

## THE NEBRASKA PROBATE CODE: ITS BACKGROUND AND DEVELOPMENT

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### INTRODUCTION

Following passage of the Nebraska Probate Code, presented to the 1974 Nebraska Legislature as L.B. 354, and completion of the 1975 legislative session it appears that the Code will become the law in Nebraska. Regardless of personal feelings as to the wisdom or merit of various provisions of the Code, it is the responsibility of the members of the Nebraska Bar to proceed with the application of the Code to furnish the best possible legal service to the client. A significant educational project has been initiated by the Real Estate, Probate and Trust Law Section of the Nebraska Bar Association, the Nebraska Continuing Legal Education Corporation, and the Office of the Court Administrator. The purpose of this article is to discuss this project and the general nature and background of the Nebraska Probate Code.

Nebraska practitioners are fortunate to have a substantial lead time before the effective date of the Code on January 1, 1977. This has allowed the educational preparation that would not otherwise have been possible, including the Creighton Institute on the Nebraska Probate Code. The Real Estate Probate and Trust Law Section, has appointed a committee to prepare a practitioners' manual for use in implementing the Nebraska Probate Code. In addition, the Section will conduct a series of institutes on the Code. It is planned that the first drafts of the practitioners' manual will be completed by the first of December, 1975, and will be edited and ready for publication by May 1, 1976. A series of three-day institutes will be conducted for discussion of the Code and introduction of the manual in August, 1976. The institutes will be held at several locations in the state to provide geographical convenience for all practitioners.

The committee anticipates that the manual will be the most detailed and comprehensive of its kind. The Colorado Bar has been very kind in allowing the committee to utilize their Colorado Estate

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Administration Manual as a basis for the manual. The committee also had the benefit of consultation with the Montana Probate Code Committee. The manual will not only cover, in textual material, all of the various areas of practice included in the Nebraska Probate Code; but will include an exhaustive forms section and a series of systems for practice under the Code. This publication will be in the form of a comprehensive office manual setting forth the steps, check lists, forms and systems for implementation of the Nebraska Probate Code. These procedures can be reconstructed by the individual attorney to permit the best application to his particular practice.

## DERIVATION OF NEBRASKA PROBATE STATUTES

### ORIGINAL STATUTES

There are 332 sections in our present Chapter 30, which cover probate matters. Of these, 219 derive either directly from the original territorial code of the territory of Nebraska or the King Decedent Act of 1907 which abolished dower and curtesy and set forth revised provisions for the division of intestate estates, which remain essentially the same in the present statute. Chapter 30 is not necessarily obsolete but it is very incomplete since it covers very little of the probate process. In the Nebraska Probate Code and the variations of the Uniform Probate Code, procedural matters are covered in detail.

### LATER CODIFICATION AND ADDITIONS

The Statutes relating to decedent's estates were ultimately codified as Chapter 30 of the Nebraska Revised Statutes, and those relating to guardianships were codified as Chapter 38 of the Nebraska Revised Statutes.

Later enacted and codified in Chapter 30 of the Nebraska Revised Statutes are the Uniform Simultaneous Death Act (30-121 *et. seq.*) and an adaption of the Model Disclaimer Act (30-120 *et. seq.*). Other modifications making substantial change have been made relating to inheritance by one unlawfully killing another, procedures for the estates of missing persons, waiver of administration for small estates, short form proceedings two years after death for testate and intestate estates, and various provisions facilitating testamentary trusts and wills pulling over property to living trusts capable of amendment.

#### BACKGROUND OF THE NEBRASKA PROBATE CODE

The legislative history of the Code began with the introduction of the Uniform Probate Code in the 1973 Nebraska legislature as L.B. 354. Subsequently, the bill was referred to a subcommittee of the Bar Association's Judiciary Committee. As time was very short, essentially all that the subcommittee could do was to make the recommendation to the legislature that the bill be tabled and held over for detailed study by the Bar Association. The committee recommended the revision of certain portions. These recommendations are reflected in section 30-2351 on disclaimers; section 30-24, 114 on estate tax apportionment, which retains the present statute; and sections 30-2217 and 30-2218 on the procedure for appeals from county court.

#### STUDIES UNDERTAKEN

The Legislature's Judiciary Committee retained counsel to pursue study of the Code in the summer of 1973, which resulted in a published volume called, *Working Papers and Preliminary Interim Study and Report*. This study is an excellent source of background material on the present Nebraska law analyzing Nebraska cases and statutes which apply to various sections of the Nebraska Probate Code. The study influenced amendments and changes in the Code when it was submitted to the 1974 legislature. The material in the working papers is to a great extent included in the comments to the Code in the 1974 supplement. Major changes in the Nebraska Probate Code from the Uniform Probate Code, were examined by the Bar Association Probate Reform Committee, under the chairmanship of Judge Robert Troyer. The Probate Reform Committee met throughout the summer of 1973 and studied the Code in great depth and detail. The committee submitted a report to the House of Delegates with two hundred fourteen suggested changes, most of which were designed either to conform the Code to existing Nebraska practice or were considered desirable from a political or practice standpoint.

