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# COMMENTS

## THE INDIANA PROBATE CODE AND THE MODEL PROBATE CODE: A COMPARISON

LEWIS M. SIMES†

Fourteen years have elapsed since the movement for a model probate code began. In February, 1940, an article by Professor Thomas E. Atkinson, entitled "Wanted: A Model Probate Code," appeared in the *Journal of the American Judicature Society*.<sup>1</sup> After publication of that article, there followed years of research, discussion, and drafting by committees of the Real Property, Probate and Trust Law Section of the American Bar Association in cooperation with the research department of the University of Michigan Law School. As a result of these efforts, the final draft of a Model Probate Code emerged.<sup>2</sup> In 1946, this was presented to the Real Property, Probate and Trust Law Section of the American Bar Association by its committee on the model probate code and was unanimously approved by that Section.

Since that time, various provisions of the Model Probate Code have been adopted or made the basis of legislation in a number of states.<sup>3</sup> The Arkansas Code of 1949 embodies many of its provisions.<sup>4</sup> In other states its enactment is presently under consideration.

The most recent adoption of the Model Probate Code as a whole is found in the new Indiana Code which took effect on January 1, 1954.<sup>5</sup> While this statute modifies many of the provisions of the Model Code, omits others, and adds sections unrelated to the Model Code, it would seem to be as nearly a complete enactment of the model legislation as has yet occurred. The purpose of this article is to suggest answers to these questions: To what extent does the Indiana Code attain the

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1. 23 AM. JUDICATURE SOC. J. 183 (1940).

2. The Model Probate Code was published in SIMES AND BASYE, *MICHIGAN LEGAL STUDIES, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE* (1946). This volume includes monographs on various topics in probate law, by the writer and Mr. Paul E. Basye, as well as statutory notes by the research staff of the University of Michigan Law School.

3. For example, the Arizona Code shows some influence of the Model Probate Code: ARIZ. CODE ANN. § 38-103 (Supp. 1952).

4. Ark. Acts (1949) No. 140; ARK. STAT. ANN. §§ 62-2003—62-3109 (Supp. 1953).

5. Ind. Acts 1953, c. 112; IND. ANN. STAT. §§ 6-101 to 8-218 (Burns Repl. 1953)—herein cited: *e.g.*, Ind. Probate Code § 6-101.

objectives of the Model Code? To what extent does it fall short of them or deviate from them?

By way of preliminary observation it should be pointed out that the Model Probate Code does not purport to be an ideal body of legislation. In preparing a probate code to be promulgated without reference to, or approval of, the society in which it is to operate, one might incorporate much of the law of trusts and make the personal representative a trustee; one might employ the civil law concept of universal succession; one might sweep away all constitutional objections and provide that one administration should operate like a bankruptcy proceeding to dispose of all property of the decedent throughout the United States. But, in a democratic society such as ours, a probate code must be acceptable to legislators and to their constituents. And, in any society, a code must fit into the existing social fabric.

Hence, the Model Code includes a series of compromises. It embodies what its framers believed would be acceptable to American legislators. In so far as possible, it was based upon existing state legislation and embodies a synthesis of the best of that legislation. Moreover, it was never anticipated that it would be adopted verbatim in any state, but rather that it would be adapted to the legal institutions of each particular jurisdiction. It is a well to draw from, not a pattern for regimentation.<sup>6</sup> At no time in the process of its preparation was it conceived of as a device to secure complete uniformity in the probate law of the several states. Therefore, the fact that the Indiana Code varies the phraseology of the Model Code or supplements it with unrelated provisions does not indicate that any of the major objectives of the Model Code are lost.

As to the general scheme, the pattern of the Model Probate Code plainly appears in the Indiana Code. While the Indiana Code includes no separate subdivision on ancillary administration corresponding to the fifth part of the Model Code,<sup>7</sup> the first nineteen articles of the Indiana Code parallel the nineteen titles or sub-titles of Part I to IV inclusive of the Model Code. The other article of the Indiana Code is concerned merely with the repeal of existing laws. The similarity of the two codes is indicated by their parallel subdivisions.<sup>8</sup>

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6. This idea is stated more fully in the author's article, *The Model Probate Code—An Achievement in Cooperative Research*, 29 AM. JUDICATURE SOC. J. 71 (1945).

