South Carolina Law Review

Volume 29 | Issue 3 Article 3

3-1978

Probate Reform for South Carolina: An Introduction to the Uniform Probate Code

Jerome Braun
University of South Carolina School of Law

SOUTH CAROLINA LAW REVIEW

VOLUME 29 1978 NUMBER 3

PROBATE REFORM FOR SOUTH CAROLINA: AN INTRODUCTION TO THE UNIFORM PROBATE CODE

JEROME BRAUN*

I. INTRODUCTION

Today is an age of challenge. Values and practices that have been accepted are now being questioned. Perhaps in no area has this been so evident as in the production of consumer goods and services. It was inevitable that this questioning would eventually turn to many traditional legal practices, primarily focusing on the cost of legal services for the consumer.[1] In response, the organized bar has agreed, albeit reluctantly, to permit at least limited legal advertising.[2] In a less organized response, enterprising individuals, both lawyers and laymen, have prepared and merchandised

* Assistant Professor of Law, University of South Carolina School of Law. Assistant Dean, University of South Carolina School of Law. B.S., University of San Francisco, 1963; J.D., University of Georgia, 1971.

1. One clear example is the recent holding of the Supreme Court that minimum fee schedules set by bar associations violate the antitrust laws. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

2. At its midyear meeting in February 1976, the American Bar Association's House of Delegates approved revisions to the ABA CODE OF PROFESSIONAL RESPONSIBILITY that allow "brief biographical and other informative data" to be placed in the yellow pages of telephone books, law lists, and legal directories. *House Broadens Code's "Publicity in General" Rules at Midyear Meeting in Philadelphia,* 62 A.B.A.J. 470 (1976). This liberalization was inadequate for some. Hobbs, *Lawyer Advertising: A Good Beginning but Not Enough,* 62 A.B.A.J. 735 (1976). However, for others it was too much. *See Views of Our Readers,* 62 A.B.A.J. 538, 548-50 (1976); *Views of Our Readers,* 62 A.B.A.J. 940, 946 (1976).

Indeed, the response to the Supreme Court's decision in Bates v. State Bar of Arizona, 97 S.Ct. 1291 (1977), allowing at least limited advertising, indicates that many lawyers need the competitive edge which advertising is perceived as providing. Legal advertisements can be found in practically every newspaper. *E.g.,* Los Angeles Times, July 3, 1977, at 6, *reprinted in Lawyers Venture into Advertising Era with Caution and Questions,* 63 A.B.A.J. 1064, 1064 (1977).

For a detailed analysis of advertising in the legal profession, see Student Project, *Attorney Advertising: Bates' Impact on Regulation,* 29 S.C.L. REV. 457 (1978).

do-it-yourself legal kits, which have found success in the market place.[3]

The practice of probate has not escaped this critical scrutiny.[4] Much of this criticism has been directed toward the administration and settlement of decedents' estates. Such criticism focuses on the claim that the process of probate is cumbersome, self-serving, unnecessarily time consuming and overly expensive.[5]

The practicing bar might naturally claim that these complaints are without foundation. Nevertheless, the public, or at least a vocal and articulate part of the public, finds them meritorious.[6] So too have scholars, at least with respect to specific problems in their respective states.[7] They perceive a jumble of state laws often inconsistent, if not in actual conflict, with their counterparts in other jurisdictions.[8] These writers detect what is at

3. No doubt the most famous of these are the tear-out forms provided in N. DACEY, HOW TO AVOID PROBATE! (1965). In the forty-sixth printing of this book in 1976, the publisher claims, on the cover, that over 970,000 copies have been sold. Do-it-yourself divorce kits are also available in some localities. However, the legality of these kits is dubious, at least in respect to their promoters. In Florida Bar v. Stupica, 300 So. 2d 683 (Fla. 1974), the marketing of do-it-yourself divorce kits was held to be engaging in the unauthorized practice of law and enjoinable. *Id.* at 687. Similar lay advice for form services has been enjoined in California and New York. State Bar v. Corey, No. 157,163 (Super. Ct. Cal., Oct. 11, 1973), *reprinted in California Restrains "No-Fault Divorce Consultation Service,"* 38 UNAUTH. PRAC. NEWS 44, 44-54 (1974); State v. Widner, No. 3789-72 (Sup. Ct. N.Y., June 29, 1972), *reprinted in* Burke, *New York "Divorce Yourself" Enjoined,* 37 UNAUTH. PRAC. NEWS 22, 30-31 (1973). *See generally* Resh, *More on Do-It-Yourself Divorce Kits and Services,* 37 UNAUTH. PRAC. NEWS 59 (1973).

4. *E.g., Let's Rewrite the Probate Laws,* CHANGING TIMES, Jan. 1969, at 39; Myers, *Probing the Sources of Probate Pains,* Wall St. J., May 14, 1968, at 18, col. 3; Bloom, *The Mess in Our Probate Courts,* READER'S DIGEST, Oct. 1966, at 102.

5. *See* M. BLOOM, THE TROUBLE WITH LAWYERS (1968). Professor Wellman describes probate as reminding him of a Rube Goldberg contraption — doing things the hard way. Wellman, *Lawyers and the Uniform Probate Code,* 26 OKLA. L. REV. 548, 550 (1973).

6. Obviously, a significant portion of the consuming public must agree with this assertion, as the voluminous sales of N. DACEY, HOW TO AVOID PROBATE! (1965) indicate. *See* note 3 *supra.*

7. *E.g.,* Basye, *Are Probate Courts in Missouri Undergoing Retrogression?,* 32 MO. L. REV. 175 (1967); Brennan, *Probate Reform,* 42 CONN. BAR J. 1 (1968); Chaffin, *Improving Georgia's Probate Code,* 4 GA. L. REV. 505 (1970); Jones, *Alabama Probate Law — Need for Revision of Intestate Provisions,* 20 ALA. L. REV. 1 (1967); Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's,* 2 CONN. L. REV. 453 (1970); Wellman, *Uniform Probate Code: A National Necessity,* 6 TRIAL 22 (1970).

8. The requirement of notice to the heirs and other interested parties upon the opening of an estate provides an illustration of the statement in the text. No such notice is required in South Carolina, either prior to the admission of a will to probate in common form or subsequent thereto. S.C. CODE ANN. § 21-7-620 (1976). Only if an heir or an interested party requires probate in due form is notice required to be given. *Id.* § 21-7-640. This lack of required notice is based on the assumption that interested parties would

least an implicit attitude in state probate codes, that a detailed, statutory supervision of probate is the only effective method of protecting society, most principally creditors, from unscrupulous heirs and beneficiaries.[9] These critics justifiably question the necessity of these intricate procedures. They point to the fact that succession to estates should be simple. Their contention is that since most people are honest and do not need to be told to do what they know must be done, the courts should stay out of probate unless they are truly needed.

The Model Probate Code[10] was the first national attempt to approach these complex problems of probate in a systematic

---

know of the admittance of a will to probate in common form. However, the period for requiring probate in due form, *i.e.*, for contesting a will, is only six months after the admission of the will to probate in common form. *Id.* Due to the ex parte nature of probate in common form, it is possible that a potential contestant would remain ignorant of the probate of the will until this six-month period has expired. Should such a situation arise, the potential contestant has no remedy as the probate in common form remains valid. *Id.*

In contrast, the statutes of Ohio would not allow this situation to occur, at least in regard to the decedent's relatives. Notice is required to be given to the surviving spouse and to those persons who would be entitled to inherit from the testator had he died intestate. OHIO REV. CODE ANN. § 2107.13 (Page 1976). This difference as to the requirement of notice probably is due, in part, to the failure of Ohio to provide a procedure similar to probate in common form. *See id.* §§ 2107.13-.18.

Georgia provides a third alternative. Georgia recognizes probate in common form as well as probate in solemn or due form. GA. CODE ANN. § 113-601 (1975). Notice is not required either prior to the admission of the will to probate or subsequent thereto. However, such a proceeding is not conclusive as to anyone whose interest in the estate is adverse to the testamentary disposition of the estate as provided in the will. *Id.* Nevertheless, probate in common form becomes final and binding on all after seven years, without exception. *Id.* § 113-605.

Thus, the notice provisions in Georgia do not differ significantly from the South Carolina provisions. However, the lack of a notice requirement in Georgia is not as likely to result in injustice as the conclusiveness of the proceeding in common form is defined for a substantial period of time — seven years as compared to six months. Unfortunately, in order to eliminate the potential for injustice, the Georgia provisions sacrifice certainty as to the validity of the proceedings. The UNIFORM PROBATE CODE (1975) [hereinafter referred to as the UPC] would eliminate this problem. Under the terms of the UPC, the personal representative must give heirs and devisees notice of his appointment. *Id.* § 3-306. An interested party, under the UPC, may commence an action for formal probate, the equivalent of probate in solemn form, within three years of the decedent's death or within twelve months of the informal probate, the equivalent of probate in common form, whichever is later. *Id.* § 3-108. *See also* notes 101-09 and accompanying text *infra.*

9. *See* Simes & Basye, *The Organization of the Probate Court in America (pt. 1),* 42 MICH. L. REV. 965 (1944); Simes & Basye, *The Organization of the Probate Court in America (pt. 2),* 43 MICH. L. REV. 113 (1944); Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's,* 2 CONN. L. REV. 453, 461-62 (1970).

10. L. SIMES & P. BASYE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE (1946).

manner and to deal effectively with these problems.[11] Due to its limited goals[12] and despite its influence on probate practices since its publication, the Model Probate Code led to only fragmented reform.[13] Thus, the perception remained that the system was unresponsive to the needs of contemporary society.[14]

Subsequently, the National Conference of Commissioners on Uniform State Laws and the Real Property, Probate and Trust Law Section of the American Bar Association in the early 1960's sponsored the development of a uniform probate law.[15] The result was the Uniform Probate Code[16] [hereinafter referred to as the UPC], which was approved by the American Bar Association in 1969.[17] Since that time, the UPC has been enacted either in whole or in part in eleven states.[18] At least two states have used prelimi-

11. Attempts to achieve uniformity among the states concerning particular aspects of probate predate the MODEL PROBATE CODE (1946), *see* note 10 *supra,* by at least ten years. Professor Atkinson stated that, in 1930, a committee appointed by the National Conference of Commissioners on Uniform State Laws to draft a UNIFORM ACT OF NOTICE TO LEGATEES reported that the task of writing such an act, incorporating notice prior to the admission of a will to probate, was impossible without abolishing probate in common form. Atkinson, *Wanted — A Model Probate Code,* 23 J. AM. JUD. SOC'Y 183 (1940). Professor Atkinson's article was the third of a series outlining the structure and functions of probate courts. This series of articles represented the first call for general reform. *See also* Atkinson, *Old Principles and New Ideas Concerning Probate Court Procedure,* 23 J. AM. JUD. SOC'Y 137 (1939); Atkinson, *Organization of Probate Courts and the Qualifications of Probate Judges,* 23 J. AM. JUD. SOC'Y 13 (1939). The MODEL PROBATE CODE (1946) followed and was the result, at least in part, of Professor Atkinson's articles. *See* L. SIMES & P. BASYE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE 5-6 (1946).

12. "[The MODEL PROBATE CODE's (1946)] objective is not the attainment of uniformity among the several states, but the improvement of probate procedure wherever revision of probate legislation is sought. Primarily, it is intended as a reservoir of ideas, and of acceptable legislative formulations of those ideas . . . ." L. SIMES & P. BASYE, note 10 *supra,* at 10.

13. Committee of Administration and Distribution of Decedents' Estates, *Administrative Portions of the Draft Uniform Probate Code — An Appraisal,* 2 REAL PROP. PROB. & TRUST J. 273 (1967) [hereinafter cited as the Committee Report].

14. N. DACEY, note 3 *supra;* M. BLOOM, note 5 *supra.*

15. Committee Report, note 13 *supra.*

16. UNIFORM PROBATE CODE (1975). There have been numerous commentaries on the UPC or on its various and specific provisions. *See, e.g.,* Wellman, *Lawyers and the Uniform Probate Code,* 26 OKLA. L. REV. 548 (1973); Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance,* 44 IND. L.J. 191 (1969). Not all commentaries have been favorable. *See, e.g.,* Zartman, *An Illinois Critique of the Uniform Probate Code,* 1970 U. ILL. L.F. 413.

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

18. The states which have enacted the UNIFORM PROBATE CODE in either the 1969 or 1975 version include: Alaska, ALASKA STAT. §§ 13.06.005-.100 (1972); Arizona, ARIZ. REV. STAT. §§ 14-1101 to -7307 (Cum. Supp. 1977); Colorado, COLO. REV. STAT. §§ 15-10-101 to

nary drafts as models for their reformed state codes.[19] Other states currently have the UPC under study or consideration.[20] South Carolina has joined this latter group.[21]

The UPC is designed, among other things, to simplify and clarify the law regarding the settlement of decedents' and protected persons' estates and to promote a quick and efficient system for the distribution of decedents' property to those who are

---

-17-401 (1973); Idaho, IDAHO CODE §§ 15-1-101 to -7-401 (Cum. Supp. 1977); Minnesota, MINN. STAT. ANN. §§ 524.1-101 to .8-103 (West 1975); Montana, MONT. REV. CODE ANN. §§ 71A-1-101 to 91A-6-104 (Supp. 1977); Nebraska, NEB. REV. STAT. §§ 30-2201 to -2902 (1976); New Mexico, N.M. STAT. ANN. §§ 32A-1-101 to -7-401 (Supp. 1976); North Dakota, N.D. CENT. CODE §§ 30.1-01-01 to -35-01 (1976); and Utah, UTAH CODE ANN. §§ 75-1-101 to -8-101 (Supp. 1977).

