February 1975

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WEST VIRGINIA AND THE UNIFORM PROBATE CODE: AN OVERVIEW
Part II

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Part One of this article1 dealt with the substantive portions of the Uniform Probate Code2 regulating interstate successions and wills. Part Two examines probate procedure under the Uniform Code. Non-probate transfers and trust administration under the Uniform Probate Code are also discussed in Part Two.

Although the reader is likely to be familiar with the close and detailed court supervision of estates practiced in West Virginia and in the majority of American jurisdictions, a brief outline of the present West Virginia system is necessary for comparison with the Uniform Probate Code.

I. THE WEST VIRGINIA PROCEDURE

Removal of the probate function from the county court is sufficient reason alone to adopt the Uniform Probate Code in West Virginia. No state, other than West Virginia, invests a board of fiscal commissioners charged with the administration of county government with the responsibility of probating estates.3 Furthermore, the role of the county court in probate matters in West

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3 Price, Probate Administration and the County Court, 27 W. Va. L. Q 221 (1921) [hereinafter cited as Price].

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Virginia has often been criticized. It is not the purpose of this discussion to outline the historical happenstance of this anomaly; it is enough to say that a constitutional amendment\(^3\) is long overdue to correct this perversion of a judicial function.

Under the present probate system each county court in West Virginia is required to appoint not more than four\(^4\) commissioners of accounts. The county court must refer estates of over $3,000 in value to the individual commissioners of accounts in rotation for proof and determination of debts and claims against the estate, to establish the priority of debts, to determine the shares of legatees and distributees, and to dispose of any other matters necessary to settlement of the estate.\(^7\)

Once an estate is referred to the commissioner of accounts, the commissioner must publish a notice to all possible claimants designating the time and place when and where all claims against the estate must be made before him. The designated time must be not less than four months, nor more than six months from the date of the first publication of the notice.\(^8\) The personal representative must within two months after his appointment provide the commissioner of accounts with an inventory of the estate signed by himself\(^9\) and the appraisers.\(^10\) The commissioner of accounts inspects the inventory and appraisal and after his approval delivers copies to the clerk of the county court for recording and to the State Tax Commissioner.\(^11\)

Creditors of the decedent must file affidavits of claims against

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\(^3\) The West Virginia Constitution vests in the county court jurisdiction over all probate matters, including "the appointment and qualification of personal representatives, guardians, committees, curators, and the settlement of their accounts and in all matters relating to apprentices," W. Va. Const. art. VIII, § 24. Section six of the recently passed Judicial Reform Amendment gives the Legislature authority to put the probate function in the circuit courts. *See also* State ex rel. Linger v. County Court, 150 W. Va. 207, 144 S.E.2d 689 (1965); Haudenschilt v. Haudenschilt, 129 W. Va. 92, 39 S.E.2d 328 (1946); Ritchie v. Armentrout, 124 W. Va. 399, 20 S.E.2d 474 (1942); Page v. Huddleston, 98 W. Va. 104, 126 S.E. 579 (1925).

\(^4\) Eight for Kanawha County, not more than four of whom shall be from the same political party. W. Va. Code Ann. § 44-3-1 (1966).

\(^7\) Id. § 44-2-1 (Cum. Supp. 1974).

\(^8\) Id. § 44-2-2 (Cum. Supp. 1974).

\(^9\) Id. § 44-4-1 (1966).

\(^10\) Id. § 44-1-14 (Cum. Supp. 1974).

\(^11\) Id.
the decedent’s estate with the commissioner of accounts within the period of time prescribed by the commissioner’s notice. All claims filed by affidavit are presumed valid and are allowed unless the claims are challenged by counter-affidavit. If a claim is so challenged, the commissioner must hold a hearing to determine the validity of the claim. Upon completion of the hearing to resolve disputed claims, but no later than ten months following qualification of the personal representative, the commissioner prepares a report of claims against the estate and the disposition of each claim. The report of claims lists the assets in the hands of the personal representative, shows how the assets are to be applied to the payment of claims, and designates the order in which claims are to be paid. The report of claims also lists those persons entitled to share in the estate as legatees or distributees and designates the amount each is to receive. After preparing the report of claims, the commissioner must give notice of the report to all interested parties and hold the report ten days for their inspection. During this ten day period any party may inspect and file exceptions to the report of claims. Exceptions to the commissioner’s report of claims are submitted along with the report to the county court. Additional exceptions may be filed by any interested party until the report is acted upon by the county court.

The county court is required to hold a hearing on the report of the commissioner of accounts during the first term of court but not less than ten days after receipt of the report of claims. If there are exceptions to the report of claims the court must pass upon the exceptions without hearing or receiving new evidence. If good cause is shown for the introduction of further proof regarding any matter contained in the report of claims, the report is referred back to the commissioner to receive further proof and to make a supplemental report. The county court makes its final decision on the basis of the report of claims and exceptions and upon the supplemental report, if there is one, and exceptions thereto. Any interested party may appeal the decision of the county court to the circuit court of the same county. Once the report of claims is confirmed by the county court or the circuit court on appeal, or is corrected and confirmed after appeal, it is recorded by the clerk...

12 Id. § 44-2-5 (1966).
13 Id. § 44-2-6.
14 Id. § 44-2-16.
15 Id. § 44-2-18.
16 Id. § 44-2-19.
of the county court\textsuperscript{17} and is binding and final on all creditors and beneficiaries of the estate.

After the commissioner's report of claims has been confirmed and one year has passed since the time of qualification of the first personal representative, the personal representative may pay the allowed claims against the estate in accordance with the order of payment set out in the report of claims. At that time, the personal representative may pay any legacies and distribute the surplus among the persons entitled to the surplus in accordance with the commissioner's report, withholding such sums as are sufficient to cover payment of any contingent, unliquidated, disputed, or unmatured claims.\textsuperscript{18}

The personal representative must prepare a statement of all money received and disbursed within one year after his qualification or within any succeeding year, and must submit the statement, together with vouchers for the disbursements to the commissioner of accounts no later than four months after the end of every such year.\textsuperscript{19} Before the account of the personal representative is settled, he must produce any securities or moneys in the account or any documents relating to investments of the estate to be checked by the commissioner against the inventory of the estate.\textsuperscript{20}

The commissioner of accounts must advertise for two successive weeks in a local newspaper, or if there is no local newspaper, a paper of general circulation, that the account is to be settled. Not until completion of publication may the commissioner complete his report of settlement.\textsuperscript{21} Before filing the report of settlement,\textsuperscript{22} the commissioner must give either oral or written notice of settlement to all interested parties and must hold the report ten days for the inspection and exceptions of interested parties.\textsuperscript{23} The county court holds the report of settlement for an additional ten days pending the filing of additional exceptions. The county court corrects any errors that appear from the exceptions or returns it to the commissioner for the taking of additional evidence and the filing of an additional report.\textsuperscript{24} Once the report of settlement has

\textsuperscript{17} Id. § 44-2-20.
\textsuperscript{18} Id. § 44-2-24.
\textsuperscript{19} Id. § 44-4-4.
\textsuperscript{20} Id. § 44-4-12.
\textsuperscript{21} Id. § 44-4-11.
\textsuperscript{22} Id. § 44-4-18.
\textsuperscript{23} Id. § 44-4-17.
\textsuperscript{24} Id. § 44-4-19.
been confirmed by the county court, or by the circuit court on appeal, it is deemed correct and is binding and conclusive upon both creditors and beneficiaries of the estate, providing they have received the required notices.25

II. Procedure Under The Uniform Probate Code

Article III: Probate of Wills and Administration

The Uniform Probate Code establishes a "new rationality in probate"26 by reducing both the necessity and the importance of contract between a decedent's beneficiaries and the court administering the probate function.27 The procedural provisions of the Code remove from the duties of the probate court the determination of how much court supervision will attend each administration and leave that determination to the persons interested in the particular estate:28

Overall, the system accepts the premise that the Court's role in regard to probate and administration, and its relationship to personal representatives who derive their power from public appointment, is wholly passive until some interested person invokes its power to secure resolution of a matter. The state, through the Court, should provide remedies which are suitable and efficient to protect any and all rights regarding succession, but should refrain from intruding into family affairs unless relief is requested, and limit its relief to that sought.29

This concept is, of course, the most controversial part of the Code.30 It implements the idea set forth in Part One of this article that the administration of a decedent's estate should no more be under the continuing supervision of the courts than are other areas of our private business dealings, such as, contracts entered into by competent consenting parties.31

Part I—General Provisions

Under the Uniform Probate Code property descends at death

25 Id. § 44-4-20.
27 UNIFORM PROBATE CODE art. III, pt. 1, General Comment.
28 Wellman, note 26 supra.
29 UNIFORM PROBATE CODE art. III, pt. 1, General Comment.
30 Wellman, note 26 supra.
31 Curry, supra note 1.
to the successors named in the decedent's last will, their substitutes or in the case of intestacy, to the heirs. In any event, the devolution is subject to the statutory allowances, the payment of debts, the statutorily forced share, and the expenses of administration.

With the exception of certain small estates the will must be declared valid either by an informal probate or by an adjudication by the court to render the will effective either to prove title or to nominate an executor. But probate of a will is not required under the Code; whether a will is probated is left to decision of the parties having an interest in the estate. Nevertheless, a conclusive presumption of intestacy arises if the will is not probated within three years. West Virginia does not recognize a conclusive presumption of intestacy; a will may be probated at any time it is produced.

If under the Uniform Code there has been no probate proceeding, to establish title under the unprobated will one must show that there has been no probate proceeding, and either that the property has been in the possession of those to whom it was devised or that its existence has been unknown to the heirs or devisees. This is an exception to the rule that prohibits admission of the will to evidence, rather than to the rule that prohibits late probate or appointment of personal representatives. The purpose of the exception is to prevent injustice where, for example, a devisee fails to probate the will devising the entire estate to himself due to either the erroneous belief that the property was held jointly, with rights of survivorship, or because the devisee was unaware of the existence of the devised property.

To acquire the status of a personal representative under the Uniform Code, one must be appointed by the appropriate public

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24 Uniform Probate Code § 3-1201.
25 Informal probate is discussed in the text accompanying notes 96-128 infra.
26 Formal probate is discussed in the text accompanying notes 127-173 infra.
27 Uniform Probate Code § 3-102.
28 Id. art. III, General Comment (1).
29 Id. § 3-108, Comment.
31 Uniform Probate Code § 3-102, Comment.
32 Id.
The administration of the estate is commenced by the issuance of letters of administration. While administration is not mandatory under the Code, it may be insisted upon by creditors of the estate by force of the provision declaring that "[n]o proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative."45

The Uniform Code, as drafted, envisions separate courts of probate and of general jurisdiction.46 Under this scheme the probate court has exclusive jurisdiction of formal proceedings to determine how the estate is to be administered and distributed. In addition, the probate court "has concurrent jurisdiction of any other action or proceeding concerning succession or to which an estate, through a personal representative may be a party . . . ."47 The Uniform Code does not, however, attempt to distribute responsibility among the courts.48 The primary concern of the Code is to set forth the functions to be performed by public officials, not to determine how these responsibilities are assigned within a given state.49 Therefore, any of several alternatives are considered acceptable organizational schemes under the Code.50 In a state such as West Virginia, the responsibility for maintenance of probate files and records and for receiving and acting upon informal applications could remain in a limited power probate office such as the clerk of the county court. The responsibility for hearing and deciding formal petitions could be assigned to the circuit court as the court of general jurisdiction for the county,51 or a separate probate court could be established having concurrent jurisdiction over the probate of all matters relating to succession or affecting an estate.52 In view of the desirability of having a legally trained probate judge and of the limited number of probate matters arising in all but the largest counties, the former alternative, dividing administration between a limited power probate office and the circuit court

43 Id. § 3-103.
44 Id.
45 Id. § 3-104.
46 Id. § 3-105, Comment.
47 Id. § 3-105.
48 See id., Comment.
49 Id.
50 Id.
51 Id.
52 See id. § 3-106, Comment; cf. id. § 3-105, Comment. See also Riley, supra note 4, at 125-37.
charged with hearing formal petitions, seems the more desirable option for West Virginia.

With the exception of supervised administration, each proceeding before the probate court is independent of any other proceeding regarding the same estate; thus, interested parties may use both formal and informal proceedings in a single estate administration, apportioning the different matters to be settled between the two methods of probate. Such severance is made possible by the Code provision allowing an interested party to determine both whether and what estate matters become subject to the court's jurisdiction by limiting the issues framed by the petition.\footnote{Supervised administration is discussed in the text accompanying notes 174-82 infra.}

Whether a decedent left a will must be determined and the administration procedure must be commenced within three years after the decedent's death under the Uniform Code. A conclusive presumption of intestacy arises if a will is not probated within this period. West Virginia has no comparable provision; a will may be probated at any time.\footnote{\textit{Uniform Probate Code} § 3-107; \textit{Id.}, Comment.} There are exceptions, however, to the three year limitation period. The most important exception is that if a will has been informally probated within the three year period, informal probate is conclusive from three years after the decedent's death or twelve months after informal probate, whichever is later.\footnote{\textit{Id.} § 3-108, Comment.} This assures an heir of at least one year after the informal probate within which to contest the probate and to secure the administration of the estate as intestate.\footnote{W. Va. Code Ann. § 41-5-10 (1966).} The other exceptions provide extensions of time for probate where the fact of death is in doubt or cannot be proved.\footnote{\textit{Uniform Probate Code} § 3-108(3), Comment.}

Persons who take a distribution from the estate prior to the expiration of the three year period (when there has been no formal determination to accelerate the time of certainty)\footnote{\textit{Id.} §§ 3-108(1),-108(2).} remain potentially liable to those persons ascertained to be entitled to the distribution in a formal proceeding.\footnote{\textit{See id.} § 3-909, -1006. See notes 343 & 359 infra and accompanying text.} If the distribution is made after a

\footnote{\textit{Uniform Probate Code} § 3-108, Comment. \textit{See also} Riley, \textit{supra} note 4, at 32.}
formal determination of testacy or intestacy, this period of uncertainty would be reduced.

