 & 208. The procedure in § 2-6-203 to probate a will without pre-hearing notice is similar to the informal probate under the UPC. *See WYO. STAT. ANN. § 2-6-203* (LexisNexis 2001). *See infra* text accompanying notes 186-192. *See also* Averill, *supra* note 16, app. I at 391 (§ 2-6-203 existed, in part, before the 1980 code and was partly taken from the Iowa Probate Code). The concept is a return to the "common form probate" that was the one of the first probate procedures brought from England to the early colonies. Wellman, *Blueprint*, *supra* note 8, at 463 (citing Lewis M. Simes, *The Function of Will Contests*, 44 MICH. L. REV. 503 (1946)). Under common form probate, proof of wills and appointment was to be made without prior notice or other delay. Wellman, *Blueprint*, *supra* note 8, at 463.

141. WYO STAT ANN §§ 2-3-102 & 111 (LexisNexis 2001). Averill points out the ambiguities and the problems raised by the latter provision on waiver by the distributees. Averill, *supra* note 16, at 172.

a week for three weeks.¹⁴² Notice must also be mailed to heirs, beneficiaries, and known creditors.¹⁴³

An inventory must be filed with the court within 120 days of appointment and an appraisal under oath must be filed within 120 days after the inventory.¹⁴⁴ The statute requires that the personal representative employ a disinterested person to determine the value of any asset that does not have a readily determinable value.¹⁴⁵

The court supervises all sales, mortgages or leases of property, though this court involvement can be waived by will.¹⁴⁶ The personal representative must petition for authority to sell, with prior notice given for sale of real estate.¹⁴⁷ The court may set conditions for sale, such as a public auction, and the court must confirm the sale and its terms.¹⁴⁸ If not expressly waived, even sales that the decedent had contracted to perform before he died must be approved by the court, after notice and hearing.¹⁴⁹ Even if the will authorizes sales of real property to be made without court approval, the personal representative must give notice to the surviving spouse and all heirs or beneficiaries prior to the sale.¹⁵⁰

As for payments or distributions from the estate, the court must approve any support allowance, and set over the homestead and other exempt property.¹⁵¹ Notice and hearing are required for any other distribution of the estate.¹⁵² Finally, any payment of fees during the admini-

142. WYO. STAT. ANN. § 2-7-201 (LexisNexis 2001).

143. *Id.* § 2-7-205(a).

144. WYO. STAT. ANN. § 2-7-403(a) & 404 (LexisNexis 2001). Failure to comply in good faith with the time limitations may result in the personal representative being found in contempt of court and a fine may be imposed. WYO. STAT. ANN. § 2-7-403(a) (LexisNexis 2001). The requirements for the inventory are less rigid than they were in the 1980 Code. *See* Averill, *supra* note 16, at 162-63.

145. WYO. STAT. ANN. § 2-7-404(a)(ii) (LexisNexis 2001).

146. *Id.* §§ 2-7-614-626 & 609. *See also* WYO. STAT. ANN. § 2-3-501 (LexisNexis 2001) (mortgage property). The personal representative does not have to follow the court-supervised procedures for perishable property and personal property for which there is a regular market. WYO. STAT. ANN. § 2-7-613 (LexisNexis 2001).

147. *Id.* § 2-7-614-615.

148. *Id.* § 2-7-615-621.

149. *Id.* §§ 2-7-601-608.

150. *Id.* § 2-7-205(c).

151. *Id.* §§ 2-7-501(a), 502 & 505.

152. *Id.* § 2-7-807. The court must determine that there is property available beyond what is needed for administration and claims, and the petition cannot be filed until 30 days after the deadline for claims to be filed. *Id.* The statute appears to require proportionate distribution. *Id.* § 2-7-807(c). *See* Averill, *supra* note 16, at 173-74, for a discussion of possible interpretations of that provision.

stration of the estate must be done by court order.¹⁵³ Expenses can be paid at any time, subject to approval in the final report.¹⁵⁴

All creditor claims must be submitted to the court clerk, who then sends a copy to the personal representative.¹⁵⁵ Creditors' claims that are not filed within the later of three months after notice by publication, or thirty days after mailed notice, are barred.¹⁵⁶ However, the Wyoming statute contains an exception that lessens the finality of this bar. The statute provides that claims are not barred if the court finds that the claimant is "entitled to equitable relief due to peculiar circumstances."¹⁵⁷ If the personal representative is a creditor of the estate, the court must appoint a temporary administrator to represent the estate in regard to the claim, and the court must either allow the claim, or treat it as a contested claim.¹⁵⁸ Allowance or rejection of all claims must be filed with the clerk.¹⁵⁹ The personal representative may choose to adjudicate claims. After hearing, a decree may be entered, binding distributees.¹⁶⁰

Probate in Wyoming must be completed in one year from the appointment of the representative, unless a court grants a continuance for good cause.¹⁶¹ This was the Wyoming legislature's response, in the 1980 Code, to public criticism of delays in probate.¹⁶²

The final report and a final accounting must be set for hearing after notice.¹⁶³ The personal representative must present evidence to the court that all taxes have been paid before the estate can be closed or the personal representative discharged.¹⁶⁴ Expenses are approved and fees

153. WYO. STAT. ANN. § 2-7-805(a) (LexisNexis 2001).

154. *Id.* § 2-7-802(a).

155. *Id.* §2-7-703(a) & (b). Claims could be submitted to the personal representative until this change was made in the 1980 code. Averill, *supra* note 16, at 164.

156. WYO. STAT. ANN. § 2-7-703(a) (LexisNexis 2001).

157. *Id.* § 2-7-703(c)(i). This was added in the 1980 Code and taken from the Iowa Code. Averill, *supra* note 16, at 164. Averill concluded that this exception created a "significant loophole" in Iowa.

158. WYO. STAT. ANN. § 2-7-708 (LexisNexis 2001).

159. *Id.* § § 2-7-712.

160. *Id.* § 2-7-715.

161. *Id.* § 2-7-801(a-c).

162. Averill, *supra* note 16, at 164-65. Averill predicted that the rule might actually slow down probate, if one year becomes the benchmark. To him, the rule made the clerk a "bureaucrat who dispenses red tape," as the clerk is to bring all problems under the time limit to the attention of the court. The U.P.C. has no deadline for completing probate, though interest must be paid on general pecuniary devises after one year from the appointment of the personal representative. U.P.C. § 3-904, 8 U.L.A. Part II, 271 (1998).

163. WYO. STAT. ANN. §§ 2-7-812, 813 (LexisNexis 2001).

164. *Id.* § 2-7-812. Averill criticized the 1981 version of this provision as invading

ordered, upon hearing on the final report and accounting.¹⁶⁵ The personal representative then seeks a court order discharging her from liability.¹⁶⁶

Supervised probate in Wyoming merits a careful reexamination. As Wellman said, most of what the public has identified and criticized about probate is related to court-supervised administration.¹⁶⁷ He describes court-supervised probate in this way,

[T]he personal representative handles the business of administration as if he were a receiver in a closely watched proceeding to wind up the affairs of an insolvent debtor.¹⁶⁸

While this may be appropriate in the hotly contested estate, independent administration, which is an option under the U.P.C., is appropriate for most estates.

III. U.P.C. PROCEDURES

A. *Do Nothing*

Before turning to informal probate, I will discuss how the U.P.C. treats a decedent's property when no probate procedure is undertaken. Suppose nothing is done after a decedent's death. If the affidavit procedure, discussed next, is not used, or the estate is not eligible to use it, and no action is taken on behalf of an intestate estate, the U.P.C. directly addresses transfer of title to assets and establishing that title. Under the U.P.C., if a decedent dies intestate, heirs can establish title by proving the decedent died owning the property, proving the death occurred and proving the devisee's relationship to the decedent.¹⁶⁹ The property descends to the heirs, subject to creditors, family allowance and abate-

the privacy of those involved in the estate, and as causing unnecessary delay. He pointed out that the tax collectors have plenty of tools to collect taxes, without getting the probate court involved. Averill, *supra* note 16, at 166-67. In 1989 the statute was amended but it did not loosen the requirements. Instead, it was made explicit that the personal representative would not be discharged without certain proof. The U.P.C. informal closing requires that the personal representative state that all taxes have been paid "except as specified in the statement" and the statement must include "arrangements that have been made to accommodate outstanding liabilities." U.P.C. § 3-1003, 8 U.L.A. Part II, 294-95 (1998).

165. WYO. STAT. ANN. § 2-7-802(a) (LexisNexis 2001).

166. *Id.* § 2-7-814.

