The Judiciary, State of Hawai‘i

Testimony to the Thirty-Second Legislature
2024 Regular Session

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair

Friday, March 15, 2024 at 9:45 a.m.
State Capitol, Conference Room 016 & Videoconference

WRITTEN TESTIMONY ONLY

by:

Jeannette H. Castagnetti
Chief Judge of the First Circuit
Chair, Committee on the Uniform Probate Code and Probate Court Practices Committee

Bill No. and Title: House Bill 1915, Relating to the Uniform Probate Code.

Purpose: Update the Uniform Probate Code.

Judiciary's Position:

The Honorable Jeannette H. Castagnetti, Chair of the Committee on the Uniform Probate Code and Probate Court Practices Committee (the "Probate Committee")[1] submits this testimony in support of House Bill 1915 to correct an oversight in Act 158, Session Laws of Hawai‘i 2023, which updated articles I through IV of the Uniform Probate Code ("UPC") in the State of Hawai‘i. Members of the Probate Committee reviewed the recently adopted Act 158 and noted an oversight in that the changes to the publication requirements applicable to estates were not similarly made for purposes of a successor trustee as was intended.

The UPC is a codification of the law of probate, bringing together common law principles, restatement of law concepts, and various pre-existing statutes.

Background & Discussion:

In Act 158, Session Laws of Hawai‘i 2023, articles I through IV of the Uniform Probate Code were updated to adjust for inflation, clarify provisions, resolve issues that have arisen in probate practice, and address societal changes in familial relations. One of the updates in Act 158 was to reduce the number of required publications of a notice to creditors by a personal representative to once a week for two successive weeks. The intent of the Probate Committee was that the publication requirements were also to be made applicable to successor trustees. This act corrects that oversight and amends 560:3-801(f) to similarly reduce the number of required publications of a notice to creditors by a trustee to once a week for two successive weeks, consistent with amendments made by Act 158, SLH 2023. Having consistent provisions applicable to estates and trusts is necessary for the efficiency of the probate and trust administration process.

The Judiciary respectfully asks this Committee to vote in favor of House Bill No.1915.

Thank you for the opportunity to testify on this measure.

1 The Probate Committee is chaired by the Honorable Jeannette H. Castagnetti of the First Circuit Court and comprised of judges for each of the other circuits (the Honorable Randal G. B. Valenciano, the Honorable Peter T. Cahill, and the Honorable Henry T. Nakamoto) and attorney members Colin Goo, Rhonda Griswold, Frank Kanemitsu, Joy Miyasaki, Jeffrey Niebling, Raymond Okada, Rosemarie Sam, Douglas Smith, Carroll Taylor, Eric Young and Summer Shelverton.

TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION

ON HB1915

RELATING TO THE UNIFORM PROBATE CODE

BEFORE THE SENATE COMMITTEE ON JUDICIARY

DATE: Friday, March 15, 2024, at 9:45 A.M.
Conference Room 016, State Capitol

PERSON TESTIFYING: Michael Tanoue
Commission to Promote Uniform Legislation

Chair Rhoads, Vice Chair Gabbard, and members of the Committee on Judiciary:

My name is Michael Tanoue, and I am one of Commissioners on the Commission to Promote Uniform Legislation (CPUL), established in chapter 3, Hawaii Revised Statutes. The CPUL **supports** this bill.

The bill amends section 560:3-801(f) of the Hawaii Revised Statutes, a part of the Uniform Probate Code, by reducing the number of required publications of a notice to creditors by a trustee to once a week for two successive weeks, consistent with the amendments Act 158 (2023) made to publication requirements applicable to probate matters generally. The Uniform Probate Code, which is chapter 560 of the Hawaii Revised Statutes, was a product of the national Uniform Law Commission, members of which include the CPUL Commissioners. In consultation with the Uniform Law Commission, the CPUL respectfully requests that this Committee pass this bill.

Senate Committee on Judiciary

Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair
Friday, March 15, 2024
9:45 A.M.
Conference Room 016

Testimony by Carolyn Nicol

Bill No. and Title:
H.B. No. 1915, Relating to the Uniform Probate Code

Position: **Support, with Amendments**

Chair Rhoads, Vice Chair Gabbard and Members of the Judiciary Committee:

My name is Carolyn Nicol. I am a retired attorney and a current member of the Elder Law section and Probate and Estate Planning section of the Hawaii State Bar Association, testifying in my individual capacity, concerning HRS §560:3-801 and other provisions in Article III, chapter 560 affected by Act 158 (2023 Haw. Sess. Laws Act 158, at 438-477).