Some protection against liability is made available, however, without regard to this three year period. Purchasers from personal representatives and distributees may be protected; a personal representative for distributions made pursuant to informal proceedings is also immune from liability. In any event, all creditor's claims are barred after three years from date of death.

The Code provides that the statute of limitations shall not bar an action that survives the decedent sooner than four months after death. If the cause of action would have been barred within the four month period, but for this provision, then it is barred at the end of the four months, unless tolled. This is an exception to the general rule, followed in West Virginia, that a statute of limitations on a cause of action which accrued to the decedent during his life is not tolled or suspended by his death. If, however, the cause of action has not accrued to the decedent until after his death, the West Virginia rule is that the statute of limitations does not begin to run until qualification of the personal representative, and if there is an interval of more than five years between the death of the decedent and the qualification of the personal representative, the personal representative shall be deemed to have qualified on the last day of the five years.

Part 2. Venue for Probate and Administration; Priority to Administer; Demand for Notice

The venue provision for estate matters in the Uniform Probate Code is similar to that of present West Virginia law. If the decedent is domiciled in West Virginia or the Code state, venue lies

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42 See Uniform Probate Code §§ 3-714, -910. See also notes 368-69, 344 infra and accompanying text.
43 See Uniform Probate Code § 3-703. See also notes 231-37 infra and accompanying text.
44 See Uniform Probate Code § 3-803(a)(2). See also note 312 infra and accompanying text.
45 Uniform Probate Code § 3-109.
47 Handy v. Smith, 30 W. Va. 195, 3 S.E. 604 (1887).
49 Uniform Probate Code § 3-201.
in the county of his domicile. If the decedent is not domiciled in West Virginia or the Code state, venue lies in any county where property of the decedent is located. Under the Uniform Code jurisdiction is exclusive in the court first assuming it; in West Virginia the county court, and when it is in vacation, the clerk of the county court has exclusive original jurisdiction over all probate matters. The Uniform Code also contains two helpful provisions not found in the West Virginia statute: a provision for change of venue; and a provision designating the situs of intangible assets.

If conflicting claims of domicile are made in actions brought in different jurisdictions, the Uniform Probate Code attempts to resolve the matter in order to avoid inconsistent administration or distribution. A decedent is presumed under the Code to prefer to have his estate administered and distributed as a unified whole under the law of a single state, rather than administered in parts, and the parts subjected to different rules merely because of conflicting conclusions as to domicile. By this presumption the Code attempts to reduce the possibility of conflicting results as to domicile. Where conflicting claims of domicile are made in proceedings in the Code state and in another state, the determination of domicile made by the court where the proceeding was first commenced is controlling under the Uniform Code, provided both actions are still pending. But if one of the actions has proceeded to judgment, the determination of domicile made by the court that has rendered judgment controls, regardless where the action was first commenced.

Thus, local law will control if the local proceeding is concluded

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72 Uniform Probate Code § 3-201(a)(2); W. Va. Code Ann. § 41-5-4(a) (1966) [real estate]; Id. § 41-5-4(c) [any property other than real estate]; Id. § 41-5-4(d) [if testator died out of state, any county where there is property devised or bequeathed by his will].
73 Uniform Probate Code § 3-201(b).
75 Uniform Probate Code §§ 1-303, 3-201(c). See id. § 3-201, Comment.
76 Id. § 3-201(d).
77 Id. § 3-202.
78 Id., Comment.
79 Id. §§ 3-408, 3-202.
80 Id. §§ 3-202, 3-408, Comment.
81 Id. §§ 3-408, 3-202, Comment.
prior to the formal proceedings in the domicile state.\textsuperscript{82} The issue of domicile is also settled locally if a local formal testacy or appointment proceeding is commenced before a similar proceeding is started elsewhere.\textsuperscript{83} If, however, the proceeding in the other jurisdiction was started first, the local proceeding must be stayed, dismissed, or amended and the local court is bound by the domicile determination of the other jurisdiction.\textsuperscript{84} This provision is not intended to affect general rules of res judicata, collateral estoppel, or full faith and credit.\textsuperscript{85}

West Virginia follows the general rule that the validity of a will is governed by the law of the testator's domicile as to personality and by the law of the situs as to realty.\textsuperscript{86}

While there are some differences in detail, both the West Virginia Code and the Uniform Probate Code establish priority among persons seeking appointment as personal representative.\textsuperscript{87} An objection to the appointment made under the Code can be made only in a formal proceeding.\textsuperscript{88} If an objection is made, the stated priorities still apply with two exceptions: (1) if the estate appears to be inadequate to satisfy anticipated unsecured claims, the court, on petition of creditors, may appoint any qualified person;\textsuperscript{89} and (2) except in the case of a personal representative nominated in the will, if an objection to the appointment is made by an heir or devisee having a substantial interest in the estate, the court may appoint a person acceptable to those having a majority interest in the estate, or in default of agreement, any suitable person.\textsuperscript{90} Both the Uniform Code and West Virginia case law provide that minors and other persons under legal disabilities can not serve as personal representatives.\textsuperscript{91} In addition, the Uniform Code grants priority to the personal representative appointed by a court of the decedent's

\textsuperscript{82} Id. § 3-408, Comment.
\textsuperscript{83} Id.
\textsuperscript{84} Id. § 3-202.
\textsuperscript{86} In re Estate of Briggs, 148 W. Va. 294, 134 S.E.2d 737 (1964).
\textsuperscript{87} W. VA. CODE ANN. §§ 44-1-1, -4 (1966); UNIFORM PROBATE CODE § 3-203(a).
\textsuperscript{88} UNIFORM PROBATE CODE § 3-203(b).
\textsuperscript{89} Id. § 3-203(b)(1).
\textsuperscript{90} Id. § 3-203(b)(2).
\textsuperscript{91} Id. § 3-203(c); Smith v. Harmer, 135 W. Va. 380, 64 S.E.2d 481 (1951); Murphy v. Karnes, 88 W. Va. 242, 106 S.E. 655 (1921), In re Stollings, 82 W. Va. 18, 95 S.E. 446 (1918).
domicile over all others appointed, unless the will nominates different persons to serve as personal representative in the state of domicile and in any non-domicile state. Current West Virginia law also permits a non-resident testator to nominate a non-resident as his executor.

Any person having a financial or property interest in an estate may file with the court a demand for notice of any order or filing pertaining to the estate. Thereafter, no order or filing to which the demand relates shall be made or accepted without notice to the demandant. Failure to give notice as demanded will not affect the validity of an order or filing, but it will permit the demandant to recover damages for any loss incurred by the demandant due to lack of notice.

Part 3. Informal Probate and Appointment Proceedings

Applications under the Uniform Probate Code for either the informal probate of a will or the informal appointment as administrator of an intestate estate must be directed to the registrar and verified by the applicant. The purpose of verification is to deter persons who might misuse the no-notice feature of informal proceedings. Persons injured as a result of deliberately false statements in an application are not bound by the time limits usually applicable to actions for fraud under the Uniform Code. Moreover, the applicant who makes intentional misstatements is subject to penalties for perjury under the Code. The drafters of the Uniform Probate Code believe that these safeguards “extend well beyond those presently available under supervised administration for persons damaged by deliberate wrongdoing.”

After the receipt of an application for informal probate, the registrar is required to determine: whether the application is complete; whether the statements in it are true; whether if the applicant is an interested party; whether venue is proper; whether he has an original, properly executed, unrevoked will in his posses-

92 Uniform Probate Code § 3-203(g).
93 Id.
95 Uniform Probate Code § 3-204.
96 Id. § 3-301.
97 Id. § 1-106; Curry, supra note 1, at 114.
98 Uniform Probate Code § 1-310.
99 Id. § 3-301, Comment.
sion; whether the required notice has been given; and whether the
time limits for original probate have expired.\textsuperscript{100} If the will appears
to bear the required signatures and attestation clause verifying
that the requirements of execution were met, the will shall be
probated without further proof;\textsuperscript{101} it is unnecessary that the will be
self-proved.\textsuperscript{102} Even without an attestation clause the will may be
probated if it appears to have been properly executed or if it is
accompanied by a sworn statement of a person, whether or not a
witness, having knowledge of the circumstances of the execution.\textsuperscript{103}
Upon determination that the requirements for an informal probate
have been met, the registrar must issue a written statement to that
effect, provided at least five days have elapsed since the testator's
death. Informal probate is then conclusive on all parties, unless
and until it is superseded by an order for a formal proceeding.\textsuperscript{104}

Informal probate is not available in all cases. The registrar, is
required to deny informal probate unless the original unrevoked
will is in his possession, except where probate, or its equivalent,
previously has occurred elsewhere.\textsuperscript{105} The application for informal
probate must be denied also if it appears that a personal represent-
ative has been appointed in another county of the state,\textsuperscript{106} or if the
application relates to a "known series of testamentary instruments
(other than wills and codicils), the latest of which does not ex-
pressly revoke the earlier . . . ."\textsuperscript{107} The registrar may also deny the
application if for any reason he determines that the will is not
entitled to informal probate.\textsuperscript{108} Denial of the application is not an
adjudication, however, and does not preclude the applicant from
instituting a formal probate proceeding.\textsuperscript{109}

Notice of the proceeding is normally not required for informal
probate.\textsuperscript{110} Notice must be given, however, to any person who has

\textsuperscript{100} Id. § 3-303(a)(1)-(7).
\textsuperscript{101} Id. § 3-303(c).
\textsuperscript{102} Id. § 3-303, Comment. The self-proving will is provided for by Uniform Probate Code § 2-504, and in West Virginia by W. Va. Code Ann. § 41-5-15 (1966). See Curry, supra note 1, at 133.
\textsuperscript{103} Uniform Probate Code § 3-303(c).
\textsuperscript{104} Id. § 3-302.
\textsuperscript{105} Id. § 3-303(a),(b), (d), (e). A lost or destroyed will must be probated in
a formal proceeding. See id. § 3-402.
\textsuperscript{106} Id. § 3-303(b).
\textsuperscript{107} Id. § 3-304.
\textsuperscript{108} Id. § 3-305.
\textsuperscript{109} Id.
\textsuperscript{110} Id. § 3-306. "Informal Probate," it is hoped, will serve to keep the simple
filed a demand for notice, and to any personal representative of the decedent whose appointment has not terminated. Upon receipt of an application for the informal appointment of a personal representative the registrar must make a finding, similar to that required by an application for informal probate, that the applicant is entitled to appointment, and if the appointment relates to a will, that the will has been probated. No appointments can be made until five days have elapsed since the decedent’s death. But if the decedent was a non-resident, no appointment can be made for thirty days after decedent’s death, unless the application is filed by the domiciliary personal representative of the decedent, or unless the will subjects the estate to the laws of the appointing jurisdiction. Thus, the first appointment may be made at the decedent’s domicile, in keeping with the Code’s grant of priority to the domiciliary representative. Only the domiciliary representative or his nominee may be appointed the personal representative in a Code state, unless the decedent’s will provides otherwise. The application also must be denied if another personal representative has been previously appointed in any county of the state, and that personal representative has not resigned prior to this application. Further, if the application reveals the existence of an unretracted will, relating to property subject to the laws of the appointing state, the registrar must deny the application. And finally, the registrar may deny any application for appointment if for any reason he is not satisfied that the informal appointment should be made. As in the case of a denial of informal probate, denial of an application for appointment as personal representa-

will that generates no controversy from becoming involved in truly judicial proceedings. The procedure is very much like “probate in common form” as it is known in England and some states.” Id. § 3-302, Comment (emphasis in original).

Id. § 3-306. See note 95 supra and accompanying text.

112 Uniform Probate Code § 3-306.

113 See Uniform Probate Code §§ 3-303, -308. See also text accompanying notes 100-104 supra.

114 Uniform Probate Code § 3-308(a)(5).

115 Id. § 3-307.

116 Id. § 3-307, Comment.

117 See id. § 3-203(g). See also text accompanying notes 93-94 supra.

118 Id. § 3-308(b).

119 See note 117 supra.

120 Uniform Probate Code § 3-308(b).

121 Id. § 3-311.

122 Id. § 3-309.
The informal appointment fully establishes the status of the personal representative and his powers and duties.\textsuperscript{124} Although the appointment is subject to termination in certain situations,\textsuperscript{125} it is not, however subject to retroactive vacation.\textsuperscript{126}

\textbf{Part 4. Formal Testacy and Appointment Proceedings}

The purpose of a formal testacy proceeding under the Uniform Code is to determine if the decedent left a valid will.\textsuperscript{127} The term "testacy" here refers to the general status of the decedent in regard to all questions about wills, including the possibility that the decedent did not have one.\textsuperscript{128} A formal testacy proceeding may be brought by any interested party\textsuperscript{129} and may, but need not, include a request for appointment of a personal representative.\textsuperscript{130}

The formal proceeding may be brought for any one of several reasons:

(i) . . . to secure "solemn form" probate of a will; (ii) . . . to secure "solemn form" probate to corroborate a previous informal probate; (iii) . . . to block a pending application for informal probate, or to prevent an informal application from occurring thereafter; (iv) . . . to contradict a previous order of informal probate; (v) . . . to secure a declaratory judgment of testacy and a determination of heirs in a case where no will has been offered.\textsuperscript{131}

If a personal representative has been appointed prior to commencement of the formal testacy proceeding, the petitioner for the formal proceeding must request confirmation of the appointment if he does not want the formal proceeding to affect the power of the personal representative. If he does not request such confirmation, the previously appointed representative must refrain from

\textsuperscript{123} Id.
\textsuperscript{124} Id. § 3-307(b).
\textsuperscript{125} Id. §§ 3-608 to 612. See also text accompanying notes 208-211 infra.
\textsuperscript{126} Uniform Probate Code § 3-307(b).
\textsuperscript{127} Id. § 3-401.
\textsuperscript{128} Id. § 3-401, Comment.
\textsuperscript{129} Id. § 3-401.
\textsuperscript{130} Id.
\textsuperscript{131} Id. § 3-401, Comment.
exercising his distributive power during the formal proceeding.\textsuperscript{132} If the petitioner for a formal proceeding desires the appointment of a different personal representative he may request that the originally appointed representative be restrained from exercising the powers of his office and that a special administrator be appointed.\textsuperscript{133}

The petition for a formal testacy proceeding must be directed to the probate court, must request a judicial order after a notice and hearing, and must request an order attesting to the validity of this particular instrument as the will of the decedent and determining the heirs.\textsuperscript{134} This petition must also contain the statements required for informal probate\textsuperscript{135} and must state whether the original copy of the last will is in the possession of the court or accompanies the petition. If the court has neither the original will nor an authenticated copy, the petition must also state the provisions of the will and indicate why the will is unavailable.\textsuperscript{136} A petition for adjudication of intestacy must request a judicial determination of heirs and a finding that the decedent left no will; the petition must also indicate if supervised administration is sought.\textsuperscript{137}

As in West Virginia probate law,\textsuperscript{138} the main distinction between formal and informal probate under the Uniform Code is the degree of notice required to be given to the interested parties. As in an informal proceeding,\textsuperscript{139} notice of a formal proceeding must be given to those persons who have filed a demand for it.\textsuperscript{140} In addition, notice of a formal proceeding must be given to the surviving spouse, children, and other heirs of the decedent; to persons named under any will that is or has been offered for informal or formal

\textsuperscript{132} Id. If nothing else is requested or decided in respect to the personal representative, his distributive powers will be restored when the proceeding is completed, with section 3-703 directing him to abide by the will. See Uniform Probate Code § 3-401, Comment.