167. Wellman, *Blueprint*, *supra* note 8, at 468.

168. *Id.*

169. This can be inferred from U.P.C. § 3-101, 8 U.L.A. Part II, 29 (1998).

ment.¹⁷⁰ If a decedent dies testate, a will must be probated, to be effective to transfer property.¹⁷¹ However, the will can be informally probated, without appointment of a personal representative.¹⁷²

The U.P.C. provides a one year from death cut off for creditor's claims against the estate and against the distributees, even if no notice is given.¹⁷³ Therefore, in an intestate estate, where no action is taken to administer the decedent's estate, the statutes of limitations in the U.P.C. may effectively clear heirs' title, if the heirs are willing to wait. After one year, the decedent's creditors would not have any claim to the property now possessed by the heirs. This would also be true for the beneficiaries of a testate estate, where the will was probated, even where no personal representative was appointed. In that situation, as Averill puts it, title is answered by "the passage of time."¹⁷⁴

170. *Id.* Wyoming has a similar provision, though the property is also "subject to the possession of the personal representative and to the control of the court . . ." WYO. STAT. ANN § 2-7-402 (LexisNexis 2001).

171. U.P.C. § 3-102, 8 U.L.A. Part II, 33-34 (1998). This seems to conflict with the prior section which provides that if the decedent executed a will, property automatically devolves to the devisees, subject to family allowances, the elective share, creditors, administration, as with intestacy. U.P.C. § 3-101, 8 U.L.A. Part II, 29 (1998).

172. U.P.C. § 3-302, 8 U.L.A. Part II, 58 (1998).

173. U.P.C. § 3-803(a)(1) & § 3-1006. This applies to claims that arose before the death of the decedent. The original U.P.C. provided a bar on creditor's claims against the estate and the distributees of three years after death. U.P.C. § 3-803 and § 3-1006 official cmt. However, in 1989, that was reduced to one year. *Id.* Four of the U.P.C. states adopted the amendments as to both claims against the estate and against the distributees, (COLO. REV. STAT. §§ 15-12-803 & 15-12-1006 (2001); N.M. STAT. ANN. §§ 45-3-803 & 45-3-1006 (LexisNexis 2001); S.C. CODE ANN. §§ 62-3-803 & 62-3-1006 (Law. Co-op. 2001); UTAH CODE ANN. §§ 75-3-803 & 75-3-1006 (2001)). Two adopted the amendment as to claims against the estate, but kept the three-year limit for claims against distributees. MINN. STAT. §§ 524.3-803 & 524.3-1006 (2001); MONT. CODE ANN. §§ 72-3-803 & 72-3-1013 (2001). Three states adopted a two year limit for both. ARIZ. REV. STAT. §§ 14-3803 & 14-3936 (2001); FLA. STAT. ch. §§ 733.702 & 733.710 (2001); IDAHO CODE §§ 15-3-803 & 15-3-1006 (LexisNexis 2001). Hawaii has an eighteen month limit for both and Maine has a nine month limit for both. HAW. REV. STAT. ANN. §§ 560:3-803 & 560:3-1006 (LexisNexis 2001); ME. REV. STAT. ANN. tit. 18-A §§ 3-803 & 3-1006 (West 2001). Finally, five states continue to have three year limits for both. ALASKA STAT. §§ 13.16.460 & 13.16.645 (LexisNexis 2001); MICH. COMP. LAWS §§ 700.3803 & 700.3957 (LexisNexis 2001); NEB. REV. STAT. ANN §§ 30-2485 & 30-24,120 (LexisNexis 2001); N.D. CENT. CODE §§ 30.1-19-03 & 30.1-21-06 (2001); S.D. CODIFIED LAWS §§ 29A-3-803 & 29A-3-1006 (LexisNexis 2001). *See also* Wellman, *Blueprint*, *supra* note 8, at 490 n.151 (noting that these bars probably do not apply to tax liens).

174. Lawrence H. Averill, *Wyoming's Law of Decedent's, Estates, Guardianship and Trusts: A Comparison with the Uniform Probate Code—Part II*, 8 LAND & WATER L. REV. 187, 207 (1973). Another possible claim, for family allowances and the elective share, will not be an issue in many estates. Those claiming an interest in an estate under

Despite the statutes of limitations just discussed, the intestate statute's "subject to" conditions on the heir's title may cause title examiners to hesitate to insure the title, when the intestate heir tries to transfer the property. For most estates, the benefit of informal appointment of a personal representative, to more easily establish title for transferees, will outweigh its minimal burden. As Averill says, "Realistically . . . purchasers and transfer agents will demand proof of heirship and that no will was probated within the three year limitation in any county in the state."¹⁷⁵

The appointment of a personal representative may be critical. The U.P.C. protects the title of those who purchase from persons to whom the appointed personal representative distributes property. As Wellman said, "The protection of real property titles was uppermost in the minds of the draftsmen."¹⁷⁶ The purchaser takes title "free of rights of any interested person in the estate and incurs no personal liability to the estate, or to any interested person, whether or not the distribution was proper or supported by court order or the authority of the personal representative was terminated before execution of the instrument or deed."¹⁷⁷ This broad protection for purchasers begins with a distributee receiving title from a personal representative.¹⁷⁸ Note that the purchaser is protected without a supervised administration or formal closing, but simply an informal appointment of the personal representative.¹⁷⁹ An official comment to the provision on persons dealing with the personal representative states, "The purpose of the Code is to make the deed or instrument of distribution the usual monument of title."¹⁸⁰

In addition to providing the basis for purchaser protections, ap-

an unprobated will have a three year statute of limitations. This is because a will cannot be probated when more than three years have passed since the decedent's death, except in narrow circumstances such as uncertainty as to whether the owner is dead. U.P.C. § 3-108.

175. Averill, *supra* note 174, at 207.

176. Wellman, *Lawyers*, *supra* note 6, at 556.

177. *Id.* The real owner has other remedies. Distributees must make restitution if property is received in error. U.P.C. §§ 3-909, 3-1004. The personal representative is liable for any improper action regarding the estate. U.P.C. § 3-712. *See also* U.P.C. § 3-1005.

178. U.P.C. § 3-910.

179. In a testate estate, "[i]nformal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding." U.P.C. § 3-302. Also, if a personal representative is appointed and then is terminated, without transferring the property, the title of devisees and heirs is cleared. U.P.C. § 3-711 official cmt.

180. U.P.C. § 3-714 official cmt. The comment continues, "[h]owever, this is not available when no administration has occurred and, in that event, reliance on general recording statutes must be had." *Id.*

pointment is necessary for creditors to enforce claims against the estate, prior to distribution of the property.¹⁸¹ Also, a personal representative cannot administer an estate without being appointed and, once appointed, is protected from liability if she acts within her authority.¹⁸² Again, an informal appointment is sufficient for these purposes.

B. *Affidavit Procedure*

For very small estates, the U.P.C. includes the affidavit procedure that Wyoming adopted.¹⁸³ In the original 1969 U.P.C., the upper limit on the estate value was \$5000. This limit would likely be increased if Article III of the U.P.C. were adopted in Wyoming. However, the U.P.C.'s informal probate and appointment might make it unnecessary to set the limit as high as the \$150,000 limit in Wyoming's current code.¹⁸⁴

C. *Informal Appointment, Probate and Closing*

Informal procedures for appointment, probate and closing are available under the U.P.C. to all estates, small and large. Informal procedures are useful as a starting point, and may well be all that is needed in an estate in which there is no disagreement about distribution and administration, and there are no serious issues with creditors. In Idaho, six years after the U.P.C. became effective, it was reported that "[a] strong emphasis is placed on using informal estate openings whenever possible."¹⁸⁵

Wyoming already has the informal initial steps in the procedure. Where the decedent had a will, Wyoming permits the probate of the will, and the appointment of the personal representative, without prior notice. This provision was added as part of the 1980 Code.¹⁸⁶ However, a hearing appears to be required.¹⁸⁷

Under the U.P.C., an informal appointment is made by a judge or court official.¹⁸⁸ The court official is called a registrar in the code and

181. U.P.C. § 3-104.

182. U.P.C. §§ 3-103, 3-703(b).

183. *See supra* Part II.B.

184. WYO. STAT. ANN. § 2-1-201 (LexisNexis 2001).

185. CRAPO, *supra* note 91, at 358.

186. WYO. STAT. ANN. § 2-6-203 (LexisNexis 2001). *See supra* note 140.

187. *Id.* *See supra* note 46.

