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MCLE SELF-STUDY ARTICLE

THE RISE OF THE REVOCABLE TRUST IN CALIFORNIA

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"NOTHING SAYS FUN LIKE PROBATE"
— Probate Attorneys of San Diego

I. SYNOPSIS

Fifty years ago, in 1973, when "Tie a Yellow Ribbon 'Round the Old Oak Tree" topped Billboard's annual list of the top 100 songs,[01] the California State Bar ("State Bar") officially refused to recommend replacing the California Probate Code with the Uniform Probate Code ("UPC").[02] Instead of recommending the adoption of the UPC, the State Bar proposed the adoption of statutes purportedly aimed at streamlining the California probate administration process. The proposed statutes became the Independent Administration of Estates Act ("IAEA"), now set forth in Probate Code sections 10400 through 10591.[03]

In the half-century since 1973, most California attorneys have gradually but fully moved away from wills and the California probate process and have embraced the revocable trust as the dominant lawyer-directed estate planning method for California residents. Lawyers and clients have adopted the revocable trust to avoid the perceived delay, publicity, and expense of California's formal probate system. As noted in the *California Trusts and Estates Quarterly* ("*Quarterly*") in 2007, "The problem is probate. Probate takes so long and costs so much that competent estate planning attorneys believe they must recommend trusts to protect their clients' families from unnecessary delay and expense."[04]

This article traces the history of California's continued refusal to adopt the UPC and other less-formal probate administration procedures, and it explores the parallel expansion in the use of the revocable trust. It focuses on four major attempts to eliminate or reform California's formal probate system, each of which was rejected while, at the same time, the use of revocable trusts skyrocketed.

The authors' discovery of the history of California's repeated rejection of efforts to reform probate administration has led to spirited discussions regarding the benefits and burdens of the revocable trust as opposed to formal probate and/or elective probate. Nevertheless, the authors have attempted in this article to present the history of attempts to reform California's probate system in a relatively dispassionate manner, with a few editorial comments. In addition, questions posed at the end of the article may suggest a need for further evaluation.

The article concerns itself with the concept of the revocable trust as a tool for avoidance of probate administration. The article does not address irrevocable trusts of any kind.

The article quotes extensively from previous articles in the *Quarterly* because the history is best illuminated through the eyes of the people who observed the developments as they happened. For the same reason, this article refers extensively to the Minutes of various meetings held by the Executive Committee of the Probate and Trust Section of the State Bar ("EXCOMM") and by EXCOMM's successor, the Trusts and Estates Executive Committee of the State Bar, which is now the Trusts and Estates Executive Committee of the California Lawyers Association ("TEXCOM").

Given that the growth of the use of the revocable trust has been driven by the public's desire to avoid probate, it is illuminating that EXCOMM (which featured the word "probate" in its formal title) changed its name to TEXCOM in 2002, at least in part because, "[the word] 'probate' connotes to many members of the public a negative image of our profession."[05]

II. THE REVOCABLE TRUST BY THE NUMBERS

The first California case to use the phrase "revocable trust" was *In re Estate of Willey*, published in 1900.[06] In *Willey*, the court validated a transfer to the trustee of a revocable trust that featured the elements of the modern revocable trust. Mr. Willey conveyed real property to a trustee, the property was held for the benefit of Mr. Willey during his lifetime, Mr. Willey retained the right to revoke or modify the trust, and, at Mr. Willey's death, the residue was to be distributed to beneficiaries named in the trust.[07]

In the years immediately following *Willey*, the number of reported cases using the phrase "revocable trust" was relatively small and consistent. After revocable trusts became popular in the 1970s and 1980s, the number of reported cases employing "revocable trust" exploded, as revealed in the following chart:

Reported cases employing "revocable trust:"[08]

January 1, 1900 - December 31, 1925	(25 years)	1 case
January 1, 1926 - December 31, 1945	(19 years)	6 cases
January 1, 1946 - December 31, 1960	(15 years)	9 cases
January 1, 1961 - December 31, 1971	(10 years)	11 cases
January 1, 1972 - December 31, 2000	(18 years)	63 cases
January 1, 2001 - December 31, 2010	(9 years)	856 cases
January 1, 2011 - December 31, 2021	(10 years)	1,642 cases

While this chart does not precisely trace the increase in the use of revocable trusts in California, it illustrates the general growth in the use of revocable trusts, not to mention the growth in litigation regarding revocable trusts.