\textsuperscript{133} Uniform Probate Code § 3-401.

\textsuperscript{134} Id. § 3-402(a)(1).

\textsuperscript{135} Id. § 3-402(a)(2); W. Va. Code Ann. § 41-5-5 (1966).

\textsuperscript{136} Uniform Probate Code § 3-402(a)(3).

\textsuperscript{137} Id. § 3-402(b).

\textsuperscript{138} See Riley, supra note 4, at 31.

\textsuperscript{139} See Uniform Probate Code §§ 3-306, -310. See also notes 110-112 supra and accompanying text.

\textsuperscript{140} Uniform Probate Code § 3-403(a). See also note 95 supra and accompanying text.
probate in this state or elsewhere; and to any personal representative whose appointment has not been terminated.\textsuperscript{141}

Where the fact of death is in doubt, the Code requires delivery of notice of the hearing by registered mail to the alleged decedent at his last known address. Additionally, the court must require the petitioner to conduct and report the results of a reasonably diligent search for the alleged decedent. The manner of the search may include advertisement, notification of law enforcement officials and welfare agencies, and engagement of a private investigator.\textsuperscript{142}

If the will is uncontested, the probate court, under the Uniform Code, may order probate or intestacy on the strength of the pleadings, or it may conduct an open hearing and require proof. Where evidence concerning execution of the will is necessary, the affidavit or testimony of any one of the attesting witnesses, or, if not available, other affidavits or evidence may be used to prove execution of the will.\textsuperscript{143}

This is similar to the present practice in West Virginia that allows the self-proved will to be admitted to probate if accompanied by affidavits of the attesting witnesses\textsuperscript{144} and allows any other will to be admitted to probate upon depositions of the witnesses, if available.\textsuperscript{145} The affidavits attached to a self-proved will are not admissible in evidence, however, if the will is contested.\textsuperscript{146} This does not mean that the testimony of subscribing witnesses is required in West Virginia for either type of will, although such testimony would normally be the best proof of proper execution.\textsuperscript{147} A will may be probated even if witnesses are not available; recitals of attestation are sufficient alone to get the issue of execution to a jury.\textsuperscript{148}

Objections to formal probate must be stated in the pleadings under both the Uniform Code and present West Virginia law.\textsuperscript{149} If

\textsuperscript{141}Uniform Probate Code § 3-403(a); W. Va. Code Ann. § 41-5-5 (1966).
\textsuperscript{143}Uniform Probate Code § 3-405. The formal proceeding may also be used for an adjudication of intestacy, which may also be ordered on the strength of the pleadings.
\textsuperscript{145}Id. § 41-5-14.
\textsuperscript{146}Id. § 41-5-15.
\textsuperscript{147}Freeman v. Freeman, 71 W. Va. 303, 76 S.E. 657 (1912); Webb v. Dye, 18 W. Va. 376 (1881).
the will is not self-proved, the testimony of at least one attesting witness, if available, is required under the Code; if the witness is unavailable execution may be proved by other evidence. But if the will is self-proved, compliance with the requirements for execution is presumed without the testimony of any witness.

In numerous cases the West Virginia supreme court has established the obligations of both proponents and contestants of wills concerning (1) the burden and order of proof necessary to establish a prima facie case, (2) going forward with the evidence, and (3) satisfying the ultimate burden of persuasion. The Uniform Probate Code codifies the standard approach to these questions.

If it is determined that the decedent was domiciled in another jurisdiction an order of a court of that state, determining testacy and the validity or construction of a will, made in a proceeding giving proper notice and an opportunity for interested parties to contest, must be accepted as determinative by the courts of the Code state. Thus, present law is extended to permit the law of another state to become binding in some cases, in regard to the proper execution or revocation of wills controlling local real property and to questions involving the construction of ambiguous wills devising local real property.

After the time period for notice has passed, upon proof of notice, after any hearing that may be necessary, and if satisfied that it has jurisdiction, the court must “determine the decedent’s domicile at death, his heirs and his state of testacy” and formally probate any valid unrevoked will. Whether a formal determination of heirs is made under West Virginia law depends upon the type of property involved. Any interested person can bring a suit

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150 Uniform Probate Code § 3-406(a).
151 Id. § 3-406(b).
153 Uniform Probate Code § 3-407.
154 Id. § 3-408.
155 Id. § 3-408, Comment.
156 Id. § 3-409. This section also provides for the termination of any informal appointment of a personal representative, if appropriate, conversion of the proceeding to one to protect the estate of one presumed dead, and probate of a will from a place that does not provide for a probate.
under West Virginia law to determine the heirs to real property in a proceeding similar to an action to remove cloud on title.\textsuperscript{157} As to personal property, the West Virginia Code requires the commissioner of accounts to include in his final report for the settlement of an estate the names of those persons "entitled to share in the estate as legatees, and as such in what property or amounts; or as distributees, and as such in what proportions."\textsuperscript{158} But the early determination of heirs, which must be made in a formal Code proceeding at the time of probate or opening of intestate administration, seems desirable since further assistance of the probate court may not be sought or required in the settlement or distribution of the estate\textsuperscript{159} and the court's determination of heirs is binding on the personal representative in making his distribution.\textsuperscript{160}

If more than one instrument is offered for probate before the final order of settlement is entered, and "neither [will] expressly revokes the other or contains provisions which work a total revocation by implication"\textsuperscript{161} both wills may be probated under the Code.\textsuperscript{162} If during the course of the formal probate proceedings it appears that only one of the instruments offered is entitled to be probated, or that there is partial intestacy, the court may issue an appropriate order to reflect its finding.\textsuperscript{163} In any event, where more than one instrument are offered for probate, the court's order should indicate which instrument controls the nomination of an executor and may, but need not, provide how the provisions of one instrument are affected by the other instrument.\textsuperscript{164}

Normally, a formal testacy order is final, subject to appeal and vacation, as to all persons and issues concerning the decedent's estate that the court considered or could have considered in connection with its determination whether the decedent left a


\textsuperscript{159} See Uniform Probate Code § 3-704. See also text accompanying note 232 infra.

\textsuperscript{160} See Uniform Probate Code § 3-703.

\textsuperscript{161} Id. § 3-410.

\textsuperscript{162} See In re Winzenrith's Will, 133 W. Va. 267, 55 S.E.2d 897 (1949), for the property probate procedure when two wills are offered for probate in West Virginia.

\textsuperscript{163} Id. § 3-411.

\textsuperscript{164} If wills are not construed in connection with a judicial probate, they may be subject to construction at any time." Id., Comment; see also id. § 3-107, Comment.
valid will and its denomination of the heirs. There are two occasions, however, when the court must entertain a petition to modify or vacate its order and probate another will: upon presentation of a later-offered will whose proponents were unaware of its existence at the time of the earlier proceeding; and upon petition of a proponent who was unaware of the earlier proceeding and whose only notice was by publication. Furthermore, the court may entertain a petition to modify or vacate, filed by persons not denominated as heirs in a determination of either total or partial intestacy, if it is shown that the persons omitted from the previous determination were unaware of their relationship to the decedent, were unaware of his death, or were given no notice except by publication; upon such petition the court may reconsider its determination of heirs. The time limits, designated by the Uniform Code, within which petitions to vacate must be filed appear to be longer than the time allowed in West Virginia to appeal a probate in solemn form, but not longer than that permitted to appeal an ex parte proceeding. The Code also allows an order to be vacated or modified for good cause shown within the time allowed for appeal.

The Code does not require a formal petition for the appointment of a personal representative as a part of the formal testacy proceeding. The personal representative may be appointed informally either before or after a formal proceeding to determine the decedent's testacy status. But a formal order concerning the appointment of the personal representative may be sought in the case where there is a dispute concerning the priority or qualification of the representative to serve, whether or not dispute exists as to the decedent's testacy status. If a proceeding to challenge the priority or qualifications of a personal representative, or applicant therefor, precedes appointment of any personal representative, it will stay any pending or future informal appointment proceedings. And if a personal representative has been appointed prior to the challenged

165 Uniform Probate Code § 3-412.
166 Id. § 3-412(1).
167 Id. § 3-412(2).
168 See id. § 3-412(3).
170 Id. § 41-5-10 (two years).
171 Uniform Probate Code § 3-413. The time allowed for appeals under the Uniform Probate Code is the same as that allowed for appeals to the state supreme court in equity cases. See id. § 1-308.
172 Uniform Probate Code § 3-414, Comment.
proceeding, the representative is restrained from acting, except to preserve the estate or as the court may order, once he has been given notice of the challenge proceeding.\textsuperscript{173}

\textit{Part 5. Supervised Administration}

The Uniform Probate Code provides the option to settle an estate in the traditional manner: treating probate as one continuous proceeding in the court. Such a proceeding, labeled “supervised administration,” is treated as an in rem proceeding, and is placed under the continuing authority of the probate court until distribution of the estate is complete, the personal representative is discharged, or the proceeding is otherwise terminated.\textsuperscript{174}

A petition for supervised administration may be filed at any time, and by any interested party or the personal representative. If the testacy status of the decedent or the priority and qualification of the personal representative have not been previously determined, the court must decide these issues even though it chooses to deny the request for supervised administration.\textsuperscript{175}

In making its determination whether to order a supervised administration, the court must consider the expressed wishes of the testator. Supervised administration is to be ordered where it is requested by the testator’s will, unless, due to changed circumstances since execution, the court finds that supervised administration is unnecessary. If \textit{unsupervised} administration has been directed by the will, supervised administration can be ordered only upon a finding that it is necessary for the protection of persons interested in the estate. Where the will is silent as to supervision of administration, the Uniform Probate Code provides for supervised administration only if the court finds supervision is “necessary under the circumstances.”\textsuperscript{176}

An application for a supervised proceeding and an application for a formal proceeding have the same effect on informal proceedings: informal administration is stayed and a personal representative previously appointed is not allowed to exercise his power of distribution.\textsuperscript{177}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} § 3-414(a).
\item \textit{Id.} § 3-501.
\item \textit{Id.} § 3-502.
\item \textit{Id.}
\item \textit{Id.} § 3-503.
\end{enumerate}
\end{footnotesize}
The Uniform Probate Code departs from the traditional supervised administration in that, unless otherwise restricted, the supervised personal representative has "without interim orders approving exercise of a power, all powers of personal representatives under this Code, but [is not permitted to] exercise his power to make any distribution of the estate without prior order of the Court." Interim orders directing partial distribution or other relief may be issued at any time during supervised administration. Notice for interim orders is required only for persons who have filed a demand for notice, and notice as to other interim matters is left to the court to determine by court order or rule. Otherwise, notice is required only for a closing order. Supervised administration is terminated by a closing order issued after notice of termination is given to interested parties.

Part 6. Personal Representative; Appointment, Control, and Termination of Authority

The provisions of the Uniform Code relating to appointment, control, and termination of authority apply to all personal representatives, whether formally or informally appointed, and whether or not administration is supervised. As in West Virginia, the personal representative qualifies under the Uniform Code by giving any required bond and a statement accepting the duties of the office. By accepting appointment, the personal representative submits to the in personam jurisdiction of the court as to any matter relating to the estate. West Virginia law requires a non-resident representative to designate the clerk of the county court as his agent for service of process. The Uniform Code, however, considers acceptance of the appointment tantamount to consent in

178 Id. § 3-504.
179 Id. § 3-505.
180 "A demand for notice under section 3-204 would entitle any interested person to notice of any interim order which might be made in the course of supervised administration." Id., Comment.
181 Id.
182 Id. §§ 3-505, -1001.
183 Id. § 3-601, Comment.
185 UNIFORM PROBATE CODE § 3-601.
186 Id. § 3-602; accord W. VA. CODE ANN. § 44-1-1 to -4 (1966); Id. § 44-5-3 (Cum. Supp. 1974).
advance to the personal jurisdiction of the court over any proceeding relating to the estate.188

Both West Virginia law and the Uniform Probate Code contain provisions which require a personal representative to furnish bond under certain circumstances to insure the faithful performance of his duties.189 The major difference between the two is that West Virginia starts from the premise that a bond is required; the Code starts from the premise that it is not.190 In West Virginia the bond requirement may be waived by the will, unless (1) the personal representative is a non-resident, or (2) an interested party requests a requirement of bond, or (3) in the opinion of the court or clerk admitting the will bond is considered necessary in spite of the waiver.191

Unlike present West Virginia administration procedure, the court is not responsible under the Uniform Code for insuring that the personal representative performs his duties properly. Rather, proper performance is induced by the remedies available to interested parties.192 The drafters of the Uniform Probate Code believed that "the total package of protection thus afforded may represent more real protection than a blanket requirement of bond."193 The Code does provide, however, that any interested party in an estate of value in excess of one thousand dollars, or a creditor with a claim in excess of one thousand dollars, may, by writing, demand that

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188 Uniform Probate Code § 3-602. Due process requires that notice of any proceeding be given to the personal representative by mail. Id., Comment.
191 Uniform Probate Code § 3-603, Comment.
193 Uniform Probate Code § 3-603, Comment.