188. U.P.C. § 3-307. The registrar can be a judge, clerk or anyone else designated by the court. *Id.* § 1-307. One of Governor Herschler's stated concerns in vetoing the U.P.C. was that the court clerks had advised him that the U.P.C. would require additional employees in the clerk's office and that they would be required to give advice that

could be the clerk in the Wyoming court system.¹⁸⁹

Under the U.P.C., informal appointment can be made within 120 hours of death, without hearing or general prior notice, and whether the decedent dies intestate or testate.¹⁹⁰ Notice is only required for two narrow groups of people. First, those who file with the court a demand for notice must be notified prior to the appointment.¹⁹¹ Second, in intestacy, the U.P.C. requires notice, before the appointment, to anyone who has statutory priority over the person applying and has not waived his or her priority.¹⁹²

The court official must check the application for informal appointment to see that it conforms with a statutory list of requirements.¹⁹³ The court official's job is simply to review the application to see if the proper statements and verification are included, and that certain basic requirements are met such as venue and priority for appointment.¹⁹⁴ However, she has broad discretion to refuse the application and the applicant must then turn to formal proceedings.¹⁹⁵ If the application conforms to the statutory requirements, the personal representative is appointed and authorized to act.¹⁹⁶ Informal appointment cannot be used to appoint someone who does not have priority under the will unless those with priority have renounced their interest.¹⁹⁷ Similarly, a person who does not have priority under the U.P.C. to administer an intestate estate must be appointed in a formal proceeding, unless those with priority have renounced their interest.¹⁹⁸ Finally, anyone who objects to an informal appointment must use the formal appointment process.¹⁹⁹

Under the U.P.C., a similar informal procedure is available for

was outside their "province." Letter from Hon. Ed Herschler, Governor of Wyoming, to Thyra Thompson (March 14, 1975) (on file with the Wyoming Secretary of State's Office). Despite this, the 1980 Wyoming Code authorizes the clerk to probate wills without prior notice. WYO. STAT. ANN. § 2-6-203 (LexisNexis 2001).

189. *Id.* § 2-6-203.

190. U.P.C. §§ 3-301, 3-307-308. The appointment is delayed thirty days unless the person applying is the personal representative at the decedent's domicile, or the will states that the law of the state where appointment is sought shall apply. *Id.* § 3-307.

191. U.P.C. §§ 3-204, 3-308(a)(6).

192. *Id.* § 3-310.

193. *Id.* §§ 3-301, 3-308(a)(6).

194. *Id.* § 3-308.

195. *Id.* § 3-309. The registrar may decline the application for "any reason." *Id.*

196. *Id.* § 3-307.

197. *Id.* §§ 3-308(a)(7), 3-203 (c), (e).

198. *Id.* § 3-203(e).

199. U.P.C. § 3-203(b).

probate of the will.²⁰⁰ Again, the court official's job is to see that the application meets the statutory requirements, though she has broad discretion to refuse to probate the will.²⁰¹

An executor may choose to proceed informally, in order to quickly obtain the authority to act, even if she plans to pursue a formal adjudication of testacy later.²⁰² The formal testacy could be readily combined with a formal closing.²⁰³

Once letters are issued by the court official, the personal representative may administer the estate without further court approval.²⁰⁴ The personal representative has a general duty to "observe the standards of care applicable to trustees," as described elsewhere in the U.P.C.²⁰⁵ She is also obligated to follow the will and act "as expeditiously and efficiently as is consistent with best interests of successors to the estate."²⁰⁶ Beyond that, the appointed personal representative "gets statutory powers and duties that permit full administration and closing of an estate without further contact with the probate office or court."²⁰⁷ She may "accomplish the entire job of collecting assets, paying debts, and selling land or intangibles as needed to raise necessary cash and distributing the estate to the successor" without further court orders.²⁰⁸

As previously discussed, the informally appointed personal representative has the ability to pass marketable title to property.²⁰⁹ Distrib-

200. *Id.* § 3-301.

201. *Id.* §§ 3-303, 3-305. The registrar can decline to probate the will in informal proceedings because of "failure to meet the requirements of § 3-303 & § 3-304 or any other reason . . ." *Id.*

202. Wellman, *Blueprint*, *supra* note 8, at 494.

203. Lawrence H. Averill, *An Introduction to the Administration of Decedents' Estates Under the Uniform Probate Code*, 20 S.D. L. REV. 265, 276 (1975).

204. U.P.C. §§ 3-307(b), 3-704. These code sections apply do not distinguish between formally and informally appointed personal representatives.

205. *Id.* § 3-703(a) (including by reference U.P.C. § 7-302, the trustee's duties in the Uniform Probate Code article on trust administration).

206. *Id.*

207. Wellman, *Lawyers*, *supra* note 6, at 553. U.P.C. § 3-715 includes a long list of actions that a personal representative may take unless restricted by the will or in an order in a formal proceeding. *Id.*

208. U.P.C. § 3-711; Wellman, *supra* note 6, at 492-93. Banks in Idaho reported that the frequently sell assets without court approval, and found this to be a "major administrative advantage of the U.P.C." Crapo, *supra* note 91, at 358-59. Section 3-715 includes a long list of actions that are expressly authorized as long as the personal representative acts "reasonably for the benefit of the interested persons." U.P.C. § 3-715.

209. *See supra* text accompanying notes 177-180.

utees then can give marketable title to purchasers.²¹⁰ Due to the powers granted the personal representative, no further proceeding may be needed after informal appointment. Proceedings under Article III of the U.P.C. are independent of each other, and the informal appointment of a personal representative ends that proceeding.

After informal appointment, the appointed personal representative is obligated to give notice. She must deliver, or mail to the last known address, notice of her appointment to heirs and devisees, within thirty days of appointment.²¹¹ The prescribed information in the notice includes "the court where the papers relating to the estate are on file."²¹² The notice informs the recipients of their right to seek further court involvement. It must include a statement that "the estate is being administered by the personal representative under the . . . Probate Code without supervision by the Court but that recipients are entitled to information regarding the administration from the personal representative and can petition the court in any matter relating to the estate, including distribution of assets and expenses of administration."²¹³

Whether the informally appointed personal representative must give general notice to creditors depends on which U.P.C. provision a particular state adopts. One alternative requires notice only to creditors who have filed a demand for notice.²¹⁴ The other requires a general publication notice.²¹⁵ If no general notice is given, claims are not barred un-

210. U.P.C. § 3-910.

211. *Id.* § 3-705.

212. *Id.*

213. *Id.* The personal representative breaches her duty if she does not send this notice, but this does not affect the validity of the appointment. *Id.*

214. *Id.* § 3-801(a). If the state chooses "may" rather than "shall" in this section, the only requirement would be to notify the creditors who have filed a demand for notice under U.P.C. § 3-204. This seems like the alternative that Wyoming would choose, since probate without prior notice is already permitted in Wyoming. WYO. STAT. ANN. § 2-6-203 (LexisNexis 2001). The Official Comment to U.P.C. § 3-803 states:

[T]he odds that holders of important claims against the decedent need help in learning of the death and proper place of administration are rather small. Any benefit to such claimants of additional procedures designed to compel administrations and to locate and warn claimants of an impending non-claim bar, is quite likely to be heavily outweighed by the costs such procedures would impose on all estates, the vast majority of which are routinely applied to quick payment of the decedent's bills and distributed without any creditor controversy.

U.P.C. § 3-803, official cmt.

215. U.P.C. § 3-801(a) (using "shall" rather than "may").

til one year after the death of the decedent.²¹⁶ Therefore, the consequence for failing to generally notify creditors is that those who take title to the property cannot use the short statutes of limitation in the U.P.C. These statutes bar claims not filed within four months of publication for those "notified" by newspaper publication.²¹⁷ For those notified directly, which is permissive under both alternatives, the limit is the later of sixty days after direct notice or four months after publication.²¹⁸ Even without notice, the period of uncertainty is limited to one year and the personal representative may choose no notice, knowing of the one-year risk. Creditors present a claim by sending the personal representative a statement indicating its basis, the amount claimed and the name and address of the claimant.²¹⁹

The informally appointed personal representative is not required to post bond unless the will requires it, or an interested person makes a written demand to the registrar that bond be required.²²⁰ Then, bond will be required before the administration can proceed, unless the personal representative seeks to be excused from the bond through a court action.²²¹ To request that bond to be set, the person requesting bond must have at least a \$1000 interest in the estate.²²² This includes creditors who have at least a \$1000 interest.²²³

Within three months of appointment, the personal representative is required to prepare an inventory and send it to interested persons who request it. She may, but is not required to, file it with the court.²²⁴ The U.P.C. permits the personal representative to employ an appraiser to value property whose value is subject to doubt, but it does not require an appraisal.²²⁵

The estate can be closed informally, simply by filing a statement

216. *Id.* § 3-803(a)(1). This statute of limitations was reduced from three years to one year in 1989. *See supra* note 172.