III. EVOLUTION OF CALIFORNIA'S PROBATE LAW

A. Probate Law in England in a Nutshell

American probate law is rooted in the laws of England.[09] In order to understand how English law developed, we go first to the period before the Norman Conquest in 1066. At that time, there were secular courts, but no ecclesiastical courts, and "[t]he clergy took part in the proceedings of the secular courts."[10] When William the Conqueror conquered England, he created separate secular courts and ecclesiastical courts, with the result that the ecclesiastical courts "acquired jurisdiction of succession to personalty including testamentary succession, while the secular courts retained jurisdiction of succession to freehold interests in realty, including jurisdiction over wills."[11]

The Conqueror's impact on English society ultimately resulted in the imposition of feudalism and the doctrine of tenure under which "no subject in the kingdom could own land absolutely."[12] "Thus, feudalism destroyed the power of everyone but the king to will away the complete legal title to lands in England."[13] The church, though, retained jurisdiction over a decedent's goods, "which were of far less public importance than land"[14] but were of importance to the church.

The adoption of the Statute of Wills in 1540 made most lands devisable, and a later act of Charles II made "practically all lands devisable."[15]

At this point, regardless of the type of property involved, a decedent's will had to be proved in the Ecclesiastical Court, "for the executor's proof of his title and the administrator's title itself could only be given by the Ecclesiastical Court."[16] However, the jurisdiction of the Ecclesiastical Court was limited. Administrators, executors, and creditors were frequently required to resort to "the Common Law Courts to recover the claims or property of the deceased."[17] Then, even though two courts might have already been involved, parties often had to resort to still a third court—Chancery—to get their claims resolved. "Since neither the Ecclesiastical Courts nor the Common Law Courts were well adapted to settle the numerous conflicting rights of creditors, legatees, and next of kin, the most effectual and usual method of asserting a claim for or against the estate of a deceased person was to get the estate administered in Chancery."[18]

After reciting a similar history, one author concluded that extensive court supervision of the decedents' estates was adopted because of a rivalry among the courts, not because the courts wanted to protect people, and not because court supervision of decedents' estates is logically necessary. "[T]he requirement of court supervision arose not because the English and common law and chancery courts wished to protect creditors and beneficiaries, but because only thus could the law courts eliminate ecclesiastical interference with testamentary causes and the distribution of intestate chattels."[19]

In his 1853 novel *Bleak House*, Charles Dickens observed that the English probate system led to:

> [S]uch an infernal country-dance of costs and fees and nonsense and corruption, as was never dreamed of in the wildest visions of a Witch's Sabbath. Equity sends questions to Law, Law sends questions back to Equity. Law finds it can't do this, Equity finds it can't do that; neither can so much as say it can't do anything without this solicitor instructing and this counsel appearing for A, and that solicitor instructing and that counsel appearing

> for B, and so on through the whole alphabet, like the history of the Apple-Pie.[20]

This was the system that England bequeathed to the new American Republic.[21] A Dickensian system of extensive and expensive court supervision over the administration of a decedent's estate that is, from at least one point of view, not a logical or a legal necessity, but "largely an historical accident."[22]

B. California Retains Its Historic Probate Law

When California became a state, its law was an uncertain mix of Mexican and common law.[23] In 1850, the fledgling California legislature established a statutory probate system by copying the Texas code.[24] It modified this code with the Field Code in 1872.[25] Thereafter, California's legislature made "piecemeal" changes to its Probate Code, "often restricted to a specific section related to a topic of current public interest, such as alienage, adoption, or succession by children born out of wedlock."[26]

In 1931, the Probate Code was revised, but the California Code Commission charged with the revision, "had no authority to do more than clarify and consolidate the code, or conform it to interpretations by the supreme court; hence no substantial revision occurred."[27] In 1979, UC College of Law, San Francisco Professor Russell Niles observed that "unfortunately" the California Probate Code had not been revised significantly since 1872 and concluded: "In its phraseology, in its excessive detail, even in many of its premises, [the California Probate Code] is a nineteenth-century code."[28] That is, California's Probate Code in 1979 resembled the codes that so incensed Mr. Dickens when he wrote *Bleak House* in the 1850s, as much of it still does.