I support Section 2 of this measure. My testimony on the bill that became Act 158 proposed the same change:

> **HRS §560:3—801.**
> Position: **Suggest addition.**
> Section 42 of this bill proposes amending HRS §560:3—801(a) to reduce from "three" to "two" the number of times a notice to creditors must be published (page 116 line 7). HRS §560:3—801(f) contains similar language that should also be amended.
>
> **Summary of recommendations** as to HRS §560:3—801:
> Page 116, after line 15: Add amendment to subsection (f) of section 560:3-801, changing "three" to "two" (" . . . trustee or successor trustee . . . may publish a notice to creditors once a week for [~~three~~] two successive weeks . . .").

March 15, 2023 testimony to the House Committee on Judiciary and Hawaiian Affairs on S.B. No. 483, S.D. 1, Relating to the Uniform Probate Code, at 10.

https://www.capitol.hawaii.gov/sessions/Session2023/Testimony/SB483_SD1_TESTIMONY_JHA_03-15-23_.PDF (page 19 of pdf).

Attached is a draft revision ("**H.B. No. 1915, Proposed S.D. 1**") proposing amendments related to **time limits**, **original wills**, and **attorneys' fees**, consistent with testimony submitted last year, to the House Judiciary Committee, cited above, and to the House Finance Committee (April 3, 2023 testimony on S.B. No. 483, S.D. 1, H.D. 1, Relating to the Uniform Probate Code, in https://www.capitol.hawaii.gov/sessions/Session2023/Testimony/SB483_HD1_TESTIMONY_FIN_04-03-23_.PDF.

Also attached for reference are excerpts from the Uniform Laws Commission's Uniform Probate Code ("model UPC").

The attached H.B. No. 1915, **Proposed S.D. 1** renumbers Sections 2, 3 and 4 of 2024 H.B. No. 1915 as Sections 7, 8, and 9, respectively; adds new Sections 2, 3, 4, 5, and 6, described below; rewords Section 1 (purpose) to reflect the proposed changes; and revises the Bill Description.

Sections **2, 3** and part of Section **4** of H.B. No. 1915, **Proposed S.D. 1** pertain to **time limits** after which probate proceedings may not be commenced.

Act 158 added a definition of "probate proceeding" that runs counter to its meaning under the Uniform Law Commission's model UPC. Section 2 deletes that definition from HRS §560:1-201, which applies throughout Chapter 560. Instead, Section 3 adds definitions of "formal testacy or appointment proceeding" and "informal probate or appointment proceeding" in a new subsection (f) within HRS §560:3-108 to clarify the meaning of terms used in that specific section.

Section 3 restores terminology properly used in prior (pre-Act 158) HRS §560:3-108, consistent with model language in the Uniform Law Commission's Section 3-108, but retains substantive changes proposed by the Judiciary's Committee on the Uniform Probate Code and Probate Court Practices Act and adopted by Act 158.

Section 4 restores terminology ("informal probate or appointment" instead of "informal probate") properly used in prior (pre-Act 158) HRS §560:3-301(a)(f), consistent with model language in the Uniform Law Commission's Section 3-301, and with changes proposed in Section 3 of this proposed S.D. 1.

Section **5** and part of Section **4** of H.B. No. 1915, **Proposed S.D. 1** affect issuance of letters testamentary to personal representatives *without* advance notice to interested persons (informal probate and appointment proceedings) as opposed to

issuance of letters testamentary following a hearing *with* advance notice to interested persons (formal probate and appointment proceedings) in cases where the decedent's original will is not available.

My familiarity with informal proceedings reflects past experience at First Circuit Court, where as registrar for several years, I reviewed applications for informal probate of wills and informal appointment of personal representatives. In my view, the original will requirement for informal probate proceedings helps safeguard against inappropriate issuance of letters testamentary, which give personal representatives broad powers to deal with assets in decedents' estates.

Act 158 added a provision allowing the registrar to admit a *copy* of a will to probate, if the purported original will was filed (or lodged or deposited) in a court elsewhere, and the other court's clerk certifies the copy to be a true and correct copy of the original on file there. The purported original will, notarizations, and signatures would *not* be available at the courthouse in Hawai`i for the registrar, court staff, judge, or even interested parties concerned about the validity of the will to inspect for signs of authenticity.

Section 4 restores terminology ("a will probated in another jurisdiction" instead of "an original will probated, filed, deposited or lodged in another jurisdiction") properly used in prior (pre-Act 158) HRS §560:3-301(2)(A), consistent with model language in the Uniform Law Commission's Section 3-301, and with changes proposed in Section 5 of this proposed S.D. 1.

Section **6** of H.B. No. 1915, **Proposed S.D. 1** pertains to attorneys' fees, and restores prior (pre-Act 158) HRS §560:3-720 consistent with the Uniform Law Commission's Section 3-720:

> **§560:3-720 Expenses in estate litigation.** If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, the personal representative or nominee shall be entitled to receive from the estate necessary expenses and disbursements, including reasonable attorneys' fees incurred.