217. *Id.* § 3-801(a).

218. *Id.* § 3-801(b).

219. *Id.* § 3-804.

220. *Id.* § 3-603.

221. *Id.* *See also* U.P.C. § 3-604.

222. U.P.C. § 3-605.

223. *Id.*

224. *Id.* § 3-706. The time for the inventory to be done, three months, is a little shorter than Wyoming's 120 days. WYO STAT. ANN. § 2-7-403 (LexisNexis 2001).

225. U.P.C. § 3-707. An appraisal does appear to be required for the summary procedure that allows distribution when the estate value is less than exemptions, expenses, and encumbrances, without notice to creditors. *Id.* § 3-1203. This makes sense, since the ability to use that procedure depends on the value of the estate.

prescribed in the Code.²²⁶ In this manner, the entire probate process can be conducted informally, even with large estates. The closing must state that the time for presentation of creditors' claims has expired.²²⁷ The personal representative's appointment is terminated one year after the closing statement is filed, if no proceedings are pending in the court involving the personal representative at that time.²²⁸ The personal representative's liability is not terminated until six months after the closing statement is filed.²²⁹ Any claims against the personal representative for breach of fiduciary duty, by creditors not otherwise barred, or by others entitled to the property of the decedent, must be filed within six months after the closing statement is filed.²³⁰ Otherwise, they are barred, unless the claim is for "fraud, misrepresentation or inadequate disclosure related to the settlement" of the estate.²³¹ The U.P.C. also provides a statute of limitations that limits liability of distributees. Distributees are only liable for one year after the distribution, though the limit does not apply if the distribution was procured by fraud.²³² To terminate the appointment and liability sooner, a formal closing is needed.

The Idaho survey of probate lawyers and trust officers showed widespread use of informal proceedings for opening and administering estates soon after the U.P.C. was adopted.²³³ In two of the larger counties, informal filings constituted at least 90% of the total probate filings in 1975.²³⁴ Only eleven supervised administration filings were made in the five most populous counties in 1973 and only one in 1974. These counties had 45% of the state's population at the time.²³⁵ Idaho trust de-

226. U.P.C. § 3-1003(a)(1). The statement cannot be filed until after the appointment of the personal representative. *Id.*

227. *Id.* § 3-1003(a)(1). This presumably means that the personal representative would have to wait one year from the death of the decedent to file the closing statement if no publication or direct notice was given to creditors.

228. *Id.* § 3-1003(b).

229. *Id.* § 3-1005. However, without a court proceeding, a personal representative can require potential distributees to object or lose any right to object to a distribution. The personal representative mails or delivers notice of a proposed distribution, and if no objection is made in thirty days, the right of a distributee to object is gone. *Id.* § 3-906(b).

230. *Id.* § 3-1005.

231. *Id.*

232. *Id.* § 3-1006.

233. Crapo, *supra* note 37, at 410 & 412. *See supra* Part I. D.

234. *Id.* The category of informal filings included a summary proceeding for surviving spouses that Idaho retained from its prior code, when adopting the U.P.C. These proceedings were about one quarter of the informal proceedings in all Idaho counties in 1973 and 1974. *Id.* at 409.

235. Crapo, *supra* note 37, at 409, 412-13. More supervised filings were made in less populous counties. *Id.* In 1997, Hawaii amended its probate code to remove the

partments also reported that they rarely used supervised administration.²³⁶

C. *Formal Proceedings*

The personal representative may decide that the benefits of formal testacy or formal closing are worth the effort and cost.²³⁷ Formal testacy requires pre-hearing notice, which must be mailed to all heirs.²³⁸ It must also be mailed to beneficiaries and executors of the will being offered for probate and of any wills offered for probate elsewhere, and to any personal representative appointed informally whose appointment has not terminated.²³⁹ Newspaper publication of the probate hearing is also required.²⁴⁰ After a hearing on the will, a court order is entered regarding its validity, decedent's domicile, and who are decedent's beneficiaries or heirs.²⁴¹ The benefit of formal testacy is that the order probating the will can only be invalidated in narrow circumstances, and only if the petition is filed within one year of the order.²⁴² Note that a formal testacy petition does not trigger court-supervised administration of the estate.²⁴³ The estate will be administered without such supervision unless an interested party petitions for it.

A request for formal appointment of a personal representative may or may not be part of a formal testacy petition.²⁴⁴ The personal representative has the same powers whether appointed formally or informally.²⁴⁵ "Although the appointment had been secured in formal proceedings before the court . . . the appointing authority has no authority to check the work of a personal representative or to make orders relating to him unless the representative or some other interested person petitions

\$40,000 limit on the use of informal probate. This change did not cause the rise in informal probate that they expected. Only 41% of the 837 new filings in one judicial circuit were seeking informal probate. This may have been due to practitioners still using the old familiar forms and procedures. Lee, *supra* note 52, at 8, 12.

236. Crapo, *supra* note 91, at 358.

237. In Hawaii, where the Code was recently changed to remove the dollar limit for using informal procedures, most lawyers will probably continue to use the formal closing. Lee, *supra* note 52, at 12.

238. U.P.C. § 3-403(a). Heirs are those entitled to property under the intestate statute. *Id.* § 1-201(20).

239. U.P.C. § 3-403(a).

240. *Id.*

241. U.P.C. § 3-409.

242. *Id.* § 3-412(3). The informal probate can be invalidated until three years following the decedent's death. *Id.* § 3-108(a).

243. U.P.C. § 3-107.

244. *Id.* § 3-401.

245. *Id.* §§ 3-307(b), 3-703, 3-715. Wellman, *Blueprint*, *supra* note 8, at 493.

after the appointment for some order or relief concerning the estate."²⁴⁶

Even if the probate, appointment and administration have been informal, the personal representative or other person may want to have the quicker protection of a formal closing. The Idaho study concluded that when a bank serves as trustee, "the banks are absolutely uniform in requiring a formal closing of the estate and a court order discharging the bank as personal administrator."²⁴⁷ One effective combination is to start with an informal appointment of a representative, administer the estate without involvement of the court, and then combine a petition for formal testacy and formal closing of the estate.²⁴⁸

Notice of the petition for formal closing must be given to all interested persons.²⁴⁹ If no formal testacy has taken place, notice by publication is required to bind unknown heirs.²⁵⁰ Others must get direct notice, including known creditors.²⁵¹ The court has authority to issue orders on a wide variety of matters after the hearing on the closing, such as approving distributions and accounts, and ending the liability of the personal representative.²⁵²

246. 1 RICHARD V. WELLMAN, *UNIFORM PROBATE CODE PRACTICE MANUAL 5* (American Law Institute-American Bar Association Committee on Continuing Professional Education 2d ed. 1977).

247. Crapo, *supra* note 91, at 358. In fact, one of their few complaints about the U.P.C. was that clients and attorneys pressured them to do informal closings. *Id.* at 359.

248. Averill, *supra* note 203, at 275. Section 3-1001 states that the petition for complete settlement of the estate may request the court to determine testacy. U.P.C. § 3-1001. Presumably, the notice of a formal testacy hearing, under U.P.C. § 3-403, and the notice of the formal hearing under U.P.C. § 3-1001, can be combined.

249. U.P.C. § 3-1001(a). Under Article 1 of the Uniform Probate Code "interested person" is defined to include:

heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward or protected person. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in any proceeding.

Id. § 1-201(23).

250. U.P.C. § 3-106.

251. *Id.* § 3-1001. Even if all interested persons do not receive notice, those who do receive notice are bound by the orders in the proceeding. *Id.* § 3-106.

252. U.P.C. § 3-1001. If the personal representative has committed fraud, she is liable for two years after discovery of the fraud. *Id.* § 1-106.

D. *Personal Representative and Attorney Fees*

Under the U.P.C., the personal representative has authority to employ and pay the attorney who provides services to the estate.²⁵³ The personal representative is also authorized to pay herself.²⁵⁴ Payment does not have to await closing, nor does it require a court order. Any person who disagrees with the decision of the personal representative and who has an interest in the estate can bring a special action for determining the reasonableness of the compensation of the personal representative or the attorney.²⁵⁵ The court can order appropriate refunds.²⁵⁶ However, if no party seeks review, the court will not review fees.