To this day, California's system of probate administration remains mired in historical concepts of court supervision with roots in the laws of England and 1850's Texas, even though by the twentieth century the requirement of court-supervised administration had been eliminated in both England and Texas.[29]

IV. NORMAN DACEY PRODS THE REVOCABLE TRUST REVOLUTION

Tides of change began to flow through the world of American probate administration in 1966 when Norman Dacey, a mutual fund salesman from New York, published *How to Avoid Probate!*.[30] Dacey's book explained the lawyer-caused evils of court-supervised probate administration and provided readers with forms for revocable trusts which they could employ to avoid the costs and delays of probate. *How to Avoid Probate!* was a best seller. It outsold Masters and Johnson's *Human Sexual Response*, which was generating its own share of notoriety at the time.[31] In a later edition of his book, Dacey commented:

> I don't claim, of course, that I made probate more interesting than sex – it was just that millions of American families had had painful contact with the probate system at one time or another. They knew that they had been 'taken,' but they did not understand the mechanics of how it had been accomplished. All they knew was that family money, which should have come to them, had gone instead to strangers. *How to Avoid Probate*! had told them exactly how it had been done. It explained how greedy lawyers and politicians had preyed upon rich and poor alike for generations.[32]

Dacey was not alone. The October 1966 edition of *The Reader's Digest* included an article entitled *The Mess In Our Probate Courts*, subtitled, "Inflated fees, paralyzing delays, patronage – these are only some of the many ugly abuses fostered by our antiquated and inefficient probate system."[33] The success of *How to Avoid Probate!* proved that millions of Americans were dissatisfied with the complexity and expense of the court supervised probate system and that they were willing to do something about it.

V. REPEATED REJECTION OF EFFORTS TO REFORM PROBATE ADMINISTRATION IN CALIFORNIA

A. The Uniform Probate Code

In 1966, the same year that Dacey published *How to Avoid Probate!* and Bloom published his article in *The Reader's Digest*, the Commissioners on Uniform State Laws published the UPC.[34] The idea behind the UPC was that people interested in a decedent's estate could manage the inheritance of property on their own without court intervention, and that the court should be used only to solve problems those people might have.[35] The authors of the UPC asserted that this concept of administering a decedent's estate free of court intervention was not new. By 1966, they argued, several jurisdictions had studied or adopted unsupervised administration and, thus, the "underlying concept of independent administration embodied in the [UPC] was neither new nor complicated."[36]

UPC Article III, "'the heart' of the UPC,"[37] "is the procedural package which meets the Code's goal of bringing reason and flexibility into the probate process."[38] It provides a flexible system under which the state offers those interested in a decedent's estate the freedom to determine how much probate court intervention they desire. They can seek, "as much by way of procedural and adjudicative safeguards as

may be suitable under varying circumstances . . . ."[39] The court's role in probate administration "is wholly passive until some interested person invokes its power to secure resolution of a matter."[40] So, "nothing except self-interest will compel resort to the judge."[41] On the other hand, if those interested in the estate of a decedent need a personal representative to be appointed, they need to apply to the court or to a Registrar for appointment.[42] Application for an informal probate is made to a Registrar, a nonjudicial officer.[43] Application for a formal probate is made directly to the court.[44] The "underlying philosophy" of the UPC is that, "the law should not compel probate or appointment or otherwise attempt to prevent persons from taking chances with their own property."[45]

The drafters of the UPC were well-aware of "lawyer haters like Dacey and Bloom,"[46] and drafted the UPC in an effort to *save* probate from the coming tide of probate avoidance. Michigan Law School Professor Richard V. Wellman, a reporter for, and advocate of, the UPC, pointed out that if probate were not made less formal, "probate avoidance will inevitably take over."[47]

This article focuses on California's repeated rejection of the UPC, but it does not suggest that the UPC is the cure for all things probate. Rather, the UPC is the most prominent of the several probate reformation schemes that California has rejected, and California has rejected it more than once.