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the personal representative give bond. In those cases where bond is demanded it is required, "but the requirement ceases if the person demanding bond ceases to be interested in the estate," or if the court excuses bond.

The Uniform Code provides different bond requirements depending on whether the personal representative was formally or informally appointed. In the case of an informal appointment a bond is required for the appointment of a special administrator, when the will expressly requires a bond or where an interested person or creditor has demanded bond. These are the only circumstances in which a bond may be required. In a formal proceeding the court may require a bond except in those cases where the will waives the bond requirement. As in West Virginia, if the bond has been requested by an interested party and the court believes that it is desirable, the court may require bond despite the waiver. If, the court determines that a bond is not necessary, however, it may waive bond even though the will would require it. Further, the Uniform Code does not require a bond of a corporate fiduciary.

If a bond is required under the Code, the amount of bond must equal the estimated value of the personal estate and the income expected from the real and personal estate during the next year. This is similar to the amount required by current West Virginia law, except in those cases where the personal representative is a nonresident; when the personal representative is a nonresident, the bond in West Virginia must not be less than "(1) double the value of the personal estate and (2) double the value of any real property authorized to be sold under the will or the value of any rents and profits from any real property which the will authorizes such nonresi dent to recieve . . . ." The Uniform Code is more flexible than West Virginia law since it allows the registrar to accept suitable security in lieu of bond, and gives the probate court broad

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194 Id. § 3-605.
195 Id.
197 Uniform Probate Code § 3-803.
199 Uniform Probate Code § 3-603.
201 Id. § 44-5-3 (Cum. Supp. 1974).
202 Uniform Probate Code § 3-604, Comment.
discretion in resolving any matters relating to the bond.  

Both the Uniform Code and West Virginia law provide that the bond is to be made payable to the state. By appearing on the bond the surety consents, under the Uniform Code, to the jurisdiction of the court "in any proceeding pertaining to the fiduciary duties of the personal representative and naming the surety as a party." Further, the Uniform Probate Code permits successive recovery on the bond until its amount is exhausted. Both statutes also provide for termination of the personal representative's appointment, although the Uniform Code provisions are more comprehensive than those of West Virginia. Both statutes provide for termination of the authority of the personal representative upon his death, disability or resignation; upon a showing of cause for removal; and upon a change in the decedent's testacy status. Both also provide for the appointment of a successor personal representative with the same power as the original representative.

A special administrator may be appointed informally by the registrar, where necessary, to protect the estate prior to appointment of the general personal representative, or when a prior appointment has been terminated. A special administrator may be appointed in a formal proceeding where necessary to preserve and to administer the estate in those cases where the general personal


206 Uniform Probate Code § 3-606(a)(3).

207 Id. § 3-606(a)(5).


213 Uniform Probate Code § 3-614.
representative cannot, or should not, act. In West Virginia, a curator may be appointed to serve during a will contest, during the infancy or absence of the executor, or until administration is granted.

Where the special administrator is appointed informally, his duties are limited to collecting, managing, preserving, accounting for, and delivering the assets of the estate to the general administrator when one is appointed. A special administrator appointed in a formal proceeding, however, has all the powers of a personal representative, except as limited in the order of appointment. Appointment may be made in a formal proceeding if it appears to the court that an emergency exists. The order of appointment in a formal proceeding may limit the terms of appointment, the powers and duties of the special administrator, and the appointment to a period of time.

To militate against the dangers of unsupervised administration, the Uniform Code contains a special protective provision that allows any interested party to petition the court to temporarily restrain the personal representative if it appears that "otherwise [the personal representative] may take some action which would jeopardize unreasonably the interest of the applicant or of some other interested person." The drafters of the Uniform Probate Code believed that the control of the personal representative permitted by this provision is "equal, if not superior to that presently available with respect to "supervised" personal representatives appointed by inferior courts."

Part 7. Duties and Powers of Personal Representatives

Although under both the Uniform Code and West Virginia law "the duties and powers of a personal representative commence

215 Uniform Probate Code § 3-614(1).
217 Uniform Probate Code § 3-617.
218 Id. § 3-614 (2).
219 Id. § 3-617.
220 Id.
221 Id.
222 See id. § 3-607(a). "Persons with whom the personal representative may transact business may be made parties." Id. Notice as the court directs and a hearing are required. Id. § 3-607 (b).
223 Id. § 3-607(b).
upon his appointment,"224 both statutes allow the person named by
the will as executor to perform certain duties, such as providing for
the funeral, prior to appointment.225 The Uniform Code provides
that the power of the personal representative relates back in time
to give acts performed by the personal representative prior to his
appointment the same effect as those performed after appoint-
ment. The same result probably would be achieved in West Vir-
ginia as a result of a statutory provision authorizing the personal
representative to "preserve the estate from waste" prior to his
appointment.226 Additionally, the Uniform Probate Code author-
ized the personal representative to ratify and to accept on behalf
of the estate acts done by others.227 The Uniform Code recognizes
the possibility of erroneous appointment of a second representa-
tive, but provides that his good faith acts prior to notice of the first
appointment was valid.228

The Probate Code makes the personal representative a fidu-
ciary and imposes upon him the standards of care applied to
trustees:229 "the standards . . . that would be observed by a pru-
dent man dealing with the property of another . . . "230 The per-
sonal representative must exercise his authority in the best interest
of the estate and must settle and distribute the estate as expeditiously and efficiently as possible.231 Unless the estate is
under supervised administration, the personal representative per-
forms his duties independent of the court. The personal represent-
ative may, however, "invoke the jurisdiction of the court . . . to
resolve questions concerning the estate or its administration."232
This provision underlies the basic philosophy of the Code — mini-
mizing control over the parties.

Keeping with this basic philosophy is a particularly important
 provision233 that "ties the question of [the personal representa-
tive's] personal liability for administrative or distributive acts to
the question of whether the act was 'authorized at the time.' Thus,

227 Uniform Probate Code § 3-701.
228 Id. § 3-702.
229 Id. § 3-703(a).
230 Id. § 7-302.
231 Id. § 3-703(a).
232 Id. § 3-704.
233 Id. § 3-703(b).
a personal representative may rely upon and be protected by a will which has been probated without adjudication or an order appoint-
ing him to administer which is issued in no-notice proceedings even though proceedings occurring later may change the assump-
tion as to whether the decedent died testate or intestate."234 If, for
example, distribution has been made to heirs at law on the as-
sumption of intestacy in an informal proceeding, a subsequent
probate of a will in a formal proceeding will not render the personal
representative liable for distribution inconsistent with the will.
Recovery from the distributees would not be precluded, however,
in such a case.235

Except as to causes of action that do not survive the decedent,
the personal representative has the same standing as the decedent
would have had to sue and be sued in the courts of the Uniform
Code jurisdiction or of any other jurisdiction.236 This provision is
intended "to reduce or eliminate differences in the amenability to
suit of personal representatives . . .,"237 and should lessen
the necessity for ancillary administration.238

Within thirty days of his appointment the personal represen-
tative is under a duty to give notice of his appointment by mail to
those heirs and devisees whose addresses can be reasonably ob-
tained. The information required in the notice includes the name
and address of the personal representative, and the court where the
estate papers are on file. The notice must state whether bond has
been filed and indicate that this information is being sent to per-
sons interested in the estate. Failure to give this information con-
stitutes a breach of the personal representative's duty to the per-
sons interested in the estate, but it does not affect the validity of
his appointment.239 Since interested parties are entitled to notice
of, and to be present at, formal proceedings,240 the information
requirement under the Code serves, as a practical matter, to advise
only those parties who fail to appear at the formal proceeding of
an appointment made in that proceeding. The information re-

234 Id. § 3-703, Comment; See id. § 3-401, Comment.
235 See id. §§ 3-909, -1004. See also notes 343, 357-58 infra.
236 UNIFORM PROBATE CODE § 3-703(c).
237 Id. § 3-703, Comment.
238 Id.
239 Id. § 3-705. An informally appointed personal representative administering
the estate on the basis of a decedent's intestacy must also inform devisees named
in any testamentary instrument not offered for probate. Id. See id. § 3-301(4)(i).
240 Id. §§ 3-403(a), -414(b). See also text accompanying notes 140-42 supra.
requirement is of greater benefit to interested parties in an informal proceeding since those parties are not entitled to notice of the informal proceeding. This provision should minimize objection to the no-notice aspect of the informal appointment proceedings. Since the rights of interested persons cannot be cut off except by the running of the statute of limitations or by a formal proceeding giving full notice to all interested parties, an interested party may still challenge an appointment made in the informal proceeding after he has been informed of the informal appointment.

Both West Virginia probate law and the Uniform Probate Code require that an inventory of the decedent’s estate be prepared. The West Virginia statute requires that appraisers be appointed by the county court or clerk of the county court. The Uniform Code authorizes appointment of appraisers by the personal representative, thereby eliminating judicial involvement in the selection of appraisers. The Uniform Code provides the personal representative a choice in the manner of handling the inventory. If an interested person requests a copy of the inventory and the personal representative elects to send copies to all interested parties who request copies, the inventory disclosing the assets of the estate need not be filed and does not become a part of the probate record. Otherwise, the personal representative must file the inventory with the probate court. If a large number of persons are interested in the estate the latter procedure would seem to be indicated. The Code requires the personal representative to make, and file or provide to interested parties, a supplementary inventory of assets discovered after the original inventory is taken. A supplementary inventory, revising the description or market value of items included in the original inventory, must also be made if it is discovered that the value or description of the item in the original inventory is erroneous or misleading. West Virginia has no specific statutory provision authorizing amendment to the inventory but the power to amend may be implied within

241 Uniform Probate Code § 3-108.
242 See id. § 3-401; Id. § 3-705, Comment.
244 Uniform Probate Code § 3-707.
245 Id. § 3-706, Comment.
246 Id. § 3-706.
247 Id. § 3-706, Comment.
248 Id. § 3-708.
249 Id.
the general powers and duties of the personal representative.\textsuperscript{250} A breach of duty concerning the inventory is grounds for removal of the personal representative under the Uniform Code.\textsuperscript{251} Such a breach of duty is in West Virginia a misdemeanor punishable by fine\textsuperscript{252} and presumably also constitutes grounds for removal.\textsuperscript{253}

A personal representative is by West Virginia law under a duty to take custody of the decedent's personal estate\textsuperscript{254} and to administer it in such a manner as to preserve and protect it for the ultimate distribution.\textsuperscript{255} A personal representative under the Uniform Code is also under a duty to take possession of the decedent's property, but he may leave or surrender real or tangible personal property to the persons who are presumptively entitled to it. Nevertheless, if the personal representative determines that possession by him of any of the decedent's property is necessary for purposes of administration, he has a right to such possession and may request delivery of any such property in the possession of an heir or devisee. He may also maintain an action to recover the property or to determine title to the property.\textsuperscript{256} While it is possible for an interested party to later question the representative's judgment in retaining the assets in an action for surcharge, the drafters of the Uniform Code believed that this possibility should not interfere with his right to possession of the assets of the estate.\textsuperscript{257} Under the Uniform Probate Code and West Virginia law the personal representative has both the power to take whatever action is necessary to recover possession of or determine the title to property and the power to set aside fraudulent conveyances against the estate.\textsuperscript{258}

The Uniform Probate Code gives the personal representative a far broader power to transfer title to property than is conferred by West Virginia law. The personal representative under the Uniform Code has the same power over the title to property of the estate that a trustee would have had. "\textit{This power may be exercised without notice, hearing, or order of court.}"\textsuperscript{259} This "power,

\begin{itemize}
  \item \textsuperscript{250} W. VA. CODE ANN. § 44-1-15 (1966).
  \item \textsuperscript{251} UNIFORM PROBATE CODE § 3-611; Id. § 3-706, Comment.
  \item \textsuperscript{252} W. VA. CODE ANN. § 44-1-14 (Cum. Supp. 1974).
  \item \textsuperscript{253} Id. § 44-1-9 (1966).
  \item \textsuperscript{254} Id. § 44-1-15.
  \item \textsuperscript{256} See UNIFORM PROBATE CODE § 3-709. Possession of property may be otherwise provided for by the decedent's will.
  \item \textsuperscript{257} Id. § 3-709, Comment.
  \item \textsuperscript{258} Id. §§ 3-709, -710; W. VA. CODE ANN. § 44-1-22 (1966).
  \item \textsuperscript{259} UNIFORM PROBATE CODE § 3-711 (emphasis added).
\end{itemize}
rather than title, that is given to the personal representative is intended to "embrace all possible transactions which might result in a conveyance or encumbrance of assets, or in a change of rights of possession." The Probate Code provides certain safeguards against the improper use of this power by the personal representative. Interested parties may petition the court to have the administration of the estate supervised or to have the personal representative removed. An interested person may also obtain an order requiring the personal representative to post bond, to refrain from doing any specific act or from exercising any power, and may recover damages resulting from a breach of the personal representative's duties. Additionally, the Uniform Code broadly defines and prohibits self-dealing by the personal representative. Any self-dealing transaction "is voidable by any person interested in the estate except one who has consented after fair disclosure, unless: (1) the will or a contract entered into by the decedent expressly authorized the transaction; or (2) the transaction is approved by the court after notice to interested persons."

Persons who deal with the personal representative in good faith and for value are protected from an improper exercise of the power. "The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise." Nevertheless, a bona fide purchaser from a supervised personal representa-

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260 Id. § 3-711, Comment.
261 Id. § 3-502. See also text accompanying notes 175-76 supra.
262 Uniform Probate Code § 3-611.
263 See id. § 3-605. See also text accompanying notes 202-04 supra.
264 Uniform Probate Code § 3-712, Comment; see id. § 3-607. See notes 222-23 supra and accompanying text.
265 If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust. The rights of purchasers and others dealing with a personal representative shall be determined as provided in Sections 3-713 and 3-714.

Uniform Probate Code § 3-712.

266 Self dealing is defined as "[a]ny sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative . . . ."

Uniform Probate Code § 3-713.