7. The draftsmen of the Model Probate Code merely incorporated in Part V three acts prepared by the Commissioners on Uniform State Laws. Hence, the omission of this part does not affect the organization of the other parts of the Model Code. The Indiana Code, however, does include a number of sections on ancillary administration. These are not segregated but are scattered through other parts of the Code.

8. The Indiana Code contains 297 Sections as compared with 260 Sections in

The first twenty-three Sections of the Indiana Code correspond roughly to Part I of the Model Code. For example, the definitional

the Model Code. The following comparison of the table of contents of the Indiana Probate Code and of the Model Probate Code shows how similar the two Codes are. Titles and article numbers are taken from the enrolled act, whereas section numbers are taken from IND. ANN. STAT. (Burns Repl. 1953).

Indiana Probate Code

§§ 6-100—6-159 (no title to this group of sections, although they were apparently intended as Article 1).

Art. 2. Intestate Succession, §§ 6-201—6-258.

Art. 3. Taking Against Will, §§ 6-301—6-308.

Art. 4. Dwelling House, Widow's and Family Allowances, §§ 6-401—6-403.

Art. 5. Execution and Revocation of Wills, §§ 6-501—5-508.

Art. 6. Construction of Wills and Determination of Heirship, §§ 6-601—6-607.

Art. 7. Probate and Grant of Administration, §§ 7-101—7-129.

Art. 8. Dispensing with Administration, §§ 7-201—7-209.

Art. 9. Adjudicated Compromise of Controversies, §§ 7-301—7-303.

Art. 10. Personal Representatives, §§ 7-401—7-451.

Art. 11. Bond of Personal Representatives, §§ 7-501—7-511.

Art. 12. Inventory, §§ 7-601—7-606.

Art. 13. Collection and Management of Assets, §§ 7-701—7-753.

Art. 14. Claims, §§ 7-801—7-821.

Art. 15. Sales, Mortgages, Leases, Exchanges—Personal and Real Property, §§ 7-901—7-953.

Art. 16. Accounting, §§ 7-1001—7-1010.

Art. 17. Distribution and Discharge, §§ 7-1101—7-1116.

Art. 19. Guardianship—General Provisions, §§ 8-101—8-179.

Art. 20. Veterans' Administration Guardianships, §§ 8-201—8-218.

Model Probate Code

Part I. *General Provisions*, §§ 1-21.

Part II. *Intestate Succession and Wills*  
Intestate Succession, §§ 22-31.

Taking Against Will, §§ 32-41.

Homestead, Exempt Property and Family Allowance, §§ 42-44.

Execution and Revocation of Wills, §§ 45-55.

Miscellaneous Provisions, §§ 56-60.

Part III. *Administration of Decedents' Estates*

Probate and Grant of Administration, §§ 61-85.

Dispensing with Administration, §§ 61-85.

Adjudicated Compromise of Controversies, §§ 93-95.

Personal Representatives, §§ 96-105.

Bond of Personal Representative, §§ 106-119.

Inventory, §§ 120-123.

Collection and Management of Assets, §§ 124-134.

Claims, §§ 135-149.

Sales, Mortgages, Leases, Exchanges, §§ 150-171.

Accounting, §§ 172-181.

Distribution and Discharge, §§ 182-195.

Part IV. *Guardianship*

A. General Provisions, §§ 196-237.

B. Uniform Veterans' Guardianship Act, §§ 238-255.

Part V. *Ancillary Administration*

Uniform Powers of Foreign Representatives Act, §§ 256-260.

Uniform Ancillary Administration of Estates Act (to be supplied).

Uniform Wills Act, Foreign Probated (to be supplied).

Section of the Indiana Code is much the same,<sup>9</sup> as are provisions for the rule making power of the court,<sup>10</sup> the powers of the clerk,<sup>11</sup> and the disqualification of the judge for interest.<sup>12</sup> A desirable provision, not found in the Model Probate Code, is Section 6-104 to the effect that the report of the Probate Code Study Commission of Indiana may be used by the courts as a guide in interpreting the Code.