B. 1969-1979–Strike One–The First Rejection of the Uniform Probate Code and the Adoption of the Independent Administration of Estates Act Instead

1. *California's Rejection of the Uniform Probate Code*

In 1969, the Board of Governors of the California State Bar "appointed an Ad Hoc Committee of probate lawyers to study the UPC and make recommendations to the Board of Governors regarding it."[48] The Ad Hoc Committee recommended rejection of the UPC. It based its recommendation on a perceived need to protect the public. The Committee concluded "that 'informal probate,' as proposed in the [UPC], provides inadequate safeguards of the public interest. It is the Committee's opinion that the Uniform Probate Code offers a more sweeping substitute for our present law than is desirable to serve the public."[49] The Preliminary Report included an appendix with proposed laws designed to make California's court supervised administration more efficient—laws that ultimately became the IAEA.[50]

In 1972, after supporters of the UPC had criticized the Ad Hoc Committee's Preliminary Report as "fragmentary, premature, conclusionary, and inadequate," the State Bar's Committee on Probate and Trust Law, "consisting of the same persons who served on the Ad Hoc Committee, plus several other members" began what was supposed to have been a new review of the UPC for possible adoption in California.[51] In 1973, the new committee issued a report which again criticized the UPC and encouraged the enactment of the IAEA, just as the Ad Hoc Committee had suggested.[52] This second report did not contain a minority position, but the committee apparently was not unanimous. In a contemporaneous article published in the *California State Bar Journal*, one committee member warned that the public was fed up with probate and was seeking alternatives to it and, "If lawyers do not see the inevitability of change and support that which is beneficial, others less qualified will do it for them and their clients."[53]

As perhaps California lawyers do best, the committee members who prevailed, and who wrote the 1973 report, decided that the law of California was too good for the UPC. The report observed (without citation to any authority) that "[t]he California Probate System has enjoyed the reputation of being one of the best and most efficiently operated in the United States."[54] The report noted that California's legislature had already made many changes in the Probate Code.[55] Finally, focusing especially on UPC Article III, which would have reformed probate administration, the 1973 report concluded:

> To repeal a system of laws that reflects the public policy of this State, carefully honed and refined over a great number of years, for an Act which . . . *strips the system of laws of even minimal safeguards for the persons beneficially interested in a decedent's estate* . . . would be a mistake from which it would take California years to recover. . . . In each state the question must be: 'Will the adoption of the Uniform Probate Code constitute an improvement over the existing probate system?' In California, the answer is a firm and confident 'No.'[56] (Emphasis added.)

Although the 1973 report limited itself to California, California lawyers did not limit their hostility to the UPC to their home state. In 1973 and 1974, Nebraska attorneys were engaged in an "emotional" and "protracted" debate surrounding a proposal to adopt the UPC.[57] The Nebraska debate was heated enough that "UPC critics in other states, *particularly California*, gave aid and comfort to the anti-Code Nebraska contingent in the hope that Nebraska might be the place where the Code would suffer its first political defeat, thus weakening its prospects elsewhere."[58] (Emphasis added.) However, the UPC was ultimately adopted in Nebraska in 1974.

2. Formal Administration Was Seen as Necessary to Protect "Persons Beneficially Interested in the Estate"

The 1973 report rested its rejection of the UPC almost entirely on a perceived need to provide the probate court's formal protection to "persons beneficially interested in the estate." Specifically, it identified, "widows and widowers, children and other beneficiaries, creditors and taxing authorities,"[59] as those needing protection. Perhaps looking for a bit of political support, the report also noted that adoption of the UPC would eliminate the need for inheritance tax referees and would reduce the need for the public administrator.[60]

3. California's Adoption of the Independent Administration of Estates Act

Having rejected the UPC, with its openness to the idea that a decedent's estate could be administered without the involvement of the court system, California's committee recommended the adoption of the IAEA in its place.[61] Whatever one might think about the IAEA, it is clear that it was not designed to eliminate the roles of the probate court or the probate attorney. Instead, as a contemporaneous writer noted, "In summary, independent administration under the Act begins and ends as do all other probate administrations in California—under the supervision of the courts."[62]

Rather than provide Californians with the possibility of an attorney and court-free administration, the IAEA added onto an already complicated Probate Code. New Probate Code section 591 had seven subsections, two of which had their own further subsections. The new section and its subsections purported to be exceptions to the general probate rules, but they had their own specifications and qualifications and left "unchanged the court's ability under the general probate code to intervene in many of these same areas on its own motion, even in the absence of controversy among the estate parties."[63] This layering of new rules on top of an already complicated system effectively eliminated the ability of unrepresented parties to take advantage of the IAEA.