South Dakota also adopted the UPC, effective January 1, 1976. Uniform Probate Code, ch. 196, 1974 S.D. Sess. Laws 332. Subsequently, the South Dakota Legislature, reacting to the determined resistance of one powerful lawyer member, repealed the UPC effective July 1, 1976. Repealing Uniform Probate Code, ch. 175, 1976 S.D. Sess. Laws 312; Raising Coverage of Summary Probate Law, ch. 177, 1976 S.D. Sess. Laws 317. Among the reasons given for this repeal were claims that the UPC would "garble land titles" and that the independent administration of the estate by the executor would result in more probate defalcations than if the state employed some degree of supervised estate administration. Wellman, *The UPC Defeat in South Dakota,* UPC NOTES, Oct. 1976, at 5.

Professor Wellman convincingly argues that the above reasons for repeal are misconceptions based on an essential lack of understanding of the UPC and, in the case of defalcation, based on doubtful data. *Id.* One might wonder, as does Professor Wellman, about the clarity of titles devolving from decedents who died during the six months the UPC was in effect. Letter from L.A. Meeby to Joint Editorial Board for the UNIFORM PROBATE CODE (May 17, 1976) and response thereto by Professor Wellman, *reprinted in* UPC NOTES, Oct. 1976, at 6. Curative legislation was adopted in 1977, but litigation clearly is contemplated. S.D. CODIFIED LAWS ANN. §§ 29A-1-1 to -4 (Supp. 1977).

19. The two states which have used preliminary drafts of the UNIFORM PROBATE CODE (1975) are Maryland and Oregon. The third state which possibly used these preliminary drafts is Wisconsin. UPC NOTES, July 1974, at 1.

20. Professor Wellman, Reporter for the UNIFORM PROBATE CODE (1975), lists Hawaii, New Jersey, Michigan, Maine, Tennessee, Alabama, Kentucky, Illinois, Ohio, Texas, Georgia, and Mississippi as the states which are either considering UPC legislation or studying the UPC. Wellman & Gordon, *The Uniform Probate Code: Article III Analyzed in Relation to Changes in the First Nine Enactments,* 1975 ARIZ. ST. L.J. 477, 478 n.2.

21. In 1965, former Associate Justice Legg prepared a proposed South Carolina Probate Code for the Judicial Council. Though these proposals were never formally enacted, the theories underlying Associate Justice Legg's suggestions were followed in subsequent legislation. *See* S.C. CODE ANN. § 14-23-580 (Cum. Supp. 1977).

Sometime later, the South Carolina State Bar Association commissioned a study of the UNIFORM PROBATE CODE (1975) in relation to existing law by professors at the University of South Carolina School of Law. With this study now complete, the Estate Practices Committee is establishing subcommittees to develop policies and recommendations in such broad areas as intestate succession, probate administration, court structure, and jurisdiction. It is expected that specific proposals for revision will be made.

entitled to such property.[22] The UPC extends over three hundred pages in its official draft form and addresses all aspects of testamentary and testamentary-like practices. For example, it extends the jurisdiction of the probate court to include both *inter vivos* and testamentary trusts.[23] The UPC thereby establishes a single court with trial level jurisdiction over matters relating to the transmission of wealth from one person to another and from one generation to another. The UPC also authorizes powers of attorney that survive the subsequent incompetency of the donor so that unnecessary guardianships may be avoided.[24] It provides a simplified procedure for the execution and proof of wills[25] and establishes a pattern of intestate succession[26] that is consistent with that which most people would choose.[27] Further, the UPC significantly expands family protection.[28] As it is not feasible to discuss the UPC in its entirety, this article will focus upon and briefly discuss three areas of particular importance to the bench

22. UNIFORM PROBATE CODE § 1-102 (1975).

23. *Id.* § 7-201. Trusts are defined as including both *inter vivos* and testamentary transactions. *See id.* § 1-201(45).

24. *Id.* § 5-501.

25. *Id.* § 2-502 requires two witnesses as compared with the three presently required in South Carolina. S.C. CODE ANN. § 21-7-50 (1976). The UNIFORM PROBATE CODE (1975) authorizes the use of self-proved wills. UNIFORM PROBATE CODE § 2-504 (1975). A self-proved will is a will in which the testator and the witnesses attest, in writing, to the regularity of the will's execution. *Id.* The use of self-proved wills does not preclude a contest of the validity of the purported will, except as to signature. *Id.* § 2-504, Comment.

With informal probate, which is similar to South Carolina's probate in common form, self-proof has little significance since the necessity of the witness's testimony is dispensed with by the UPC. *Id.* § 3-303. However, under present South Carolina law, the testimony of one witness is required. S.C. CODE ANN. § 21-7-620 (1976). The real value of self-proof lies with formal probate, which is much like present probate in solemn or due form, where the testimony of one witness is required by the UPC. UNIFORM PROBATE CODE § 3-406 (1975). Under existing South Carolina law, all witnesses must testify. S.C. CODE ANN. § 21-7-640 (1976).

Self-proof conclusively presumes compliance with the signature requirements of the execution of a will. UNIFORM PROBATE CODE § 3-406 (1975). There is no counterpart of a self-proved will in South Carolina. For a discussion of formal and informal probate, see notes 96-145 and accompanying text *infra.*

26. UNIFORM PROBATE CODE §§ 2-102, -103 (1975). Generally, the UPC prefers the surviving spouse over the collateral kin of the decedent. This differs from the present practice in South Carolina, which admits collaterals into the distribution of the estate in addition to the surviving spouse. S.C. CODE ANN. § 21-3-20 (1976). For a more complete discussion of the rationale on which the UPC's intestate provisions are based, see notes 32-46 and accompanying text *infra.*

27. *See* note 37 *infra.*

28. UNIFORM PROBATE CODE §§ 2-401, -403 (1975). *See* notes 70-90 and accompanying text *infra.*

and bar of South Carolina. These three areas are: 1) the UPC's pattern for spousal and family protection;[29] 2) the procedures for opening, administering and closing estates;[30] and 3) the structure and function of the court of probate.[31]

II. FAMILY PROTECTION

A. *Protection of the Surviving Spouse*

Statutes of descent and distribution have long been recognized as being surrogate wills, providing schemes for the disposition of property that an intestate most likely would have made for himself.[32] Indeed, the original English statute[33] was described by Lord Chief Justice Raymond as a parliamentary will.[34] If the parliamentary wills are intended to reflect that which the intestate would have done for himself, recent studies show that most of these wills, as established by various states' statutes of distribution, including South Carolina's,[35] fail in effectuating this intent.[36] Actual wills differ substantially from statutory wills, at least in regard to the surviving spouse.[37]

---

29. *See* notes 32-90 and accompanying text *infra*.

30. *See* notes 91-246 and accompanying text *infra*.

31. *See* notes 247-68 and accompanying text *infra*.

32. *E.g.*, Barron v. Janney, 225 Md. 228, 170 A.2d 176 (1961); *In re* Williams Estate, 162 Misc. 507, 295 N.Y.S. 56 (Sup. Ct. 1937), *aff'd*, 254 App. Div. 741, 4 N.Y.S.2d 467 (1938); Magee v. Chambers, 17 Del. Ch. 45, 147 A. 306 (1929); Sorrels v. McNally, 89 Fla. 457, 105 So. 106 (1925).

33. 22 & 23 Car. II, c. 10 (1670).

34. Edwards v. Freeman, 24 Eng. Rep. 803, 806 (1727).

35. S.C. CODE ANN. § 21-3-20 (1976). Basically, the South Carolina intestate statute treats the widow as a child for purposes of distribution. Thus, if the decedent leaves a widow and a child, each shares equally in the estate. *Id.* § 21-3-20(1). If a decedent leaves a widow and more than one child, the widow takes one-third of her spouse's estate, and the children share the remaining two-thirds of the estate. *Id.* The widow never takes less than a third of the estate, regardless of the number of children.

If the decedent is survived by a widow but not by children, the widow takes one-half of the estate, and the blood relatives of the decedent share the remaining half. *Id.* § 21-3-20(2)-(5). Only where the decedent is not survived by a child or lineal descendant, a father, mother, brother or sister of the whole-blood, a child of such a brother or sister, a brother or sister of the half-blood, or by a lineal ancestor will the widow take the entire estate under current law. *Id.* § 21-3-20(6).

36. *See* note 37 *infra*.

37. M. SUSSMAN, J. CATES, & D. SMITH, THE FAMILY AND INHERITANCE (1970) [hereinafter cited as SUSSMAN]. The authors report that, based on a 1965 study of probate estates closed in Cuyahoga County, Ohio (Cleveland), 85.8% of the testators who were survived by a spouse and lineal descendants or ancestors did not follow the Ohio statute of distribution, OHIO REV. CODE ANN. § 2105.06 (Page 1976), but rather bequeathed their entire estate to the surviving spouse. SUSSMAN at 89.

It appears unlikely that any statutory pattern of distribution can be developed that would be appropriate for universal application as there are simply too many people with too many differing problems and estate objectives. Nevertheless, it is reasonable to expect the various statutes of descent and distribution to reflect the common desires of a decedent, that is, to be truly a surrogate will in fact as well as in theory. To accomplish this, most existing statutes governing succession to intestate property need to be amended to include one feature found in actual wills that is generally absent from parliamentary wills, *i.e.*, a recognition that normally the surviving spouse is the principal concern of the decedent.[38]

The UPC represents a compromise between prevalent testamentary patterns and traditional distribution statutes.[39] As compared to the latter, the UPC provides for the surviving spouse generally to be given an increased share of the estate, never to be less than one-half.[40] The surviving spouse will receive the first $50,000 of the estate in addition to one-half the remaining estate,

---

An earlier study in Cook County, Illinois (Chicago), with a much smaller sample, revealed that 100% of the testators who were survived by a spouse and children chose a scheme of distribution different from that of the intestate statute, ILL. ANN. STAT. ch. 3, § 2-1 (Smith-Hurd 1977), and left their entire estate to the spouse and excluded the children completely. Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1962).

A more recent study, taken of living persons without examining their wills, demonstrates that more than one-half of the respondents would exclude children from participation in their estate in favor of a surviving spouse and that, if there were no surviving children, they would exclude parents in favor of the surviving spouse. Fellows, Sinion, Snapp & Snapp, *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L.F. 717. The authors offer three possible bases on which to reconcile the discrepancy in the percentage of disinheritances of children demonstrated in their study with that in SUSSMAN's study: (1) lawyer advice at the time of actually drafting the will; (2) relatively more participants without children existed in this study than existed in SUSSMAN's; and (3) a higher percentage of females was present in this sample group than were in SUSSMAN'S. The authors found that women were far less likely to disinherit their children in favor of their spouses than were males. *Id.* at 729-30. However, the authors would discount the female response and weigh more heavily the male response as men are likely to die sooner than women. *Id.* at 731. Despite their findings, the authors suggest that a total disinheritance of children in favor of a surviving spouse is desirable as a matter of social policy because of the need of the spouse for continued support and because, if minors were allowed to participate in the estate, of the necessity for guardianships.

There are no similar studies in existence concerning South Carolina, either of the wills actually admitted to probate or of the intention of living persons.

38. *See* UNIFORM PROBATE CODE § 2-102, Comment (1975); note 37 *supra;* SUSSMAN, note 37 *supra*, at 86-103.

39. *See* note 37 *supra.*

40. UNIFORM PROBATE CODE § 2-102 (1975). *See* note 35 *supra.*

unless the decedent is also survived by issue who are not also issue of the spouse.[41] In the latter instance, she receives only one-half of the estate.[42] The same pattern, $50,000 plus one-half of the remaining estate to the spouse, is employed if the decedent is survived by his spouse and parents, but not by issue.[43] If the decedent is not survived by issue or parents, his surviving spouse takes the entire estate to the exclusion of all collaterals.[44]

The practical effect of these provisions, at least in modest estates, is to allow the surviving spouse to take the entire estate to the exclusion of all other claimants. This is an intended result of the UPC[45] and is consistent with actual patterns of testate distribution. Such a result is impermissible, however, under existing South Carolina law.[46]

Clearly, there are instances where the UPC's provisions for the spouse or, for that matter, any intestate distribution to the spouse would be inappropriate. For example, if the surviving spouse was unfit or unable to handle property, or unwilling to care for minor children, or if the decedent and the spouse had marital difficulties, outright gifts to her might be unwarranted.

---

41. UNIFORM PROBATE CODE § 2-102(3) (1975).

42. *Id.* § 2-102(4).

43. *Id.* § 2-102(2).

44. *Id.* § 2-102, Comment. SUSSMAN, note 37 *supra*, reveals that the average gross value of all estates in the study was $31,097, the value of intestate estates was $8,599, and that the median of intestate estates was $6,000. *Id.* at 73. Of this study, only two estates which had a gross value of $60,000 or more were intestate. *Id.* at 292.

Allowing for inflationary pressures since 1965, under the UNIFORM PROBATE CODE (1975) a surviving spouse will probably take the entire intestate estate, even where the estate may exceed $50,000 in value. The spouse may be paid an allowance for the family, UNIFORM PROBATE CODE § 2-403 (1975), for homestead, *id.* § 2-401, and personal property, *id.* § 2-402. Together, these may total as much as $14,500 and may be delivered to the surviving spouse without specific authorization by the court. Thus, she will receive the entire estate if it totals less than $64,500. This is clearly a desirable result as it prevents the fragmentation of small estates and, where there are minor children, eliminates the need of protective proceedings in order for property to pass to minor children. *Id.* § 2-102, Comment.

45. UNIFORM PROBATE CODE (1975) § 2-102(1), Comment.

46. Either applicable law or the provisions of a will may limit the surviving spouse as to what she receives from the estate. In the case of intestacy, she can never take the entire intestate estate in South Carolina unless the stringent conditions of S.C. CODE ANN. § 21-3-20(6) (1976) are met. For a discussion of the precarious position of the surviving spouse in South Carolina, see note 35 *supra*.

There is presently no provision of an allowance for the widow or family in any form. Homestead and personal property exemptions are limited to the property which the surviving spouse receives by intestacy or will. Dorn v. Stidham, 139 S.C. 66, 137 S.E. 331 (1926).

However, these are precisely the situations in which society and the UPC reasonably expect the decedent to have made a will. The UPC's pattern of distribution, because it must serve as every-man's will, is drafted for the norm, *i.e.,* towards that which will serve the greatest need. Special situations regularly fall beyond the scope of the parliamentary will.