#### LEGISLATIVE ACTION

The 1974 Legislature passed L.B. 354 with an effective date of January 1, 1977. Certain further changes were made on the legislative floor, notably the adoption of a requirement of publication of all probate notices, including the notices following informal probate, for a period of three consecutive weeks.

L.B. 354 is designated at Section 1 as the "Nebraska Probate Code." The Code does the following general things:

- (1) Recodifies to considerable extent present case law and statutory law relating to the preparation and construction of wills and the intestate distribution of estates;
- (2) Readopts certain uniform laws already passed in Nebraska;
- (3) Reorganizes and restates the law in certain areas in logical fashion;
- (4) Introduces certain new concepts and procedures not previously part of Nebraska law.

#### SUBJECT MATTER OF THE CODE

The Code covers not only the probate area, but includes provisions concerning guardianships, powers of attorney, multiparty accounts and trust administration as well. The Code is divided as follows:

- (1) General provisions, definitions and court jurisdiction are contained in sections 30-2201 to 30-2222;
- (2) Intestate succession, exempt property, formalities of wills and rules of construction of wills are covered by sections 30-2301 to 30-2356;
- (3) Probate of wills and administration of estates, including appointment of personal representatives, powers of personal representative, creditors' claims and distribution and closing are covered by sections 30-2401 to 30-24, 218;
- (4) Foreign personal representatives and ancillary administration are covered by sections 30-2502 to 30-2512;
- (5) Guardians and conservators of minors and incapacitated persons are covered by sections 30-2601 to 30-2661;
- (6) Powers of attorney are covered by sections 30-2262 and 30-2663;
- (7) Multiparty accounts and nonprobate transfers are covered by sections 30-2701 to 30-2713;
- (8) Trust administration is covered by sections 30-2801 to 30-2818.

#### RELATED RECENT LEGISLATION

There are also some related bills which have been passed that are significant.

The 1974 Legislature passed L.B. 755 making certain changes in the administration of estates during the period until the effective date of L.B. 354 on January 1, 1977, as follows:

- (1) Amends the present section 30-103 to provide for distribution of small estates without probate if the inven-

tory shows a value not exceeding \$10,000 which is raised from the previous amount of \$3,000;

(2) Amends section 30-217 to provide that the county court shall "forthwith" after the filing of the will and petition for probate give notice of probate hearing;

(3) Amends section 30-331 to provide that notice for the appointment of an administrator be given by the county court "forthwith" after filing of the petition for the same;

(4) Amends section 30-341 to raise the value of property which may be transferred to the surviving spouse or other distributees of an estate upon affidavit from \$3,000 to \$10,000;

(5) Amends section 30-401 to reduce the time limited for filing inventory from three months after appointment of the executor or administrator to two months;

(6) Amends section 30-603 to shorten the time limit for the presentation of claims from not more than 18 months and not less than 3 months to not more than 6 months and not less than 60 days;

(7) Amends section 30-604 to limit the entire time to which the court may extend time for creditors to present claims from two years to one year;

(8) Amends section 30-1413 to shorten the time at which executor or administrator may be cited to render account from six months to four months after appointment, and shortens the time at which an executor or administrator failing to render an account shall be cited to account from one year to nine months, except where estate tax processing prevents such accounting.

L.B. 912 provides for "trustee accounts" with banks and building and loan associations as to savings accounts or shares. The depositor may be a self-declared trustee with the sole right of withdrawal and with proceeds passing to the beneficiary upon death of the depositor. While this provision is incorporated in Chapter 8 of the Nebraska Statutes, its provisions are similar to those of section 30-2711 of the Nebraska Probate Code.

The technical amendments necessary to harmonize the Nebraska Probate Code with other sections of the Nebraska Revised Statutes, and certain other technical amendments to L.B. 354 are incorporated in L.B. 481 passed by the 1975 Legislature and also effective on January 1, 1977.

L.B. 500 passed by the 1975 Legislature amends section 30-2446 of the Nebraska Probate Code to provide that a bond is required of a personal representative unless waived by the will or all the heirs or devisees. The original section essentially required bond only when directed by the will or requested by an interested party.

The Nebraska Probate Code as passed by the 1974 Legislature is incorporated in the 1974 Cumulative Supplement to the Nebraska Revised Statutes including the comments of the Commissioners on Uniform Laws to the Uniform Probate Code, and certain portions of the comments in the "working papers" issued by the Judiciary Committee of the Nebraska Legislature.