One of the primary objectives of the Model Code was to secure a probate court which is the same as, or coordinate with, the trial court of general jurisdiction. Indiana had attained this objective long before the Model Probate Code, and such legislation was retained by the new Code. In most counties the circuit court is the court having probate jurisdiction; and appeals are to the same appellate court as appeals taken from other causes in the circuit court.<sup>13</sup>

As is pointed out by the Indiana Probate Code Study Commission, the law as to probate appeals was not changed.<sup>14</sup> Thus, one important reform embodied in Section 20 of the Model Probate Code was not achieved. This Section provides that when an appeal is taken from an order of the court prior to the decree of final distribution, the court may, with some exceptions, postpone the appeal and have it heard with the appeal from the order of final distribution. Since there are often several appealable orders in the course of a probate proceeding, such legislation tends to reduce the number of appeals.

The variations from the Model Code in Sections 6-111 to 6-114 of the Indiana Code call for special comment. These are the general provisions on notice and are analogous to Model Probate Code Section 14.<sup>15</sup> The important differences are found in Indiana Code Section 6-112, corresponding to Model Code Section 14(b). In the Model Code this subsection applies only to the case where the Code directs notice but does not state what kind of notice is to be given.<sup>16</sup> In substance it provides that, in such a case, the court may select any one of the follow-

9. The definitional section of the Indiana Code, § 6-103, corresponds to § 3 of the Model Probate Code.

10. Ind. Probate Code § 6-107 corresponds to Model Probate Code § 10.

11. Ind. Probate Code § 6-108 corresponds to Model Probate Code § 11.

12. Ind. Probate Code § 6-106 corresponds to Model Probate Code § 9.

13. Ind. Probate Code § 6-122.

14. The Commissioners' Comment to Section 6-122 says: "This section leaves the question of appeals exactly as it is under the present law.

"Any decision of the court under this code may be appealed if it is a final decision or one from which an appeal is presently allowed."

15. Sections 6-111, 6-113, and 6-114 of the Indiana Code closely follow Model Code Section 14(a), (c), and (d), respectively.

16. Model Probate Code § 14(b) begins as follows: "Unless waived and except as otherwise provided by law, all notices required by this Code to be served upon any person shall be served as the court shall direct, by rule or in a particular case. . . ."

ing modes of service or any combination of two or more of them: personal service; service by publication; service by registered mail. Then follows the statement that, where service by publication is ordered, but personal service or service by registered mail is not ordered, all persons whose names and addresses are given in the petition shall be served by ordinary mail.

Section 6-112 of the Indiana Code begins in the same manner as Section 14(b) of the Model Code with the phrase: "Unless notice is waived and except as otherwise provided by law, all notices required by this code to be served upon any person shall be served as the court shall direct. . . ." Then follows a statement of only two modes of service, which are not really alternative at all. The first is personal service. The clause in which the second is stated is to the effect that service may be made by publication only if the person to be served is a nonresident or if his name or residence is unknown. Then follows this separate paragraph:

"In all cases where service or notice by publication is ordered, or is required by this code, such notice shall be deemed sufficient only if all persons so notified are also served by ordinary mail addressed to such person located in the United States. . . . Such notice by mail shall be excused, however, in any case if it is shown by affidavit of a person required to give such notice either that, upon diligent inquiry, the residence or name of such person is unknown."

This section should be compared with Indiana Code Section 7-107 which is similar to Model Code Section 70. Both of these Sections provide for publication of notice to creditors and notice of appointment of personal representative as a single notice. Each of these Sections also provides for notice by mail to heirs and devisees whose names and addresses are known. The Model Code requires that this additional notice to heirs and devisees be either by personal service or by registered mail, while the Indiana Code specifies notice by ordinary mail.