Beyond intestacy, there are other situations under existing South Carolina law where provisions for a surviving spouse may be inadequate. For example, at present a husband may totally exclude his spouse from his will, although in doing so he may not deny her dower.[47] A wife may completely disinherit her husband since he has no dower equivalent.[48] In either case, whether made deliberately or as a result of neglect or oversight, an unfair or inadequate testamentary provision is binding on the survivor since present law provides no way of avoiding the will, save by contest of its validity.[49] Even when dower is available for a widow,

47. Dower is the common law right of a widow to maintenance from her deceased husband's real property. *See* Elder v. McIntosh, 88 S.C. 286, 70 S.E. 807 (1911). In Jefferies v. Allen, 33 S.C. 268, 11 S.E. 764 (1890), common law dower was defined by Justice McGowan as "that portion of lands which a wife hath for the term of her life in the lands of her husband after his decease." *Id.* at 270-71, 11 S.E. at 765. By statute, dower is admeasured against one-third of the husband's lands. S.C. CODE ANN. § 21-5-910 (1976). If the property subject to dower cannot be equally and fairly separated from the remainder of the husband's lands, then the heir at law or the person in possession of the land shall pay the widow a sum in lieu of dower. *Id.* § 21-5-930. The proper assessment in this situation is one-sixth of the appraised value of all the husband's lands. Jefferies v. Allen, 33 S.C. 268, 11 S.E. 764 (1890); Stewart v. Blease, 4 S.C. 37 (1872).

The widow may be required, either by express direction or by implication, to choose between her dower rights and the testamentary provisions made in her favor. Bomar v. Wilkens, 154 S.C. 64, 151 S.E. 110 (1929). If the husband does not put her to an election, she may have both. *Id.* A wife may not, however, have both her dower rights and her distributive share of the husband's intestate estate. She must choose one or the other. S.C. CODE ANN. § 21-5-710 (1976). *See generally* Note, *Widow's Election Between Dower and Other Benefits,* 9 S.C.L.Q. 277 (1957). For a form of bequest requiring election, see WILKINS, DRAFTING WILLS AND TRUST AGREEMENTS IN SOUTH CAROLINA 544 (2d ed. 1977) [hereinafter cited as WILKINS].

48. Tenancy by curtesy was abolished in 1883. S.C. CODE ANN. § 21-5-10 (1976). Dower by its terms is applicable only to women. *Id.* §§ 21-5-110 to -990. *See* Elder v. McIntosh, 88 S.C. 286, 70 S.E. 807 (1911).

49. This assumes, of course, that the will is actually presented and admitted to probate. If the custodian of the will refuses to present the will, it obviously has no effect on the distribution of the estate because proof of the will, admission to probate, and the issuance of letters testamentary are essential to effectuate probate. S.C. CODE ANN. § 21-15-50 (1976). *See* Counts v. Wilson, 45 S.C. 571, 23 S.E. 942 (1896). Thus, it is clear that an aggrieved spouse who has possession of the decedent's will or, for that matter, anyone having possession of the will who sympathizes with the spouse, can prevent the will from becoming effective.

it is likely to be of limited protection since it exists only in realty. Personalty, the major factor in family wealth today, is free from dower or any equivalent interest.[50]

The UPC would afford the spouse a much greater degree of protection. Under the UPC, a surviving spouse may elect against the decedent's will and take one third of his augmented[51] estate.[52] Though the concept of an elective share is novel for South Carolina, the concept that a will need not be conclusive of the rights of a widow is not.[53]

Generally, in other jurisdictions, when a spouse is dissatisfied with the testamentary gifts made to him or her, and an election against the will is permitted, the electing spouse is entitled to take a share of the probate estate,[54] the size of the share

---

Refusal to present the will entails criminal liability, however. Anyone having possession of a will must present it to the judge of probate within 30 days of the decedent's death. S.C. CODE ANN. § 21-7-730 (1976). Failure to do so may result in a misdemeanor violation. *Id.* § 21-7-780. Intentional or fraudulent destruction or suppression of a will may be punished by a fine up to $500, imprisonment, or both. *Id.* § 21-7-790. However, the command of these statutes and the imposable sanctions do not appear to be of sufficient weight so as to deter the failure to produce a nonbeneficial will. Presumably, if no will was presented, it would be difficult to establish that a will was being suppressed. Even if such suppression were established, the penalties are not severe. This may explain the paucity of prosecution in this area. There has been but one case involving the suppression of a will, and that was based on an allegation of common law conspiracy. State v. DeWitt, 20 S.C.L. (2 Hill) 282 (1834).

Once the will is admitted and becomes final, either by the passage of time from the initiation of probate in common form or by virtue of probate in due form, it is not subject to either direct or collateral attack. Jackson v. Cannon, 266 S.C. 198, 222 S.E.2d 494 (1976); Wooten v. Wooten, 235 S.C. 228, 110 S.E.2d 922 (1959); Wilkinson v. Wilkinson, 178 S.C. 194, 182 S.E. 640 (1935).

50. By definition, dower is limited to real estate. S.C. CODE ANN. § 21-5-910 (1976). *See* Lamar v. Scott, 34 S.C.L. (3 Strob.) 562 (1849).

51. UNIFORM PROBATE CODE §§ 2-201(a),-202 (1975). For a discussion of the composition of the augmented estate, see notes 56-64 and accompanying text *supra.*

52. In order to make the election, the surviving spouse must file with the court or deliver to the personal representative her petition of election within nine months of the decedent's death or within six months of the probate of the decedent's will, whichever is later. *See* UNIFORM PROBATE CODE § 2-205(a) (1975). This petition institutes a judicial proceeding to determine the composition and value of the augmented estate. *See id.* § 2-205(b).

While the surviving spouse may elect in her discretion, there is no need for her to do so if the decedent has adequately provided for her through testamentary or *inter vivos* gifts that exceed her elective share of one-third of the augmented estate. If the surviving spouse has been fairly treated, an election under the UNIFORM PROBATE CODE (1975), as described above, would gain her nothing and only would delay her distributive share. *See* notes 56-68 and accompanying text *infra.*

53. *See* WILKINS, note 47 *supra.*

54. The term "probate estate" encompasses only those assets subject to administra-

being dependent upon the number and character of other surviving heirs.[55] Under the UPC, the electing spouse always takes a third of the augmented estate, rather than a varying share of the probate estate. The augmented estate is the total of the probate estate, less funeral and administration expenses, plus gratuitous testamentary-like transfers made by the decedent during the marriage to persons other than the spouse and all gifts made within two years of death, except for gifts of $3,000 to any one person in each of those years.[56] In addition, it includes all property owned by the spouse at the decedent's death, which the spouse received from or through the decedent during his lifetime.[57]

In many respects, the augmented estate is similar to the gross estate under federal and South Carolina estate tax law.[58] For example, just as the gross estate includes transfers of wealth made prior to death that are incomplete because the transferor retained some dominion over the subject matter of the transfer,[59] the augmented estate also includes property formally transferred in which the transferor retained some beneficial interest.[60] How-

---

tion, including real property. It excludes, for example, property which the decedent possessed in joint and survivor tenancy with another, life insurance proceeds, and property in an *inter vivos* trust established by the decedent. *See* N. DACEY, note 3 *supra*; R. LYNN, AN INTRODUCTION TO ESTATE PLANNING (1975). Though such property is not subject to administration and is excluded from the probate estate, it is subject to federal estate taxation. I.R.C. §§ 2033, 2036, 2038, 2042.

55. *E.g.*, OHIO REV. CODE ANN. § 2107.39 (Page 1976); 20 PA. CONS. STAT. ANN. § 2508(b) (Purdon 1975). The Ohio statute provides that the surviving spouse's share shall be one-half of the decedent's gross estate. The Pennsylvania statute provides that the spouse's share shall be one-third or one-half of the gross estate, depending upon the existence of surviving children or surviving issue of children.

56. UNIFORM PROBATE CODE § 2-202(1)(iv) (1975).

57. *Id.* § 2-202(2).

58. I.R.C. §§ 2031-2044; S.C. CODE ANN. § 12-15-40 (1976). South Carolina's estate tax law parallels the federal estate tax law. Thus, while there is no express state marital deduction, that provision is incorporated into the state tax law by reference. Clark v. South Carolina Tax Comm'n, 259 S.C. 161, 191 S.E.2d 23 (1972). However, the recently enacted Federal Tax Reform Act of 1976, Pub. L. No. 94-455, 43 STAND. FED. TAX REP. (CCH) 1001 (Sept. 25, 1976), has not yet been incorporated into the state estate tax law. Though it probably will be incorporated, the impact it will have on state revenue cannot be ascertained as it both increases the marital deduction, I.R.C. § 2056(c), and replaces the previous specific exemption of $60,000 with a credit applicable to both testamentary and nontestamentary transfers, *id.* § 2010.

59. I.R.C. §§ 2033, 2036, 2038.

60. UNIFORM PROBATE CODE § 2-202(1) (1975). If the right of election were limited to the probate estate, *see* note 54 *supra*, it would be fairly simple for the decedent to emasculate this right by using nontestamentary methods to pass his property, *e.g.*, joint accounts

ever, this analogy is not a perfect one. Under the federal estate tax law, insurance on the decedent's life is included in his gross estate if he retained any incident of ownership.[61] The augmented estate, in contrast, includes only life insurance payable to the surviving spouse, and only then if the decedent paid the premiums.[62] Similarly, while all gifts made to the surviving spouse, regardless of when made, are included in the augmented estate,[63] gifts to a spouse of one-half the adjusted gross estate or $250,000, whichever is the larger, may be deducted in computing the taxable estate.[64] These latter examples illustrate the difference in the purposes of the tax law and the augmented estate. The former is designed to subject all testamentary and testamentary-like transactions to taxation in order to generate income for public purposes and, at the same time, to accomplish the distribution of wealth in our society.[65] The augmented estate, on the other hand, is designed to insure that a spouse receives only a fair share of the total family wealth, whether by lifetime gift, by testamentary provision, or by election.[66]

Obviously, a determination of the composition and value[67] of the augmented estate may not be simple in any given case. As discussed above, the purpose of the augmented estate is the protection of the spouse and not the simplicity of use. The potential complexity of this determination and the litigation that may rea-

---

with the right to survivorship and revocable trusts as to which he retains the power of control and disposition. *See* I UNIFORM PROBATE CODE PRACTICE MANUAL 99 (2d ed. 1977). Thus, under existing law there is little a South Carolina widow may do to avoid such transfers other than assert her dower interest. There is nothing a widower may do as he has neither curtesy nor dower rights. S.C. CODE ANN. §§ 21-5-10, -910 (1976).

61. I.R.C. § 2042.

62. UNIFORM PROBATE CODE § 2-202 (1975). Life insurance payable to someone other than the surviving spouse is not included in the augmented estate, even though the decedent had retained incidents of ownership. I UNIFORM PROBATE CODE PRACTICE MANUAL 100 (2d ed. 1977).

63. UNIFORM PROBATE CODE § 202(2) (1975); I UNIFORM PROBATE CODE PRACTICE MANUAL 99 (2d ed. 1977).

64. I.R.C. § 2056(c). *See* note 58 *supra*.

65. *See House Comm. on Ways and Means, Estate and Gift Tax Reform Act of 1976*, H.R. REP. No. 94-1380, 94th Cong., 2d Sess. 5 (1976).

66. UNIFORM PROBATE CODE § 2-202, Comment (1975). *See also* note 60 *supra*.

67. Normally, the components of the augmented estate are valued as of the decedent's death. However, property that was irrevocably transferred during the decedent's lifetime is valued as of the time the donee first came into possession or enjoyment of the property. UNIFORM PROBATE CODE § 2-202(2) (1975). Similarly, valuation of the spouse's property that is derived from the decedent is determined at the time the gift became irrevocable or the decedent died, whichever came first. *Id.* § 2-202(3)(ii).

sonably be expected to follow is designed to caution potential claimants as to the seriousness of the endeavor and to discourage elections.[68] Practitioners may expect to see few such elections since they would be of doubtful utility in most cases. Nevertheless, there is much to be said for making a process available by which a spouse who has been omitted from a will or who has been given a minimal devise may obtain a fair share of the family wealth to which she has contributed both services and, in all probability, capital. Thus, the societal limitation on the disinheritance of immediate family found in the anti-lapse and pretermitted heir statutes[69] are also found in the UPC's provisions protecting the spouse as well as children.

B. Protection of the Family

Under present law, family members who are legatees, devisees, distributees, or heirs participate in the estate only after debts, expenses, and taxes have been determined and paid,[70] and the executor or administrator may not treat them with preference.[71] Under the UPC this would change. The UPC recognizes

---

68. *See id.* § 2-202, Comment:

> Depending on the circumstances it is obvious that this section will operate in the long run to decrease substantially the number of elections. . . . [T]he spouse can[not] [profitably] . . . elect in cases where substantial provision [for her] is made by joint tenancy, life insurance, lifetime gifts, living trusts set up by the decedent, and the other numerous nonprobate arrangements by which wealth is today transferred. . . .
>
> The augmented net estate approach embodied in this section is relatively complex and assumes that litigation may be required in cases in which the right to an elective share is asserted.

See generally Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513, 537-43 (1970).

69. *E.g.*, S.C. CODE ANN. §§ 21-7-450, 460 (1976). Section 21-7-450 provides that children born after the death of the testator shall participate equally with his other children who were gifted. Section 21-7-460 extends this protection to children who were born after the making of the will and who were unprovided for. As with posthumous children, the child born after the will shares equally in the gifts made to the brothers and sisters. The protection of these provisions is limited, however. With both these provisions, protection is dependent upon gifts having been made to other children in which the posthumous and afterborn children may share. In the absence of a gift, such children receive nothing. Weinberg v. Weinberg, 208 S.C. 157, 167-68, 37 S.E.2d 507, 512 (1946).