#### CHANGES MADE BY THE NEBRASKA PROBATE CODE FROM THE UNIFORM PROBATE CODE

The Nebraska Probate Code does vary somewhat from the Uniform Probate Code.

##### NOTICE PROVISIONS

Following informal probate or appointment, notice of the probate pursuant to section 30-2414 or the appointment pursuant to section 30-2420 must be given by newspaper publication for three weeks within 30 days thereof.

Notice of any hearing, unless other specific notice requirements are provided, must be given by publication for three consecutive weeks with the last publication at least 10 days before the hearing and by mailing a copy of the notice to each interested person at least 14 days before the hearing according to section 30-2220.

The court may require notice before distribution of assets and satisfaction of family allowances according to section 30-2325.

##### WILLS

Requirement of dating is added to holographic wills under section 30-2328 and a requirement of dating is added to the "laundry list" provisions under section 30-2338.

##### ESTATE ADMINISTRATION

One of the major changes made in Nebraska concerns the Statute of Limitations. The Uniform Probate Code is premised on the assumption that if no formal proceedings are undertaken for the admission of a will, after a lapse of time, the entire situation becomes quieted. Under the Nebraska version, section 30-2408, which is essentially an adaptation of a variation incorporated in the Arizona code, a will may still be formally admitted to probate after three years from informal probate for the purpose of proving it as the document of title. Under the Uniform Probate Code the three-year period bars probate and perfects the informally probated will as a title document.

In the estate administration process in dealing with out-of-state personal representatives, the Nebraska Probate Code requires that the provisions facilitating movement from state to state by the personal representatives are effective only if there is reciprocal legislation in the state from which the personal representatives come. This is an important variation which should be noted when the situation arises. The time for filing claims under the Nebraska Code is two months, pursuant to section 30-2485, rather than the four months of the Uniform Probate Code. There are more restrictive provisions on inventory and distribution in the Nebraska Code and there is more court filing required than under the Uniform Code. In the trust area, registration of living trusts is discretionary rather than mandatory under section 30-2801.

#### SIGNIFICANT AREAS OF DEPARTURE IN THE NEBRASKA PROBATE CODE FROM PRIOR LAW AND PROCEDURE

The Code departs greatly from the existing Nebraska practice. The intestate inheritance is significantly revised in the Code. Requirements for survival by a five-day period after death are incorporated both as to the testate and intestate estates; which is essentially a codification of the clause that is very commonly drawn in wills. The survival requirements apply unless the will states to the contrary. Holographic wills are added to Nebraska law pursuant to section 30-2328.

The so-called "laundry list" provisions are included, whereby a list of personal effects for distribution may be referred to by will as a document of independent significance, even though it may be changed, altered and revised after the will has been executed under section 30-2338.

The Code also includes self-proving will provisions. Section 30-2329 provides a form of attestation which eliminates proof for admission to probate in formal proceedings and establishes a prima facie case in contested proceedings.

Probate procedures include the addition of informal appointment of the personal representative and common-form probate under section 30-2414.

It is interesting to note that supervised administration is a peculiarly American institution, and in the English courts unsupervised administration is the norm. Perhaps supervised administration in America grew coincident with the populist philosophy in

the early states that there be no requirements for admission to the bar. It may have been thought that supervision of the uneducated lawyers by the local probate Judge was a highly desirable thing at that time. The Code proceeds upon the assumption that a bar subject to modern licensing and educational requirements should have a latitude of choice in probate administration which includes various alternatives free from formal proceedings and from court supervision. The Code thus adopts alternate modes of estate administration, probate of wills and appointment of personal representatives which allow highly flexible proceedings tailored to the assets of the estate and the personalities of the interested parties.

A significant new procedure in the Code, section 30-2413, allows an interested party to file a demand for notice of everything the personal representative does. After the demand is filed, no order related to the demand may be entered or any related filing in the estate acted upon, without notice to the person filing the demand or his attorney.

Another important remedy is that if the estate administration is initiated in informal proceedings, an interested party can always convert the administration into formal proceedings by filing an application with the court. The attorney representing an adverse heir is not committed to informal or unsupervised proceedings.

The procedure for will contests and creditors' claims is set forth in great detail. Particularly, the handling of a disputed creditor's claim is converted into a more customary form of litigation so that the creditor whose claim has been disallowed must initiate what amounts to litigation with the personal representative. He may do this in any court with subject matter jurisdiction pursuant to section 30-2486. In will contests, the procedures concerning initiating a will contest are set out in Article 24, Part 4. The personal representative's powers are significantly broadened, particularly in the area of real estate under section 30-2486.

The Code also introduces a novel procedure for partition at the end of an estate under section 30-24,109. If the real estate goes in fractions to the various heirs or legatees, partition may now be undertaken by a petition to the probate court to require the personal representative to sell the land and distribute the proceeds. The procedures for estate closing are more varied; including both formal and informal procedures for estate closing, depending on whichever procedure is suitable under the circumstances.

