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The Uniform Probate Code: A Possible Answer to Probate Avoidance

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Succession, or probate as it is more likely to be called, is currently quite controversial. This fact, though possibly useful to would-be speech makers, is unfortunate. There should not be any controversy about the rules protecting individual freedom in regard to personal savings. The fundamental principles, *e.g.*, the premise of private property that a decedent's unused savings should go as he indicates in his will, or to his heirs if he leaves no will, are not disputed or disputable. Nor can the troubles of the area be attributed to contentiousness of survivors and other claimants. Wills are rarely challenged, and the occasional challenges are usually unsuccessful.\(^1\) Creditors of decedents, protected in many situations by security or insurance, if not by survivors concerned about family credit ratings, are not a notable source of controversy.\(^2\) Indeed, the controversy arises from the charge that we have more rules than we need.

Perhaps the presence of elaborate rules and procedures causes survivors to forego natural contentiousness. Perhaps we should accept the ponderousness of our system as the price for desirable tranquility. Still, there are other explanations for lack of disputes, which seem particularly applicable to small estates. Inheritance is a family matter. Any economic advantage one set of survivors might gain over another by stirring up trouble would be countered in most cases by displeasure and resentment by relatives or close acquaintances, rather than strangers. And, disappointment in regard to an expectancy is seldom as keen as other economic losses. We are quite accustomed to the idea that an estate owner is free to dispose of his savings as he pleases. Hence, losses of anticipated inheritances can be borne with equanimity and when there is something to inherit, it comes as a happy surprise! In sum, therefore, many of the

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\(\dagger\dagger\) This article is an adaptation of an address delivered at the Institute on Estate Planning and Administration in Indiana, Indiana State Bar Association, October 25, 1968.

1. Of 453 testate estates in a random sample studied in a recent survey of probate records in Cuyahoga County, Cleveland, Ohio, will contests occurred in only six, or 1.3 per cent of the cases. None were wholly successful. The survey was conducted by a sociology-law team at Case-Western Reserve University, Cleveland, Ohio. The results soon will be published. The manuscript from which the information was obtained is entitled *The Family and Inheritance*. Its authors are Marvin B. Sussman, Judith Cates and David Smith.

2. According to the manuscript of the Cleveland survey, "... we do not find that debts constitute a significant problem in the settlement of an estate."
usual components in succession tend to lead survivors to resolve any differences privately and amicably.

At some point, however, the size of the inheritance becomes large enough to induce would-be successors to disregard various environmental restraints in an effort to get something, or to get more. Whether this phenomenon exists in fact, or only in the minds of would-be decedents and their fiduciaries, is problematical. In either event, persons counselling owners of substantial estates are not likely to agree that survivors will not be contentious or that they will be able to resolve their differences without outside assistance. To them, a complex system for succession may tend to prevent problems before they become serious.³

Nonetheless, in estates of the size most frequently encountered,⁴ the picture should be one of peace and harmony. Paradoxically, however, the factors in modest estates which should indicate legal tranquility appear to have contributed indirectly to the current hue and cry about probate. In any event, it is clear that we have a controversy about probate law. It is identified by the words AVOID PROBATE.⁵ Mr. Dacey struck a raw nerve, as he learned to his delight, when his paperback of about fifty pages of text and 291 pages of duplicated forms ran first on the nonfiction best seller list in the late months of 1966. Total sales of this expensive packet of legal forms has passed 670,000.⁶ Dacey’s charges were quite specific and quite serious. He asserted that probate law and procedure are archaic, needlessly complex, and exist principally for the benefit of lawyers and probate judges. As a result, succession through probate is terribly time-consuming and costly. He also stated that lawyers cannot be trusted to give sound estate planning advice because of a conflict of interest; i.e., the conflict between what is good for the client, and the lawyer’s interest in probate fees.