This question, then, arises: Does the last paragraph of Indiana Code Section 6-112 apply to notice to creditors? As has been seen, this paragraph states: "In all cases where service or notice by publication . . . is required by this code," notice by ordinary mail is necessary. If this provision is applicable to creditors, then all creditors whose names and addresses are known must receive notice, not only by publication, but also by ordinary mail. Certainly Section 14(b) of the Model Code does not apply to notice to creditors; by its terms it applies only to cases where notice is required, but the kind of notice is not

specified by the Code. Hence, it is clear that the Model Code does not require notice to creditors in any manner other than by publication. But it is possible that this last paragraph of Section 6-112 of the Indiana Code, which has no counterpart in the Model Code, requires notice by mail to creditors. On the other hand, it may be argued that all parts of Section 6-112 are qualified by the opening clause of that Section, "except as otherwise provided by law." And since Section 7-107 states specifically that heirs and devisees are to be notified by mail, Section 6-112 does not apply. Indeed, it would be most extraordinary if Section 7-107 should specify what persons are to receive notice by mail and yet Section 6-112 should provide that additional persons are to receive the same notice by mail. Of course, the ambiguity stems from the fact that Section 7-107 follows the Model Probate Code while the last part of Section 6-112 was inserted by the Indiana Commission.

This troublesome paragraph was included because of the decision of the Supreme Court of the United States in the case of *Mullane v. Central Hanover Bank & Trust Co.*<sup>17</sup> The Code Commission takes a much more optimistic view of the legal situation resulting from that decision than does the writer when it says that case "clarifies and settles" the question of what, in a proceeding *in rem*, constitutes notice to a nonresident and to a person whose name and address is unknown for purposes of satisfying due process requirements under the Fourteenth Amendment.<sup>18</sup> The *Mullane* case held that a statute which does not require anything more than notice by publication to beneficiaries of a common trust fund for a hearing on an accounting by the trustee is unconstitutional. It is doubtful that the Supreme Court intended its decision to apply to recognized modes of procedure in the ordinary administration of decedents' estates. Indeed, the Court said in its opinion: "Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects."<sup>19</sup> The case doubtless did determine that the mere fact that a proceeding is *in rem* does not mean that service by publication is sufficient and that reasonable notice is necessary both in proceedings *in rem* and *in personam*. But whether the decision has any application to the usual procedures in decedents' estates is not yet entirely clear. It would seem most unfortunate if anything more than notice by publication were required for creditors.

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17. 339 U.S. 306 (1950).

18. See Commissioners' Comment to § 6-112.

19. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

After the *Mullane* decision, a statute was passed by the Michigan Legislature which clearly provides for notice by registered mail to all creditors whose names and addresses are known.<sup>20</sup> Yet, at the present time the Michigan bench and bar are almost unanimous in their disapproval of this provision; and legislation modifying it is now under consideration. One lawyer said: "We will soon have so many returns from notices sent by registered mail to creditors that there will be no room for them in the files of the probate court." Moreover, attorneys complain that the expense involved in sending these notices is relatively substantial in small estates. While notice by ordinary mail (required by the Indiana statute) would be less burdensome than notice by registered mail, it would seem to be unduly onerous in many cases.

But whatever may be said about the application of the last paragraph of the Indiana Code Section 6-112 to the notice to creditors, it would seem that the first part of that provision does apply to cases where notice is required by the Code but the manner of notice is not stated. Thus it could apply to notice of hearing on an account.<sup>21</sup> This means that in such a situation there must be personal service on interested parties unless they are nonresidents or their names or addresses are unknown, in which case there must also be service by publication; in the case of nonresidents who reside in the United States, and whose names and addresses are known, there must be service by ordinary mail. Moreover, if the Code requires notice by publication, but does not specify any other notice, as, for example, in the case of notice of sales of real estate and notice of hearing on final account, then, under the last paragraph of Section 6-112, notice by ordinary mail would also be required.<sup>22</sup>

In many respects, Article 2 of the Indiana Code, on intestate succession, follows the Model Code.<sup>23</sup> Sections 6-201 to 6-203, which are provisions concerning the course of descent and distribution, follow

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20. MICH. COMP. LAWS § 701.32 (1948) as amended by Mich. Pub. Acts (1951), No. 253, and MICH. COMP. LAWS § 708.2 (1948).