267 Id.
268 Id. § 3-714.
tive is not so protected, if restrictions on the powers of the representative are endorsed on the letters of appointment. As to all other types of personal representatives, however, a provision in a will or court order limiting the power of the personal representative is not effective except as to persons with actual knowledge of the restriction.269

The Uniform Probate Code "accepts the assumption of the Uniform Trustee's Powers Act that it is desirable to equip fiduciaries with the authority required for the prudent handling of assets and extends it to personal representatives."270 As under West Virginia law the statutory authority of the personal representative under the Uniform Code can be modified by the will or by an order of the court.271 Otherwise, a personal representative under the Uniform Probate Code who acts "reasonably for the benefit of the interested persons" may exercise certain enumerated powers.272

The Uniform Code authorizes a personal representative to carry out a wide variety of enumerated transactions in proceeding with the business of administration.273 He may retain assets in which he is personally interested or which are otherwise improper for trust investment.274 He may perform, compromise, or refuse performance of any of the decedent's contracts.275 He may satisfy written charitable pledges of the decedent whether or not the pledges are legally binding, if in his judgment the decedent would have wanted the pledges satisfied.276 He may use funds of the estate that are not needed to meet currently payable debts and expenses, and which are not immediately distributable, for any investments which would be prudent for a trustee.277 He may deal with real

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269 Id.
270 Id. § 3-715, Comment.
271 W. VA. CODE ANN. § 44-6-6 (Cum. Supp. 1974); UNIFORM PROBATE CODE § 3-715.
272 UNIFORM PROBATE CODE § 3-715; Id., Comment.
273 Id. §§ 3-715(1)-(27).
276 UNIFORM PROBATE CODE § 3-715(4). The effect of this sub-paragraph is to permit the personal representative to discharge noncontractual pledges without fear of surcharge where he believes the decedent would have wanted him to do so. Id. § 3-715, Comment.
property in the estate as if he were the absolute owner of it;\textsuperscript{278} he may deal also with stocks and other securities as if they were his own\textsuperscript{279} and may hold them in the name of a nominee.\textsuperscript{280} He has the authority to insure assets of the estate against damage, loss, or liability, and may insure himself against liability to third persons.\textsuperscript{281} He may borrow money,\textsuperscript{282} compromise claims,\textsuperscript{283} and pay taxes, assessments, and his own compensation.\textsuperscript{284} He may sell or exercise stock subscription or conversion rights.\textsuperscript{285} He may also allocate items of income or expense to either estate income or principal, as permitted or provided by law.\textsuperscript{286} The personal representative has the power under the Code to hire attorneys, auditors, investment advisors, or agents, even if they are associated with him professionally, to advise or assist him in the performance of his duties.\textsuperscript{287} He has the authority to prosecute or defend claims\textsuperscript{288} and to sell, mortgage, or lease any real or personal property of the estate.\textsuperscript{289} He may continue any unincorporated business in unincorporated form for four months, or longer if approved by court order,\textsuperscript{290} or he may incorporate and continue the business throughout the period of distribution, subject to objection by the probable adult distributees of the business.\textsuperscript{291} He may provide for exoneration of himself of personal liability arising from contracts for the estate.\textsuperscript{292} And finally, he may satisfy and settle claims and distribute the estate in accordance with the Uniform Code.\textsuperscript{293} All of these transactions can be carried out by the personal representative without the specific approval of the probate court.

\textsuperscript{274} \textit{Uniform Probate Code} §§ 3-715(6) to (11), (23). In West Virginia the personal representative has no authority to sell real property unless it is devised to be sold. \textit{See} W. Va. Code Ann. §§ 44-1-20; 44-8-1 to -10 (1966).

\textsuperscript{279} \textit{Uniform Probate Code} § 3-715(12).

\textsuperscript{270} Id. § 3-715(14).

\textsuperscript{271} Id. § 3-715(15).

\textsuperscript{272} Id. § 3-715(16).

\textsuperscript{273} Id. § 3-716(17).

\textsuperscript{274} Id. § 3-716(18).

\textsuperscript{275} Id. § 3-716(19).

\textsuperscript{276} Id. § 3-715(20). West Virginia trust law incorporates the Uniform Principal and Income Act in W. Va. Code Ann. §§ 36-6-1 to -17 (1966).

\textsuperscript{277} \textit{Uniform Probate Code} § 3-715(21).


\textsuperscript{270} \textit{Uniform Probate Code} § 3-715(24).

\textsuperscript{271} Id. §§ 3-715(24)(iii), (25).

\textsuperscript{272} Id. § 3-715(26).

\textsuperscript{273} Id. § 3-715(27).
unless approval is otherwise specifically required.\textsuperscript{294}

Unless the will provides otherwise, the Uniform Code requires that co-representatives concur in all acts connected with the administration and distribution of the estate. Concurrence of co-representatives is not required, however, for receipt of property belonging to the estate, when concurrence cannot be obtained in time necessary to take emergency action to preserve the estate, or where one co-representative has been delegated to act for all.\textsuperscript{295} Care must be taken in delegation, however, since a representative who abandons his responsibility to co-administer the estate by a blanket delegation of his authority is considered in breach of his fiduciary duty.\textsuperscript{296} In any case, any person who deals with a co-representative who is unaware that others have also been appointed to serve with the co-representative or who is advised by the co-representative with whom he deals that the co-representative has authority to act alone, is as protected as if the person with whom he dealt had been the sole personal representative.\textsuperscript{297} A co-representative surviving termination of the authority of one or more of his co-representatives may exercise all the powers incident to the office, unless otherwise provided by will.\textsuperscript{298}

Both West Virginia law and the Uniform Probate Code provide that the personal representative is entitled to reasonable compensation for his services.\textsuperscript{299} If the testator has made a provision in the will for the compensation of his executor, that provision is binding under common law if the executor accepts the appointment.\textsuperscript{300} However, unless there is a contract between the decedent and the personal representative regarding compensation, the Uniform Code allows the personal representative to renounce the provision in the will regarding compensation before qualifying and to demand reasonable compensation.\textsuperscript{301} In West Virginia the amount

\textsuperscript{294}Id. § 3-715. See also text accompanying notes 270-72 supra. A successor personal representative has the same power and duty as the original personal representative unless the power is made personal to the executor named in the will. Uniform Probate Code § 3-716; accord W. Va. Code Ann. §§ 44-1-9,-16,-25 (1966).

\textsuperscript{295}Uniform Probate Code § 3-717.

\textsuperscript{296}Id. §§ 3-703, -717, Comment. Some limited delegations, which are reasonable and for the benefit of interested persons are allowed by section 3-715(21).

\textsuperscript{297}Id. § 3-717.

\textsuperscript{298}Id. § 3-718. See also Hofheimer v. Seaboard Citizen's Nat'l Bank, 154 Va. 996, 156 S.E. 581, cert. denied, 283 U.S. 855 (1931).


\textsuperscript{300}Williams v. Bond, 120 Va. 678, 91 S.E. 627 (1917).

\textsuperscript{301}Uniform Probate Code § 3-719. See also 8 M.J. Executors and
of compensation rests with the discretion of the court unless an amount is specified by the will. The usual rate of compensation in West Virginia is five per cent; either a higher or lower rate is applied under unusual circumstances.302 Under the Uniform Code the personal representative may determine the amount of, and pay, his own fee,303 although any interested party may test his action.304 Both West Virginia law and the Probate Code provide that the personal representative is entitled to recover any necessary expenses or disbursements, including attorney's fees, incurred or made defending or prosecuting in good faith any estate litigation.305

Judicial review of the reasonableness of the compensation determined by the personal representative for the services may be had by any interested party. If the court finds that any person has received excessive fees from the estate it may order such person to make appropriate refunds.306

The subject of fees under the Uniform Probate Code is one of natural concern to members of the bar. They are no doubt greatly concerned with the impact that the Uniform Code will have on probate practice, especially in regard to the amount of income that will be generated from that practice if the Code is adopted. To engage in much discussion on the matter would be to indulge in pure speculation. Nevertheless, in a symposium on the Code held by the American College of Probate Counsel one practicing attorney had several salient points to make. Probate practice under the Code should provide savings to the practitioner in both time and costs: (1) by reducing the number of court appearances necessary; (2) by cutting down the amount of paper work required, thereby reducing the attorneys' office costs and eliminating the need for para-professional personnel to do the paper work; and (3) by simplifying ancillary administration thereby reducing the time, expense, and paper work involved in starting administration in another state. Although work on small estates should be concluded much more rapidly under the Code than is presently possible, the Uniform Probate Code should not eliminate much, if any, work on

Administrators § 226 (1949).
302 See Uniform Probate Code § 3-715(18).
303 See id. §§ 3-105, -721.
305 Uniform Probate Code § 3-721.
large estates, since most of the work on large estates concerns estate and fiduciary income tax matters. Both the attorney and the personal representative should have a more creative role under the Code due to the choice or procedures available to them under the Code. Increased responsibility also follows increased creativity and the attorney can rightfully expect to receive a fee that reflects the increased responsibility and liability that arises from such creativity.297

Part 8. Creditors' Claims

The drafters of the Uniform Probate Code believe that "[t]he need for uniformity of law regarding creditors' claims against estates is especially strong. Commerical and consumer credit depends upon efficient collection procedures. The cost of credit is pushed up by the cost of credit life insurance which becomes a practical necessity for lenders unwilling to bear the expense of understanding or using the cumbersome and provincial collection procedures found in 50 codes of probate."298 The Uniform Code attempts to facilitate the creditors' efforts to collect claims against decedents by simplifying the probate collection procedure. The basic period under the Code within which to file creditors' claims is four months following the date of the first publication of notice to the creditors.299 The Probate Code provides that a general statute of limitations that has not already barred a creditor's claim at the time of the decedent's death is suspended during the four months after the decedent's death but that it thereafter resumes running and may operate to bar the claim before the normal period of non-claim has elapsed.300 The basic non-claim period under the Uniform Probate Code is also four months, and begins to run from

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298 Uniform Probate Code art. III, pt. 8, General Comment.

299 Id. §§ 3-801, -803(a)(1); see W. Va. Code Ann. § 44-2-2 (Cum. Supp. 1974). "The time so designated by the Commissioner [for presenting claims against the estate] shall not be less than four months nor more than six months from the date of the first publication of notice . . . ." Id.

300 Uniform Probate Code § 3-802; Id., Comment. See W. Va. Code Ann. § 44-2-12 (1968). "No claim barred by any statute of limitations shall be allowed by a commissioner against the estate of a decedent." Id.
the time the first notice by publication is given.\textsuperscript{311} If no notice to creditors is published, however, claims are not barred until three years after the decedent’s death.\textsuperscript{312}

The Uniform Code also places a limitation on claims against the decedent’s estate that arise at or after his death. All claims based on a contract with the personal representative are barred four months after performance by the personal representative is due; all other claims are barred four months after the claim arises.\textsuperscript{313}

The types of claims that must be presented to the personal representative within the appropriate non-claim period to avoid the statute of limitations in West Virginia law and under the Uniform Code are similar. The West Virginia statute requires presentation of “[e]very claim against the estate . . . whether open account, note, bond, bill, writing obligatory, judgment, decree, or other evidence of debt . . . .”\textsuperscript{314} The Uniform Code requires presentation of “[a]ll claims . . . including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis . . . .”\textsuperscript{315} The Uniform Code limitation

\textsuperscript{311} Uniform Probate Code § 3-803(a)(1).

\textsuperscript{312} Id. § 3-803(a)(2); W. Va. Code Ann. § 44-2-26 (1966) provides:

Every person having a claim against a deceased person, whether due or not, who shall not, when notice to creditors has been published as prescribed in this article, have presented his claim on or before the time fixed in such notice, or before that time have instituted action of suit thereon, shall, notwithstanding the same be not barred by some other statute of limitations that is applicable thereto, be barred from recovering such claim of or from the personal representative, or from thereafter setting off the same against the personal representative in any action or suit whatever; except that if a surplus remain after providing for all claims presented in due time, or on which action or suit shall have been commenced in due time, and such surplus shall not have been distributed by the personal representative to the beneficiaries of the estate, and the claimant prove that he had no actual notice of the publication to creditors nor knowledge of the proceedings before the commissioner of accounts, such creditor may prove his claim either before the commissioner or by action or suit and have the same allowed out of such surplus; and, in order that such late claims if proved may be provided for, the commissioner shall reopen his report if the same has not been returned to the county court, or if returned shall make and return a supplemental report.

\textsuperscript{313} Uniform Probate Code § 3-803(b).


\textsuperscript{315} Uniform Probate Code § 3-803(a)(b).
period does not affect, however, any proceeding to enforce a mortgage, pledge, or other lien against estate property or to establish liability of the decedent or his personal representative to the limit of insurance liability protection.\textsuperscript{316}

Claims against a decedent's estate may be perfected by mailing or delivering to the personal representative a written statement of the claim stating the name and address of the claimant and the basis and amount of the claim. Alternatively, the claimant may file a written statement with the clerk of the probate court.\textsuperscript{317} If the claim is contingent or unliquidated, the nature of the uncertainty must be described in the written statement; if the claim is secured, the security must be described; if the claim is not yet due, the due date must be stated. The failure to describe correctly any contingency, uncertainty, security, or due date, however, does not invalidate the presentation of the claim.\textsuperscript{318} A claim that is the subject matter of a proceeding which was pending against the decedent at his death need not be presented.\textsuperscript{319}

If the decedent's assets are insufficient to pay in full all of the claims against the estate, the Uniform Code and the West Virginia law establish similar orders of priority.\textsuperscript{320} Under West Virginia law claims against the decedent's estate are either allowed or rejected by the commissioner of accounts to whom the estate has been referred.\textsuperscript{321} But, the personal representative may act alone under the Uniform Code in allowing or disallowing a claim. Any claim that is disallowed, however, is barred under the Code unless the claimant files a petition for review with the court within sixty days after notice of the disallowance, if the notice warns the claimant of the impending bar. The personal representative may change his decision on a claim, but he may not change a disallowance of a claim after the time for review has passed and the claim has been barred.\textsuperscript{322} The personal representative under the Uniform Code

\textsuperscript{316} \textit{Id.} § 3-803(c).

\textsuperscript{317} The filing of a claim with the probate court under . . . this section does not serve to initiate a proceeding concerning the claim. Rather, it serves merely to protect the claimant who may anticipate some need for evidence to show that his claim is not barred. The probate court acts simply as a depository of the statement of claim . . . .