Prior (pre-Act 158) HRS §560:3-720 entitled a personal representative to reimbursement for litigation expenses out of assets in the decedent's estate. Act 158 adopted a revision of §560:3-720 proposed by the Judiciary's Committee on the Uniform Probate Code and Probate Court Practices that bears little

resemblance to the Uniform Law Commission's model UPC. Act 158 amended HRS §560:3-720 as follows:

> SECTION 40. Section 560:3-720, Hawaii Revised Statutes, is amended to read as follows:
>
> "**§560:3-720 Expenses in estate litigation.** If any personal representative or person nominated as personal representative, or an heir or beneficiary if a personal representative or person nominated as a personal representative refuses to act, defends or prosecutes any proceeding regarding the validity of a will in good faith, whether successful or not, that person [~~is~~] shall be entitled to receive from the estate [~~that person's necessary~~] reasonable costs, expenses, and disbursements, including reasonable attorneys' fees [~~incurred.~~], regardless of whether counsel has been retained on a contingency fee basis."

2023 Haw. Sess. Laws Act 158, §40 at 475.

Under HRS §560:3-720 as amended by Act 158, any heir who, in good faith, engages in will challenge litigation "shall be entitled to" (not "may be awarded") attorneys' fees, even if the litigation was unsuccessful and the attorney was hired on a contingency fee basis. As a practical matter, if a personal representative declines to contest the validity of a will ("refuses to act"), the stage is set for a disgruntled heir or beneficiary to hire counsel to pursue litigation at the expense of the decedent's estate.

HRS §560:3-720 as amended by Act 158 no longer entitles personal representatives to reimbursement for litigation expenses aside from litigation "regarding the validity of a will."

Section **7** of H.B. No. 1915, **Proposed S.D. 1** renumbers Section 2 of H.B. No. 1915 concerning publication of notice, which I support, as noted above.

Thank you for the opportunity to testify.

Description:
Updates the Uniform Probate Code to modify amendments to Article III of Chapter 560 made by Act 158, SLH 2023.

A BILL FOR AN ACT RELATING TO THE UNIFORM PROBATE CODE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The purpose of this Act is to modify amendments adopted by Act 158, Session Laws of Hawaii 2023, which sought to update articles I through IV of the Uniform Probate Code to adjust for inflation, clarify provisions, resolve issues that have arisen in probate practice, and address societal changes in familial relations. Specifically, this Act revisits changes Act 158 made to Article III of Chapter 560 regarding time limits for commencing proceedings; authority to issue letters testamentary to a personal representative when an original will is unavailable; and expenses in estate litigation. In addition, this Act corrects an oversight by reducing the number of required publications of a notice to creditors by a trustee to once a week for two successive weeks, consistent with the amendments Act 158 made to publication requirements applicable to probate matters generally.

SECTION 2: Section 560:1-201, Hawaii Revised Statutes, is amended by deleting the definition of "probate proceeding".
["~~"Probate proceeding" means a formal or informal proceeding to probate a will, formal or informal proceeding to appoint a personal representative, or formal proceeding to adjudicate intestacy.~~"]

SECTION 3: Section 560:3-108, Hawaii Revised Statutes, is amended to read as follows:
"**§560:3-108 Probate, testacy and appointment proceedings; ultimate time limit.** (a) No informal probate or appointment proceeding or formal testacy or [~~to establish a will and related~~] appointment proceeding, other than a [~~an ancillary~~] proceeding[~~,~~] to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, shall be commenced more than five years after the decedent's death; provided that:
(1) If a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment, or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred before the initiation of the previous proceeding and the

applicant or petitioner has not delayed unduly in initiating the subsequent proceeding;

(2) Appropriate probate, appointment, or testacy proceedings may be maintained in relation to the estate of an absent, disappeared, or missing person for whose estate a conservator has been appointed, at any time within three years after the conservator becomes able to establish the death of the protected person;

(3) A [~~formal probate~~] proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment if the contest is successful, may be commenced within:

(A) Ninety days after receiving notice of an informal proceeding pursuant to section 560:3-306;

(B) Twelve months from the date the will was informally admitted to probate; or

(C) Thirty days from the entry of a formal order approving the accounts and settlement of the estate by an informally appointed personal representative,

whichever time period expires first. If an informal proceeding is closed informally, the court in its discretion may allow a will contest to proceed after the limitations period has expired if it determines that notice of the informal probate proceedings was not provided pursuant to section 560:3-306 and not more than five years has elapsed since the decedent's death; and

(4) A formal testacy proceeding may be commenced at any time after five years from the decedent's death if:

(A) In the discretion of the court, it would be equitable to do so for the purpose of establishing an instrument to direct or control the ownership of property passing or distributable after the decedent's death from one other than the decedent when the property is to be appointed by the terms of the decedent's will;

(B) The terms of the decedent's will provide for a distribution to the decedent's revocable living trust;

(C) Newly discovered assets of the decedent require administration; or

(D) All interested parties who are entitled by statute to notice of the petition join in the petition.