His advice was explicit and alarming: Do not trust the law of succession. Opt out, and avoid probate by the use of self-declared trusts

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4. The Cleveland survey described in note 1 supra covered 659 estates which were identified in a five per cent simple random sample of all estates closed in Cuyahoga County between November 9, 1964 and August 8, 1965. Of the 659, forty-eight or 7.3 per cent involved assets of 60,000 dollars or over and eighty-five or 12.9 per cent involved assets of less than 2,000 dollars and so were released from administration. Four hundred fifty-three (68.7 per cent) were testate and 206 (31.3 per cent) were intestate. The mean testate estate grossed 41,218 dollars; the mean intestate estate grossed 8,599 dollars. The median testate estate size was 15,000 dollars gross; the median intestate estate was 6,000 dollars gross. The figures refer to the size of the probate estate. From these figures it can be said that half of the estates in probate involve well under 15,000 dollars gross.
5. N. Dacey, HOW TO AVOID PROBATE (1965).
6. Dacey’s full page ad in The New York Times, May 3, 1967, reported that more than 673,000 had been sold.
of various assets and by use of joint tenancy designations.

Unfortunately, from the view of those who dislike Dacey's charges, there is much in them that cannot be denied, particularly if we focus on the estate of modest size and the relationships most commonly encountered in succession. Probate laws in almost all of our states, including some with recently adopted codes, are undeniably obsolescent. For example, intestacy laws nearly everywhere continue to divide estates between the spouse and children of a decedent, even through this pattern has not made sense since the family farm ceased to be the dominant feature of American family organization a couple of generations ago. Also, modern probate procedures are best explained by reference to colonial times when our rule assigning personal property of decedents to publicly appointed local officials at least served to protect local interests against unwanted claims from afar. This ancient starting point explains a heritage which haunts probate procedures in many states today. The assumption that administration of an estate requires a judicial proceeding is as doubtful as it is costly. The burden it imposes on succession has become more apparent as the Supreme Court has made lawyers realize that easy judicial notices via publication or posting cannot be considered due process if better notice is possible. The absurdity of the assumption is nowhere more apparent than in our crowded cities where low paid probate clerks go through the motions of checking receipts against items of expenditure listed in accounts of personal representatives. One coming on such a scene from abroad might assume that outlays of public moneys rather than private family distributions were involved. However, he would soon learn that routine big-city probate audits are superficial affairs which serve best to remind us how futile it is to use public offices to check private family transactions.

This is not to say that the probate situation is the product of a conspiracy by lawyers against the public, as Dacey suggests, or that probate laws do not work very well in many situations. Rather than a

7. But we should be less than fair if we sought to excuse the abuses in the probating of wills that are inducements to avoiding probate. It is our belief that regardless of the merits of the revocable trust, it is the duty of a vigilant organized bar to take to heart the criticisms that have been aimed at lawyers and at the improper practices of the probate courts. Editorial, Avoiding Probate, 52 A.B.A.J. 938, 939 (1966).
9. As far as the writer knows, unless a question is raised by an interested person, the process is limited to determining whether receipts with which the accounting fiduciary charges himself have been properly expended and distributed.
conspiracy, what we have is the natural product of understandable conservatism in regard to changes of basic law. Coupled with this, we have a situation in which the basic law works well for persons of wealth who know that their affairs involve values which may invite trouble unless there is careful planning. These persons, whose affairs tend to be unusual, are rarely bothered by rules designed for the average person because they see to it that custom-made charters govern their estates.

But there is a vacuum of consumer interest in the laws which affect most directly the person whose estate is very modest and whose affairs are average. This vacuum has been principally responsible for the neglect of our estates codes. Legislatures respond to pressure. Decedents obviously pose no political problems, nor do the more thoughtful prospective decedents who can protect themselves by planning. Survivors tend to be happy with their windfall. Hence, probate laws have remained largely unchanged for generations, because the groups principally concerned with them, the lawyers and probate court officials, have found that they work very well for what they see to be the important cases; e.g., the big estate where planning occurs, and the bitterly contested case. These professionals are paid to make rules work, rather than to question or to change them, and until recently at least, there has been almost no pressure for change. In a sense, the legal profession has demonstrated its technical proficiency by making the old laws work as long and as well as they have.