Wellman sees the fee provisions as important to addressing critics of the probate system. "[T]he elimination of . . . arbitrary methods of fee determination, particularly the percentage scale with which probate critics have had such a field day, should reduce talk of the 'lawyers' tax' on estates and slow the flight from probate which has occurred in recent years."²⁵⁷

The U.P.C. does not provide guidelines for the reasonableness of fees, but this is an area where a few states have modified the U.P.C. provision. Colorado and Nebraska use the factors listed in the Model Rules of Professional Conduct as the criteria for determining the reasonableness of the attorney's fee.²⁵⁸ These factors include the time spent, skill required, customary fee, amount involved and experience of the attorney. Montana still has a statutory fee structure similar to Wyoming's for both the personal representative and the attorney. It sets a maximum fee for the personal representative based on a percentage of the estate value for federal tax purposes, and then sets the maximum fee for the attorney at one and one half times the fee allowable to the personal representa-

253. U.P.C. § 3-715(18)-(21).

254. *Id.* § 3-715(18).

255. *Id.* § 3-721. However, those involved in the estate will not necessarily receive notice of the fees paid, except in a formal closing. The formal closing can include a final accounting, which would include the fees. *Id.* § 3-1001. The closing by sworn statement only requires a statement that expenses were paid or otherwise disposed of. *Id.* § 3-1003.

256. U.P.C. § 3-721.

257. Wellman & Gordon, *supra* note 5, at 511. See also SHARON BELL, FEES OF EXECUTORS, ADMINISTRATORS, AND TESTAMENTARY TRUSTEES (The American College of Trust and Estate Counsel 1993).

258. NEB. REV. STAT. ANN. § 30-2482 (Michie 2001). COLO. REV. STAT. ANN. § 15-12-721 (West 2001). Interestingly, Colorado removed one of the criteria, the nature and length of the professional relationship with the client, from the list, after it adopted the Uniform Probate Code. These criteria also appear in Wyoming's ethical rules. WYO. CODE OF PROF'L CONDUCT R. 1.5 (2001).

tive.²⁵⁹ The Utah statute provides criteria for the reasonableness of the personal representative's fees including the "quality, quantity and value" of the services and the customary fee for other similarly situated personal representatives.²⁶⁰ North Dakota does not provide guidelines for reasonableness of the fees. However, it does require that, when the fee is based on the value of the estate, a copy of a written fee agreement be sent to the heirs.²⁶¹

Idaho adopted the U.P.C. provisions without changes, authorizing payment of a reasonable fee.²⁶² Attorneys and personal representatives report that they use several factors to determine fees, including the size of the estate. Fifty-nine percent of the attorneys who responded to the survey reported that they set fees using an hourly rate adjusted for the size of the estate and the expertise required. Twenty-three percent used just an hourly fee. Fourteen percent used just a percentage of the estate value to set a fee, as under the fee schedule prior to adoption of the U.P.C.²⁶³ This is a rapid change from most Idaho lawyers using the percentage fee guidelines only four years earlier.²⁶⁴ The banks who served as personal representatives used an hourly rate or a rate for a specific job, "adjusted for such factors as complexity, liability exposure, expertise required, and type of management."²⁶⁵ A study of Idaho estate accountings concluded that fees for attorneys and personal representatives had generally shifted to a fee based on services rendered. The study found the result was that "the larger the estate, the smaller the fee as a percentage of the estate."²⁶⁶

Attorney fees and personal representatives commissions were a larger percentage of the smallest estates, after the U.P.C. was adopted, according to the Idaho study.²⁶⁷ This is important, since small estates are

259. MONT CODE ANN §§ 72-3-631, 72-3-633(1) (Smith 2001). It also sets 3% of the value of the interest passing as a maximum fee for attorney services in terminating a life estate, or severing joint tenancies. *Id.* § 72-3-633(2), (3). Both provisions permit the court to order additional fees for extraordinary services. *Id.* §§ 72-3-631(5), 72-3-633(5).

260. UTAH CODE ANN. §§ 75-5-718, 75-3-718(1) (2001).

261. N.D. CENT. CODE § 30.1-18-21 (2001).

262. IDAHO CODE §§ 15-3-715(18), (21), 15-3-721 (Michie 2001).

263. Crapo, *supra* note 37, at 403.

264. *Id.* at 402. See *supra* text accompanying notes 103 and 104.

265. Crapo, *supra* note 91, at 355. Some reported increased record keeping, but several trust officers "agreed that a fee based on services was far easier to justify to clients than the percentage fee." *Id.* "[T]he percentage fee system produced windfall profits in some instances." *Id.*

266. Crapo, *supra* note 91, at 349.

267. *Id.*

a significant part of the estates that are probated.²⁶⁸ The increase in fees in small estates, when the percentage fee guideline or statute is removed, is not too surprising. Some expenses may be incurred in all estates, no matter how small. Also, it may be that attorneys are not using all of the informal devices available under the Code for the smaller estates.²⁶⁹

A percentage fee system, like Wyoming's, probably does not adequately compensate lawyers and personal representatives for their work in small estates.²⁷⁰ The lawyers probating small estates in Wyoming may not be getting paid for all of the services provided. As Wellman puts it, "existing legal requirements in many areas not only irritate the public but complicate the settlement of quite modest estates to the point where someone, usually a lawyer, must work for very little or nothing if titles are to be cleared."²⁷¹ The U.P.C. fees provision may more adequately compensate lawyers and personal representatives in small estates. In Idaho, institutional personal representatives, including those who were representing small estates, found the fee amounts were more acceptable to clients than percentage fees.²⁷² The greatest benefit of the U.P.C. fee system may be "the replacement of an arbitrary fee system with an equitable one."²⁷³

E. Protection for Heirs, Beneficiaries and Creditors

One protection for those with interests in the estate is the U.P.C.'s perjury provision. The U.P.C. addresses perjury in its general provisions. Under the general provision, the filing of any document under the U.P.C. is deemed to be an affirmation "that its representations are true as far as the person executing the document knows or is informed."²⁷⁴ This provision is important since the informal appointment process in the U.P.C. grants significant power to the personal representative, relying solely on verified statements of the applicant. The applications for informal probate and appointment require significant informa-

268. Wellman, *Lawyers*, *supra* note 6, at 549.

269. Crapo, *supra* note 91, at 353. Also, the study was based only on estates where an accounting was submitted, which may be the estates that had problems and thus higher costs. *Id.* Any additional fee for complexity in a small estate will create a big change in what percent fees are of that estate. *Id.* at 349.

270. *See id.* at 349. "Several [Idaho] attorneys and trust officers . . . commented that . . . the increased fees [for small estates after adoption of the U.P.C.] merely represent the charging of a proper fee for services rendered." *Id.*

271. Wellman, *Blueprint*, *supra* note 8, at 454.

272. Crapo, *supra* note 91, at 353.

273. *Id.* at 357.

274. U.P.C. § 1-310.

tion about the decedent, the successors, and known wills.²⁷⁵ Deliberate falsification may lead to penalties for perjury, and is also cause for removal of the personal representative.²⁷⁶

Under another general provision, in Article I, anyone who commits fraud in connection with a proceeding is personally liable to any person injured. The injured person may obtain relief by filing an action within two years of discovering the fraud.²⁷⁷

For those with interests in the estate, even the informal processes include certain specific protections. Informal probate is not permitted if the decedent executed more than one will and earlier wills were not expressly revoked.²⁷⁸ Though notice is not generally required before an informal application, any person who has an interest in an estate can demand notice of all filings and orders, even informal proceedings, under the U.P.C.²⁷⁹ Also, before an informal appointment of a personal representative, notice must be given to those who have prior or equal right to appointment.²⁸⁰ Finally, informal proceedings are not a final adjudication of rights until three years have passed since death. Unless formal proceedings are invoked, the rights of the successors to the estate are finally decided only when three years have elapsed.²⁸¹

Any interested person may petition the court for formal testacy, formal closing, or a court-supervised administration, even if the personal representative prefers to proceed informally.²⁸² "Interested person" is broadly defined.²⁸³ If a formal petition for appointment or testacy is made, the informally appointed personal representative must stop ad-

275. *Id.* § 3-301. The registrar must confirm that the applicant has "made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief." *Id.* § 3-303(a)(2).

276. *Id.* See also *id.* § 3-611(b).