\textit{Id.} § 3-804, Comment.

\textsuperscript{318} \textit{Id.} § 3-804(1). \textit{See also} W. VA. CODE ANN. § 44-2-8 (1966).

\textsuperscript{319} \textsc{Uniform Probate Code} § 3-804(2).


\textsuperscript{321} W. VA. CODE ANN. §§ 44-2-5 to -10 (1966).

\textsuperscript{322} \textsc{Uniform Probate Code} § 3-806(a).
may pay claims allowed against the estate after the expiration of
four months from the first notice given to creditors.\textsuperscript{323} In West
Virginia, claims against an estate are not paid until one year from
the qualification of the first personal representative has elapsed.\textsuperscript{324}

The Code makes some changes in the common law as to the
liability of the personal representative in his individual and fidu-
ciary capacity. A personal representative under the Uniform Code
need not expressly disclaim personal liability on contracts which
he makes in his fiduciary capacity, unless he fails to reveal his
representative capacity and identify the estate in the contract.\textsuperscript{325}
Nor is he personally liable for torts committed in administration
of the estate, unless he is personally at fault.\textsuperscript{326} Even though the
personal representative is not individually liable, claims may be
asserted against the estate by proceeding against the personal rep-
resentative in his fiduciary capacity.\textsuperscript{327} The Uniform Code is "de-
designed to make the estate a quasi-corporation for purposes of such
liabilities. The personal representative would be personally liable
only if an agent for a corporation would be under the same circum-
stances, and the claimant has a direct remedy against the quasi-
corporate property."\textsuperscript{328}

Both West Virginia law and the Uniform Probate Code estab-
lish the manner of payment of claims that are not due or are
contingent or unliquidated.\textsuperscript{329} Furthermore, the Code allows the
personal representative in allowing a claim to deduct from the
amount allowed the value of any counterclaim which the estate
may have against the claimant;\textsuperscript{330} in West Virginia, the personal
representative must present the counterclaim to the commissioner
of accounts who decides whether or not to allow the counter-
claim.\textsuperscript{331}

\textbf{Part 9. Special Provisions Relating to Distribution}

Even if there is no administration of a decedent's estate, the

\textsuperscript{323} Id. § 3-807.
\textsuperscript{324} W. VA. CODE ANN. § 44-2-24 (1966).
\textsuperscript{325} UNIFORM PROBATE CODE § 3-808(a).
\textsuperscript{326} Id. § 3-808(b).
\textsuperscript{327} Id. § 3-808(c).
\textsuperscript{328} Id., Comment.
\textsuperscript{329} See id. § 3-810, W. VA. CODE ANN. §§ 44-2-8, -17 (1966).
\textsuperscript{330} UNIFORM PROBATE CODE § 3-811.
\textsuperscript{331} W. VA. CODE ANN. § 44-2-10 (1966).
heirs and devisees are entitled to the estate according to the provisions of the will and the law of intestate succession. Devisees may establish record title to devised property by the probated will. Title as a result of homestead allowance, exemption, or intestacy may be established by proof of the decedent's ownership, his death and the claimant's relationship to him.\textsuperscript{333}

Both the West Virginia law and the Uniform Probate Code recognize the doctrine of abatement of legacies.\textsuperscript{333} Both also give preference to the order of abatement, if any, established by the testator,\textsuperscript{334} otherwise the Code establishes an order to be followed.\textsuperscript{335} Both West Virginia law and the Uniform Code provide that any debt owed to the estate by a legatee or heir may be offset against the legacy or distributive share of the legatee or heir.\textsuperscript{336} Both also provide that an \textit{in terrorem} clause in a will is unenforceable if probable cause exists for instituting the will contest.\textsuperscript{337}

The Probate Code establishes a preference for distribution in kind of an estate.\textsuperscript{338} In furtherance of this preference, a devise payable in money may be satisfied by value in kind, provided the

\begin{itemize}
\item \textsuperscript{332} Uniform Probate Code § 3-901.
\item \textsuperscript{331} Id. § 3-902(a); Harper v. Cumberland & Allegheny Gas Co., 140 W. Va. 193, 83 S.E.2d 522 (1954). Abatement as applied to legacies means a proportional diminution or reduction of the pecuniary legacies, when the funds or assets out of which such legacies are payable are not sufficient to pay them in full. BLACK'S LAW DICTIONARY 15 (4th ed. 1951).
\item \textsuperscript{334} Uniform Probate Code § 3-902(b); Cuppett v. Neilly, 143 W. Va. 846, 105 S.E.2d 548 (1958).
\item \textsuperscript{335} (1) property not disposed of by the will; (2) residuary devisees; (3) general devisees; (4) specific devisees. For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.
\item \textsuperscript{336} Uniform Probate Code § 3-902(a). See also T. Atkinson, HANDBOOK ON THE LAW OF WILLS § 136 (2d ed. 1953).
\item \textsuperscript{337} Uniform Probate Code § 3-903; In re Rogers, 20 F. Supp. 120 (S.D.W. Va. 1937); Hooper v. Hooper, 32 W. Va. 526, 9 S.E. 937 (1889).
\item \textsuperscript{338} Uniform Probate Code § 3-905; Dutterer v. Logan, 103 W. Va. 216, 137 S.E. 1 (1927). An \textit{in terrorem} clause in a will provides that legacies are given under the condition that the recipient shall not dispute the validity or dispositions of the will. BLACK'S LAW DICTIONARY 901 (4th ed. 1951).
\item \textsuperscript{339} Uniform Probate Code § 3-906, Comment.
\end{itemize}
person entitled to it has not demanded payment in cash. The Code also specifies valuation dates for many assets and this will facilitate distribution in kind. Where distribution in kind is made, the personal representative must execute an instrument that assigns, transfers, or releases the asset to the distributee, as evidence of the distributee’s title. This instrument is conclusive evidence of the distributee’s title against all persons interested in the estate, except the personal representative, who may recover the asset or its value if it is later found that the distribution was improper. Unless the distribution can no longer be questioned because of adjudication, estoppel, or limitation, a distributee of assets improperly distributed or paid is liable to return the property and the income it has earned since the date of distribution, or its value. But a transferee for value from the distributee “takes title free of any claims of the estate and incurs no personal liability to the estate, whether or not the distribution was proper.”

The Uniform Probate Code authorizes the personal representative to bring a partition suit in order to distribute undivided interests, and if the property cannot be partitioned without loss, the court may order it sold. This would change the present West Virginia law, under which the personal representative has no authority to sell the decedent’s real estate unless authorized by the decedent’s will or by statute. The Code recognizes family settlements and the personal representative is bound by them, subject to his obligations to persons having an interest in the estate but

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230 Id. § 3-906(2)(i).
231 Id. § 3-906(3).
232 Id. § 3-907. This section should be read with section 3-709 which allows the representative to leave certain assets of the estate in the possession of the persons presumptively entitled thereto. Id., Comment.
233 Id. § 3-908.
234 Id. § 3-909. This section must be read in light of section 3-703. See text accompanying notes 234-35 supra.
Thus, a distribution may be ‘authorized at the time’ as contemplated by Section 3-703, and still be “improper” under this section . . . . When an unadjudicated distribution has occurred, the rights of persons to show that the basis for the distribution (e.g., an informally probated will, or informally issued letters of administration) is incorrect, or that the basis was improperly applied (erroneous interpretation, for example) is preserved against distributees by this section.

Id. § 3-909, Comment.
235 Id. § 3-910. The purchaser or lender need not inquire whether a personal representative acted properly. See also W. Va. Code Ann. §§ 41-5-19, -20 (1966).
who are not parties to the agreement. 348 Before making distribution to a trustee, the personal representative may require that the trust be registered if the law of the state where the trust is to be adminis-
tered provides for registration. 349 Furthermore the personal repre-
sentative may petition the appropriate court to require the trustee to post bond, unless the trust instrument excuses bond, and may delay distribution until the court acts. 350

Both the Code and West Virginia law provide for the apportionment of federal estate taxes among the beneficiaries of the estate in the proportion that the value of each beneficiary's interest in the estate bears to the total value of the estate. 351

Part 10. Closing Estates

The term "closing" under the Code refers to circumstances that support the conclusion that the affairs of the decedent's estate either are, or have been alleged to have been, completely settled. If the actions of the personal representative are reviewed and adjudicated, 352 a court determination that the estate has been settled terminates the authority and fiduciary obligations of the personal representative. 353 Without such judicial determination, the closing statement of the personal representative is only his affirmation that he believes the affairs of the estate are settled; he is still fully subject to suit 354 and his authority is not terminated until one year after the statement is filed. 355 Even after his authority is terminated the personal representative remains subject to suit unless protected by the limitation on proceedings against him 356 or unless

348 Uniform Probate Code § 3-912. This point has not been decided in West Virginia but the Virginia court is in accord. See Moore v. Gregory, 146 Va. 504, 131 S.E. 692 (1925).

349 Uniform Probate Code § 3-913(a). Trust registration is discussed in art. VII. pt. 1 infra.

350 Uniform Probate Code § 3-913(b).
352 Uniform Probate Code §§ 3-1001, -1002.
353 Id. § 3-1003, Comment. See also id. § 3-610(b).
354 Id. § 3-1003(b), Comment; See id. §§ 3-602, -608.
355 Id. § 3-1003(b); Id., Comment.
356 Id. § 3-1005. Unless previously barred by adjudication and except as provided in the closing statement, the rights of successors and of creditors whose claims have not otherwise been barred against the personal representative for breach of fiduciary duty are barred unless a proceeding to assert the same is commenced within 6 months after the filing of the closing statement. The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's estate.
an adjudication settling his accounts is the reason for the termination.\textsuperscript{355}

Even if the personal representative neither obtains a judicial order of protection nor files a closing statement, he is protected from liability in regard to acts or distributions that were authorized when done but which became doubtful because of a change in the decedent’s testacy status.\textsuperscript{356} Nevertheless, as to other matters, the personal representative who fails to file a closing statement or obtain an adjudication has no protection against later claims of breach of his fiduciary duties.

Both the Uniform Code and West Virginia law\textsuperscript{357} limit the liability of distributees in suits by creditors seeking to recover on claims not yet barred after the assets are distributed, to the value received by the distributee as distribution from the decedent’s estate. The Code values the distribution at the time it was made.\textsuperscript{358} Both the Uniform Code and West Virginia law place a maximum time limit within which creditors can recover from distributees. Creditors are barred under the Uniform Code after “the later of (1) three years after the decedent’s death; or (2) one year after the time of distribution.”\textsuperscript{359} In West Virginia such an action must be brought within two years of distribution.\textsuperscript{360}

The Uniform Probate Code also provides for administration of property discovered after the estate has been settled.\textsuperscript{361}

\textit{Part 11. Compromise of Controversies}

The Uniform Code provides procedures for securing court approval of a compromise of a controversy among parties having a beneficial interest in the decedent’s estate and also deals with some of the substantive matters that may accompany a compromise agreement.

A compromise agreement may relate to the admission of an instrument to probate, to the construction, validity, or effect of any probated instrument, to the rights or interest of any person in

\begin{itemize}
\item \textsuperscript{355} Id. § 3-1003, Comment. \textit{See also id.} § 3-608.
\item \textsuperscript{356} Id. § 3-1003, Comment. \textit{See also id.} § 3-703.
\item \textsuperscript{357} Id. § 3-1004; W. VA. CODE ANN. § 44-2-27 (1966).
\item \textsuperscript{358} UNIFORM PROBATE CODE § 3-1004, Comment.
\item \textsuperscript{359} Id. § 3-1006. Section 3-1006 does not bar an action to recover property or value received as the result of fraud.
\item \textsuperscript{360} W. VA. CODE ANN. § 44-2-27 (1966).
\item \textsuperscript{361} UNIFORM PROBATE CODE § 3-1008.
\end{itemize}
the estate, or to the administration of the estate.362 Court approval of the compromise in a formal proceeding renders the agreement binding on all parties, even though the agreement may affect a trust or an unalienable right, including unborn, unascertained, or unlocated persons. However, a compromise agreement does not affect the rights of creditors or taxing authorities who are not parties to the agreement.363 The Code sets out a procedure for securing court approval of a compromise. If all competent parties and parents acting for any minor child having an interest in, or claim against, the estate agree, a settlement plan may be substituted for the manner of settlement which would otherwise govern the controversy.364 The procedure for representing minors and unknown or unlocated persons who are beneficially interested must be followed.365 Before the substitute proposal may be accepted, the court must determine "that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable."366

The thrust of the compromise procedure, in keeping with the overall philosophy of the Code, is to authorize initiation of a settlement proposal by the parties who are beneficially interested in the estate and to prevent the personal representative or testamentary trustee from vetoing the proposal,367 to secure, perhaps fees or commissions which they would earn if the testators wishes were carried out.368 Once approved and executed, the compromise agreement governs further disposition of the estate.369

Part 12. Collection of Personal Property by Affidavit and Summary Administration Procedure for Small Estates

The Uniform Code establishes a procedure facilitating the transfer of small estates by affidavit, without the use of a personal

362 Id. § 3-1101.
363 Id.
364 Id. § 3-1102, Comment.
365 Id. § 1-403.
366 Id. § 3-1102(3). The drafters believe that "the procedure does not threaten the planning of a testator who plans and drafts with sufficient clarity and completeness to eliminate the possibility of good faith controversy concerning the meaning and legality of his plan." Id., Comment.
367 Id. § 3-1102(3).
368 Id., Comment.
369 Id. § 3-1102(3).
representative, and simplifies the duties of the personal representative of the small estate.\textsuperscript{370} One claiming to be successor of the decedent may collect the personal property and assets of the decedent thirty days after the decedent's death by presenting an affidavit to persons in possession of the property or indebted to the decedent. The affidavit made by the successor of the decedent must state that:

(1) The value of the entire estate, wherever located, less liens and encumbrances, does not exceed $5,000; (2) 30 days have elapsed since the death of the decedent; (3) no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction; and (4) the claiming successor is entitled to payment or delivery of the property.\textsuperscript{371}