(b) A proceeding seeking an adjudication of intestacy and related appointment proceeding may be commenced at any time unless there has been a prior informal probate or appointment proceeding or a prior formal testacy or appointment proceeding concerning the decedent's estate[~~. If there has been a prior probate proceeding~~], in which case, a formal proceeding seeking

an adjudication of intestacy may be commenced only under the conditions and circumstances set forth in section 560:3-412.

(c) These limitations shall not apply to proceedings to construe probated wills or determine heirs of an intestate.

(d) In cases under subsection (a)(1) or (2), the date on which a probate proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitations provisions of this chapter that relate to the date of death.

(e) As used in this section:

"Formal testacy or appointment proceeding" means a proceeding held pursuant to part 4 of article III.

"Informal probate or appointment proceeding" means a proceeding held pursuant to part 3 of article III."

SECTION 4. Section 560:3-301, Hawaii Revised Statutes, is amended by amending subsection (a) as follows:

"(a) Applications for informal probate or informal appointment shall be directed to the registrar, and verified by the applicant to be accurate and complete to the best of the applicant's knowledge and belief as to the following information:

(1) Every application for informal probate of a will or for informal appointment of a personal representative, other than a special or successor representative, shall contain the following:

(A) A statement of the interest of the applicant, together with the name; residence, business, or mailing address; and telephone number of the applicant;

(B) The name and date of death of the decedent, the decedent's age, the county and state of the decedent's domicile at the time of death, and the names and addresses of the spouse or reciprocal beneficiary, children, heirs, and devisees and the ages of any who are minors so far as known or ascertainable with reasonable diligence by the applicant;

(C) If the decedent was not domiciled in the State at the time of the decedent's death, a statement showing venue;

(D) A statement identifying and indicating the address of any personal representative of the decedent appointed in this State or elsewhere whose appointment has not been terminated;

(E) A statement indicating whether the applicant has received a demand for notice, or is aware of any demand for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this State or elsewhere; and

(F) That the time limit for informal probate or appointment as provided in this article has not expired either because five years or less have passed since the decedent's death, or, if more than five years from death have passed,

circumstances as described by section 560:3-108 authorizing tardy probate or appointment have occurred;

(2) An application for informal probate of a will shall state the following in addition to the statements required by paragraph (1):

(A) That the original of the decedent's last will is in the possession of the court, or accompanies the application, or that an authenticated copy of a [~~an original~~] will probated[~~, filed, deposited, or lodged~~] in another jurisdiction accompanies the application;

(B) That the applicant, to the best of applicant's knowledge, believes the will to have been validly executed; and

(C) That after the exercise of reasonable diligence, the applicant is unaware of any instrument revoking the will, and that the applicant believes that the instrument that is the subject of the application is the decedent's last will;

(3) An application for informal appointment of a personal representative to administer an estate under a will shall describe the will by date of execution and state the time and place of probate or the pending application or petition for probate. The application for appointment shall adopt the statements in the application or petition for probate and state the name, address, and priority for appointment of the person whose appointment is sought;

(4) An application for informal appointment of an administrator in intestacy shall state in addition to the statements required by paragraph (1):

(A) That after the exercise of reasonable diligence, the applicant is unaware of any unrevoked testamentary instrument relating to property having a situs in this State under section 560:1-301 or a statement why any instrument of which the applicant may be aware is not being probated; and

(B) The priority of the person whose appointment is sought and the names of any other persons having a prior or equal right to the appointment under section 560:3-203;

(5) An application for appointment of a personal representative to succeed a personal representative appointed under a different testacy status shall refer to the order in the most recent testacy proceeding, state the name and address of the person whose appointment is sought and of the person whose appointment will be terminated if the application is granted, and describe the priority of the applicant; and

(6) An application for appointment of a personal representative to succeed a personal representative who has tendered a resignation as provided in section 560:3-610(c), or whose appointment has been terminated by death or removal, shall

adopt the statements in the application or petition that led to the appointment of the person being succeeded except as specifically changed or corrected, state the name and address of the person who seeks appointment as successor, and describe the priority of the applicant."

SECTION 5. Section 560:3-303, Hawaii Revised Statutes, is amended to read as follows:

"**§560:3-303 Informal probate; proof and findings required.** (a) In an informal proceeding for original probate of a will, the registrar shall determine whether:

(1) The application is complete;

(2) The applicant has made an oath or affirmation that the statements contained in the application are true to the best of the applicant's knowledge and belief;

(3) The applicant appears from the application to be an interested person as defined in section 560:1-201;

(4) On the basis of the statements in the application, venue is proper;

(5) An original, duly executed and apparently unrevoked will is in the registrar's possession;

(6) Any notice required by sections 560:3-204 and 560:3-306 has been given and that the application is not within section 560:3-304; and

(7) It appears from the application that the time limit for original probate has not expired.