277. *Id.* § 1-106. The injured person may also get restitution from those who benefited, other than bona fide purchasers. *Id.*

278. U.P.C. § 3-304. Similarly, lost and destroyed wills cannot be informally probated. *Id.* §§ 3-303(a)(5), 3-402(a).

279. *Id.* § 3-204.

280. *Id.* § 3-310.

281. *Id.* § 3-108(a). See also Wellman, *Blueprint*, *supra* note 8, at 500. Any earlier termination of successor's rights would require "best possible notice", under the Uniform Probate Act. *Id.* Creditors' claims are now cut off after one year. See *supra* text accompanying note 173.

282. *Id.* §§ 3-401, 3-502, 3-1001(a). Section 3-414(a) is explicit that a proceeding for formal appointment is authorized even if an informal application is pending or an informal appointment has already been made.

283. U.P.C. § 1-201(23).

ministration except to preserve the estate, or as the court orders.²⁸⁴ An interested party can also seek a narrower order stopping the personal representative from taking a particular action, or petition for removal of the informally appointed personal representative for cause.²⁸⁵ Note that neither of these actions would lead to ongoing court supervision unless that is also sought, and the court decides supervision is necessary.²⁸⁶ Also, a person who has an interest in the estate greater than \$1000 can file a demand with the registrar that the personal representative post bond.²⁸⁷

Finally, the interested party with broad concerns can seek a fully court-supervised administration. She can file a petition for supervised administration of the estate, which will prevent distributions without court order.²⁸⁸ This is a "single in rem proceeding to secure complete administration and settlement of a decedent's estate."²⁸⁹ However, even under a supervised administration, the U.P.C. authorizes the personal representative to act without court involvement, except for making distributions.²⁹⁰ The court may impose additional restrictions on the personal representative, which must be endorsed on the letters of administration.²⁹¹

In comparing U.P.C. informal procedures with existing formal probate requirements, Wellman asks that we keep in mind the non-probate alternatives that are available, such as joint accounts and revocable trusts.²⁹² Joint accounts provide a particularly easy vehicle for those close to a decedent before his death to see that assets transfer directly with no formal process. As he puts it, we would not readily accept these probate substitutes if "family pressures and basic honesty" were not satisfactory safeguards in the usual situation.²⁹³ No notice to heirs or

284. *Id.* § 3-414(a).

285. *Id.* §§ 3-607, 3-611.

286. *Id.* §§ 3-107, 3-502.

287. *Id.* § 3-605. *See* U.P.C. § 3-604 (provides the applicable bond amount). If the will waives bond, it may still be required, in a formal proceeding, if requested by an interested party. *Id.* § 3-603. On the other hand, even if bond is required in the will, it may be dispensed with if the court finds that bond is not necessary. *Id.*

288. U.P.C. §§ 3-502, 3-504.

289. *Id.* § 3-501. The court is authorized to decide that supervised administration is not necessary to protect those with interests in the estate. *Id.* § 3-502. On the other hand, if the will directs supervised administration, the court shall order it unless the relevant circumstances have changed since the will was executed. *Id.*

290. U.P.C. § 3-504.

291. *Id.* §§ 3-501, 3-504.

292. Wellman, *Blueprint*, *supra* note 8, at 498.

293. *Id.*

likely beneficiaries is required for many techniques of wealth transmission at death, such as revocable trusts, life insurance trusts and joint tenancies.²⁹⁴ Wyoming's lack of anxiety about creditors in particular is shown by the relatively high \$150,000 limit on using affidavits to transfer title to assets after death. Wellman observes that creditors' protections in probate codes are not very important. "Decedents as a class are not a major concern of commercial creditors; advanced in years they generally leave little unsecured debt."²⁹⁵ He notes that creditor groups had showed no concern during a decade of debate about the U.P.C.'s probate procedure reforms.²⁹⁶ Besides, even with informal appointment and probate under the U.P.C., there is "some record of assumption of responsibility for control of assets."²⁹⁷

IV. COMPARISON OF PROBATE IN STATES OTHER THAN DECEDENT'S DOMICILE

One goal of the U.P.C. is to unify administration for the estate that has property in different states.²⁹⁸ The probate procedure articles of the U.P.C. "eliminate the need for or advantage of separate administrations for portions of decedent's estate which happen to be located in various states."²⁹⁹ The U.P.C. does this even though it defers to two traditional assumptions that have tended to prevent this:

The Code accepts the long-standing assumption that each state controls the law applicable to its land titles. Also, the Code assumes that creditors should not be deprived by death of a nonresident debtor of access to his property which is locally available to them [T]he code enables unified administration in spite of these assumptions which have served traditionally to prevent it.³⁰⁰

Wyoming procedure already includes some of the flexible principles of the U.P.C., for probate of the property of a decedent who is not domiciled in Wyoming. However, the Wyoming Code often does not spell out the particulars. For example, the U.P.C. has detailed provisions

294. Wellman, *Blueprint*, *supra* note 8, at 498.

295. *Id.* at 512.

296. *Id.*

297. *Id.* at 498.

298. Richard V. Wellman, *How the Uniform Probate Code Deals with Estates that Cross State Lines*, 5 REAL PROP. PROB. & TR. J. 159 (1970) [hereinafter Wellman, *State Lines*].

299. Wellman, *Blueprint*, *supra* note 8, at 488.

300. Wellman, *State Lines*, *supra* note 298, at 159.

that control transfers of property if the U.P.C. state is not the domiciliary jurisdiction, and provisions which coordinate probates in different states, if more than one probate is necessary.³⁰¹ Wyoming has neither.

In the 1980 Code, Wyoming incorporated the U.P.C. provision on the foreign personal representative's authority to act in Wyoming.³⁰² In Wyoming and under the U.P.C., when a decedent is not domiciled in the state, a personal representative appointed in the decedent's domicile may exercise all powers that a "local personal representative" could.³⁰³ I will call such a person the foreign personal representative. She has the same authority in Wyoming as if she were the resident personal representative, to collect and distribute decedent's property located in Wyoming.³⁰⁴

However, the same basic provision on the authority of the foreign personal representative has very different effects in Wyoming and in a U.P.C. jurisdiction, because of the rest of each jurisdiction's code. Under the U.P.C., the provision gives the foreign personal representative broad non-court supervised authority. However, in Wyoming, this same provision limits the foreign personal representative, from Colorado, for example, to the court supervision required by Wyoming statutes.

Generally, in a U.P.C. state, no court proceeding would be required even for the foreign personal representative to sell real property. Since the personal representative could sell property without court order if the decedent was a domiciliary, and since foreign personal representatives are authorized to do what domiciliary personal representatives can, formal probate would not be needed.³⁰⁵ The foreign personal representative need only file, with the U.P.C. state court where the property is located, authenticated copies of his appointment and of any bond given, to

301. See *infra* text accompanying notes 334-339 (discussing coordination of probates in different states).

302. WYO. STAT. ANN. § 2-11-302 (LexisNexis 2001). See U.P.C. § 4-205. See also Averill, *supra* note 16, app. I at 394.

303. WYO. STAT. ANN. § 2-11-302 (LexisNexis 2001). In Wyoming, a nonresident cannot be appointed as personal representative of an intestate estate, unless a resident is appointed as co-personal representative. *Id.* § 2-4-201(c). There seems to be no such restriction in Wyoming on appointment as executor. *Id.* § 2-6-208. The Uniform Probate Code does not prohibit appointment of a nonresident in either situation, though the nonresident applicant for informal appointment may have to wait longer after the decedent's death to be appointed. U.P.C. §§ 3-203, 3-307.

304. Such personal representative may "gather up all the assets, sue in Wyoming courts for claims of property, and remove these assets out of state for administration in the domiciliary estate." Averill, *supra* note 16, at 176-77.

305. U.P.C. § 3-715(6), 4-205.

be authorized to act.³⁰⁶ The foreign domiciliary personal representative may file an informal probate in the non-domiciliary state, to facilitate transfer of real estate title.³⁰⁷ However, even the informal probate does not require court involvement, as would be required in Wyoming to sell property.

In contrast, to sell Wyoming real property, unless the will expressly authorizes sale without court intervention, the foreign personal representative would have to go through a court-supervised procedure.³⁰⁸ Similarly, to make distributions of real property, a court order would be needed to transfer title.³⁰⁹ In other words, conferring on the foreign personal representative the powers of the local personal representative is conferring much less power in Wyoming than in a U.P.C. state.