If, as I have suggested, probate laws which work unjustly for the average person are the product of history and historic indifference, one might expect that better legislation would appear rather quickly in this day of rising emphasis on estate planning. The combination of steadily rising levels of affluence, complex federal and state tax laws with burdensome rates and more and more public awareness of the advantages of planning which our burgeoning estate planning industry has generated, has made hundreds of thousands of persons newly conscious of their estates.

With the aid of paid and free advice, they are learning that succession via probate runs directly against such usually desired objectives as privacy in regard to family property matters, avoidance of delay in transmission at death and avoidance of periods of artificial non-liquidity following death. Joint estates, life insurance, living trusts and various extra-legal devices which avoid the shortcomings of probate are being utilized with steadily increasing frequency. Still, probate substitutes involve some personal and legal inconveniences when compared to the will. And, many people are sufficiently resentful about being pushed toward probate-avoiding devices by bad law that they would gladly
support legislative correction of the probate problems even though they also may move to protect themselves.

But, new statutes to correct probate problems are not going to be promoted or written by laymen. Lawyers must do the job and most other lawyers must support the results. The question is, how do lawyers view the probate problem?

My premise in regard to probate reform is that Dacey is simply wrong in suggesting that lawyers will not support probate law changes. There are too many reasons why lawyers should jump at the chance to get probate laws on a modern track. Let me elaborate.

Traditionally, the principal service of lawyers in relation to the succession process has involved the counselling of personal representatives and survivors. There are no better clients. But the importance of this role is shrinking in direct correlation to the extent to which individuals are using devices to avoid probate. Of course, an important new role for lawyers, garbed in the catchy words, "estate planning," has developed. These words used to mean will drafting. But, much modern estate planning is likely to center around non-probate devices. Indeed, if the sales of Dacey's book are an indicator, we should accept the fact that many laymen may shy away from use of a will. Surely, the layman is interested in substitutes. Seeing that the lawyer has no insurance, mutual investments, or joint accounts to sell, the layman is likely to believe that the lawyer can meet his estate planning needs only where the estate is large enough to warrant use of a trust.

Of course, if laymen also realized that lawyers might assist them with small trusts using family trustees, as well as with many other devices—that, indeed, a lawyer is an expert in probate avoidance—my concern about a shrinking role in estate matters for lawyers would not be so great. I am told that a good deal of new interest in estate planning by lawyers has been stimulated by the Dacey furor. But, lawyers also concede that much of this business probably would have come to them anyway. Any wide-spread discussion of estates, whether it is focused on the inadequacy of present rules, or on the advantages of a new code, would probably have some short-run effect in moving people to law offices.

I conclude, therefore, that the new "avoid probate" emphasis in estate planning works in several ways to discourage persons from using lawyers as estate planners. First, it is related to charges that the law is defective and that lawyers are in some degree responsible. Second, it has deprived lawyers of their best known stock-in-trade for estate planning, the will. Third, it has made lawyers appear to be useful only in regard to estates of unusual size and complexity.

Most estates are not of unusual size and complexity, at least as far
as estate owners are concerned. The practicing bar surely should be con-
cerned with any trend suggesting that most estate owners understand they
need some planning, but believe that lawyers have little to offer them. One
disconcerting aspect is that a lawyer probably will not be the professional
to whom the young family man turns first in his search for assistance in
financial planning. By the time the typical person gets to the lawyer, his
affairs have become complicated and much untangling becomes necessary.
Worse, he may not get to the law office at all.

As a service industry, we cannot afford a posture that makes us
appear useless to the average man. The other side of the coin is equally
disconcerting: It is that present trends are shrinking the area of utility of
estates lawyers to the point where their livelihoods may depend on continu-
ance of a few relatively narrow provisions of our federal tax laws. When
lawyers do participate in modern estate planning, the shift in the timing
and character of their service means that they are working more for estate
accumulators than for estate inheritors. There are significant differences
between these groups in regard to their tolerance for legal fees. If put to a
choice, would not lawyers prefer to be employed by inheritors? If so, there
is additional reason for skepticism about the proposition that the lawyer’s
role in modern estate planning makes him uninterested in probate law
reforms.