70. The rights of a creditor are superior to the claims of estate beneficiaries. Graves v. Spoon, 18 S.C. 386 (1883).

71. However, some courts have indicated that, where there is a good faith belief that the estate is solvent, the administrator or executor may pay family members a portion of their share of the estate ahead of creditors. *E.g.*, *Ex parte* Boddie, 200 S.C. 379, 21 S.E.2d

that the family, spouse, and dependent children all have legitimate needs for subsistence to be satisfied from the property of the decedent. Such needs do not cease to exist because of the decedent's death. Therefore, the UPC adopts the concept of a family allowance. This is a reasonable monetary payment out of the assets of the estate, not necessarily to maintain the family's standard of living, but to assist the family unit during administration.[72] The amount to be paid to the family, *i.e.*, what is reasonable, rests largely in the discretion of the personal representative. He may pay up to $6,000 in a lump sum or make monthly payments of $500 without prior authorization of the court.[73]

In addition to the family allowance, the UPC provides for a homestead allowance and personal property exemption — a maximum of $5,000 in the case of the former and $3,500 in the latter.[74] In the case of homestead, the allowance is intended to secure for the family unit some portion of the decedent's estate free from the claims of creditors.[75] In other words, the intent is to give the family a modest but hopefully adequate base with which to begin anew. Thus, the allowance is not limited to the value in a home or residence. Rather, recognizing that all families, including those who live in rental housing — and perhaps these most of all — require some sustenance to maintain the viability and functions of the family unit, the UPC provides that the allowance be a monetary payment out of the general estate.[76] It is payable to the surviving spouse or, if there is no surviving spouse, then equally to the surviving minor and dependent children of the decedent.[77]

The exemption of personal property is similar. It, too, is available to the family unit and is payable to the surviving spouse or, if none, to the children of the decedent.[78] Unlike the home-

4 (1942); Darby v. Darby, 7 S.C. Eq. (2 McCord Eq.) 451 (1827). At least one case has spoken in terms that would require that the fiduciary care for the minor children. Lyles v. McClure, 17 S.C.L. (1 Bail.) 7 (1828).

72. UNIFORM PROBATE CODE § 2-403 (1975); *id.*, Comment. As the allowance payable to the wife, either in her own right or on behalf of the family as a unit, terminates on her death, the payment would not qualify for the material deduction under I.R.C. § 2056 and S.C. CODE ANN. § 12-15-60 (1976). The portion of the allowance payable to the widow on behalf of the remaining family would continue to be paid to its representative. UNIFORM PROBATE CODE § 2-403 (1975).

73. UNIFORM PROBATE CODE § 2-404 (1975).

74. *Id.* §§ 2-401, -402.

75. *See* I UNIFORM PROBATE CODE PRACTICE MANUAL 111-12 (2d ed. 1977).

76. *Id.*; UNIFORM PROBATE CODE § 2-401 (1975).

77. UNIFORM PROBATE CODE § 2-401 (1975).

78. *Id.* §§ 2-401, -402.

stead allowance, the personal property exemption is shared by all children, whether dependent or not.[79]

These allowances for the family, for homestead, and for personal property are not estates of inheritance. Rather, they are familial claims on the estate of the deceased for maintenance and are generally payable in addition to other benefits received by will, by intestacy, or by way of the election of a share of the augmented estate.[80] However, a testator by express provision may require a beneficiary to elect between his will and any one or more of the allowances.[81]

These allowances may be thought of as similar to creditor claims and, indeed, it may well be said that the family is in the nature of a creditor, and a preferred one at that. Claims for the homestead and family allowances and for the personal property exemption have priority over other claims against the estate.[82] As to the priority among these allowances, the claim for homestead is of first priority, followed, in order, by the family allowance and the exempt personal property.[83]

The homestead allowance and personal property exemption differ from the present South Carolina homestead allowance and personal property exemption[84] in two significant aspects. First, the current allowance is constitutionally limited to $1,000 for realty and $500 for personalty.[85] The UPC cannot immediately

79. *See id.* § 2-402. *Cf. id.* § 2-401 (limiting homestead to minor and dependent children).

80. *Id.* § 2-401 specifically provides that: "Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent by the will of the decedent . . . by intestate succession or by way of elective share." A similar statement is made with respect to exempt property and the family allowance. *Id.* §§ 2-402, -403. *See generally* I UNIFORM PROBATE CODE PRACTICE MANUAL 110-14 (2d ed. 1977).

81. UNIFORM PROBATE CODE §§ 2-401 to -403 (1975). In this respect, the rights of the testator are not unlike those of a husband under current practice in South Carolina. Under existing law, the husband may force an election by his wife between his will and her dower rights. *See* notes 47-49 and accompanying text *supra*. Thus, the UNIFORM PROBATE CODE (1975) allows a decedent to put a spouse to an election regarding the exemptions but presumes that no such election would be automatically required. *Id.* § 2-402, Comment.

82. UNIFORM PROBATE CODE §§ 2-401 to -403 (1975). Property that is specifically devised is not subject to the homestead allowance or the personal property exemption unless the estate is otherwise inadequate. *Id.* § 2-404. The family allowance is a cash payment, which is normally paid from the residue of the estate. *See id.*

83. *Id.* §§ 2-401 to -403.

84. S.C. CODE ANN. §§ 15-41-10, -100 (1976) (homestead allowance); *id.* § 15-41-320 (personal property exemption).

85. S.C. CONST. art. III, § 28.

change these figures.[86] Second, and of far greater importance, the present allowances are available to the spouse and family only out of qualifying[87] property received by them from the decedent, either through inheritance or testamentary gift. These current allowances are never an additional entitlement, which they have the potential of being under the UPC.[88] If nothing is received from the testator, there is no homestead or personal property allowance available to the family, as there are no assets to which it may attach.[89] However, in this situation, there is no justification for not allowing the family to receive the allowances, for the estate assets are benefiting relative strangers and not the decedent's family. The UPC's provisions are consistent with the theory that the benefit of the exemptions should be limited to the family. The UPC's basic difference lies in the right of the family to the entitlements. Under the UPC, these entitlements are generally available,[90] regardless of the asset mix of the estate. This represents a significant increase in protection for the family.

---

86. The South Carolina Supreme Court has so stated:

> But when the people in their sovereign capacity . . . prescribed what should be the nature and character of the homestead and personal property exempted, describing what it should be, the particular kind of property, its amount and value, and to whose benefit it should enure, all these matters were placed beyond the domain of legislative power and nothing was left for the general assembly to do . . . .

Norton v. Bradham, 21 S.C. 375, 379-80 (1884).

87. Though the homestead exemption is limited to land, it encompasses estates in land less than a fee. S.C. CODE ANN. § 15-41-10 (1976). Thus, for example, leased lands are a proper subject of homestead. *Cf.* Harrell v. Kea, 37 S.C. 369, 16 S.E. 42 (1892) (leased land must be used as part of the homestead). It is not available in land owned by a tenant in common as the debtor/decedent owned no particular land subject to being set-off under a homestead claim. Eaddy v. Wall, 183 S.C. 229, 190 S.E. 497 (1937). However, once the lands are partitioned and the debtor thus has an interest in specified land, the homestead exemption may attach. Riley v. Gaines, 14 S.C. 454 (1881).

The personal property exemption is limited to that of the head of the family and to a value of $500. If the debtor is not the head of the family, the exemption is limited to necessary wearing apparel and to tools and implements of a trade, with a maximum total value of $300. S.C. CODE ANN. § 15-41-310 (1976).

88. *See* note 80 and accompanying text *supra*.

89. Dorn v. Stidham, 139 S.C. 66, 137 S.E. 331 (1927); *Ex parte* Cothran, 128 S.C. 122, 121 S.E. 556 (1924); *Ex parte* Bullock, 58 S.C. 238, 36 S.E. 563 (1900).

90. *See* note 81 and accompanying text *supra*.

III. Probate and Administration

A. *Probate of Estates*

If the UPC's provisions regarding intestate distribution[91] are thought of as having the greatest divergence from present South Carolina law,[92] then its provisions for the opening of estates[93] and their subsequent administration[94] and distribution[95] must be regarded as the closest to current South Carolina procedures and practices.

The manner of admitting a will to probate provides a clear illustration. Currently, the UPC offers two methods of initiating probate. These two methods are informal[96] and formal[97] proceedings, approximating probate in common form[98] and probate in due form of law,[99] provided for under existing statutes.[100]

Probate in common form and the UPC's informal proceedings both achieve a tentative probate, which is subject to confirmation or rejection if subsequent proceedings are timely filed.[101] Prior notice to interested parties of an intent to seek probate in common form is unnecessary,[102] and as a practical matter this is also true of informal probate.[103] However, in contrast to current

---

91. *See* notes 39-46 & 80 and accompanying text *supra*.

92. *See* S.C. Code Ann. § 21-3-20 (1976). *See* note 35 *supra*.

93. Uniform Probate Code §§ 3-301 to -311, 3-401 to -414 (1975).

94. *Id.* §§ 3-701 to -721, 3-801 to -816.

95. *Id.* §§ 3-901 to -916, 3-1001 to -1008.

96. *Id.* § 3-301.

97. *Id.* § 3-401.

98. S.C. Code Ann. 21-7-620 (1976).

99. *Id.* § 21-7-640.

100. Probate in common and due form refer only to testate proceedings. Letters of administration of the intestate estate are issued pursuant to S.C. Code Ann. § 21-15-90 (1976). Both formal and informal proceedings under the Uniform Probate Code (1975) are available whether the decedent died testate or intestate. *Id.* §§ 3-301, -401, -402.

101. S.C. Code Ann. § 21-7-440 (1976) (6 months); Uniform Probate Code § 3-308 (1975) (the later of three years after the decedent's death or 12 months after the admittance of the will to informal probate).

102. S.C. Code Ann. § 21-7-620 (1976) ("[w]ithout citing or calling before him such as have interest the judge of probate may . . ."); Reed v. Lemacks, 204 S.C. 26, 28 S.E.2d 441 (1943) (probate of a will in common form is an ex parte proceeding).

103. Uniform Probate Code §§ 3-302, -303, -306 (1975). There are two situations in which the registrar may not act on an ex parte application. Any person desiring notice of orders or filings may file a demand with the court, even before the appointment of a representative. *Id.* § 3-204. In the unlikely event this is done, no order or filing to which the demand relates may be made or accepted. *Id.* Further, if a personal representative of the decedent had been previously appointed, he is required to be given notice by the moving party unless his appointment has been terminated. *Id.* § 3-306. Additionally, if

South Carolina practice, the UPC requires that post-probate notice be given to interested persons[104] by the personal representative,[105] where letters testamentary are issued[106] or by the applicant for probate, where letters testamentary are not sought.[107]

The absence of a similar notice requirement in cases of probate in common form is a serious failure of the South Carolina Code.[108] In effect, the heirs bear the responsibility for learning of both the decedent's death and the probate of his will. Ordinarily, this burden presents no serious problems as the death of the decedent likely will be known to his family. However, if the heirs are not close family or their relationship with the decedent was such that they would not learn of his death or of the probate of the will in the ordinary course of events, they have no way of knowing that they must act promptly to protect their interests. Unless the executor or someone looking out for their interests tells them of the probate, the time for contesting the will may pass before the heirs learn of their right to contest. Rather than placing the burden of gaining such knowledge on the heirs, it would be better to require, as does the UPC,[109] that the executor notify

---

the application is for the appointment of a respresentative, the applicant must give notice of his intention to seek informal appointment to any person having a prior or equal right to appointment. He must also provide notice to those who request it. *Id.* § 3-310. The latter requirement appears the most likely to cause the proceeding not to be ex parte. However, even this ordinarily will not be the case since those entitled to notice may waive this right. *Id.* With the bulk of applications, *i.e.*, those where there are no family disputes, this waiver of the right to notice should be the norm.

104. Interested persons are defined by the UNIFORM PROBATE CODE § 1-201(20) (1975) as including "heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against . . . the estate of a decedent, . . . which may be affected by the proceeding." It also includes those who have priority for appointment. *Id.*

105. Essentially, the term "personal representative" encompasses all estate fiduciaries, such as executors and administrators. *Id.* § 1-201(30).

106. *Id.* § 3-705. The notice must be given to heirs and devisees within 30 days of his appointment. *Id.*

107. *Id.* § 3-306. The applicant must provide the notice to heirs and devisees within 30 days of the grant of informal probate. *Id.*

108. *Cf.* S.C. CODE ANN. § 21-15-90 (1976) (notice is given to next of kin and creditors of an intestate before letters of administration are granted). This provision allows interested persons to be heard as to the qualifications of the petitioner for letters. *Ex parte* Small, 69 S.C. 43, 48 S.E. 40 (1904). There is no indication that the hearing is intended to establish intestacy, except incidently insofar as necessary to issue letters. Indeed, it is clear that the grant of letters does not prevent the subsequent probate of a valid will. *See* Satcher v. Grice, 53 S.C. 126, 31 S.E. 3 (1898). Clearly this hearing cannot be likened to a formal testacy determination under UNIFORM PROBATE CODE § 3-401 (1975).

109. *See* notes 104-07 and accompanying text *supra*.

interested persons of his appointment. While the giving of notice may result in a greater number of will contests, the benefit of insuring that all concerned persons be aware of their rights and be given a fair chance to protect them, if they determine that to be necessary, outweighs any inconvenience which may result due to a greater frequency of will contests.

Probate is now initiated in common form by a petition addressed to the probate judge.[110] An application for informal probate under the UPC would be addressed to an administrative official identified by the UPC as the registrar.[111] The duties of the registrar and the present probate judge are nearly identical.[112] Each must satisfy himself that the will is complete and that the application has been properly completed.[113] However, the duties of the two differ in this regard. The probate judge must take the testimony of at least one of the witnesses and satisfy himself that the offered document is indeed the decedent's last will and testament.[114] The registrar, on the other hand, does not have any similar adjudicative power. He does not take the testimony of the subscribing witnesses.[115] In any event, the inability to examine witnesses is immaterial as their testimony is unnecessary for informal probate.[116] If the registrar finds the will to be regular and the application in order, he will admit the will to probate.[117]

Ordinarily, an application for probate will be accompanied by an application for appointment of a personal representative.[118] Certainly this is true today. While the two applications are tech-

110. S.C. CODE ANN. § 21-7-420 (1976).

111. UNIFORM PROBATE CODE § 3-301(a) (1975).

112. *Compare* Davis v. Davis, 214 S.C. 247, 52 S.E.2d 192 (1949) (probate in common form settles all questions concerning formalities of creation) *with* UNIFORM PROBATE CODE § 3-303, Comment (1975) ("The purpose of this section is to permit informal probate of a will which . . . appears to have been executed properly.").