21. Ind. Probate Code § 7-1006(a).

22. Ind. Probate Code § 7-915 and § 7-1006(b).

23. Thus, § 6-204 on partial intestacy follows the Model Code § 23; § 6-205, to the effect that kindred of the half blood inherit equally with kindred of the whole blood, follows Model Code § 24; § 6-206, on posthumous heirs, follows Model Code § 25. The Model Code provision on advancements in § 29 is copied in the Indiana Code § 6-210. It applies to heirs generally and not merely to children and grandchildren; it, also, represents a novel solution for the situation where the advancee dies before the intestate leaving issue.

Sections 6-212 to 6-215 of the Indiana Code have no counterpart in the Model Code. They appear, however, to be valuable additions to the Model Code. Section 6-213 states the manner in which an expectancy can be waived. Sections 6-214 and 6-215 deprive spouses of intestate shares for certain kinds of marital misconduct.

substantially the form of the Model Code but retain largely the substance of earlier Indiana law. Thus, though the Model Code does not distinguish between spouses, the Indiana Code differentiates the widow from the widower and, also, in certain cases, the surviving first spouse from the surviving second spouse.

Section 6-211 of the Indiana Code copies Model Code Section 31 verbatim in stating that the estates of dower and curtesy are abolished. Yet, one finds in Section 6-203 of the Indiana Code a clear indication that, in fact, a wife may have some sort of inchoate interest prior to the death of her husband. Of course, one of the objects of the Model Code was to eliminate, in the interests of free alienability of property, all inchoate interests in spouses. On the other hand, it must be realized that prevailing ideas of the people of a state as to what marital rights should obtain cannot be lightly disregarded even if something better is offered in a model code.

Article 3 of the Indiana Code, which concerns taking against the will, adopts the pattern of the Model Code. However, since the Indiana law of intestate succession varies substantially from that provided in the Model Code, so the share which the surviving spouse elects similarly varies. Section 33 of the Model Code, on gifts in fraud of marital rights, is, of course, omitted since that is intended for a scheme of distribution which does not recognize any inchoate rights in a wife during the life of her husband.

The Model Probate Code makes no attempt to deal with the following question: What happens to future interests when a surviving spouse renounces a present interest in property devised by a deceased spouse? The Indiana Code Section 6-301 appears to offer a solution to this problem. It reads in part:

“Where by virtue of an election pursuant to this article it is determined that such spouse has renounced his rights in any devise, either in trust or otherwise, the will shall be construed with respect to the property so devised to him as if such surviving spouse had predeceased the testator.”

This doubtless provides a convenient rule of thumb and would work out in accordance with testamentary intent in many cases. However, one can imagine situations where it might defeat intent. Thus, suppose H devises a piece of land to his wife, W, for life, remainder to his cousin, A, in fee simple, the residue of the estate being devised to the testator's son, S. If W renounces, under the clause just quoted, A's remainder would be accelerated and would at once become a possessory

fee simple. Moreover, if the normal order of abatement is followed to give W her one-third, that one-third would be taken from the residuary devise to S.<sup>24</sup> Thus, A would get more than the testator intended, and S would get less. At common law, however, A's remainder would not be accelerated; the income of the property would be taken during the life of the widow to compensate S for his loss sustained by the widow's election.<sup>25</sup> However, the last clause of Section 7-1103, following the Model Code, provides that the usual order of abatement may be modified if necessary to carry out the testator's intent. Thus, a way of escape may be found in that Section.

Section 6-308 of the Indiana Code, on pretermitted heirs, follows almost verbatim the Model Code and retains the desirable features found therein. This legislation permits a child who is living when the will is made, but entirely omitted from it, to take against the will only if the testator believed he was dead when the will was executed. The rule is so restricted because that is the only situation in which a testator would, by mistake or inadvertence, omit a living child from his will. Moreover, a child born after the making of the will is not allowed to take against it if "when the will was executed the testator had one or more children known to him to be living and devised substantially all his estate to the spouse who survives him."<sup>26</sup> It is believed that in such a situation the testator has shown an intent to exclude all children he may have whether born or unborn.