Probate law dilemmas are therefore lawyers’ dilemmas. The probate
controversy should not embarrass us—it should delight us. It has given
us a great opportunity to solve some old problems. What remains to be
seen, however, is whether lawyers will make the proper response to the
probate controversy. In some instances to date, lawyer organizations
have moved in precisely the wrong direction. Consider the action of the
New York County Bar Association. That group sued to enjoin distribu-
tion of the Dacey book in New York on the ground that the author was
engaged in the illegal practice of law. This action, which was in effect to
say that the public should not read matters lawyers do not want them to
read, simply tended to prove Dacey’s charges that the bar would do
whatever it could to keep the public from learning something about
probate. Even if the suit in New York had resulted in a lawyer victory,
which it did not, the practicing bar in general stood to be seriously
damaged by this emotional outburst. As you can imagine, the litigation
was publicized to the hilt by Mr. Dacey.

10. The decision of the New York Court of Appeals terminating the litigation is
11. In Florida, the content of a bar journal article criticizing Dacey seems now
to be the subject of a libel action by Dacey against the lawyer group. See TIME, Jan.
A somewhat more typical reaction by various lawyers has been to write and speak of the danger of following the Dacey form book approach to probate avoidance. In the main, these pieces have done a good job of discrediting Mr. Dacey's advice concerning how probate is to be avoided. But, the reasoned answer sometimes seems to interest a smaller circle than the emotional attack.

Moreover, many lawyer responses to Dacey's charges fail to offer the layman a practical solution to his estate problem. The usual message has been either that probate is not so bad after all, or that only lawyer-drawn trusts are safe. But, it is still obvious to most people that probate routines are expensive and senseless as applied to the ordinary estate, and the advice that everyone should see a lawyer, is increasingly impractical. Owners of ordinary estates are the ones who have been most frightened by the turmoil about probate, and many of these persons, being newly arrived in the status of having enough to worry about, do not know a lawyer. The suggestion that they find one is troublesome. It sounds expensive. Also, lawyers are busy and the general practitioner who serves the walk-in trade is becoming hard to find. Even if the layman with a modest estate can locate an estates lawyer, more likely than not he will encounter a product of recent law school emphasis on estate planning oriented around federal tax problems. If so, he may end up with a monstrous estate plan which will be worth its price only if all of his relatives suddenly die without plans and he is later wiped out in an airline accident causing gobs of double indemnity and travel insurance to fall into the pot.

These observations suggest the parameters of the probate problem. Obsolete laws and outmoded administrative institutions threaten to trap estates lawyers and to strip them of their traditional and principal function. Interest in estate planning for persons with complex affairs has diverted professional attention so that the loss of customary function does not appear to be as alarming as reflection suggests it may be. To correct the problem, major and meaningful steps must be taken to restore the confidence of the owner of small estates in the probate system. But, lawyers must offer the solutions. And, the general area of probate has been of such pervasive importance to lawyers for so long, that the process of persuading lawyers to concede that the present system is defective, and to apply their energies vigorously to its correction, stirs up professional doubts and emotions that threaten to render the bar

Hopefuly, the rapidly maturing Uniform Probate Code may provide some answers if it is approved by the Uniform Law Commissioners when they give it final consideration next July. The project which is producing the Code is one for which every lawyer may claim credit. Originated by a sub-committee of the American Bar Association, financed almost entirely by lawyers' bar dues and gifts channeled through the American Bar Foundation, the project has been active since late 1962. Because the project was well underway long before Mr. Dacey touched the public's sensitivity, it offers an explicit rejection of the charge that lawyers will never act on their own to sweep away probate dead wood. Moreover, the major features of the evolving Code will provide an affirmative, professional response to the major complaints about existing law.