(b) The application shall be denied if it indicates that a personal representative has been appointed in another judicial circuit of this State or except as provided in subsection (d), if it appears that this or another will of the decedent has been the subject of a previous probate order.

(c) A will that appears to have the required signatures and contains an attestation clause showing that requirements of execution under section 560:2-502, 560:2-503, or 560:2-506 have been met shall be probated without further proof. In other cases, the registrar may assume execution if the will appears to have been properly executed, or the registrar may accept a sworn statement or affidavit of any person having knowledge of the circumstances of execution, regardless of whether the person was a witness to the will.

(d) Informal probate of a will that has been previously probated elsewhere may be granted at any time upon written application by any interested person, together with deposit of an authenticated copy of the will and of the statement probating it from the office or court where it was first probated.

(e) A will from a place that does not provide for probate

of a will after death and that is not eligible for probate under subsection (a) may be probated in this State upon receipt by the registrar of a duly authenticated copy of the will and a duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has become operative under the law of the other place.

[~~(f) A will that has been filed, deposited, or lodged in another jurisdiction, but not probated, may be probated in this State upon receipt by the registrar of a duly authenticated copy of the will or a copy of the will and a statement from its legal custodian that the copy filed is a full, true, and correct copy of the original.~~]"

SECTION 6. Section 560:3-720, Hawaii Revised Statutes, is amended to read as follows:

"**§560:3-720 Expenses in estate litigation.** If any personal representative or person nominated as personal representative[~~, or an heir or beneficiary if a personal representative or person nominated as a personal representative refuses to act,~~] defends or prosecutes any proceeding [~~regarding the validity of a will~~] in good faith, whether successful or not, [~~that person~~] the personal representative or nominee shall be entitled to receive from the estate necessary [~~reasonable costs,~~] expenses[~~,~~] and disbursements, including reasonable attorneys' fees incurred.[~~, regardless of whether counsel has been retained on a contingency fee basis.~~]"

SECTION 7. Section 560:3-801, Hawaii Revised Statutes, is amended by amending subsection (f) to read as follows:

"(f) The trustee or successor trustee of any trust created by the decedent may publish a notice to creditors once a week for [~~three~~] two successive weeks in a newspaper of general circulation in the judicial circuit in which either:

(1) The decedent was domiciled; or

(2) An application or petition for appointment of personal representative is filed announcing the trustee's name and address, and notifying creditors of the decedent to present their claims to the trustee within four months after the date of the first publication of the notice or be forever barred.

The notice may be combined with the published notice of the pendency of any probate or appointment proceedings."

SECTION 8. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 9. This Act shall take effect upon its approval.

Uniform Probate Code excerpts, attached for reference:

General Comment regarding Article III, at 325-27;
("Flexible System of Administration of Decedents' Estates")

Section **3-102** and Comment, at 328-330;
("will may be probated without appointment of a personal representative")

Section **3-103** and Comment, at 330;

Section **3-107** and Comment, at 333-334;
("each proceeding . . . is independent of any other proceeding involving the same estate" but "proceedings for probate of wills or adjudications of no will may be combined with proceedings for appointment of personal representatives"); (persons interested in an estate may use combinations of formal and informal proceedings).

Section **3-108** and Comment, at 334-336;

Section **3-303** and Comment, at 347-49;
("Except where probate or its equivalent has occurred previously in another state, informal probate is available only where an original will exists and is available to be filed.")

Section **3-720** and Comment, at 415.

Source: "Final Act with Comments: Uniform Probate Code" (UPC_Final Act_2023aug31.pdf) from the National Conference of Commissioners on Uniform State Laws (www.uniformlaws.org).

UNIFORM PROBATE CODE (1969)

(Last Amended or Revised in 2019)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

WITH COMMENTS

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August 31, 2023

ARTICLE III

PROBATE OF WILLS AND ADMINISTRATION

The following free-standing Act is associated with Article III:

Revised Uniform Estate Tax Apportionment Act

Article III, Part 9A has also been adopted as the free-standing Revised Uniform Estate Tax Apportionment Act (2003).

GENERAL COMMENT

The provisions of this article describe the Flexible System of Administration of Decedents' Estates. Designed to be applicable to both intestate and testate estates and to provide persons interested in decedents' estates with as little or as much by way of procedural and adjudicative safeguards as may be suitable under varying circumstances, this system is the heart of the Uniform Probate Code.