113. *See* S.C. CODE ANN. § 21-7-620 (1976); UNIFORM PROBATE CODE § 3-303 (1975).

114. S.C. CODE ANN. § 21-7-620 (1976).

115. *See* UNIFORM PROBATE CODE § 3-303(c) (1975).

116. *Id.*

117. *Id.* § 3-302. The registrar may, however, decline to admit the will because of the failure to meet the requirements specified in §§ 3-303, -304. However, he may also decline to admit the will for any reason. *Id.* § 3-305. This decision by the registrar, unlike the result of the refusal of the South Carolina probate judge to admit the will, is not an adjudication. *Id. See* S.C. CODE ANN. § 21-7-620 (1976); Davis v. Davis, 214 S.C. 247, 52 S.E.2d 192 (1949). The registrar must refuse to admit a will to probate if the will appears to be one of a series of wills, the latest of which does not expressly revoke earlier wills. UNIFORM PROBATE CODE § 3-304 (1975).

118. *See* UNIFORM PROBATE CODE § 3-301 (1975).

nically separate,[119] they are in fact dependent on each other. The present South Carolina statute specifically provides that a will may not be probated unless an application for either letters testamentary or letters of administration has been filed.[120] However, under the UPC, this dependence is dispensed with as the probate of the will and the appointment of a representative are distinct and independent acts. Occasionally an application for probate also may be filed simply to confirm title.[121]

As an alternative to the informal proceedings outlined above, the UPC permits the applicant to undertake formal proceedings in order to determine the validity of a will[122] or to confirm intestacy.[123] These proceedings may be initiated either before an informal determination is requested or subsequent thereto.[124]

Just as current probate in common form and the UPC's informal proceedings are similar, the adoption of the UPC's formal proceedings would be very similar to probate in solemn or due form.[125] These latter proceedings differ, however, in at least two respects. Presently, solemn form probate may be initiated only after the will has been admitted to probate in common form.[126] Under the UPC, formal proceedings may be used without first instituting the informal proceeding, since the two proceedings are independent of each other.[127] Further, under current practice, there is no way of finally determining intestacy because a will may be admitted whenever it is discovered, even though many years may have passed since the death of the decedent and even though an intestate proceeding may have been completed.[128] The formal proceedings of the UPC, in contrast, may be utilized to establish intestacy conclusively.[129] Even in the absence of a deter-

119. S.C. CODE ANN. § 21-7-620 (1976) makes reference to proof of a will, while S.C. CODE ANN. § 21-15-50 (1976) refers to an apparently separate application for letters testamentary. In practice, however, one application serves both purposes. A. MOSES, SOUTH CAROLINA PROBATE PRACTICE MANUAL PPM Form 3 (1974). The form is available from the probate court. *Id.*

120. S.C. CODE ANN. § 21-15-50 (1976).

121. *See* UNIFORM PROBATE CODE §§ 3-101, -102 (1975).

122. *Id.* § 3-401. *See id.*, Comment.

123. *Id.* § 3-401.

124. *Id.*

125. *Compare id.* §§ 3-401, -406, *with* S.C. CODE ANN. § 21-7-640 (1976).

126. *See* S.C. CODE ANN. § 21-7-640 (1976).

127. UNIFORM PROBATE CODE § 3-401 (1975).

128. *See* Satcher v. Grice, 53 S.C. 126, 31 S.E. 3 (1898) (will admitted to probate 54 years after testator's death).

129. UNIFORM PROBATE CODE §§ 3-108, -412 (1975).

mination by a formal proceeding, once three years have passed from the death of the decedent, intestacy is conclusively established, and a will may no longer be proved.[130]

As with probate in solemn form,[131] formal testacy proceedings are full notice hearings,[132] to which all interested persons have been made a party.[133] Formal proceedings are not simply an administrative determination of the validity of a will, as is the case with informal probate. Rather, formal proceedings are heard by the judge of probate[134] in a regular civil trial, which includes the right to a jury.[135] As a consequence, the decision of the court is conclusive as to all parties,[136] subject to the normal appellate process.[137]

If, as may be expected, informal probate is followed by formal proceedings in the nature of a will contest, the UPC would extend, by at least six months, the present period of limitation for bringing a will contest.[138] Formal proceedings must be filed within twelve months of informal probate or within three years of the decedent's death, whichever is later.[139] This limitation also has the effect of imposing a needed absolute maximum time for

130. *Id.* § 3-108.

131. S.C. CODE ANN. § 21-7-640 (1976).

132. UNIFORM PROBATE CODE §§ 3-401, -403 (1975).

133. Notice is required to be given to the surviving spouse, children, and other heirs of the decedent. Additionally, all devisees and executors named in a related will must be notified. Publication notice also must be given to all unknown persons and known persons whose addresses are unknown and who have an interest in the litigation. Of course, notice must be given to those who have filed a demand for notice. *Id.* § 3-403(a). Further, if the death of the purported decedent is in doubt, notice must be given to him at his last known address. *Id.* 3-403(b).

134. The UNIFORM PROBATE CODE (1975) speaks of the court rather than of the judge, but it is clear that the reference only refers to, in this context, the judicial officer because no functions are assigned to the registrar in formal proceedings, in contrast to the practice in informal proceedings. *Compare, e.g.*, UNIFORM PROBATE CODE § 3-401 *and* § 3-409 *with* § 3-301 *and* § 3-302 (1975).

135. *Id.* § 1-306. A jury must be demanded. *Id.* The parties are entitled to a jury for questions of fact in an action for probate in solemn form, unless waived. Meier v. Kornahrens, 113 S.C. 270, 102 S.E. 285 (1920).

136. UNIFORM PROBATE CODE § 3-412 (1975).

137. *Id.* §§ 1-308, 3-412. Appeals would be permitted on questions of law only since the court has complete and exclusive jurisdiction over probate matters. *Id.* §§ 1-302, -308, 3-412. *See generally* notes 256-57 and accompanying text *infra*.

138. S.C. CODE ANN. § 21-7-640 (1976) provides that probate in due form must be initiated within six months of probate in common form. The UNIFORM PROBATE CODE (1975) provides that an application for a formal determination of testacy must be brought within three years after the decedent's death or 12 months after informal probate, whichever is later. UNIFORM PROBATE CODE § 3-108 (1975).

139. UNIFORM PROBATE CODE § 3-108 (1975).

initiating probate of a will. Such a limitation, which does not presently exist,[140] would serve to stabilize titles to real property.[141] For example, assume that a devisee[142] enters real property under a will admitted to probate according to existing practice and that the will is subsequently set aside because of the discovery and probate of a later, valid will. His only title protection against the claimants under the later will would be through application of the doctrine of adverse possession.[143] For at least ten years from the date of his entry, despite the fact that a court had confirmed the authorizing document as the will of the decedent, he is in jeopardy.[144] This is too long a period for titles to remain unsettled when the entry appears rightful. The UPC's limitation would serve the salutary purpose of requiring claimants under an unprobated will to assert that will promptly, *i.e.*, within three years.[145]

B. Administration of Estates

Just as the UPC in many respects parallels existing practice as to the probate of estates,[146] so too does it parallel existing practice with respect to the administration of estates. Though the UPC uses somewhat different terminology regarding the individuals who administer estates—what are presently identified as executors[147] and administrators[148] are referred to by the UPC as

140. *See* Satcher v. Grice, 53 S.C. 126, 31 S.E. 3 (1898).

141. *See* notes 143-44 and accompanying text *infra*.

142. "Devisee" as used in this context refers to the testate successor to real property. *See generally* S.C. CODE ANN. § 21-7-420 (1976).

143. Satcher v. Grice, 53 S.C. 126, 31 S.E. 3 (1898). *See* Taylor v. Jennings, 233 S.C. 600, 106 S.E.2d 391 (1953); Crossland's Ex'rs v. Murdock, 15 S.C.L. (4 McCord) 217 (1827).

144. An action for the recovery of real property may be brought at any time within ten years of the deseizen of the plaintiff, his ancestor, predecessor, or grantor. S.C. CODE ANN. § 15-3-340 (1976). In some instances the party ejected may be able to recover at least some of his costs. Section 27-27-10 allows a defendant who purchased the property expecting the title to be good to recover from the successful plaintiff, in an action for ejectment, the full value of all improvements made by him or by those under whom he claims. The protection offered is not extended to devisees since the statute speaks of purchasers. At any rate, this protection may be dubious at best. Recovery is limited to the increase in value of the land attributable to the improvements. Recovery is not based on the cost of the improvements. Dunham v. Davis, 232 S.C. 175, 101 S.E.2d 278 (1957); Reaves v. Stone, 231 S.C. 628, 99 S.E.2d 729 (1957). Certainly, inflationary increases are not recoverable. *See* Dunham v. Davis, 232 S.C. 175, 101 S.E.2d 278 (1957).

145. UNIFORM PROBATE CODE § 3-108 (1975).

146. *See* notes 91-145 and accompanying text *supra*.

147. The individual nominated in a will to administer the estate is the executor. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 5 (2d ed. 1953). *See* S.C. CODE ANN. § 21-15-140 (1976).

148. "In case of intestacy the personal representative . . . is called the 'adminis-

personal representatives[149]—the functions of these individuals remain essentially the same. Each has sole responsibility for the administration of the decedent's estate.[150] Each must take possession of the estate[151] and manage, protect, and preserve it.[152] The UPC makes explicit that which is implicit under present law, namely, that the representative is a fiduciary[153] holding the estate in trust for creditors and interested persons.[154] Thus, the UPC states that the representative "is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this Code, and as expeditiously as is consistent with the best interests of the estate."[155]

---

trator.'" T. ATKINSON, note 147 *supra*, at 4-5. *See* S.C. CODE ANN. § 21-15-30 (1976). An administrator is also appointed when, though the decedent died testate, his will fails to appoint an executor, or, if he appointed one, the executor fails to qualify or ceases to act. In this case, an administrator, with the will annexed, is appointed by the court. S.C. CODE ANN. § 21-15-110 (1976). If the executor dies while in office, an administrator *de bonis non*, with the will annexed, is appointed. S.C. CODE ANN. § 21-15-130 (1976). He is simply the successor of an executor where the administration of the estate remains to be completed. *See* T. ATKINSON, note 147 *supra*, at 4-5.

149. UNIFORM PROBATE CODE § 1-201(30) (1975). The term includes all estate fiduciaries. *Id.* However, it does not include a trustee. *Id.* § 1-201(45).

150. *See* Trimmier v. Thomson, 10 S.C. 164 (1878) (title to personal property of an intestate decedent passes to the administrator); Lenoir v. Sylvester, 17 S.C.L. (1 Bail.) 632 (1830) (title to personal property of a testate decedent rests in the executor). As the administrator or executor has sole title, only he may undertake administration, and only he may receive letters of appointment. *See* S.C. CODE ANN. § 21-15-50 (1976). Title to real property, on the other hand, passes directly to the devisees or heirs, as appropriate. Carter v. Wroten, 187 S.C. 432, 198 S.E. 13 (1938); Satcher v. Grice, 53 S.C. 126, 31 S.E. 3 (1898). Thus, realty need not go through administration in order to prove title. However, the executor or administrator may reach real assets for payment of debts and claims. *See* S.C. CODE ANN. §§ 21-15-920, -1250 (1976). Even in the absence of a statute, the probate court has the authority to order the sale of land in this situation as part of its general powers over administration. McNamee v. Waterbury, 4 S.C. 156 (1872).

While title passes to the devisee rather than to the personal representative under the UNIFORM PROBATE CODE (1975), the assets, including real property, are nevertheless subject to administration. UNIFORM PROBATE CODE § 3-101 (1975). Having been appointed, the personal representative is under a specific duty to settle and distribute the estate. *Id.* § 3-703.

151. *See* Groves v. Spoon, 18 S.C. 386 (1883); UNIFORM PROBATE CODE § 3-709 (1975). However, the personal representative may leave realty or tangible personalty with the person "presumptively entitled thereto." *Id.*

152. *See* S.C. CODE ANN. § 21-15-1410 (1976); Witherspoon v. Watts, 18 S.C. 396 (1883); UNIFORM PROBATE CODE § 3-709 (1975).

153. UNIFORM PROBATE CODE § 3-703 (1975).

154. *Id.* § 3-711.

155. *Id.* § 3-703.

Within this broad framework, the representative or the executor/administrator under current practice is burdened with few specific duties. He must file an inventory and appraisement of the property of the decedent,[156] which of course must be supplemented if other assets are subsequently discovered.[157] However,

156. *Id.* § 3-706. The inventory must be filed within three months after the administrator's or representative's appointment. *Id.*; S.C. CODE ANN. § 21-15-320 (1976). The South Carolina executor must file more quickly, *i.e.*, within one month of his appointment. *Id.* Within another month thereafter, the appraisal must be filed. *Id.* § 21-15-350. The inventory and appraisement under the UNIFORM PROBATE CODE (1975) is not the two step procedure presently provided for. Rather, the UPC's inventory must include an indication of the fair market value of each item listed. UNIFORM PROBATE CODE § 3-706 (1975). It must also include an indication of the type and amount of encumbrances on each item of property listed. *Id.* There is no such requirement under existing state law. *See* S.C. CODE ANN. § 21-15-350 (1976).