Let me become more specific. The heart of the Code is its system of probate administration. The basic scheme is not very original, but it may be both useful and acceptable. The idea is to offer the various major features of the different probate systems presently followed in our fifty states, as options, in a single system. Thus, under the draft Code, it will be possible for persons representing an estate to secure probate of a will very promptly after the testator's death by application to a non-judicial official of the probate court. Only a mandatory five day delay to permit family coordination and to discourage races is involved.

15. For further example, the American Bar Association has been criticized for sponsoring and producing the film "The Revocable Trust—An Essential Tool For the Practicing Lawyer." The film suggests that legal fees can be avoided by use of the revocable trust. See Avoiding Probate, note 7 supra.

16. Preliminary consideration was given to portions of early drafts at annual meetings of the National Conference in 1965 and 1966. A first tentative draft was introduced in 1966 and an expanded and improved second draft was introduced at the 1967 meeting. Three days of full Conference attention was given to a fourth working draft at the Philadelphia meeting of the Conference in 1968. Three meetings of the Special Committee of Commissioners have been scheduled for the winter 1968-69, during which it is contemplated that one or possibly two additional drafts will be prepared. Present plans are to present a final draft to the National Conference at its meeting in Dallas in 1969.

17. The project originated in 1962 when a subcommittee of the Real Property, Probate and Trust Law Section of the American Bar Association was formed to revise the Model Probate Code. Soon thereafter, the project was taken over by the National Conference of Commissioners on Uniform State Laws, which has assumed sole responsibility for the research and drafting effort. The ABA committee continues to serve in advisory capacity, however.


19. Neither probate nor appointment can occur until at least five days after the decedent's death, Code §§ 3-210; 3-216. However, provision is included for emergency appointment of a special administrator, if needed before five days have elapsed. Code § 3-313. But, by use of the "relation-back" idea, and by giving the personal representative
out notice, which permits a will to be put into effect without being finally adjudicated, is an old and respected feature in many states which have long permitted what is usually called "common form probate."\(^{20}\) However, if the parties desire a binding adjudication of the will's validity, the draft Code offers an appropriate, optional procedure.\(^{21}\) Either no-notice or formal probate can occur without administration. But, if persons want to collect and transfer assets, administration will be a practical necessity because only an appointed representative can protect transfer agents and others.

An executor or an administrator in intestacy may be appointed with no more fuss than is required to probate a will, just as is true in many states today. After securing letters, a personal representative under the Code becomes in effect a statutory trustee with the necessary powers and protections to permit him to accomplish the entire job of collecting assets, paying debts, and selling land or intangibles as needed to raise necessary cash and distributing the estate to the successor.\(^{22}\) If desired, all of these steps can be handled without further court orders. Again, however, isolated adjudications to answer particular questions or general orders settling accounts are available as desired.

The Code accepts the proposition that the probate court's proper role in regard to settlement of estates is to answer questions which parties want answered rather than to impose its authority when it is not requested to see that otherwise peaceful settlements are correct. This idea, though it would change the law in Indiana, is not novel in American probate law. Pennsylvania procedures and practice have long sanctioned settlement of estates without any activity by public offices or officials other than common form probate and routine issuance of letters. New Jersey procedures are similar. New York's surrogate courts have little to do with personal representatives after appointment. In Georgia, Texas and Washington, wills can effectively provide that the probate court shall not supervise the work of executors, and all well-drawn wills in these areas routinely so provide.

But, the draft Code offers the option of supervised administration which features, like your present Indiana Code, the necessity of a court ordered distribution of assets to close the judicial proceedings, which are deemed to have been initiated by probate, and issuance of letters.\(^{23}\)

\(^{21}\) Code § 3-222 et seq.
\(^{22}\) Article III, Part 4, Code. See also Code § 3-104.
\(^{23}\) Code § 3-105 et seq.
All that is required is that some interested person request supervision by the court and that a need for it exist.