Upon presentation of the affidavit, any debtor of the decedent or anyone having tangible personal property or an instrument evidencing a debt or other intangible asset belonging to the decedent must pay the debt or turn over the tangible or intangible property to the claiming successor.\textsuperscript{372} Upon presentation of such affidavit, a corporate transfer agent must change the registered ownership in the corporation's records.\textsuperscript{373} Persons paying, delivering, or transferring in accordance with this affidavit are discharged and released of further obligation to the same extent as if they had dealt with a personal representative. The person who receives property or payment by presenting the affidavit is, nevertheless, accountable to any personal representative or other person having a superior right to property or payment he has received.\textsuperscript{374}

The Probate Code allows the personal representative of the small estate to distribute the estate to the persons entitled to it and to file a closing statement without giving notice to the creditors if "the value of the entire estate, less liens and encumbrances, does not exceed homestead allowance, exempt property, family allowance, cost and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent . . . ."\textsuperscript{375}

\textsuperscript{370} Id. art. III, pt. 12, General Comment.
\textsuperscript{371} Id. § 3-1201(a).
\textsuperscript{372} Id.
\textsuperscript{373} Id. § 3-1201(b).
\textsuperscript{374} Id. § 3-1202.
\textsuperscript{375} Id. § 3-1203. See also id. § 3-1204. This would amount to a net estate of $14,500. See Curry, supra note 31, at 129-30.
Summary administration under West Virginia law differs from the Uniform Code procedure: if the value of the estate does not exceed three thousand dollars the personal representative need not refer it to a commissioner of accounts; the personal representative must collect assets and distribute within two months of his appointment; unless a creditor or heir within thirty days of filing of the personal representative's report shows cause why the report is not correct, the personal representative is released after distribution.375

Article IV. Foreign Personal Representatives; Ancillary Administration

Article IV of the Uniform Probate Code is concerned with the law applicable when a decedent's estate involves property located or debts owed in more than one state. It deals with the powers and responsibilities in a Uniform Code state of the personal representative appointed in another state, regardless of whether that state has adopted the Uniform Code. Additionally, some provisions in Article III deal with local appointment of personal representatives for nonresident decedents.376 Read together, Articles III and IV are "designed to coerce respect for domiciliary procedures and administrative acts to the extent possible."378 By the use of the related provisions in these two articles "it may be possible to avoid administration in any state other than that in which the decedent was domiciled."379 By contrast, it is generally necessary for the probate court in West Virginia to appoint an ancillary personal representative to collect the local assets of the nonresident decedent, unless voluntary payment is made to the domiciliary representative; the domiciliary representative has no authority to act beyond the jurisdiction of the court granting him his letters.380

375 UNIFORM PROBATE CODE art. IV, General Comment. See also id. § 3-201 (venue), § 3-202 (resolution of conflicting domiciliary claims), § 3-203 (priority of domiciliary personal representative), § 3-307(a) (30 day delay required before appointment of a local representative for a nonresident), § 3-303(a) (claims barred by non-claim at domicile before local administration commenced are barred locally), § 3-815 (duty of personal representative in regard to claims where estate is being administered in more than one state.
376 Id. art. IV, General Comment.
377 Id. § 3-201, Comment.
Part 2. Powers of Foreign Personal Representatives

There are three different types of power which a foreign personal representative may obtain in a Uniform Code state. The first is the power to receive payments of debts owed to the decedent or to collect and receive property belonging to the decedent. Normally, local debtors are subject to the risk of doubt liability by voluntarily paying the debt to the domiciliary representative.

This risk is minimized by the Code. Upon presentation of an affidavit of authority by the domiciliary foreign personal representative, the resident debtor acting in good faith may pay the debt to the domiciliary foreign personal representative. Such payment releases the debtor to the same extent as if the payment had been made to a resident personal representative. Local creditors of the nonresident decedent can protect their interest by notifying local debtors of the claims that they have against the estate. Once notified the debtor can no longer make a good faith payment to the domiciliary representative without incurring the risk of double liability.

The second power that the foreign personal representative may obtain is the power to file a copy of his appointment and office bond, if he has one, with local court. Upon such filing a foreign personal representative acquires all the powers of a local personal representative, including the power to maintain actions in the state as well as "all of the powers provided for in an unsupervised administration as provided in Article III of the Code."238

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231 Part I of Article IV defines local administration, local personal representative, and resident creditor for purposes of the Uniform Code. Foreign personal representative, personal representative, and non-resident decedent are defined in section 1-201.

232 Uniform Probate Code § 4-201.

233 See Wilkins v. Ellett, 76 U.S. (9 Wall.) 740 (1869). See also Atkinson, supra note 335, at 585-89.

234 The domiciliary foreign personal representative of the nonresident decedent must present proof of his appointment and an affidavit stating (1) the date of the death of the nonresident decedent (sixty days must expire before payment can be made), (2) that no local administration, or application or petition therefore, is pending, and (3) that the domiciliary foreign personal representation is entitled to payment or delivery. Uniform Probate Code § 4-201.

235 Persons having possession of personal property are released to the same extent upon delivery of the property, in good faith and upon presentation of affidavit, to the foreign personal representative. Id. § 4-202.

236 Id. § 4-203.

237 Id. § 4-204.

238 Id. § 4-205.

239 Id. art. IV, General Comment.
The third type of power which the foreign domiciliary personal representative has arises from the priority he has above others seeking appointment as local personal representative and from his power to nominate another, if he chooses not to serve as local representative. This is in accord with present West Virginia law.

The application or petition for local administration of an estate terminates the authority of the foreign personal representative to act locally, but the local court may allow him to do whatever is necessary to preserve the estate. The Uniform Code protects those persons who acted in reliance on the authority of the foreign personal representative prior to receiving actual notice of a pending local administration. Furthermore, "[t]he local personal representative is subject to all duties and obligations which have accrued by virtue of the exercise of the powers by the foreign personal representative and may be substituted for him in any [local] action or proceedings in this state."

Part 3. Jurisdiction Over Foreign Representatives

The Uniform Probate Code confers upon the local court jurisdiction over a foreign personal representative who acts locally. Once local or ancillary administration has been started, Article III subjects the representative to the power of the local court. The foreign personal representative submits himself to the local court's jurisdiction by filing a copy of his appointment, by receiving money or property, or by doing any act locally as personal representative that would give the state jurisdiction over him as an individual. The collection of money or property under this provision gives the court quasi in rem jurisdiction over a foreign per-

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39 Id. §§ 3-203 (g), 4-207. Unless otherwise provided by will, the domiciliary representative has priority over others to appointment in a Code state as ancillary representative in an informal proceeding. No one else may be appointed ancillary administrator except in a formal proceeding. See id. § 3-308(b).

391 W. V. Code Ann. § 44-5-3 (Cum. Supp. 1974) provides that a testator who is a nonresident of this State at the time of his death may name, and there may be appointed and act, a nonresident as his executor.

392 Uniform Probate Code § 4-206.

393 Id. art. IV, General Comment. See id. § 3-602. See also notes 183-188 supra and accompanying text.

394 See Uniform Probate Code § 4-204.

395 See id. § 4-201.

396 Id. § 4-301.
sonal representative to the extent of the value collected.\textsuperscript{397} In addition, a foreign personal representative is subject to the jurisdiction of local courts "to the same extent that his decedent was subject to jurisdiction immediately prior to death."\textsuperscript{398}

The West Virginia Code, in a somewhat analogous provision, provides that when a nonresident qualifies as personal representative he thereby appoints the clerk of the county court his attorney-in-fact for purposes of service of process. By qualification, the personal representative agrees that service in the manner described shall have the force and effect of personal service.\textsuperscript{399}

\textit{Part 4. Judgments and Personal Representative}

This part of the Code deals with the res judicata effect to be given adjudication for or against a foreign personal representative. Such an adjudication is as binding on the local personal representative as if the local personal representative were a party to the adjudication,\textsuperscript{400} unless, of course, the adjudication resulted from fraud or collusion to the prejudice of the estate.\textsuperscript{401}

\textbf{Article VI. Non-Probate Transfers.}\textsuperscript{402}

\textit{Part 1. Multiple-Party Accounts}

Article VI of the Uniform Code offers two different statutory approaches to two problem areas in non-probate transfers. The first problem area is multiple-party accounts\textsuperscript{403} in financial institu-

\textsuperscript{397} See generally id. art. IV, General Comment.

\textsuperscript{398} Id. § 4-302. Service of process may be made upon the foreign personal representative by registered or certified mail, if available, otherwise by first class mail. Any other method of service allowed by local law is also permitted. See id. § 4-303.

\textsuperscript{399} W. VA. CODE ANN. § 44-5-3 (Cum. Supp. 1974).

\textsuperscript{400} UNIFORM PROBATE CODE § 4-401.

\textsuperscript{401} Id. art. IV, General Comment. See also id. § 3-408.

\textsuperscript{402} Article V (Protection of Persons Under Disability and Their Property) is not discussed in this article because of time and space considerations and because it is outside the mainstream of probate practice and the coverage of this discussion.

\textsuperscript{403} UNIFORM PROBATE CODE § 6-101(5):

A "multiple-party account" is any of the following types of account: (i) a joint account, (ii) a P.O.D. account, or (iii) a trust account. It does not include accounts established for deposit of funds of a partnership, joint venture, or other association for business purposes, or accounts controlled by one or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, charitable or civic organiza-
tions.\textsuperscript{404} The second problem area involves provisions in effective
written instruments that shift or cancel rights by reason of the
death of the owner.\textsuperscript{405}

The provisions dealing with multiple-party accounts can be
divided into two groups. The first group deals with the relationship
between the parties to the account,\textsuperscript{406} while the second deals with
the relationship between the financial institution and the parties
to the account.\textsuperscript{407} Such separation was intended by drafters of the
Code:

By keeping these relationships separate, it is possible to achieve
the degree of definiteness that financial institutions must have
in order to be induced to offer multiple-party accounts for use
by their customers, while preserving the opportunity for indi-
viduals involved in multiple-party accounts to show various
intentions that may have attended the original deposit, or any
unusual transactions affecting the account thereafter.\textsuperscript{408}

The Code makes the assumption that the depositor of funds
in a multiple-party account normally does not intend the arrange-
ment to constitute an irrevocable gift of the funds represented by
the deposit. Rather, the Code position is that the funds deposited
belong to the parties during their lifetime in proportion to the net
contributions made by each, absent proof that a gift was in-
tended.\textsuperscript{409}

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\textsuperscript{404} Id. § 6-101(3). A "financial institution" is any organization authorized to
do business under state or federal laws, including, but not limited to, banks and
trust companies, savings banks, building and loan associations, savings and loan
companies or associations, and credit unions. \textit{Id}.

\textsuperscript{405} Wellman, supra note 26, at 483.

\textsuperscript{406} \textit{Uniform Probate Code} § 6-101(7). A party is defined as:
a person who, by the terms of the account, has a present right, subject
to request, to payment from a multiple-party account. A P.O.D. payee
or beneficiary of a trust account is a party only after the account becomes
payable to him by reason of his surviving the original payee or trustee.
Unless the context otherwise requires, it includes a guardian, conservator,
personal representative, or assignee, including an attaching creditor, of
a party. It also includes a person identified as a trustee of an account for
another whether or not a beneficiary is named, but it does not include
any named beneficiary unless he has a present right of withdrawal.

\textit{Id}.

\textsuperscript{407} Id. § 6-102, Comment.

\textsuperscript{408} Id.

\textsuperscript{409} Id. § 6-103. See \textit{id.} §§ 6-103(a), (c). "Net contribution" of a party to a joint
The Code presumes survivorship was intended by the parties to a joint account⁴⁻¹⁰ absent “clear and convincing evidence of a different intention at the time the account is created.”⁴¹¹ A presumption that survivorship was intended also applies to P.O.D. or trust accounts. Upon the death of the original depositor any sums remaining belong to the surviving P.O.D. payee or payees, or to the surviving person or persons named as beneficiaries of the trust account. But if more than one payee or beneficiary survives there is no right of survivorship among the payees or beneficiaries hereafter, unless the terms of the account or deposit agreement expressly provide for it.⁴¹² In all other cases, the death of any person beneficially interested in a multiple-party account has no effect on beneficial ownership other than to transfer the decedent’s rights as a part of his estate.⁴¹³ The rights of survivorship are determined by the form of the account at the death of the party beneficially interested in it. The form of the account may be changed by a written order to the financial institution from a party either to change the form of the account or to stop payment under the account. Once given, the order cannot be countermanded by the same party.⁴¹⁴ Nor can terms of the account be changed by a will of the party.⁴¹⁵ Further, these transactions are nontestamentary in nature and not subject to Articles I through IV of the Uniform Code.⁴¹⁶

Multiple-party accounts cannot be used as a device to defraud creditors or to disinherit a surviving spouse or minor children. Under the Uniform Code the surviving spouse is protected against the operation of a multiple-party account to the extent that the estate’s other assets are insufficient to cover the amount of the surviving spouse’s statutory allowance.⁴¹⁷

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account is defined as “the sum of all deposits thereto made by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance.” Id. § 6-101(6).

⁴⁻¹⁰ Id. § 6-101(4) “[J]oint account means an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship . . . .” Id.

⁴¹¹ Id. § 6-104(a).

⁴¹² Id. § 6-104(b),(c).

⁴¹³ Id. § 6-104(d).

⁴¹⁴ Id. § 6-105.

⁴¹⁵ Id. § 6-104(e).

⁴¹⁶ Id. § 6-106.

⁴¹⁷ Id. § 6-107 and Comment. “Statutory allowances” include the homestead
The Code also provides for the protection of the financial institution making payment of funds it holds to parties beneficially interested in a multiple-party account. Similar protection of the financial institution dealing with multiple-party accounts is provided by West Virginia statute. In providing this protection the West Virginia court has held that the statutes create joint tenancy rights to joint deposits.