Sections 45 to 55 of the Model Probate Code, which deal with execution and revocation of wills, are made up of two components. The first six Sections on execution of wills are Sections 2 to 7 of the Model Execution of Wills Act, prepared and promulgated by the Commissioners on Uniform State Laws. Sections 51 to 55 on revocation were drafted by the Committee of the Real Property, Probate and Trust Law Section of the American Bar Association as a part of the Model Code.

In the main, Article 5 of the Indiana Code follows the scheme of the Model Code; but numerous variations appear, some of which are substantial. Thus, there is no provision for holographic wills; and a partial revocation of a written will must be effected by a writing.<sup>27</sup> Section 6-508 of the Indiana Code follows the Model Code in making divorce the only ground for revocation by circumstances but adds a sentence to the effect that "annulment of the testator's marriage shall

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24. Ind. Probate Code § 6-1103.

25. 2 RESTATEMENT, PROPERTY § 234 (1936).

26. Ind. Probate Code § 6-308(a).

27. Ind. Probate Code § 6-506. Compare Model Probate Code § 51.

have the same effect as divorce." This seems to be a desirable modification of the Model Code.

Section 6-509 of the Indiana Code, which has no counterpart in the Model Code, provides that an inter vivos trust is not rendered testamentary by the reservation in the settlor of a power to amend or revoke or some similar power. Doubtless this is sound common law;<sup>28</sup> but, in view of the litigation which has arisen on this question,<sup>29</sup> it may be desirable to state the rule in statutory form.

Article 6 of the Indiana Code, entitled "Intestate Succession and Wills," corresponds somewhat to Sections 56 to 60 of the Model Code, entitled "Miscellaneous Provisions." The Indiana Code, however, contains a number of interesting provisions not found in the Model Code, some of which appear to be highly desirable.

Section 6-601 consists of ten subsections dealing with various problems of construction. Most of them are evidently designed to clarify the common law, although a few depart from common law norms of construction.

Subsections (i) and (j) of this provision are particularly desirable. They cover the situation in which a testator devises property to the trustees of an inter vivos amendable trust. Subsection (i) merely lays down the broad common law doctrine that nontestamentary extrinsic facts may be taken into consideration in determining the meaning of a will even though the facts occurred after the will was executed.<sup>30</sup> Subsection (j) is to the effect that in the absence of a contrary intent stated in the will, a devise to the trustee of an inter vivos trust is valid even though the inter vivos trust is amendable and has been amended.<sup>31</sup> Certainly these provisions should enable a draftsman to make use of a desirable legal device without plunging devisees into a sea of litigation.

A comparison of the provisions of the two codes with respect to probate and grant of administration indicates that all the major objectives of the Model Code on this subject have been attained in the new Indiana Code. Thus, in both Codes a will may be admitted to probate and a personal representative appointed summarily and without notice;<sup>32</sup> the notice of appointment of the personal representative and notice to

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28. RESTATEMENT, TRUSTS § 57 (1935).

29. See *Adams v. Hagerott*, 34 F.2d 899 (8th Cir. 1929); *Roche v. Brickley*, 254 Mass. 309, 146 N.E. 716 (1925); *Talbot v. Talbot*, 32 R.I. 72, 78 Atl. 535 (1911).

30. ATKINSON, WILLS § 81 (2d ed. 1953).

31. In general, as to the common law on this situation, see RESTATEMENT, TRUSTS § 54, Comment c (1935); Palmer, *Testamentary Disposition to the Trustee of an Inter Vivos Trust*, 50 MICH. L. REV. 33 (1951).