Wyoming has a conflicts of law provision on probate of wills that is common among the states. It recognizes and probates wills that have been probated elsewhere.³¹⁰ Wyoming also has a summary administration procedure for estates that have been completely settled in another jurisdiction.³¹¹ It applies, however, only to estates having property in this state not exceeding \$150,000 in value. After the petitioner submits documents from the completed probate in another state, and gives notice by publication, and if no objection is made at the hearing, the out-of-state proceedings may be admitted as if the probate took place here.³¹²

306. *Id.* §§ 4-204, 4-205.

307. *Id.* § 3-303(d). As discussed, *supra* note 171, to be effective to transfer property, a will must be probated. *Id.* § 3-102. Devisees establish title to property under a "probated will." *Id.* § 3-901. However, it appears that an informal probate already completed in the domiciliary estate should be recognized in the other state simply upon filing the copies and bond under U.P.C. § 4-204. Wellman, *State Lines*, *supra* note 298, at 161.

308. WYO. STAT. ANN. §§ 2-7-614-626 (LexisNexis 2001). *See supra* notes 146-150 and accompanying text. The Wyoming Legislature recently added a court procedure for selling Wyoming property when the probate court in another state has authorized the sale. The procedure applies only when the estate in Wyoming has a value of \$150,000 or less, and requires the district court judge to do notice by publication. If the petition for sale is approved, the proceeding is to be "treated from that time as original proceedings." Presumably, this means the sale would proceed as other court-supervised sales in Wyoming probate. Also, the petition for sale must be denied if a creditor objects who did not file a claim in the proceeding in the other state. 2002 Wyo. Sess. Laws 60, to be codified at WYO. STAT. ANN. § 2-11-202 (LexisNexis 2002).

309. *Id.* § 2-7-807.

310. WYO. STAT. ANN. §§ 2-11-101-104 (LexisNexis 2001). Wyoming also has a process for probate of wills that have become operative in another jurisdiction that does not require probate. *Id.* § 2-11-105.

311. WYO. STAT. ANN. § 2-11-201 (LexisNexis 2001). *See supra* note 308 (description of new summary procedure for the sale of Wyoming property).

312. *Id.* However, a creditor who did not present his claim in the state where the

The U.P.C. has a broader provision than Wyoming for recognition of probate actions from a different state which is decedent's domicile, both those that are part of formal court proceedings and those that result from statutes of limitations. The U.P.C. state is required to give *res judicata* effect to final domiciliary adjudications, not only those regarding testacy, which Wyoming recognizes, but also domiciliary adjudications of will construction and validity.³¹³ Unlike Wyoming, the probate does not have to be complete. However, for the domiciliary decisions to be *res judicata* in a U.P.C. state, they must have included a finding that the decedent was domiciled in the state.³¹⁴ The proceeding in the court where *res judicata* is sought must provide notice and opportunity to be heard. Judgments for or against any personal representative in any jurisdiction bind the local personal representative.³¹⁵ Finally, under the U.P.C., if the creditor's claims are barred by the nonclaim statute in the domiciliary jurisdiction, they are barred in the other states, unless notice was published in the other state before the bar was effective in the domicile.³¹⁶ Therefore, a creditor's claim will be barred in the other state unless she files for probate and publishes notice quickly in the other state.

The foreign personal representative cannot act in Wyoming if a local administration is pending or in effect.³¹⁷ This provision is taken from the U.P.C.³¹⁸ This conflict is unlikely to occur in a jurisdiction that has adopted the U.P.C. because an administration in a jurisdiction other than the decedent's domicile is unlikely.³¹⁹ Under both codes, if a local

other probate was done can cause the summary procedure to be postponed while he petitions for letters of administration in Wyoming. *Id.* The value limit in this provision was increased to \$150,000 in the last legislative session. 2002 Wyo. Sess. Laws 60, to be codified at WYO. STAT. ANN. § 2-11-202(a)(iv) (LexisNexis 2002).

313. U.P.C. § 3-408.

314. *Id.* The first court in which formal proceedings are started has the exclusive right to determine domicile. *Id.* § 3-202. The finding of domicile may also occur in a formal closing proceeding. *Id.* §§ 3-1001-1002.

315. U.P.C. § 4-401.

316. *Id.* § 3-803(a)(1), (b) The one year from death bar would apply if no notice was given to creditors in the domicile. *Id.*

317. WYO. STAT. ANN § 2-11-303 (LexisNexis 2001).

318. U.P.C. § 4-206. *See* Averill, *supra* note 16, app. I at 394.

319. Averill reached a similar conclusion about Wyoming. He concluded, soon after the provisions for the foreign personal representatives were added in the 1980 Code, that "for a large number of nondomiciliary decedents who leave property located in Wyoming, no actual administration will take place Unless there are substantial unpaid creditors, no one ordinarily will desire to require local administration." Averill, *supra* note 16, at 177. However, it seems that local administration would be required where real estate in Wyoming is part of the estate. *See supra* text accompanying notes 308-09.

administration is filed, third persons are protected who previously dealt with the foreign personal representative and had no notice of the local administration.³²⁰ Also, the local personal representative steps into the shoes of the foreign personal representative as far as actions the foreign personal representative has already taken.³²¹

The U.P.C. does provide tools for those interested persons who want the court to be more involved, in any jurisdiction where the decedent owned property. Subject to the *res judicata* provisions, those who are interested in the estate, as defined by the Code, can petition in any such jurisdiction for formal probate, appointment or closing; or supervised administration; or for other proceedings authorized by the U.P.C.³²²

However, under the U.P.C., the personal representative appointed in the decedent's domicile has priority as personal representative in an administration in another state, and can have anyone else removed who has been appointed.³²³ Also, the personal representative from the domicile is the only one who can do an informal probate in the other state.³²⁴

The U.P.C. provides a procedure for the foreign personal representative to use an affidavit to collect property in other states.³²⁵ Those who transfer such property in good faith to the foreign personal representative are protected, unless resident creditors notify them not to transfer the property.³²⁶ The Wyoming affidavit procedure cannot be used by foreign personal representatives, though it can be used by nonresident distributees, and the personal representative may also be a distributee.³²⁷

320. See WYO. STAT. ANN. § 2-11-303 (LexisNexis 2001); U.P.C. § 4-206. These two provisions are virtually identical.

321. See WYO. STAT. ANN. § 2-11-303 (LexisNexis 2001); U.P.C. § 4-206.

322. U.P.C. § 4-207. A proceeding must be brought where a decedent was domiciled or owned property. *Id.* § 3-201.

323. U.P.C. § 3-203(g). This rule applies unless the will appoints someone different for the state administration. *Id.*

324. *Id.* § 3-308(b). Also, one seeking informal appointment in a jurisdiction that is not decedent's domicile, and who has not already been appointed in the domicile, must wait thirty days after death to be appointed. *Id.* § 3-307. This delay is so the first appointment can be in the domicile. *Id.*, official cmt.

325. U.P.C. § 4-201.

326. *Id.* § 4-202. Filing of his appointment and bond would also presumably provide such protection for third parties under sections 4-205 and 3-714. Wellman, *State Lines*, *supra* note 298, at 161 n. 18.

327. WYO. STAT. ANN. § 2-1-201 (LexisNexis 2001).

The Wyoming procedure also has a \$150,000 limit, which the U.P.C. affidavit procedure does not.³²⁸

In another provision with no counterpart in the Wyoming Code, the U.P.C. gives the state court broad personal jurisdiction over foreign personal representatives. For example, if the decedent would have been subject to personal jurisdiction in the state, the foreign personal representative is also subject to such jurisdiction.³²⁹ Also, jurisdiction is explicitly extended on a long-arm basis. If the state would have personal jurisdiction over the foreign personal representative as an individual, it has jurisdiction over her as a personal representative.³³⁰ Also, state courts have jurisdiction over the foreign personal representative if she has filed her appointment in the U.P.C. state.³³¹

Wyoming and the U.P.C. have different arrangements for serving the foreign personal representative. In Wyoming, the personal representative must designate a resident bank or trust company to act as agent for service.³³² The U.P.C. provides various methods for serving a foreign personal representative, including certified mail.³³³

The U.P.C. also explicitly coordinates simultaneous probates in different states if they do occur. As would be expected with a Uniform Law, the U.P.C. provides for coordination between the two probates. If the estate is solvent, the general rule is that the personal representative in another state must distribute all assets to the domiciliary personal representative.³³⁴ One significant exception is when the will or choice of law requires that the law of the state where the property is located control as to who receives the property.³³⁵ Another exception would apply only when there is a formal closing in the other jurisdiction. Then, the court

328. *Id.* See *supra* Part II.B. 2002 Wyo. Sess. Laws 60, to be codified at WYO. STAT. ANN. § 2-1-201 (LexisNexis 2002).