The organization and detail of the system here described may be expressed in varying ways and some states may see fit to reframe parts of this article to better accommodate local institutions. Variations in language from state to state can be tolerated without loss of the essential purposes of procedural uniformity and flexibility, *if* the following essential characteristics are carefully protected in the redrafting process:

(1) Post-mortem probate of a will must occur to make a will effective and appointment of a personal representative by a public official after the decedent's death is required in order to create the duties and powers attending the office of personal representative. Neither are compelled, however, but are left to be obtained by persons having an interest in the consequence of probate or appointment. Estates descend at death to successors identified by any probated will, or to heirs if no will is probated, subject to rights which may be implemented through administration.

(2) Two methods of securing probate of wills which include a non-adjudicative determination (informal probate) on the one hand, and a judicial determination after notice to all interested persons (formal probate) on the other, are provided.

(3) Two methods of securing appointment of a personal representative which include appointment without notice and without final adjudication of matters relevant to priority for appointment (informal appointment), on the one hand, and appointment by judicial order after notice to interested persons (formal appointment) on the other, are provided.

(4) A five day waiting period from death preventing informal probate or informal appointment of any but a special administrator is required.

(5) Probate of a will by informal or formal proceedings or an adjudication of intestacy may occur without any attendant requirement of appointment of a personal representative.

(6) One judicial, in rem, proceeding encompassing formal probate of any wills (or a determination after notice that the decedent left no will), appointment of a personal representative and complete settlement of an estate under continuing supervision of the court (supervised administration) is provided for testators and persons interested in a decedent's estate, whether testate or intestate, who desire to use it.

(7) Unless supervised administration is sought and ordered, persons interested in estates (including personal representatives, whether appointed informally or after notice) may use an "in and out" relationship to the court so that any question or assumption relating to the estate, including the status of an estate as testate or intestate, matters relating to one or more claims, disputed titles, accounts of personal representatives, and distribution, may be resolved or established by adjudication after notice without necessarily subjecting the estate to the necessity of judicial orders in regard to other or further questions or assumptions.

(8) The status of a decedent in regard to whether he left a valid will or died intestate must be resolved by adjudication after notice in proceedings commenced within three years after his death. If not so resolved, any will probated informally becomes final, and if there is no such probate, the status of the decedent as intestate is finally determined, by a statute of limitations which bars probate and appointment unless requested within three years after death.

(9) Personal representatives appointed informally or after notice, and whether supervised or not, have statutory powers enabling them to collect, protect, sell, distribute and otherwise handle all steps in administration without further order of the court, except that supervised personal representatives may be subjected to special restrictions on power as endorsed on their letters.

(10) Purchasers from personal representatives and from distributees of personal representatives are protected so that adjudications regarding the testacy status of a decedent or any other question going to the propriety of a sale are not required in order to protect purchasers.

(11) Provisions protecting a personal representative who distributes without adjudication are included to make nonadjudicated settlements feasible.

(12) Statutes of limitation bar creditors of the decedent who fail to present claims within four months after legal advertising of the administration and unsecured claims not previously

barred by non-claim statutes are barred after three years from the decedent's death.

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.

PART 1. GENERAL PROVISIONS

SECTION 3-102. NECESSITY OF ORDER OF PROBATE FOR WILL. Except as provided in Section 3-1201, to be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of informal probate by the Registrar, or an adjudication of probate by the court.

Comment

The basic idea of this section follows Section 85 of the Model Probate Code (1946). The exception referring to Section 3-1201 relates to affidavit procedures which are authorized for collection of estates worth less than $5,000.

Section 3-107 and various sections in Parts 3 and 4 of this article make it clear that a will may be probated without appointment of a personal representative, including any nominated by the will.

The requirement of probate stated here and the limitations on probate provided in Section 3-108 mean that questions as to testacy may be eliminated simply by the running of time. Under these sections, an informally probated will cannot be questioned after the later of three years from the decedent's death or one year from the probate whether or not an executor was appointed, or, if an executor was appointed, without regard to whether the estate has been distributed. If the decedent is believed to have died without a will, the running of three years from death bars probate of a late-discovered will and so makes the assumption of intestacy conclusive.

The exceptions to the section (other than the exception relevant to small estates) are not intended to accommodate cases of late-discovered wills. Rather, they are designed to make the probate requirement inapplicable where circumstances led survivors of a decedent to believe that there was no point to probating a will of which they may have had knowledge. If any will was probated within three years of death, or if letters of administration were issued in this period, the exceptions to the section are inapplicable. If there has been no proceeding in probate, persons seeking to establish title by an unprobated will must show, *with reference to the estate they claim,* either that it has been possessed by those to whom it was devised or that it has been unknown to the decedent's heirs or devisees and not possessed by any.