Part 2. Provisions Relating to Effect of Death

This part of the Uniform Probate Code deals with written instruments, such as contracts, gifts, conveyances, or trusts, that have in the past been treated as testamentary and were, therefore, invalid to transfer property at death because they were not executed in accordance with the statute of wills. The Uniform Code eliminates the testamentary characterization of the contractual arrangements that come within its terms. Two basic types of arrangements are authorized by the Uniform Code. First, a provision in a written instrument effective as a contract, gift, conveyance, or trust which directs that money or other benefits or property shall be paid or shall pass on death "to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently" is deemed nontestamentary. Second, any provision in such instrument which directs "that money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand" is also deemed nontestamentary and is not invalid for failure to comply with the statute of wills. The fact that these transactions are often part of a business relationship and are required to be in writing reduces the danger of fraud and, therefore,
UNIFORM PROBATE CODE eliminates the reason to require compliance with the statute of wills in the formalities of execution. Since such transactions are deemed nontestamentary under the Uniform Code, they do not have to be probated and the personal representative has no power or duty with respect to the assets involved. The rights of creditors, however, are not affected by this provision.

Article VII. Trust Administration.

West Virginia, like many states, subjects testamentary trusts to probate court control. From an estate planning viewpoint, court supervision of testamentary trustees causes several problems. For example, in some states testamentary trusts cannot be released to be administered in another state. Also, some states do not authorize foreign trust companies to serve as trustees of local testamentary trusts without complying with strict or prohibitive qualification requirements. To avoid these problems the Uniform Testamentary Additions to Trusts Act was widely adopted to provide a way of keeping testamentary trusts away from the continuing and costly probate court control. Both the popularity of this legislation and the widespread use of pour-over wills suggest that statutes requiring judicial supervision over testamentary trusts are obsolete and irrelevant. One of the problems with the inter vivos trust and pour-over will is that state law frequently leaves the trustee or beneficiary without effective means of obtaining adjudications that will bind all interested parties. The drafters of the Uniform Probate Code have attempted to minimize, if not eliminate, this and other problems likely to be encountered by persons involved in testamentary trusts. Several objectives of the Code are summarized in the Official Comments:

1. To eliminate procedural distinctions between testamentary and inter vivos trusts.
2. To strengthen the ability of owners to select trustees by eliminating formal qualification of trustees and restrictions on the place of administration.
3. To locate nonmandatory judicial proceedings for trustees

425 Id. § 6-201, Comment.
426 Id. § 6-201(b).
427 Id. art. VII, General Comment. See generally W. VA. CODE ANN. §§ 44-5-3, 44-11-6, -7 (1968).
429 See Wellman, supra note 26; UNIFORM PROBATE CODE art VII, General Comment.
and beneficiaries in a convenient court fully competent to handle all problems that may arise.

4. To facilitate judicial proceedings concerning trusts by comprehensive provisions for obtaining jurisdiction over interested persons by notice.

5. To protect beneficiaries by having trustees file written statements of acceptance of trusts with suitable courts, thereby acknowledging jurisdiction and providing some evidence of the trust’s existence for future beneficiaries.

6. To eliminate routinely required court accountings, substituting clear remedies and statutory duties to inform beneficiaries.

Part 1. Trust Registration

The registration of trusts is a new concept. Registration applies alike to inter vivos and testamentary trusts, and is available for both locally-created and foreign-created trusts. The place where the trust was created may lose its significance to the parties concerned since the place of registration is the place where the trust is primarily administered. Furthermore, trusts must be administered at a location “appropriate to the purpose of the trust and the interests of its beneficiaries.”

The Uniform Probate Code requires the trustee of any trust having its principal place of administration in the Code state to register the trust in the court at the principal place of administration, which unless otherwise designated, is deemed the trustee’s usual place of business. Registration does not require judicial action or determination, nor does it require disclosure of the terms of the trust, assets, or the identity of the beneficiaries. Rather, registration is accomplished by filing a statement indicating the name and address of the trustee and whether the trust has been registered elsewhere, and identifying the trust:

(1) in the case of a testamentary trust, by the name of the testator and the date and place of domiciliary probate; (2) in the case of a written inter vivos trust, by the name of each settlor and the original trustee and the date of the trust instrument; or (3) in the case of an oral trust, by information identifying the settlor or other source of funds and describing the time

40 Uniform Probate Code art. VII, General Comment.
41 Id. art. VII, pt. 1, General Comment (emphasis added).
42 Id. § 7-101. Alternatives for locating the principal place of administration are provided. Id.
and manner of the trust's creation and the terms of the trust, including the subject matter, beneficiaries and time of performance.\textsuperscript{432}

A trust is registered in only one location, although registration may be transferred to another place within the state or to another state.\textsuperscript{434}

The effect of registration is to submit the trustee personally to the jurisdiction of the probate court in any proceeding relating to the trust brought by an interested party while the trust remains registered.\textsuperscript{435} Quasi in rem jurisdiction is also conferred on the court of registration over all beneficiaries, to the extent of their interest in the trust.\textsuperscript{436} Failure of the trustee to register a trust in the proper place does not defeat attachment of the jurisdiction of the court over him personally, but failure to register may subject the trustee to removal and denial of compensation.\textsuperscript{437}

A foreign corporate trustee who maintains the principal place of administration of a trust within a Uniform Code state must qualify to do business in that state. But, a foreign corporate trustee is not required to qualify merely because it is co-trustee of a local trustee. Nor is a foreign corporate trustee required to qualify to do business in the state of trust administration to receive distribution from a local estate; to hold, invest, manage, or acquire property located in the state; or to sue or defend the trust within the state.\textsuperscript{438} The drafters of the Uniform Code believe that common restrictions upon the ability of a foreign corporate trustee to do business should apply only to the "continuous pursuit of general trust business" rather than to "isolated instances of litigation and management of the assets of a particular trust."\textsuperscript{439}

\textbf{Part 2. Jurisdiction of Court Concerning Trusts}

"The Court\textsuperscript{440} has exclusive jurisdiction of proceedings ini-
ated by interested parties concerning the internal affairs of trusts." Any matters which concern the administration and distribution of trusts, or the determination of rights and other matters involving trustees and beneficiaries are considered "internal affairs" of trusts under this provision. Neither registration of a trust nor a proceeding involving the internal affairs of the trust, however, results in continuing supervision of the trust by the court. The court may properly intervene in administration only when its jurisdiction is invoked by an interested party or otherwise provided by law.

Although the Code permits subjecting trusts which are essentially foreign to proceedings in a Code state, it employs the forum non conveniens concept to center litigation involving the trustee and beneficiaries, wherever possible, at the principal place of administration of the trust. Thus, a Code court will not entertain such a case over the objection of a party, unless all appropriate parties could not be bound by a decree of the court of the state where the trust is registered or has its principal place of administration, or unless the interest of justice would seriously be impaired if the court declined to exercise its jurisdiction. Furthermore, "the Court may condition a stay or dismissal of a proceeding . . . on the consent of any party to jurisdiction of the state in which the trust is registered or has its principal place of business . . . ."

Part 3. Duties and Liabilities of Trustees

The standard of skill and care expected of trustees under the Uniform Probate Code differs from the standard usually applied to trustees that requires "such care and skill as a man of ordinary prudence would exercise in dealing with his own property." This prudent man standard seems to be applied in West Virginia both to general actions of trustees and when a trustee makes investments. But under the Code a trustee must comply with an external...
nal, rather than a personal, standard of care:

Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

The Code attempts to avoid extensive mandatory formal accountings but still provides the beneficiaries of a trust with sufficient information and protection. Thus, regular accounting to the court is not required; neither does the Code require that copies of statements furnished to the beneficiaries be furnished to the court. Nevertheless, the Code's drafters believed that a reasonable selection of current beneficiaries must be entitled to information in order to adequately protect the interests of future beneficiaries. Thus the Code requires the trustee within thirty days after accepting the trust, to inform the current beneficiaries of the court in which the trust is registered and of his name and address. Further information may thereafter be obtained by the beneficiaries upon reasonable request.

A bond is not required of a trustee unless required by the terms of the trust, reasonably requested by a beneficiary or found by the court to be necessary. West Virginia law is not clear as to whether a bond is required of a trustee but it would seem that the court having jurisdiction over the trust could order a bond.

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ments is required by West Virginia law to "exercise the judgment and care under the circumstances then prevailing which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital." Id.

44 Uniform Probate Code § 7-302, Comment.
45 Id. § 7-302 (emphasis added).
46 Id. § 7-303(a) & Comment.
47 Id. §§ 7-303(b), (c); See generally id., Comment; W. Va. Code Ann. §§ 44-4-1 to -23 (1966).
48 Uniform Probate Code § 7-304.
49 West Virginia law seems to allow the court having jurisdiction over the trust to require a bond:

The court under whose order, or under the order of whose clerk, any such fiduciary derives his authority, when it appears proper on any report of the clerk or a commissioner of accounts, or a commissioner in chancery, or on evidence adduced before it by any party interested, may, at any time, whether such fiduciary shall or shall not have before given any bond, or whether he shall have given one with or without sureties, order
The general rules regarding the tort and contractual liability of a trustee in his individual as well as fiduciary capacity have been altered by the Code. The Uniform Code makes "the liability of the trust and trustee the same as that of the decedent's estate and personal representative."

A final accounting terminates the trustee's obligation to the beneficiaries of the trust unless a proceeding to assert a claim against the trustee for breach of trust is commenced within six months of the final accounting. If the trustee fails to make a full disclosure in the accounting, an action against him is not barred for three years.

him to give before such court an additional bond within a prescribed reasonable time, in such penalty, and with or without sureties, as may appear proper; or when any surety on the bond of a fiduciary, or the personal representative of any such surety, shall apply therefor, such court shall order such fiduciary to give before such court a new bond within a prescribed reasonable time, in such penalty, and with such sureties, as may appear proper; and may, in either case, if the order be not complied with, or whenever from any cause it appears proper, revoke and annul the powers of such fiduciary; but no such order shall be made unless reasonable notice shall have been given to such fiduciary by the clerk or the commissioner who made such report, or by the surety or the personal representative of the surety making the application aforesaid, or by the service of a rule or otherwise. And no such order of revocation shall invalidate any previous acts of such fiduciary.


See 3 A. Scott, Law of Trusts §§ 261-64 (1967).

Uniform Probate Code § 7-306 provides:

(a) Unless otherwise provided in the contract, a trustee is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust estate unless he fails to reveal his representative capacity and identify the trust estate in the contract.

(b) A trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he is personally at fault.

(c) Claims based on contracts entered into by a trustee in his fiduciary capacity, on obligations arising from ownership or control of the trust estate, or on torts committed in the course of trust administration may be asserted against the trust estate by proceeding against the trustee in his fiduciary capacity, whether or not the trustee is personally liable therefor.

(d) The question of liability as between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding.

Id. § 7-306, Comment. See notes 325-28 supra and accompanying text.

Uniform Probate Code § 7-307; Id., Comment.
Part 4. Powers of Trustees

This part of the Code has no substantive provisions, only a General Comment stating that there has been considerable interest in recent years in legislation giving trustees extensive powers. The drafters of the Code suggest that a state adopting the Uniform Probate Code appropriately include "[c]omprehensive legislation dealing with trustees’ powers . . . ."\footnote{Id. art. VII, pt. 4, General Comment.}

Conclusion

The Uniform Probate Code is the culmination of the efforts of distinguished scholars and practitioners in the probate field. It represents the most modern and best thinking on both the substantive rules of law that should govern the devolution of property at death\footnote{See Curry, supra note 1.} and the procedural rules necessary to transform that devolution of property into the simple and orderly procedure it should be. At the same time it provides adequate safeguards for all persons interested in a decedent’s estate, both as creditors and as beneficiaries. It affords a sound basis for the long overdue revision of West Virginia probate law.

In the intestate succession area the proposed patterns of distribution seem to be an improvement over present West Virginia law. They more likely reflect the probable wishes of the average decedent by favoring the surviving spouse to a greater extent than does present West Virginia law. The adoption of the Uniform Code would be an excellent opportunity for West Virginia to abolish dower, an antiquated doctrine that no longer provides the protection that was intended; the protection the Uniform Code provides for the surviving spouse and other members of the decedent’s family is clearly superior to present West Virginia law.

As to the executor of wills, the major effect of the Uniform Code is to relax the formal requirements necessary for the execution of a valid will. It is designed to implement the intent of the testator and to avoid the rigidity of present rules. With respect to revocation of wills, the Uniform Probate Code will change West Virginia law from revocation by marriage to revocation by divorce. As to the revival of revoked wills the Uniform Code would provide a clear cut answer to an area now in considerable doubt.

In the area of statutory construction the need for reform is not
so obvious as it is in other areas, perhaps because properly drafted wills generally escape these problems. However, as long as wills are permitted to be written without professional advice—a practice which is encouraged by permitting holographic wills—there is a need for well-defined rules to deal with the problems that arise as a result of faulty and non-professional draftsmanship. In this respect the Uniform Probate Code provides better and more modern rules to meet the problems that may arise. As a result of these rules much litigation and the accompanying cost can be eliminated and the harsh results of the common law rules avoided as well.

On the procedural side the opportunity to remove the probate function from the jurisdiction of the county court\(^{41}\) should be sufficient motivation alone to move the West Virginia Legislature to consider the adoption of the Uniform Code. Even without such consideration, the merits of the flexible system of administration of decedents' estates, that allows interested persons a choice of administration with as little or as much procedural and adjudicative safeguards as may be suitable in their particular circumstances, has a great deal to be said for it in comparison to the cumbersome and inflexible procedure presently employed. Recognition of the need for reform of the West Virginia probate system is not new. Several years before the Uniform Probate Code was promulgated one critic of West Virginia probate stated:

The present probate system in West Virginia is largely made up of laws that were passed almost a century ago. Experience has shown that many of the laws are archaic and the time has arrived for the entire system to be up-dated to correspond with modern thinking and practices. Changes in the probate laws are being made piecemeal by the legislature at almost every session. This is required in order to enable out-dated laws to fit into modern practices. The recommended changes will simplify the probate procedures which have been very confusing, because of piecemeal legislation and attempts by the supreme court to modernize the system by court interpretation.\(^{42}\)

This criticism is as valid today as it was when first written. The only difference is that today there is available for adoption a modern probate system that did not exist when the criticism was first made. The means for effective change are now available. All that remains is for the West Virginian Legislature to avail itself of that change.

\(^{41}\) See Riley, supra note 3.

\(^{42}\) See Riley, supra note 3, at 125.