In trust administration, there are some interesting things that are now possible. It might be observed that the frequency of use



of revocable trusts is perhaps directly related to the percentage of probate fees. In Colorado where the percentage had been historically four per cent, revocable trusts are widely used. In Nebraska, where a 2½ per cent fee applies, fewer revocable trusts are used. The registration procedure of the Code endeavors to put administration of revocable and testamentary trusts on the same footing. Under the Code neither living trusts nor testamentary trusts are required to be supervised. Once the trust is in the registration process, the county court is the first line of attack when problems arise in the trust. Under our present procedure, if there is an interpretation problem in a trust, it is necessary to bring a separate action in district court joining all the beneficiaries and interested parties as defendants. Under the Code, a summary notice procedure allows the parties to be brought before the county court pursuant to section 30-2811. The county court can render an interpretation of the trust, and the trustee then returns to the administration of the trust.

The Nebraska version of the Code, requires published notice. The Uniform Probate Code is disjunctive and allows for either mailed notice or published notice unless the court issues an order to the contrary under section 30-2220. Obviously in a situation such as the interpretation of trust, involving only known parties, a notice published for three weeks followed by a ten-day waiting period is not desirable. The court can tailor various probate notices under section 30-2220(b) and notices in guardianship and conservatorship proceedings to allow a hearing to proceed on mailed notice without publication in order to expedite such hearings.

Under the guardianship and conservatorship section some new concepts are introduced. Foremost, the guardianship of the person is separated from the conservatorship of the property. This is essentially what is done in wills which include family trusts, setting up the trust to manage the property for the family and then appointing a statutory guardian to have the care of the persons of the children.

There are other concepts which are novel, such as the ability to proceed in county court with a single request for a single order relating to the management of a ward's property without having to undertake a full conservatorship. The powers of administration for guardians and conservators are substantially broadened and there is more discretion allowed, while at the same time there are more definite remedies for the abuse of that discretion. The durable power of attorney concept is added, which allows a power of

attorney to be effective upon incompetence or to continue to be effective after incompetence.

TRANSITION TO THE NEBRASKA PROBATE CODE  
AND ESTATE PLANNING DURING THE  
TRANSITIONAL PERIOD

In terms of estate planning during the transitional period, there are some things to be conscious of in preparing for the advent of the Code. Realize that the Code preserves the validity of all acts done before its effective date and the integrity of all rights established in the probate process before the effective date under section 30-2901. The probates which are in process at the time of the effective date may be completed upon order of the court either under the Probate Code procedures or by complying with previous procedures. During the transitional period, there are some things that can be done simply because the Nebraska Probate Code is on the books and available in the 1974 supplement. Wills can be drawn with the self-proving provision, which will be available after the effective date of the Code. In addition, the "laundry list" may be used. If the decedent dies before the effective date of the Code the "laundry list" will not be effective. A backup provision should be used to protect against such possibility. If the decedent dies after the effective date of the Code the "laundry list" would be effective.

Durable powers of attorney can be drawn to be operative only after the effective date of the Code. Wills that are drawn now should take advantage of the ability to prescribe either supervised or unsupervised administration and the ability of the will to relieve the personal representative from bond. There is a provision under section 30-2447 whereby the will may even prescribe the amount of bond to be filed in informal proceedings. The provisions of the Nebraska Probate Code can be referred to as facts of independent significance. In other words, a will can be drawn that states that the personal representative will have all the powers that are set forth under the appropriate sections of the Nebraska Probate Code. Such a procedure would eliminate about three-quarters of the bulk in the average will. The definitions that are used in the Code can be utilized; such as "issue," "representation," etc.

As the effective date of the Code approaches, administration of an estate may be deliberately prolonged in order to allow various provisions of the Code to be utilized later in the tax proceedings in the estate or in its administration and distribution. For example:

(1) The disclaimer and renunciation provisions of the Code are somewhat broadened from the present act and may allow for helpful estate tax saving adjustments if the effective date occurs earlier than nine months following the date of death (the ability under the Code to disclaim trustee powers selectively may be particularly helpful after its effective date);

(2) The possibility may exist of rehabilitating defective marital deduction clauses which run afoul of Revenue Procedure 64-19 by utilizing the provisions of the Code establishing a preference for distributions in kind rather than in cash pursuant to section 30-24,104;

(3) The provisions for spouse's election and the augmented gross estate for estates in administration at the effective date of the Code may provide ways of increasing the marital deduction in some instances.

The articles presented in this issue of the *Creighton Law Review* will be helpful to Nebraska practitioners in acquiring a preliminary understanding of the Code and in preparing for the more detailed institutes on the Code which will be held in 1976.