What is new about the procedural package? In a sense, nothing is new because each procedure has its tested counterpart somewhere among the states now. But the extension of familiar, easy procedures to intestate estates and the presence in the Code of clear options to handle various steps in testate or intestate administration, with or without court orders, will offer new advantages in procedure for every state.

In two other respects, however, the draft code offers somewhat newer ideas for improvement of succession in the United States. The most important is a new basic pattern of succession to intestate estates left by married persons. The old system, found almost everywhere in this country, divides estates equally between the spouse and children of intestate decedents. The Code alters this so that the first 50,000 dollars will pass to the spouse, and any excess over 50,000 dollars will be divided between the spouse and children. There is a variation from this pattern if all children are not the children of both the decedent and the surviving spouse. The new pattern is deemed to reflect what an overwhelming majority of married persons want. An impressive amount of data shows quite clearly that married persons of ordinary means do not want their estates divided between their spouse and children. If the children are young, expensive guardianships result from a parent's death without a plan. If the children are grown, their heirship may well reduce the spouse's share below what should be provided for predictable needs. Moreover, reducing the surviving spouse's share in favor of children deprives the survivor of a degree of control over children's inheritances which may be useful to bolster natural ties when problems of old age might strain the relationship.

Thus, the draft code rejects the feature of existing law which tends to compel every married person to make a will or employ a will substitute.

This new pattern of heirship, coupled with efficient procedures for intestate estates, should tend to reduce pressures on persons of modest means to make wills or avoid probate. In a sense, the Code offers a statutory estate plan which should be wholly satisfactory for most persons. Thus, the drafts offer the legal profession an answer to the question of

25. See Dunham, The Method, Process and Frequency of Wealth Transmission, 30 U. CHI. L. Rev. 241 (1963). The Cleveland study mentioned in note 1 supra reports that 89.2 per cent of testate decedents who were survived by spouse and issue willed everything to the spouse. The survey also includes responses to interviewer questions by survivors. In the survivor sample, 87.2 per cent of those with spouse and issue planned to leave their entire estates to their surviving spouse. Where the decedent was survived by a spouse and collateral heirs, 85.8 per cent willed everything to the spouse.
how to accommodate the large bulk of estate owners without diverting professional attention from the increasing demands of persons with complex affairs. It will be much easier to give advice about intestacy than to mass produce wills.

In addition, the new Code, if widely adopted, will go far to reduce the problems of planning via wills for persons who own property in several states. Estate planning by will and testamentary trust presently is handicapped in regard to persons who may change residences from one place to another, or who would invest in land in more than one state. Lawyers, who are so important to persons who prefer to manage their own affairs, should vigorously support uniformity of estate law because it will increase the range and value of the planning devices which lawyers are uniquely well equipped to handle. Also, lack of uniformity of estate law may be pushing persons who anticipate moving about the United States toward nationally managed investment pools, and the pre-packaged estate plans which go with them. I have no quarrel with these arrangements if they are preferred over owner-controlled investments on the merits. We should see, however, that individualized ownership is not unduly handicapped by legal anachronisms.

The Uniform Probate Code thus offers some positive answers to current probate dilemmas. Properly explained and properly used by lawyers assisting survivors, it will offer a much easier answer to worried owners than Mr. Dacey's. The message might be: "Relax; keep your property for yourself; inheritance is safe and, like any alternative, as cheap or expensive as your survivors and creditors make it." Shortened, the message might simply be, "Save your money. Probate works well."

The new Code would let lawyers carry out this kind of promise to the public. When survivors of a decedent who did not avoid probate seek legal counsel, the attorney will find it easier to give efficient service, for many of the old procedural drawbacks are gone. The Code makes it possible to avoid public disclosure of the assets of a decedent. Court-appointed appraisers are eliminated. Probate bonds, which every testator avoids when he can, will not be needed unless demanded by survivors, and awkward judicial sales of real estate should become a thing of the past.

The legal system will offer protection, but will not force it. As a corollary of less required paperwork and fewer adjudications, legal fees in individual cases may go down, but if general confidence in the probate system is restored the overall effect should be a marked increase in the number and size of estates in which lawyers may be involved.