The personal representative under the UPC may employ such appraisers as he deems appropriate to assist him in determining the valuation of estate assets. The determination of whether to hire such an appraiser and which appraiser to hire lies within the discretion of the representative. UNIFORM PROBATE CODE § 3-707 (1975). Quite clearly, the representative may dispense with the use of appraisers where he feels no need for them. *See id.* The South Carolina executor may not do so. Legislation specifically provides for the appointment of three or more appraisers, whether needed or not. S.C. CODE ANN. § 21-15-340 (1976). If property is located in more than one county, appraisers must be appointed in each county. *Id.* § 21-15-360.

Probably the only reason for retaining the appraisal system is to set asset values for estate tax purposes. Unfortunately, the valuation resulting from the appraisal is not conclusive for the purposes of the Internal Revenue Service and further unofficial appraisals may be necessary. *See* I.R.C. § 2031; Treas. Reg. § 20.2031-1(b), T.D. 6826, 1965-2 C.B. 368. In Estate of M.S. Pridmore, 20 Tax Ct. Mem. Dec. 47 (1961), the valuation of the probate court's appraisers was not followed because none of the appraisers were called to testify. If the appraisers are qualified experts, the Internal Revenue Service may accept their valuation. *See id.* However, there is no requirement that the probate court appoint experts. *See* S.C. CODE ANN. § 21-15-340 (1976). Further, with the greatly expanded exemption equivalent for federal estate tax reporting purposes, the need for an appraisal in every case is wanting. *See* I.R.C. § 6018. A return is now required only if the gross estate is greater than $120,000. *Id.* By 1981, this figure will rise to $175,000. *Id.* The UPC procedure is preferable in that it leaves the determination as to the necessity of appraisals with the representative.

157. UNIFORM PROBATE CODE § 3-708 (1975). The requirement that an executor or administrator file a supplemental report is not explicit. If a primary purpose of appraisal is taxation, it is clear that the tax commission must be notified of later discovered assets, and, since it is notified initially by inventory and appraisement, it follows that notification of additional assets should be in the same manner. This is confirmed by the requirement that the appraisal be on a form prescribed by the South Carolina Tax Commission. S.C. CODE ANN. § 21-15-350 (1976). Further, since title to personalty passes to the estate fiduciary, administration is necessary to pass title to the proper recipient, Lenoir v. Sylvester, 17 S.C.L. (1 Bail.) 632, 633 (1830), and an inventory is an essential part of the administration, S.C. CODE ANN. § 21-15-370 (1976); it follows that a supplemental inventory is necessary. Certainly, this is true in other jurisdictions. *See, e.g.*, OHIO REV. CODE ANN. § 2113.69 (Page 1976).

unlike the executor and administrator under current law,[158] the UPC's representative need not make accountings to the court.[159]

Relief from accounting to the court signifies the fundamental philosophical difference between the UPC and present law, namely, the necessity for supervision of the estate fiduciary. Clearly, the current requirement for accounting is a product of a perceived need for the state, through the court, to take steps to insure that the executor or administrator does not defraud creditors or estate beneficiaries.[160] The UPC's premise is just the opposite. It assumes that the representative will not act negligently or fraudulently and, if he should, that the estate claimants, creditors, and devisees[161] have sufficient means of protecting themselves.[162] It supposes that he will act voluntarily in conjunction with the beneficiaries and others interested in the estate to do properly that which needs to be done.[163] Supervision by the court

158. S.C. CODE ANN. § 21-15-1410 (1976). The initial account is due five months after the executor's or administrator's appointment and every six months thereafter. *Id.* However, upon approved petition, the period for the initial account may be extended to 11 months and annually thereafter. *Id.* § 21-15-1420.

159. The representative must account to heirs and devisees as part of closing the estate. UNIFORM PROBATE CODE §§ 3-1001 to -1003 (1975). In formal closings, the accounting may be approved by the court, but it will not do so unless requested. *Id.* §§ 3-1001, -1002. Only the supervised representative must account to the court. *See id.* §§ 3-504, -505.

160. *See* Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 467-70 (1970); S.C. CODE ANN. § 21-15-1410 (1976) ("[E]xecutors or administrators shall file with the probate judge a verified statement of all liabilities of the estate and *the probate judge shall pass upon and determine whether such claims are true and just liabilities* . . . .") (emphasis added).

161. "Devisee" is defined by the UNIFORM PROBATE CODE (1975) as "any person designated in the will to receive a devise." UNIFORM PROBATE CODE § 1-201(8) (1975). A devise means any testamentary disposition of real or personal property. *Id.* § 1-201(7). Hence, the UPC draws no distinction between recipients of real or personal property. All are referred to as devisees.

162. The claimants, creditors, and devisees of the estate are entitled to: (1) notice of informal probate, UNIFORM PROBATE CODE §§ 3-306, -310, -705 (1975); (2) a copy of the inventory, if requested, *id.* § 3-706; and (3) an accounting as part of the estate closing procedure, *id.* §§ 3-1001 to -1003. They may, at any time, request the court to supervise the representative. *Id.* § 3-502. Without engaging in that procedure, they may petition to have the representative restrained from exercising his office or any specified act of administration, disbursement or distribution of the estate. *Id.* § 3-607. Finally, they may petition for his removal. *Id.* § 3-611. Because administration is normally a family matter and the beneficiaries have ample notice and opportunity to protect their interests, there is no need for the court to intervene unless asked to do so. Hence, the representative is directed by the UNIFORM PROBATE CODE (1975) to proceed with the expeditious settlement and administration of the estate without court order. *Id.* § 3-704.

163. *See* UNIFORM PROBATE CODE, Art. III, General Comment (1975); note 162 *supra*.

is deemed to be unnecessary.[164]

This is not to say that there may never be a need for action or supervision by the court. The UPC recognizes and provides for those situations where disputes between the representative and the devisees or creditors might arise or where the representative or an interested party believes that instructions as to some facet of the administration are necessary. In these cases, any interested party may move for the court to settle the dispute, declare rights, or make any other appropriate order.[165] However, until requested to act, the court has no authority, for it may not supervise or demand reports of the representative on its own initiative.[166] Its role is strictly passive.[167] That, of course, is not true of the present probate court.[168]

---

164. Notes 162 & 163 and accompanying text *supra*. If the representative does exercise his powers and authority improperly, he will breach his duties to the estate beneficiaries and creditors. For such conduct, he may be liable for any loss resulting from the breach of his fiduciary duties. UNIFORM PROBATE CODE § 3-712 (1975).

165. UNIFORM PROBATE CODE § 3-105 (1975). The representative may also petition the court for such an order. *Id.* § 3-704. This may be described as an in-and-out procedure and it is thought of as occupying some middle ground between unsupervised and supervised administration. *See* notes 169-76 and accompanying text *infra*. However, it occupies no middle ground, as none exists. The UNIFORM PROBATE CODE (1975) provides for either supervised or unsupervised administration. The in-and-out procedure is available in order for either the representative or interested parties to bring before the court a particular question for expeditious determination. *See* UNIFORM PROBATE CODE §§ 3-105, -190, -704 (1975). These questions may arise under either form of administration. Except for questions of distribution and as specifically limited by court order, the power and authority of the representative are the same regardless of the type of administration being utilized. *Id.* § 3-501. Thus, the right of the representative and interested persons to seek resolution of specific questions or disputes has no effect on the status of the representative. If unsupervised, he remains so. If supervised, he remains so. *See id.* §§ 3-105, -501, -704.

166. *See* UNIFORM PROBATE CODE §§ 3-105, -501, -704 (1975). The UNIFORM PROBATE CODE (1975) has but one provision by which the court may invoke its jurisdiction itself. Where supervised administration has been ordered, the representative is "responsible to the Court . . . and is subject to directions concerning the estate made by the Court on its own motion or on the motion of any interested party." *Id.* § 3-501. However, the court cannot on its own initiative order supervised administration. This must be invoked by an interested party. *Id.* § 3-502.

167. Note 166 and accompanying text *supra*. *See generally* Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 486-93 (1970); Wellman & Gordon, *The Uniform Probate Code: Article III Analyzed in Relation to Changes in the First Nine Enactments*, 1975 ARIZ. ST. L.J. 477, 499.

168. Thus, an executor must file accountings, S.C. CODE ANN. § 21-15-1410 (1976), and he must obtain an order for the sale of personal property, in addition to real property, unless authorized to do so by the will. *Id.* §§ 21-15-1250, -1270. A representative under the UNIFORM PROBATE CODE (1975), in contrast, may sell both personal and real property unless restricted by the will or by an order in a formal proceeding. UNIFORM PROBATE CODE § 3-715 (1975). The heirs and devisees, if they object, may petition to restrain the representative. *Id.* § 3-607.

The UPC also recognizes that there may be instances, hopefully rare, where because of the inexperience of the representative, continuous supervision of the representative by the court is desired.[169] The court, thus, may order supervised administration.[170] This is a continuous procedure entailing formal probate[171] and a formal closing of the estate.[172] The representative may not distribute any part of the estate without the prior approval of the court upon a hearing with full notice to all concerned parties.[173] In the meantime, he may hold and exercise authority over estate assets in the same manner as an unsupervised representative.[174] The representative's authority, upon proper request, may be curtailed in any appropriate manner during administration.[175] However, these restrictions must be endorsed on the representative's letters of appointment to be valid against third persons.[176]

Clearly, continuous supervision is not consistent with the basic underpinnings of the UPC,[177] and it is not the favored form of administration.[178] It must be expressly sought.[179] Continuous

---

169. UNIFORM PROBATE CODE §§ 3-501 to -505 (1975).

170. *Id.* § 3-501.

171. *Id.* § 3-502.

172. *Id.* § 3-505.

173. *Id.* § 3-504.

174. *Id.* § 3-501.

175. *Id.* § 3-504, Comment.

176. *Id.* Restriction by endorsement is required to put the world on notice of limitations on the personal representative's authority. Normally, persons transacting business with a representative are not required to inquire as to the extent of his authority nor are they bound by testamentary or judicial limitations unless they are aware of such limitations. Nevertheless, it may reasonably be expected that, in exercising ordinary prudence, they will require the representative to confirm that he is what he purports to be. Any restrictions are effectively made known to the business world because such restrictions must be endorsed on the letters. *Id.* § 3-504. The letters of appointment, in this respect, resemble a certificate of title to an automobile. Unless a lien is noted on the certificate, the auto may be sold to a bona fide purchaser. Likewise, unless the restriction on the representative's authority is noted on his letters, an innocent third person is protected if the representative treats the estate property in a manner inconsistent with the restrictions.

177. *See* notes 160 & 162-64 and accompanying text *supra*.

178. The UNIFORM PROBATE CODE (1975) requires that the request for supervision meet one of several requirements before such supervision will be ordered:

> 1) The decedent's will directs supervised administration and there is no change in circumstances since the execution of the will that would make supervision unnecessary;
>
> 2) supervision is necessary for the protection of persons interested in the estate; or
>
> 3) supervision is deemed necessary by the court.

UNIFORM PROBATE CODE § 3-502 (1975). Thus, the normal situation contemplated by the UPC is one without supervision. *See id.* § 3-501, Comment; *id.* § 3-502, Comment.

179. *Id.* § 3-502.

supervision is not initiated by an application for formal proceedings[180] nor by resort to the court for settlement of disputes or declaration of rights.[181] In other words, it cannot be triggered unintentionally.[182] Since supervised administration is so involved and since a more expeditious method of administering the estate is provided, its use should be rare. However he operates, whether supervised or not, the representative, unlike his South Carolina counterpart,[183] has substantial authority over the estate.[184] Indeed, he may treat the assets as the decedent would have, subject[185] to his fiduciary obligations,[186] which include payment of debts[187] and taxes.[188]

Creditors must be given notice of a need to file their claims against the estate.[189] They may file directly with the representa-

180. *See id.* §§ 3-107, -401 to -414, -502. If only a formal testacy proceeding is initiated, the determination thereof and the appointment of a representative terminate the court's involvement in the administration as, the representative, unless restricted, proceeds without orders of the court. *Id.* § 3-704. *See generally id.* § 3-501, Comment.

181. *See id.* § 3-107; note 179 and accompanying text *supra*.

182. *See* UNIFORM PROBATE CODE § 3-502 (1975).

183. For example, the executor or administrator may not sell real or personal property of the decedent without either testamentary authority or court order. S.C. CODE ANN. §§ 21-15-920, -1210, -1250, -1270 (1976). *See generally* Means, *Estate Planning and the Law of Wills and Inheritance for South Carolina Farmers*, 12 S.C.L.Q. 491, 553-54 (1960). *Cf.* S.C. CODE ANN. §§ 21-11-10 to -170 (1976) (relating to the management of investments and property).

184. UNIFORM PROBATE CODE § 3-715 (1975). The UNIFORM PROBATE CODE (1975) lists 27 classes of powers which inhere in the representative unless he is otherwise restricted, providing he acts reasonably in the best interests of the beneficiaries and those others interested in the estate. These powers include: 1) a general power of sale; 2) the retention of assets otherwise improper for investment; 3) the satisfaction of charitable pledges even if nonbinding; 4) making repairs and alterations to buildings; 5) the power to subdivide, develop, or dedicate land; 6) the power to vote stocks, borrow money with or without security; 7) the power to compromise claims with estate debtors; and 8) the power to continue business for four months or, if approved by the court in a formal proceeding with notice, for a longer period of time. *Id.* § 3-715. If he fails in his fiduciary duties, he is liable to any interested person for the resultant loss to the same extent as the trustee of an express trust would be. *Id.* § 3-712. Thus, he must exercise his authority as would a prudent man in dealing with the property of another. *Id.* § 7-302.

185. *Id.* § 3-711.

186. *Id.* The representative is specifically referred to as a fiduciary. *Id.* § 3-703. He has the same power over title as would an absolute owner, but such title is in trust for creditors and others interested in the estate. *Id.* § 3-711.

187. *Id.* § 3-711.

188. *Id.* §§ 3-709, -715(18).