32. Ind. Probate Code § 7-104; Model Probate Code § 68.

creditors are combined in one notice;<sup>33</sup> there can be only one contested hearing on the probate of a will;<sup>34</sup> and the admission of a will to probate decides that it is the last will, thus precluding the production of an after-discovered will subsequent to the final decree of distribution.<sup>35</sup> Moreover, Section 7-102 of the Indiana Code emulates the Model Code Section 62 in declaring that the administration proceeding from start to finish is *in rem* for purposes of jurisdiction. Indiana Code Section 7-123 also follows Model Code Section 84 in stating that title to the decedent's real and personal property passes to his distributees at the moment of his death subject to the possession of the personal representative.<sup>36</sup> Apparently, the Indiana Code Commission was not fully aware of the significance of this Section, for the comment of the Commissioners to Section 7-701 states that the personal representative "takes title to the personal property but not to the real estate." Yet, the Commissioners' comment to Section 7-123 seems to recognize that the distributee has title immediately on the decedent's death. But whether the personal representative or the distributee has title to the personalty at the moment of the decedent's death would seem to make little or no practical difference.<sup>37</sup>

One unique feature of the Model Probate Code with respect to probate and administration was not followed. It was felt by the draftsmen of the Model Code that the court should have jurisdiction to determine that a person whose estate is being administered is in fact dead; that very liberal provisions for reopening the judgment should be included to take care of the rare case where the person is not dead; but that the judgment should not be subject to collateral attack on this ground. In order to make sure that the presumed decedent would not be deprived of his property without due process of law, it was provided that he could be made a party to the proceeding and that elaborate steps could be taken on the court's order to determine whether he was dead.<sup>38</sup> This was thought to be preferable to the separate statutes found in a number of states, including Indiana, providing for the administration of the estates of absentees. The Indiana Legislature, however, retained the statutes pertaining to administration of the

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33. Ind. Probate Code § 7-107; Model Probate Code § 69.

34. Ind. Probate Code § 7-115; Model Probate Code § 73.

35. Section 73 of the Model Probate Code is explicit on this point. It would seem that the same conclusion would be reached by considering together Indiana Probate Code, Sections 7-115—7-117, although the language does not expressly so state.

36. See Note, 29 IND. L. J. 251 (1954).

37. The important thing is that, under both codes, the personal representative normally is entitled to possession of the property, whether realty or personalty. Ind. Probate Code § 7-701; Model Probate Code § 124.

38. Model Probate Code §§ 69-71, 81.

estates of absentees and did not make the finding of death *res adjudicata* in the ordinary probate proceeding.<sup>39</sup>

Another basic objective of the Model Code was to make the final decree of distribution the significant indicia of the title to the decedent's real and personal property.<sup>40</sup> This objective appears to be fully attained in the Indiana Code.<sup>41</sup>

Three other desirable features of the administrative provisions of the Model Code, which have been substantially embodied in the Indiana Code, may be briefly noted. One is the detailed provision for an adjudicated compromise when there is a dispute as to the validity or construction of a will.<sup>42</sup> Provisions are made for the appointment of guardians *ad litem* for unborn and unascertained persons and for a decree of the court declaring the compromise and substituting it for the terms of the will. Another desirable feature is that which permits interested parties to dispense with administration in whole or in part. The Model Code presented three such devices adapted to three different situations,<sup>43</sup> and all three were adopted as a part of the Indiana Code.<sup>44</sup> A third feature of the Model Code incorporated into the Indiana Code is the provision for conducting the decedent's business during the administration period.<sup>45</sup>

Brief reference should be made to provisions for the determination of heirship. Under the Model Code, the only provision of this kind is found in Section 195. It is applicable only after five years have elapsed since the death of the decedent and is intended to be used merely in cases where there had been no administration. It was believed that the final decree of distribution made a determination of heirship unnecessary in situations where there was a full administration because such a decree accomplished the same objective. Since, under the Model Code, probate of the will was barred in five years and debts could not

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39. See IND. ANN. STAT. §§ 7-2301—7-2310 (Burns Repl. 1953). These sections are not a part of the Probate Code. It should be pointed out, however, that Indiana Probate Code Section 7-108 does follow the Model Probate Code in providing for special steps to be taken to ascertain whether the person whose estate is to be administered is dead.

40. § 183(d).

41. § 7-1102(d).