329. U.P.C. § 4-302.

330. *Id.* § 4-301.

331. *Id.*

332. WYO. STAT. ANN. § 2-11-301 (LexisNexis 2001). This section states that when the court having jurisdiction sees that the personal representative is not a resident, it shall require designation of such an agent. However, Averill interprets the reference to this section in the next Code section to mean no other court involvement is required, such as recognition of the domiciliary probate. Averill, *supra* note 16, at 176. If this is so, how does the residency of the personal representative come before the court? This is one illustration of the problem with taking from parts of the Uniform Probate Code and not the integrated whole.

333. U.P.C. § 4-303(a).

334. *Id.* § 3-816. Sections 3-815(b) & (c) apply if the estate is insolvent.

335. *Id.*

in the other jurisdiction may order a distribution other than to the domiciliary personal representative.³³⁶

When the estate in the U.P.C. state is insolvent, or the estates in both states combined are insolvent, the personal representatives together must assure that family protections are met, and coordinate payment of creditor claims.³³⁷ This provision has the effect of "subjecting all assets of the decedent, wherever they may be located and administered, to claims properly presented in any local jurisdiction."³³⁸ The two personal representatives must coordinate payment of claims on a pro rata basis, adhering to the priority of claims.³³⁹

V. CONCLUSION

This article has examined Articles III and IV, the procedural parts of the U.P.C. These parts contain the two guiding principles of the U.P.C. First, the amount of probate process required should depend on the needs of those involved and the conflict over the estate. The second related principle is that the duly appointed personal representative should have the same authority to act that a trustee has, without court supervision, unless those involved in the estate seek such intervention.

Articles III and IV may seem complex to the reader. This is hard to avoid in a procedural system designed to give the estate choices, among levels of formality, at each stage of the probate process. However, the U.P.C. was designed, after careful study by practitioners, as a complete procedural system. Its use over the last two to three decades in many states, including all states contiguous to Wyoming except South Dakota, has shown few problems in Articles III and IV. Those problems have been corrected with a few discreet amendments and these articles of the U.P.C. are generally in the same form as when originally approved in 1969.³⁴⁰

Over twenty-five years have passed since Governor Herschler vetoed Wyoming's attempts to adopt the U.P.C. substantially as a whole. Though the legislature later revisited the probate code, it picked sections here and there from the U.P.C. and omitted essential parts. It is now time

336. *Id.*

337. U.P.C. §§ 3-815(b), (c). These provisions apply when the estate is insufficient to satisfy all "family exemptions and allowances" and "prior charges and claims." *Id.*

338. U.P.C. § 3-815, official cmt.

339. U.P.C. §§ 3-815(b), (c).

340. *See* UNIF. PROBATE CODE, apps. X-XII (West 11th ed. 1993) (Supp. 2001).

for the Wyoming Legislature to reconsider adopting the U.P.C. It is important, however, that the Legislature adopt all or most of Articles III and IV, rather than picking and choosing specific provisions.³⁴¹ These two articles form a carefully thought out system of integrated probate procedure. The advantages to such a system are significant. It would likely reduce the time and expense of the probate process in Wyoming for most estates. It would also eliminate or reduce the need for revocable trusts whose intent is to avoid probate, and it would make Wyoming's procedures very similar to those of most states in the region. Lastly, ambiguities that require one to guess about how to proceed are likely to be few in a Uniform law, if it is adopted as a whole, not piecemeal.

341. Wellman & Gordon, *supra* note 5, at 526. See also *supra* note 332 (shows a Wyoming example of problems that can be created). The Maine Commission recommending the U.P.C. to the legislature stated in its report, "[o]ne thing that became clear to the Commission in the course of its study is the importance of avoiding 'tinkering' with the language of the uniform version of the Uniform Probate Code, or changing sections here and there, or adding new provisions, without very careful consideration of the impact of such changes on both, (a) the operation of the Code as a whole and (b) the desirability of uniformity of law and statutory language from state to state." Report to the Legislature, *supra* note 24, at 6-7. The General Comment that precedes Article III lists the essential characteristics that need to be preserved if a state does decide to vary from the language of Article III of the Uniform Probate Code. U.P.C. art. III, official cmt.; 8 U.L.A. Part II, 26-28 (1998).

APPENDIX

A brief description of current probate procedures for independent administration in two non-UPC states.

Washington. A solvent estate can be administered in Washington with no court supervision other than the initial hearing on probate of the will, appointment, and the order granting nonintervention powers to the personal representative. Under this nonintervention probate procedure, the personal representative can be appointed and an order granting nonintervention powers entered, without prior notice in two situations. This can occur when the person seeking appointment is the executor in the will; or when the surviving spouse who seeks appointment and nonintervention is the parent of all of the decedent's children, and all of the property is community property.¹ Others who are not creditors can be granted nonintervention powers but prior notice is required to heirs, beneficiaries and certain creditors.² The court has limited discretion to decline nonintervention.³ After the order, the personal representative has the statutory powers and limits on liability of a trustee, as well as the statutory powers of a personal representative but not the duties.⁴

To close the estate, the personal representative may submit a statement of completion. The statute prescribes its content. Copies must be sent to heirs and devisees, unless they have waived notice or received their full distribution. If the heirs and devisees do not petition the court, the personal representative is automatically discharged thirty days after the statement is filed.⁵

Washington also has a procedure by which, after an order deciding testacy or intestacy, followed by notice to heirs and legatees, an order of distribution can be entered that is the equivalent of a final decree of distribution.⁶ No personal representative is appointed. Since there is no administration, the heirs' or devisees' rights in the property are subject to creditors, homestead and similar claims.⁷ Third persons who deal

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1. WASH. REV. CODE § 11.68.041 (West 1998).
 2. *Id.* § 11.68.041(2).
 3. *Id.* § 11.68.011(2).
 4. *Id.* § 11.68.080(1).
 5. *Id.* § 11.68.110(2), (4).
 6. *See id.* § 11.28.110 (dealing with intestacy). *See id.* § 11.20.020 (dealing with probate procedures).
 7. *Id.* § 11.28.340.

with the heirs are protected.⁸ Title insurance companies “typically accept such orders as proof of transfer of title to the decedent’s heirs without charging any extra premium”⁹

Texas. Independent administration is available in Texas. It is required where the will designates it.¹⁰ It can be authorized in other cases where all distributees agree, including guardians for minors¹¹, and beneficiaries of trusts.¹² The court must also determine that independent administration is in the best interests of the estate.¹³ Those seeking independent administration in an intestate estate must show clear and convincing evidence that the distributees who agree are all of the decedent’s heirs.¹⁴

In the Texas version of independent administration, no court involvement is generally required after the probate of the will, inventory, appraisal, and list of claims are approved “except where this Code specifically and explicitly provides for some action in the county court.”¹⁵ The statute is explicit that the personal representative can approve, pay or reject claims, and can transfer exempt property and family allowances, without court action.¹⁶ Certain claims can be paid without personal liability.¹⁷ The personal representative is required to post bond unless waived by the will.¹⁸ It appears that partition or sale of property, when the will does not distribute all of the decedent’s property, requires court approval as in a court-supervised probate.¹⁹

The closing of an independent administration can be done formally, or the personal representative may file a report verified by affidavit and receipts from the distributees.²⁰ If such a report is filed, the independent administration ends and those with claims must deal directly with the distributees.²¹ However, the personal representative is still liable

8. *Id.*

9. KELLY KUNSCH, WASHINGTON PRACTICE, METHODS OF PRACTICE, ESTATE ADMINISTRATION § 31.9 (4th ed. 1997).

10. TEX. PROB. CODE ANN. § 145(b) (Vernon 1980).

11. *Id.* § 145(i) (Vernon 1980 & West Supp. 2002).

12. *Id.* § 145(j) (Vernon 1980).

13. *Id.* § 145 (Vernon 1980 & West Supp. 2002).

14. *Id.* § 145(g) (Vernon 1980).

15. *Id.* § 145(b), (c), (h) (Vernon 1980).

16. *Id.* § 146(a) (Vernon 1980 & West Supp. 2002).

17. *Id.* § 146(c) (Vernon 1980 & West Supp. 2002).

18. *Id.* § 149 (Vernon 1980).

19. *Id.* § 150.

20. *Id.* §§ 151(a), 152 (Vernon 1980 & West Supp. 2002).

21. *Id.* § 151(b).

for past mismanagement of the estate and for false statements in the affidavit.²²

22. *Id.*