189. *Id.* § 3-801. Notice is given by publication in a newspaper of general circulation once a week for three successive weeks. *Id.*

tive[190] or with the court.[191] A creditor need only state the basis of the claim, his name and address, and the amount claimed.[192] If the claim is contingent, the nature of the contingency must be noted,[193] and, if secured, the security must be described.[194] The statement of claim need not be attested.[195]

Claims must be filed within four months of notice, or if no notice was given, within three years of the decedent's death.[196] Failure to file bars the claim, not only against the estate, but also against heirs and devisees.[197] The representative may pay the claim whenever he deems it appropriate.[198] Further, he may com-

---

190. *Id.* § 3-804.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* § 1-310.
196. *Id.* §§ 3-803(a)(1), (2).
197. *Id.* § 3-803(b).
198. *Id.* § 3-807(b). This assumes that the claim has not been disallowed. Disallowance of a claim requires a positive action of the representative by mailing notice of disallowance within 60 days of the time for original presentation of the claim. If he fails to mail the notice, the claim is allowed. *Id.* § 3-806. If the claim is disallowed, the claimant has 60 days in which to petition the court for allowance or to bring an action against the representative. If the claimant does not follow this procedure, his claim is barred. *Id.*

The representative is not given any time limit within which he must give notice of his appointment. However, his failure to provide prompt notice would be a breach of his fiduciary obligations, subjecting him to liability should a claimant later assert a claim against a devisee. The representative would be liable for the costs related to the discharge of the claim and the recovery of contributions from others. *Id.* § 3-801, Comment. *See id.* §§ 3-801, -712. This situation will not arise if the probate court handles publication, as it does in some locations, as a convenience to representatives.

In contrast, a South Carolina executor or administrator must file with the court an affidavit that he has fulfilled the publication requirement of advertisement once a week for three consecutive weeks, and he must begin the advertisements within 30 days of his appointment. S.C. CODE ANN. § 21-15-630 (1976).

Under the UNIFORM PROBATE CODE (1975), creditors are barred completely if they do not timely file. UNIFORM PROBATE CODE § 3-803 (1975). This is not true under present South Carolina law. Creditors are barred against the estate if they do not file claims within five months of the first pubication of notice of appointment. S.C. CODE ANN. § 21-15-640 (1976). From its language, the statute is appparently a complete bar to the later assertion of claims against the heirs and distributees of the decedent. *Id. See* Means, *Estate Planning and the Law of Wills and Inheritance for South Carolina Farmers*, 12 S.C.L.Q. 491, 552 (1960). Nevertheless, at least two federal cases have held otherwise. Dubuque Fire & Marine Ins. Co. v. Wilson, 213 F.2d 115 (4th Cir. 1954); Muckenfuss v. Marchant, 105 F.2d 469 (4th Cir. 1939). The late Professor Coleman Karesh disagreed. Karesh, *Survival of Actions—Filing of Claims—Parties*, 8 S.C.L.Q. 162 (1955). In any event, there are no cases from the South Carolina Supreme Court on the issue.

The South Carolina statutes have no provision allowing for the early payment of claims. However, like the representative under the UPC, the executor or administrator

promise it, if such appears to be in the best interest of the estate.[199] Of course, if he pays prematurely, and the estate ultimately turns out to be inadequate to discharge all claims, or if he improperly compromises the claim, he may be held personally liable.[200]

C. *Distribution and Closing of Estates*

The UPC takes a fundamentally different approach to devolution of title to the decedent's property than does present South Carolina law, at least with respect to personal property. Presently, real property is said to pass directly to the decedent's devisees[201] or, in the absence of an effective testamentary gift, to his heirs.[202] Personal property, however, passes to the executor or administrator and not to the legatees or distributees.[203] Thus, while administration is not necessary to pass title to realty from the decedent, administration is essential for title to personalty to pass to legatees.[204]

Under the UPC, administration is not necessary to pass title to any property, whether real or personal, as title passes to the persons entitled thereto upon the decedent's death.[205] All property, of course, is subject to administration, but this is not a title-perfecting process.[206]

---

may compromise claims with the consent of the probate judge. S.C. CODE ANN. § 21-15-720 (1976).

199. UNIFORM PROBATE CODE § 3-813 (1975).

200. *Id.* §§ 3-807(b)(2), -712.

201. Carter v. Wroten, 187 S.C. 432, 435, 198 S.E. 13, 15 (1938); Satcher v. Grice, 53 S.C. 126, 128, 31 S.E. 3, 4 (1898).

202. *See* S.C. CODE ANN. § 21-3-20 (1976).

203. Trimmier v. Thomson, 10 S.C. 164, 182 (1877); Lenoir v. Sylvester, 17 S.C.L. (1 Bail.) 632, 633 (1830).

204. *See* Richardson v. Cooley, 20 S.C. 347, 350 (1884); Lenoir v. Sylvester, 17 S.C.L. (1 Bail.) 632, 633 (1830).

205. UNIFORM PROBATE CODE § 3-101 (1975). Title is not entirely clear, however, since the property is subject to the homestead allowance, to exempt property and family allowances, to creditor's claims, to the elective right of the surviving spouse, and to administration. *Id.* Ordinarily, to insure that these claims are satisfied, the representative will take possession of the property, though he need not do so if he thinks it unnecessary. *Id.* § 3-709.

206. *See id.* §§ 3-101, -901. Of course, administration serves to confirm title and to make it marketable. Thus, if distribution is made in kind, the representative shall execute a deed of distribution. *Id.* § 3-907. That deed is conclusive evidence that the distributee has succeeded to the interests of the estate in the particular property. *Id.* § 3-908. If the distribution was improper, the representative may recover the assets or their value. *Id.* Nevertheless, the distributee may pass good title to a purchaser. *Id.* § 3-910.

For example, if probate proceedings are not instituted within three years of death, intestacy is conclusively established,[207] as no will may thereafter be probated.[208] The heirs, having presumably gone into possession, are protected in their title despite the absence of administration.[209] Similarly, if a will was offered for probate and proven but no administration was conducted, the devisees who entered under the will are protected in their title.[210] In the rare situations where devisees enter under a will which was not offered for probate, they, too, receive some protection. They may, after the three year period for probate has run, offer the will as evidence of their title to the claimed estate.[211] Title is not established thereby; that can be done only by a validly probated document.[212] However, the will might, for example, help support a claim of adverse possession against the heirs,[213] and it does represent a form of color of title.[214] Problems of this sort are not common. Probate and administration are the rule rather than the exception, and either probate itself[215] or the representative's distribution establishes title.[216] This results in no change from cur-

207. *See id.* § 3-108; *id.*, Comment.

208. *Id.* § 3-108. However, a will which was probated in the informal proceeding may still be contested for up to another year since a formal proceeding may be instituted at any time within three years after death or 12 months after informal probate, whichever is later. *Id.* However, no new will may be offered after three years of death. *Id.*

209. *See id.* §§ 3-101, -108, -109; *id.* § 3-108, Comment. The heirs must establish the decedent's ownership of the property, his death, and their relationship to him in order to establish their title. *Id.* § 3-108; *id.*, Comment. Of course, they take subject to the claims for allowances and the claims of creditors. *Id.* §§ 3-101, -108. *See also id.* § 3-104.

210. *Id.* §§ 3-101, -901. In this situation, the devisees rely on the probated will to establish their title. *Id.* § 3-901. As is the case with taking by heirs, the title of the devisees is subject to the claims for allowances and the claims of creditors. *Id.*; *id.* § 3-101. *See also id.* § 3-104.

211. *Id.* § 3-102; *id.*, Comment. This situation might arise where a surviving spouse pays all the claims herself and does not admit the will to probate under the belief that it will add nothing to her rights. She may mistakenly think she is entitled to the whole of her decedent husband's estate when in fact she is not. Similarly, she might have been fraudulently induced into believing probate was unnecessary.

212. *Id.* § 3-102.

213. In the absence of a will, the heirs are entitled to the property. *Id.* §§ 3-101, -901. If the widow enters under an unprobated will, she does so against the interests of the heirs, and they may bring an action for the recovery of the land. S.C. CODE ANN. § 15-3-340 (1976).

214. *See* S.C. CODE ANN. § 15-67-210, -220 (1976). The right to offer the will as evidence becomes important if the heirs wait more than 10 years to record the property because it supplies the element of adversity. *Id.* § 15-67-220.

215. UNIFORM PROBATE CODE §§ 3-102, -901 (1975).

216. *Id.* § 3-907.

rent procedures.[217]

Ordinarily, the representative will have taken possession of the decedent's personal property.[218] He may begin distribution at such time as he, in conformity with his obligations as a fiduciary[219] and his obligation to pay death taxes,[220] finds appropriate.[221] Presumably, under this standard, in a proper situation he may begin distribution in less than six months from his appointment;[222] under present South Carolina law he could not do so.[223]

The representative may and normally would distribute in kind rather than converting assets to cash.[224] He, of course, may distribute to a trustee.[225] He must abide by any agreements concerning distribution that are entered into by all of the successors to the decedent's property, even though the agreements may alter the terms of the will or deviate from the statute of distribution.[226]

Consistent with the UPC's provisions allowing a choice between informal or formal proceedings, the representative may elect to close the estate informally by affidavit[227] or formally by petitioning for an order of settlement and termination of his appointment.[228] In contrast, a South Carolina fiduciary has no choice. Informal discharge is unavailable.[229]

When the representative closes informally by affidavit, he affirms that he has properly completed the administration of the estate, that all claims and expenses have been paid, and that the

---

217. *See* notes 201-04 and accompanying text *supra*.

218. UNIFORM PROBATE CODE § 3-709 (1975). The representative may leave real or personal property with any person "presumptively entitled thereto" unless he will need it to complete the administration. *Id.*

219. *See* notes 152 & 153 and accompanying text *supra*.

220. UNIFORM PROBATE CODE §§ 3-715(18), -709 (1975).

221. *See id.* §§ 3-709, -906.

222. However, he may not close the estate before six months have elapsed since his appointment. *Id.* § 3-1003.

223. S.C. CODE ANN. § 21-15-1630 (1976).

224. UNIFORM PROBATE CODE § 3-906 (1975). Presumably, a South Carolina executor would also distribute in kind as there is no statutory or case law prohibiting his doing so. Inferentially, there is authority for his doing so where a will so directs. *See* S.C. CODE ANN. § 21-15-1760 (1976).

225. UNIFORM PROBATE CODE § 3-913 (1975). A South Carolina executor may also distribute to a trustee. S.C. CODE ANN. § 21-33-20 (1976). *Cf. id.* § 21-29-40 (prohibiting foreign corporations domiciled or licensed to do business in a state contiguous to South Carolina from serving as testamentary trustee).

226. UNIFORM PROBATE CODE § 3-912 (1975).

227. *Id.* § 3-1003.

228. *Id.* §§ 3-1001, -1002.

229. S.C. CODE ANN. § 14-23-350 (1976).

assets have been distributed to those entitled thereto.[230] He must provide a copy of his affidavit and an accounting of his administration to all distributees.[231] They then have six months in which to assert claims of malfeasance or be barred.[232] The representative's authority is not terminated,[233] however, for another six months, a full year after the affidavit was originally filed.[234] Thus, if assets were discovered during the year following the affidavit, the representative could administer them without reopening the estate since it would not have been closed.[235]

Alternatively, the representative may choose formal closing. This results in a simultaneous bar of claims against him and termination of his authority.[236] As part of the proceedings, the court may adjudicate testacy,[237] may compel an accounting,[238] and may approve an accounting previously submitted.[239] As with all formal proceedings, notice must be given to all devisees,[240] and the court's order is final and conclusive unless appealed.[241] The formal proceeding is an adjudicative proceeding by which the representative may be discharged from further claims of devisees.[242]

---

230. UNIFORM PROBATE CODE § 3-1003 (1975).

231. *Id.*

232. *Id.* § 3-1005. The bar does not apply to actions for fraud, misrepresentation, or inadequate disclosure. *Id.* In such cases, the action may be brought within two years after discovery of the fraud, but not later than five years after its commission. *Id.* § 1-106.

233. The term "terminated" refers to the cessation of the authority to act rather than to the possibility of liability to interested persons. *Id.* § 3-1003, Comment. Thus, his authority may be terminated by his removal, *see id.* § 3-611, while his liability for breach of his fiduciary duties remains until applicable limitations have become effective. *Id.* § 3-1003, Comment.

234. *Id.* § 3-1003(b).

235. *See* note 233 *supra.*

236. UNIFORM PROBATE CODE §§ 3-1001, -1002 (1975).

237. *Id.* § 3-1001. It is not necessary that the court adjudicate this matter, however. *Id.* § 3-1002. Thus, an estate could be opened informally, *id.* §§ 3-201 to -311, and closed formally, *id.* § 3-1002. Because it does include a final discharge of the representative, *id.*, this may prove an attractive method of estate administration to corporate fiduciaries.

238. *Id.* § 3-1002.

239. *Id.*

240. *Id.*

241. *See id.*

242. In some respects, the provisions for the discharge of a South Carolina executor or administrator are similar to that for a formal closing under the UNIFORM PROBATE CODE (1975). He must account and give publication notice for a month of his intent to apply for the discharge. S.C. CODE ANN. § 14-23-350 (1976). The effect of this procedure is to vacate the office and to discharge the fiduciary, though it is not conclusive of a complete settlement of the estate. If assets are subsequently discovered, an administrator *de bonis*

Formal proceedings are available to all representatives, including one appointed informally.[243] Similarly, a formally appointed representative may close informally.[244] However, the option is not available to a supervised representative;[245] he must use the formal closing as the court approval of distribution is an inherent feature of supervised administration.[246]

IV. THE PROBATE COURT

The UPC would substantially change current South Carolina probate procedures and practices. Certainly, the character and structure of the court having supervision of probate would differ significantly from the present court. In South Carolina, the probate court is a court of limited jurisdiction, having a mixture of ministerial and judicial functions.[247] It may admit an estate, whether testate or intestate, to probate. However, in cases of contested testacy, its judgment is not conclusive as the circuit court may hear the entire matter on appeal by a trial de novo.[248] The probate court may not remove an executor, though it may remove an administrator, since the latter is appointed by the court and serves as its functionary, whereas the former does not.[249]

---

non may be appointed. McNair v. Howle, 123 S.C. 252, 116 S.E. 279 (1922). *See also* note 157 and accompanying text *supra.*

243. UNIFORM PROBATE CODE §§ 3-1001, -1002 (1975). *See* note 237 *supra.*

244. *See* UNIFORM PROBATE CODE § 3-1003 (1975).