42. Ind. Probate Code §§ 7-301 to 7-303; Model Probate Code §§ 93 to 95.

43. §§ 86 to 92. It may be pointed out that, in 1951, the Commissioners on Uniform State Laws promulgated a Model Small Estates Act, which follows, in part, the Model Probate Code but which covers situations not dealt with by the Model Code. The Model Small Estates Act was prepared with the assistance of two of the draftsmen of the Model Probate Code. Doubtless the Small Estates Act was not available at the time the Indiana Probate Code was being drawn up.

44. §§ 7-201—7-209.

45. Ind. Probate Code § 7-711; Model Probate Code § 131.

be asserted after five years when no administration was had, a determination of heirship after the five year period operated as effectively as a decree of final distribution before that time.

The Indiana Code Section 7-1115 follows closely this provision of the Model Code except that determination of heirship is permitted when one year has elapsed after the decedent's death. The Indiana Code also provides for determination of heirship during administration.<sup>46</sup> Furthermore, under the Indiana Code, debts are barred at the end of one year when there has been no administration;<sup>47</sup> and, under some circumstances, the heir can effectively convey real estate to a bona fide purchaser when one year has elapsed and no will has been produced.<sup>48</sup> But otherwise the limitation on the filing of a petition to probate a will is three years.<sup>49</sup> It will thus be seen that cases can arise in Indiana where it would be advantageous to have a determination of heirship before the final decree of distribution. However, since both the determination of heirship during administration and the final decree of distribution are made conclusive by the Indiana statute,<sup>50</sup> one wonders which would control if they should be inconsistent.

Of the two articles of the Indiana Code on guardianship, it may be said that they follow the general pattern of the Model Code in that one subdivision deals with general guardianships<sup>51</sup> and the other with veterans' guardianships.<sup>52</sup> Indiana had formerly enacted the Uniform Veterans' Guardianship Act, first promulgated by the Commissioners on Uniform State Laws.<sup>53</sup> In adopting the scheme of the Model Probate Code, it accepted with minor variations, the revised Uniform Veterans' Guardianship Act of the Commissioners on Uniform State Laws.

In the Introduction to the Model Probate Code,<sup>54</sup> nine important features were listed: the probate judge to be the same as or coordinate with the trial judge of the court of general jurisdiction; general administration to be initiated without notice; the court to have jurisdiction

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46. Ind. Probate Code § 6-606.

47. § 7-801(d).

48. § 7-115(c).

49. § 7-115(d).

50. § 6-606(d) and § 7-1102(d).

51. Art. 19, §§ 7-1101—7-1116.

52. Art. 20, §§ 8-201—8-218.

53. The first Uniform Veterans' Guardianship Act was adopted by the Commissioners in 1928 and was made the basis of a Veterans' Guardianship Act in Indiana in 1931. Ind. Acts 1931, c. 69. In 1942 the Commissioners promulgated a revised Veterans' Guardianship Act, which was incorporated into the Model Probate Code.

54. SIMES AND BASYE, MICHIGAN LEGAL STUDIES, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE 9-22 (1946).

over land as well as personalty; only one will contest to be permitted; notice to creditors to be combined with original notice; a time schedule to insure speedy administration; the decree of distribution to be significant in determining title; the number of appeals to be reduced; and administration to be dispensed with in certain cases. The Indiana Code attains all but one of these objectives. As has already been stated, the device presented by the Model Probate Code to reduce the number of appeals was not adopted. However, not only has the Indiana Code effectively incorporated the eight other reforms, but it has also enacted many other valuable provisions of the Model Code. In some instances, indeed, Indiana has made improvements upon its model. Moreover, it has in the main effectively incorporated many existing Indiana statutes with which the bench and bar of that state are familiar.

Like all large codes, this one will no doubt require minor amendments and some wise judicial interpretation before all its parts are in working order. For example, the last legislative line on notice in probate proceedings is perhaps yet to be written. And it is to be hoped that some of the provisions as to marital rights will be brought more nearly in line with prevailing trends. But on the whole, the Indiana Probate Study Commission and the Indiana Legislature are entitled to high commendation for the effective use they have made the Model Probate Code and for the Code which they have presented to the people of Indiana.