It is to be noted, also, that devisees who are able to claim under one of the exceptions to this section may not obtain probate of the will or administration of the estate to assist them in their efforts to obtain the estate in question. The exceptions are to a rule which bars admission of a will into evidence, rather than to the section barring late probate and late appointment of personal representatives. Still, the exceptions should serve to prevent two "hard" cases which can be imagined readily. In one, a surviving spouse fails to seek probate of a will giving her the entire estate of the decedent because she is informed or believes that all of her husband's property was held by them jointly, with right of survivorship. Later, it is discovered that she was mistaken as to the nature of her husband's title. The other case involves a devisee who sees no point to securing probate of a will in his favor because he is unaware of any estate. Subsequently, valuable rights of the decedent are discovered.

In 1993, a technical amendment removed a two-pronged exception formerly occupying about 8 lines of text in the official text. The removed language permitted unprobated wills to be admitted in evidence in two limited categories of cases in which failure to probate a will within three years of the testator's death were deemed to be justified. The 1993 technical amendment to Section 3-108 so limits the three year time bar on probate and appointment proceedings as to

make the Section 3-102 exception unnecessary.

SECTION 3-103. NECESSITY OF APPOINTMENT FOR ADMINISTRATION. Except as otherwise provided in [Article] IV, to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the court or Registrar, qualify and be issued letters. Administration of an estate is commenced by the issuance of letters.

Comment

This section makes it clear that appointment by a public official is required before one can acquire the status of personal representative. "Qualification" is dealt with in Section 3-601. "Letters" are the subject of Section 1-305. Section 3-701 is also related, since it deals with the time of accrual of duties and powers of personal representatives.

See Section 3-108 for the time limit on requests for appointment of personal representatives.

In Article IV, Sections 4-204 and 4-205 permit a personal representative from another state to obtain the powers of one appointed locally by filing evidence of his authority with a local court.

SECTION 3-107. SCOPE OF PROCEEDINGS; PROCEEDINGS INDEPENDENT; EXCEPTION. Unless supervised administration as described in [Part] 5 is involved,

(1) each proceeding before the court or Registrar is independent of any other proceeding involving the same estate;

(2) petitions for formal orders of the court may combine various requests for relief in a single proceeding if the orders sought may be finally granted without delay. Except as required for proceedings which are particularly described by other sections of this [article], no petition is defective because it fails to embrace all matters which might then be the subject of a final order;

(3) proceedings for probate of wills or adjudications of no will may be combined with proceedings for appointment of personal representatives; and

(4) a proceeding for appointment of a personal representative is concluded by an order making or declining the appointment.

Comment

This section and others in Article III describe a system of administration of decedents' estates which gives interested persons control of whether matters relating to estates will become occasions for judicial orders. Sections 3-501 through 3-505 describe supervised administration, a judicial proceeding which is continuous throughout administration. It corresponds with the theory of administration of decedents' estates which prevails in many states. See, Section 62, Model Probate Code (1946). If supervised administration is not requested, persons interested in an estate may use combinations of the formal proceedings (order by judge after notice to persons concerned with the relief sought), informal proceedings (request for the limited response that nonjudicial personnel of the probate court are authorized to make in response to verified application) and filings provided in the remaining Parts of Article III to secure authority and protection needed to administer the estate. Nothing except self-interest will compel resort to the judge. When resort to the judge is necessary or desirable to resolve a dispute or to gain protection, the scope of the proceeding if not otherwise prescribed by the Code is framed by the petition. The securing of necessary jurisdiction over interested persons in a formal proceeding is facilitated by Sections 3-106 and 3-602. Section 3-201 locates venue for all proceedings at the place where the first proceeding occurred.

SECTION 3-108. PROBATE, TESTACY AND APPOINTMENT PROCEEDINGS; ULTIMATE TIME LIMIT.

(a) No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the decedent's death, except:

(1) if a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred before the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding;

(2) appropriate probate, appointment or testacy proceedings may be maintained in relation to the estate of an absent, disappeared or missing person for whose estate a conservator has been appointed, at any time within three years after the conservator becomes able to establish the death of the protected person;

(3) a proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful, may be commenced within the later of twelve months from the informal probate or three years from the decedent's death;

(4) an informal appointment or a formal testacy or appointment proceeding may be commenced thereafter if no proceedings concerning the succession or estate administration has occurred within the three year period after decedent's death, but the personal representative has no right to possess estate assets as provided in Section 3-709 beyond that necessary to confirm title thereto in the successors to the estate and claims other than expenses of administration may not be presented against the estate; and

(5) a formal testacy proceeding may be commenced at any time after three years from the decedent's death for the purpose of establishing an instrument to direct or control the ownership of property passing or distributable after the decedent's death from one other than the decedent when the property is to be appointed by the terms of the decedent's will or is to pass or

be distributed as a part of the decedent's estate or its transfer is otherwise to be controlled by the terms of the decedent's will.

(b) These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate.

(c) In cases under subsection (a)(1) or (2), the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitations provisions of this [code] which relate to the date of death.