Still, there are substantial risks that the Code will not become the answer to probate avoidance. The principal worry lies in the difficulty
of marshalling lawyer opinion behind the project. There are some who believe that the probate controversy is a tempest in a teapot and that it would be a mistake to undo settled law in response to the new found public interest in estates. I am convinced, however, that these views are wrong. In my five years of work on the Code, I have heard from dozens of laymen, and I have discussed these matters with lawyers from every part of the country. Most lawyers concede that the law needs to be improved. The public wants a change of law. If there is doubt on any point, it relates simply to whether lawyers will react affirmatively to the obvious demand for change. Until now much of the pressure for change has been tempered by publicity to the effect that the Uniform Code project would result in significant improvement. If the organized bar disappoints the public and follows the advice of the "stand-patters" on this occasion, it will be inviting a new and serious wave of anti-lawyer opinion which I, for one, do not believe it can afford. Moreover, it will be missing a golden opportunity to get public support for law changes that are badly needed in order to get the will, the lawyer's stock-in-trade, back into the circle of approved methods for handling many estate planning demands.

Some lawyers, particularly older practitioners who enjoy good probate practices, express apprehension about the Code's impact on probate fees. However, old assumptions concerning probate fees are likely to be unreliable guides for the future whether or not the Uniform Code gains much support. The increasingly popular revocable trust and publicity about probate fees already have brought new fee fixing criteria into the picture. Further, the Uniform Code does nothing about probate fees other than to make the lawyer's work load in particular estates somewhat less predictable, and to get the probate court out of the business of determining or approving fees in routine cases. Perhaps the biggest difference will be that lawyers will be able to handle small estates efficiently enough to begin to realize a decent return for time invested. Certainly they would prefer to be well paid for two or three hours of work, rather than nurse a file along for months to pick up a few hundred dollars from a small estate.

As far as large estates are concerned, I see little reason to predict great change in the actual work which lawyers will perform. Of course, if all that is involved is the transfer of securities and the routine determination of taxes, work and fees may be modest. But corporate fiduciaries will want the protection of adjudicated settlements; fees will continue to be borne in large part by the government in the form of deductible expenses; survivors receiving big inheritances should not be any more hard-nosed about fees than they are today. Indeed, with increased pros-
pects that fees will be carefully explained and irritating rituals in court minimized, there may well be less resistance to good fees in big estates than is present today.

Some lawyers and trustmen may worry about loss of inter vivos trust business under the Code but if any diminution occurs, it will be because probate business grows. Moreover, if there is no reason for a trust except to avoid probate, it is not certain that professional trustees will find participation profitable. There is an essential and expensive contradiction between the idea that the trust company owns and controls and the notion that the settlor is still the owner. Yet a settlor who has kept a power of revocation is likely to see it just this way, especially if the whole purpose was merely to avoid probate. But, there should be no loss of the desirable revocable trust business. The Probate Code does nothing to reduce the advantages of revocable trusts for persons who want the investment, tax counselling, bookkeeping, and “senility-insurance” features offered by present trusts for management.

Indeed, by its inclusion of an up-to-date set of optional legal proceedings for trustees and beneficiaries of all kinds of trusts, without distinction between those created by will and those created inter vivos, the Code should encourage greater use of trusts.

Many lawyers who tend to favor the Code fear the reaction of the probate judiciary to the new package. They fail to take into account that probate judges and their employees everywhere have been hit with the main force of the probate controversy. These people are caught between an interest in serving the public which led them to accept public office, on the one hand, and unpopular and useless law which they must enforce, on the other. The Uniform Code, though it may be adapted to a wide variety of court organizations, advocates that probate courts be thought of as fully equivalent in terms of power to courts of general jurisdiction. The Code also expands the subject matter jurisdiction of the probate court, giving it clear authority to resolve controversies relating to all kinds of will substitutes, and to handle questions and accounts by inter vivos and testamentary trustees. Overall, the Code is designed to relieve probate judges of the unpopular and difficult job of riding herd on all estates, and to open the way to the development of a powerful and specialized court which should offer real opportunity for valuable and dignified service by incumbent and future probate judges. Surely many will favor such a package.