245. *Id.*

246. *Id.* § 3-501.

247. *See generally* S.C. CODE ANN. §§ 14-23-510 to -580 (Cum. Supp. 1977). This legislation established state-wide provisions for probate courts and added provisions that possibly increase the scope of jurisdiction of these courts. *See* note 252 and accompanying text *infra.*

248. S.C. CODE ANN. § 18-5-10 (1976) established the right to appeal from the judgment of the probate court after probate in due or solemn form. The issues before the circuit court on appeal are the same issues that were addressed in the probate court. Thus, this appeal to the circuit court, essentially, is a trial de novo. Johnson v. Johnson, 160 S.C. 158, 158 S.E. 264 (1931).

249. In the traditional analysis of the executor's position, he is thought of as having been appointed by the testator and not by the court, which merely issues letters testamentary. Hence, as the court did not appoint him, it could not remove him. *See* Griffith v. Frazier, 12 U.S. (8 Cranch) 1 (1814) (appeal from a South Carolina judgment). However, the legislature has specifically authorized the judge of probate to revoke letters testamentary if the executor fails to make proper returns, though this appears to be different from a removal from office. S.C. CODE ANN. § 21-13-370 (1976). In the instance where the executor removes from the state, this is statutorily deemed to be a renunciation of his office. *Id.* § 21-13-390. However, to the extent that this amounts to removal from office, it is not the probate court which makes the removal.

This does not mean that the executor is immune to judicial authority in relation to

The court has traditionally been thought of as not having general equitable powers and therefore as being incapable of, for example, construing wills.[250] However, the recently enacted Judicial Reform Act[251] establishes the jurisdiction of the probate court in language identical to that of the Uniform Declaratory Judgments Act,[252] and this may reasonably be interpreted as extending at least some equitable jurisdiction to a court that may be and often is manned by a nonlawyer.[253] Even before this legislation, the traditional division of authority in probate matters between the probate courts and the circuit courts was beginning to be questioned by the South Carolina Supreme Court. In *Tucker v. Tucker*,[254] the court said that once the probate court was chosen

---

his activities. In a proper case, a court of equity may appoint a receiver for the estate and enjoin the executor from interfering with the receiver. Gadsen v. Whaley, 14 S.C. 210 (1879); Stairley v. Rube, 16 S.C.Eq. (McMul. Eq.) 22 (1840). Though some cases speak of removing an executor, *see, e.g.*, Witherspoon v. Watts, 18 S.C. 396 (1882), there actually is only an abeyance of the executor's authority while the receiver acts. Even a court of equity may not technically remove the executor. Gadsen v. Whaley, 14 S.C. 210 (1879).

Whether a probate court is so limited today is unclear. In Tucker v. Tucker, 264 S.C. 172, 213 S.E.2d 588 (1975), the court considered a demurrer interposed to a circuit court proceeding for the removal of a coexecutor because, it was averred, only the probate court had jurisdiction to do so since that court had assumed supervision of the estate. The court held that the demurrer should have been sustained because the forum for the administration was the probate court. *Id.* at 177-78, 213 S.E.2d at 590. The significance of this decision is unknown as yet. It does imply that original actions involving administration must be brought in the probate court, thereby limiting the circuit court to an appellate role. Original jurisdiction in the probate court necessarily means it would hear essentially equitable matters, such as removal of an executor, a jurisdiction heretofore denied to the probate court. It may be that *Tucker* will be of little significance for, but a year later, the court specifically denied the jurisdiction of a probate court to construe a will, a decision seemingly inconsistent with the *Tucker* rationale of original probate matters being heard in the forum of administration. Jackson v. Cannon, 266 S.C. 198, 222 S.E.2d 494 (1976). Perhaps the answer lies in the distinction between the removal of an executor and the construction of a will. One deals directly with the essence of administration, traditionally thought to be within the scope and jurisdiction of the probate court; the other deals with matters independent of the day to day administration.

An administrator, however, is clearly of a different status. He is appointed by the probate court, rather than by the decedent, and derives his authority from and is subject to the court. A probate judge may remove him. *Ex parte* Small, 69 S.C. 43, 48 S.E. 40 (1903).

250. Jackson v. Cannon, 266 S.C. 198, 222 S.E.2d 494 (1976) ("Probate Court does not have jurisdiction to interpret the terms of a will or pass upon the validity of clauses of a will."). *See also* Karesh, *Probate Court Jurisdiction over Testamentary Trusts*, 2 S.C.L.Q. 13 (1949); note 249 *supra*.

251. 1976 S.C. Acts 1859.

252. *Compare* S.C. CODE ANN. § 15-53-20 (1976) *with* S.C. CODE ANN. § 14-23-580(a) (Cum. Supp. 1977).

253. *See id.* § 14-23-30 (1976).

254. 264 S.C. 172, 213 S.E.2d 588 (1975).

as the forum of administration, that court was the proper forum initially to hear estate matters traditionally thought to be without its jurisdiction, *e.g.*, the removal of an executor.[255]

Whatever questions may exist, they would be laid to rest by the adoption of the UPC, for, in the UPC's contemplation, the probate court, whatever it may be called, would have plenary and exclusive jurisdiction over all matters relating to admission of the estate to probate, administration of the estate, and, finally, distribution of the estate's assets.[256] In addition, the probate court would have jurisdiction, to the exclusion of other civil courts, over all matters concerning *inter vivos* as well as testamentary trusts.[257] As a result of the probate court's broad jurisdiction, the questions which the court generally will be called upon to resolve will require legally trained individuals, and thus the judge of the court under the UPC will be an attorney.[258] If the present court were reconstituted as the UPC court, a nonattorney incumbent could continue in office and, in addition, could seek re-election as judge.[259] This, naturally, would result in a nonattorney exercising significant legal and equitable functions normally only allowed to judges with legal training. Attrition would resolve the

---

255. *Id.* The court stated:

> "While it is true that the circuit court has general jurisdiction in civil matters, once the forum for administration has been chosen, the forum or court so assuming jurisdiction has control of the administration of the estate and parties interested in estate matters should apply to the judge of that court."

Id. at 177, 213 S.E.2d at 590. The court apparently interpreted S.C. CONST. art. V, §§ 7, 8 as establishing the jurisdiction of the probate and circuit courts and interpreted the implementing statutes as conferring on the probate court exclusive jurisdiction over all probate matters, thereby relegating the circuit court to an appellate position in all probate matters. *See* Tucker v. Tucker, 264 S.C. at 178, 213 S.E.2d at 590. Previously, the circuit courts had been thought of as having concurrent jurisdiction, if not exclusive jurisdiction, in basically equitable matters. Indeed, just a year after *Tucker*, the court reemphasized that the probate court may not construe a will. Jackson v. Cannon, 266 S.C. 198, 222 S.E.2d 494 (1976). *See generally* Karesh, *Probate Court Jurisdiction over Testamentary Trusts*, 2 S.C.L.Q. 13 (1949). *See also* note 249 *supra*.

256. UNIFORM PROBATE CODE § 1-302 (1975). The UNIFORM PROBATE CODE (1975) specifically includes the construction of wills and the determination of heirs and successors within the jurisdiction of the probate court. *Id.* § 1-302(a).

257. *Id.* § 1-302(b). The term "trust" is defined as including "any express trust, private or charitable, . . . wherever and however created." *Id.* § 1-201(45). It excludes constructive and resulting trusts, as well as other trusts generally considered as nonprobate and custodial arrangements. *Id.*

258. *Id.* § 1-309. This provision specifies that the judge of the court have the same qualifications as circuit judges who, in South Carolina, must be lawyers. S.C. CONST. art. V, § 11.

259. UNIFORM PROBATE CODE § 8-101(6) (1975).

problem in the long run, and, of course, appellate review would ensure fair treatment of parties in individual cases.

Although the probate court that the UPC envisions would have greater jurisdiction than does the present court, there is no reason to expect that in its general day-to-day nonjudicial operations, such as informal probate and receipt of inventories, it will function much differently from the present court. These primarily ministerial functions will be fulfilled by a nonjudicial officer, the registrar, rather than by the judge of probate.[260] Indeed, the responsibilities assigned to the registrar are much like those which South Carolina probate judges now perform.[261] However, unlike present judges who may hear an action for probate in solemn form, for example, the registrar would have no judicial or formal duties. He would be purely an administrative official while the judge of probate would essentially concern himself with the judicial functions of the office, *e.g.*, formal probate, will construction, and supervision of fiduciaries.

There are at least three ways in which the UPC's objectives might be realized. District courts of probate might be established, similar to the present judicial circuits and the newly instituted family courts.[262] Under this plan, the present county probate judge might be constituted as the registar or clerk of probate for his county, or alternatively, he might continue to be identified as the county probate judge. Regardless of the name chosen, he would perform the functions assigned by the UPC to the registrar, while the district court of probate entertains judicial matters. A second method would retain the county probate court system but

260. The UNIFORM PROBATE CODE (1975) distinguishes between the registrar, who makes such nonjudicial adjudications as informal appointments, *id.* § 3-105, and the clerk, whose duty it is to maintain records of the court and to issue certified copies of records upon payment of proper fees, *id.* § 1-305. There is no prohibition against the amalgamation of these functions in one person, and indeed this would seem to be desirable to estabish clearly the responsibilities for the efficient operation of the court. The author assumes that the registrar would be superior rather than equal to the clerk and, therefore, accountable for the clerk's performance. Hence, the registrar is treated as having the responsibility for all ministerial activities of the court.

261. This includes, for example, the maintenance of record books and the issuance of certified copies of letters of appointment. S.C. CODE ANN. § 14-23-570 (1976); UNIFORM PROBATE CODE § 1-305 (1975). The UNIFORM PROBATE CODE (1975) does not address the function of the court with respect to the issuance of marriage licenses, as is now done by South Carolina probate courts, nor the obligation of present judges to act as clerks of the court of common pleas in relatively rare situations when the regularly appointed clerk is disqualified. *See* S.C. CODE ANN. §§ 14-23-55, -570 (1976). It is reasonable to assume these functions would be added to the duties of the court and the responsibility for their performance would be assigned to the registrar if the UPC were adopted.

262. The family courts were established as part of judicial reform. There are 16

lessen its jurisdiction to some extent. Those acts principally ministerial in nature, that is, those assigned by the UPC to the registrar, including informal probate hearings, would continue to be performed by the county probate judge. Proceedings which are judicial in nature, *e.g.,* formal probate and formal intestacy proceedings, will constructions, and requests for instructions, would be heard originally and exclusively by the appropriate circuit court as would any other civil matter. A third alternative would be to increase substantially the jurisdiction of the present probate court, notwithstanding the potential infirmities which may result from having a court with a nonattorney judge having the scope of jurisdiction envisioned by the UPC.[263] This plan would eliminate the trial de novo, which now follows probate court determinations,[264] and, in its place, this plan would allow appeals to the circuit court only on questions of law and not of fact.[265]

The second method theoretically would be the least disruptive of the bench, as the judicial functions exercised by the probate courts are ultimately heard on appeal de novo by the circuit court.[266] If, however, there are few such appeals taken, the placement of all such actions initially in the circuit courts may result in an increase in the court docket.[267] The third alternative would solve this problem, but would add the problem of having judges without formal legal training ruling on questions of law of a far broader nature than they currently do.[268] However, by making the circuit court the court of review only on questions of law, it would appear that errors could be corrected relatively quickly.

Whatever court structure is finally chosen is truly immaterial to the accomplishment of the UPC's goals. What is important is

---

circuits, and for each a family court was created. S.C. CODE ANN. § 14-21-410 (1976).

263. Notes 256-59 and accompanying text *supra.*

264. S.C. CODE ANN. § 18-5-50 (1976); note 256 *supra.*

265. This would have the effect of adding an intermediate appellate court on questions of law in probate matters. The wisdom of this effect remains to be debated. Alternatively, appeals on questions of law could be certified directly to the South Carolina Supreme Court, similar to the manner in which appeals are now taken from the family courts. S.C. CODE ANN. § 14-21-435 (1976). The circuit court, thus, would not be in the chain of appeals. This is the approach taken by the UNIFORM PROBATE CODE (1975). UNIFORM PROBATE CODE § 1-308 (1975).

266. Note 264 *supra.*

267. There is no requirement that probate judges be lawyers, unlike circuit and family court judges. S.C. CONST. art. V, § 11 (circuit judges); S.C. CODE ANN. § 14-21-425 (1976) (family court judges).

268. *See* note 18 *supra.*

that a form be chosen that will end duplicative actions and clearly assign judicial responsibilities so that speedy and efficient administration may be realized.

V. CONCLUSION

The Uniform Probate Code will be the major force in the development of American probate law during the next several years. Indeed, the rapidity with which it has been accepted points to its being the determinative force in forming probate procedure.[269] Perhaps because of this impetus and as a part thereof, South Carolina is studying the revision of the current probate provisions, with the UPC as the focus of the study.

The fundamental question is whether probate reform is needed in South Carolina. If this question is answered in the affirmative, as it should be, the question arises as to the utility of the UPC as the vehicle for achieving the needed reform. The UPC has much to recommend it. Its language is clear and simple. It offers an expeditious and simple method of administering decedents' estates. At the same time, this method insures that creditors and those having a beneficial interest in the estate are protected in their claims. Perhaps of most importance in South Carolina, the UPC would recognize the importance of the surviving spouse in the family unit and would insure that the spouse receive a fair share of the wealth. In short, the UPC offers a modern and equitable system for the inter- and intra-generational transfers of wealth at death.

269. The Estate Practices Committee of the South Carolina Bar in conjunction with the Probate Judges Association has undertaken the study. The author is a member of this Committee.