Comment

As originally approved and read with Section 3-102's requirement that wills be probated before being admissible in evidence, this section created a three-year-from death time period within which proceedings concerning a succession (other than a determination of heirs, or will interpretation or construction) must be commenced. Unless certain limited exceptions were met, an estate became conclusively intestate if no formal or informal estate proceeding was commenced within the three year period, and no administration could be opened in order to generate a deed of distribution for purposes of proving a succession.

Several of the original UPC states rejected the three year bar against late-offered wills and the correlated notion that formal proceedings to determine heirs in previously unadministered estates were necessary to generate title muniments locating inherited land in lawful successors. Critics preferred continued availability of the UPC's procedures for appointing personal representatives whose distributive instruments gave protection to purchasers. The 1987 technical amendment to Section 3-108 reduced, but failed to eliminate, instances in which original probate and appointment proceedings were barred by the three year limitation period.

PART 3. INFORMAL PROBATE AND APPOINTMENT PROCEEDINGS; SUCCESSION WITHOUT ADMINISTRATION

Subpart 1. Informal Probate and Appointment Proceedings

SECTION 3-303. INFORMAL PROBATE; PROOF AND FINDINGS REQUIRED.

(a) In an informal proceeding for original probate of a will, the Registrar shall determine whether:

(1) the application is complete;

(2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of the applicant's knowledge and belief;

(3) the applicant appears from the application to be an interested person as defined in Section 1-201(23);

(4) on the basis of the statements in the application, venue is proper;

(5) an original, duly executed and apparently unrevoked will is in the Registrar's possession;

(6) any notice required by Section 3-204 has been given and that the application is not within Section 3-304; and

(7) it appears from the application that the time limit for original probate has not expired.

(b) The application shall be denied if it indicates that a personal representative has been appointed in another [county] of this state or except as provided in subsection (d), if it appears that this or another will of the decedent has been the subject of a previous probate order.

(c) A will which appears to have the required signatures and which contains an attestation clause showing that requirements of execution under Section 2-502, 2-503, or 2-506 have been met shall be probated without further proof. In other cases, the Registrar may assume execution if the will appears to have been properly executed, or the Registrar may accept a sworn statement or affidavit of any person having knowledge of the circumstances of execution, whether or not the person was a witness to the will.

(d) Informal probate of a will which has been previously probated elsewhere may be granted at any time upon written application by any interested person, together with deposit of an authenticated copy of the will and of the statement probating it from the office or court where it was first probated.

(e) A will from a place which does not provide for probate of a will after death and which is not eligible for probate under subsection (a), may be probated in this state upon receipt by the Registrar of a duly authenticated copy of the will and a duly authenticated certificate of its legal

custodian that the copy filed is a true copy and that the will has become operative under the law of the other place.

Comment

The purpose of this section is to permit informal probate of a will which, from a simple attestation clause, appears to have been executed properly. It is not necessary that the will be notarized as is the case with "pre-proved" wills in some states. If a will is "pre-proved" as provided in Article II, it will, of course, "appear" to be well executed and include the recital necessary for easy probate here. If the instrument does not contain a proper recital by attesting witnesses, it may be probated informally on the strength of an affidavit by a person who can say what occurred at the time of execution.

Except where probate or its equivalent has occurred previously in another state, informal probate is available only where an original will exists and is available to be filed. Lost or destroyed wills must be established in formal proceedings. See Section 3-402. Under Section 3-401, pendency of formal testacy proceedings blocks informal probate or appointment proceedings.

PART 7. DUTIES AND POWERS OF PERSONAL REPRESENTATIVE

SECTION 3-720. EXPENSES IN ESTATE LITIGATION. If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, the personal representative or nominee is entitled to receive from the estate necessary expenses and disbursements including reasonable attorneys' fees incurred.

Comment

Litigation prosecuted by a personal representative for the primary purpose of enhancing his prospects for compensation would not be in good faith.

A personal representative is a fiduciary for successors of the estate (Section 3-703). Though the will naming him may not yet be probated, the priority for appointment conferred by Section 3-203 on one named executor in a probated will means that the person named has an interest, as a fiduciary, in seeking the probate of the will. Hence, he is an interested person within the meaning of Sections 3-301 and 3-401. Section 3-912 gives the successors of an estate control over the executor, provided all are competent adults. So, if all persons possibly interested in the probate of a will, including trustees of any trusts created thereby, concur in directing the named executor to refrain from efforts to probate the instrument, he would lose standing to proceed. All of these observations apply with equal force to the case where the named executor of one instrument seeks to contest the probate of another instrument. Thus, the Code changes the idea followed in some jurisdictions that an executor lacks standing to contest other wills which, if valid, would supersede the will naming him, and standing to oppose other contests that may be mounted against the instrument nominating him.