There are many other less obvious perils ahead for the Code, but all of them will evaporate if lawyers support the project. Some elements of the newspaper industry are unhappy with what they deem to be inadequate provisions for publications of legal notices, and peddlers of probate
bonds dislike the Code's provisions on bonds. Another, perhaps more worrisome, obstacle to the Code is the tendency of local committees of lawyers examining the Code to prefer familiar local rules of heirship and wills to any national model. This tendency easily could wreck the objective of uniformity. Committee by committee, the realization must spread that lawyers, and the people legal rules should serve, have everything to gain and nothing to lose by relinquishing their hold on traditional provincial rules regarding inheritance. Only very minor adjustments in basic rules will be necessary for most states to align present rules to the Code. The goal of expanding every estate lawyer's useful counselling range so that interstate succession problems can be handled is important.

But, do not let talk of doubts blur your perspective about the Code. Keep in mind that the Code will represent a very thoroughly considered professional response to problems which were identified by lawyers long before Mr. Dacey got excited. Literally hundreds of lawyers representing all kinds of practice in all parts of the country have been continuously involved in its preparation over the last five years. Their diversity and their awareness of the great public interest in the project have enabled them to evolve drafts which offer fair balance between public and professional interests. If these drafts become law, millions of owners of modest estates may find reason to stop worrying about estate planning and probate because the law's estate plan will be as good as they can find. Thus, the law may at least stop pushing these people toward non-lawyer estate specialists. At the same time, lawyers will gain important new legal equipment to enable them to meet the interest of persons who know they have enough property to make planning and protection worthwhile. This is a charter which should attract wide support.

In passing, I should note that the conditions in Indiana which bear on the Code's chances of success here strike me as especially favorable. Your present Code, like the Uniform Code, has borrowed much from the old Model Probate Code of 1946. Your court organization, which presently recognizes the probate court as a court of significant power and stature, is essentially compatible with the Uniform Code. The

26. The advisory committee of the Real Property, Probate and Trust Law Section, was mentioned in note 17. Primary responsibility for the drafts has rested in the Special Committee on the Uniform Probate Code of the National Conference (see note 16 supra) with whom the Reporters have met frequently since 1962. This committee, numbering over twenty, is composed of lawyers from different states. Other subcommittees of the Real Property, Probate and Trust Law Section of the American Bar Association have studied and reported on the Code. More than 150 lawyers are involved in these committees. The American College of Probate Counsel, The Trust Division of the American Bankers Association and many state and local bar groups have had committees studying the drafts for some time.
interest of the bar of Indiana in estate planning, as reflected by the focus of this important meeting, is a very good omen. Your people, situated near the crossroads of the nation, are more interstate than provincial. Surely, you need to keep your laws in tune with, if not ahead of, those in neighboring states. Finally, I am delighted to learn that your Commission on Interstate Cooperation has recommended to the Indiana legislature that the Probate Code Study Commission be reconstituted with a charge to study the Uniform Probate Code. This is a very good start.

It remains to be seen, however, whether we lawyers can agree on anything so pervasive and so important to the general practice of law as a uniform probate code. If we can, and if we use the resulting new law intelligently, we will have our answer and that of the public to the probate avoidance controversy. If we cannot, we will not block changes in probate law and practice. Present trends, if unchecked, dictate that probate avoidance will become the main road with wills and intestacy becoming infrequently encountered by-ways. Present trends also suggest that estates law and lawyers will become increasingly irrelevant to the ordinary person's estate problems. Our failure to agree on a useful new Code will not change these trends. It will prove only that lawyers as a group are so incapable of constructive reform that they cannot even agree on changes which seem necessary to the perpetuation of the profession as we have known it. I, for one, am not yet ready to believe that this will be the case.