The IAEA, too, did not reduce statutory commissions for personal representatives or statutory fees for attorneys. If the IAEA actually made probate administration more streamlined and efficient, one might expect that the law would include a reduction in the statutory commission and fee schedules for those who elected to use the IAEA during the probate process, but it did not. In fact, in 1979, the legislature adopted a new statutory fee schedule that tended to *increase* statutory probate fees. For example, in 1978 the statutory attorney fees for a $100,000 probate and for a $1,000,000 probate were $2,630 and $14,630 respectively. In 1979, the statutory fees for a $100,000 probate and for a $1,000,000 probate were $3,150 and $21,150 respectively. There was no reduction for employing the IAEA.[64]

C. 1974-1980: Responses to the Rejection of the UPC and the Adoption of the Independent Administration of Estates Act in California

1. The UPC Editorial Board Replies to the California Committees

In 1974, the Joint Editorial Board for the Uniform Probate Code responded to California's rejection of the UPC (the "Response").[65] The Response began by pointing out the huge amount of work (nationwide) that had gone into the creation of the UPC and the constructive approach that several states had taken in their analysis and criticism of the UPC.[66] Turning to "The California Scene," the Response noted that no member of California's Ad Hoc Committee was an expert on the UPC and that two Bay Area lawyers who were UPC experts were not invited to be on the Ad Hoc Committee.[67]

The Response argued that "the preparation and publication of the 1973 Report on UPC appears to have been a mere extension of the Ad Hoc Committee's 1971 plan to promote alternative legislation for California and to discourage any further interest in UPC."[68] The Response argued, further, that the 1973 report was not issued as a good faith analysis of the UPC. Instead, it was issued just in time to influence the legislature to adopt the IAEA rather than the UPC. This understanding of the chronology, the Response argued, "explains the otherwise remarkable fact that the [1973] Report makes no mention of the 1971 and January, 1973 enactments in Idaho and Alaska of almost all of the Uniform Probate Code."[69] The Response concluded that "[t]he [1973] Report is not the product of careful, objective analysis which should be the basis of any document which is presented as the view of The State Bar of California."[70]

Taking aim at the 1973 Report's conclusion that the UPC lacked sufficient safeguards for those beneficially interested in a decedent's estate, the Response pointed out that, in California in 1964, "more than 60% of all dollars moving at death in taxable estates of over $10,000 and under $400,000 passed via survivorship rights under joint tenancies."[71] The Response then asked the question that would be repeated many times by California lawyers interested in probate reform over the following decades:

> But what good are the protections which the [1973] Report sees in court supervision of estates if the public succeeds in moving most dollars out of the probate court through easily available,

> wholly unsupervised, private arrangements? How do creditors and natural objects of testamentary bounty fare as against rights of surviving joint tenants? Does the [1973] committee believe that joint tenancy arrangements and other will substitutes should be encouraged, as against succession via will or intestacy? If so, the readers of its Report deserve an explanation, since most lawyers hold a dim view of the general use of joint tenancies and revocable living trusts as alternatives to wills.[72] (Original emphasis.)

This is a fundamental issue. How can California's system requiring court supervision of even simple estates be defended as providing protection to those interested in a decedent's estate when that same system is so cumbersome that it induces widespread probate avoidance using estate planning vehicles that do not provide that protection? Why not just provide Californians with a non-court supervised estate administration so that they can plan their estates with wills (which were favored by lawyers at that time) that would accomplish their objectives without saddling them with formal administration? When so many Californians were opting out of an allegedly protective system, did it not suggest that the argument that "we need the system because it protects Californians" was a red herring?

D. The Academic Community Weighs In

1. The Southern California Law Review

A note published in the Southern California Law Review in 1977, just after the enactment of the IAEA and containing a detailed recitation of the politics and considerations underlying that enactment,[73] argued that the "'independence' provided under [the IAEA] is, at best, highly limited . . . ."[74] It also revealed that legal newspapers "had played a substantial role in shaping the politics of the UPC and the IAEA, and had insisted on including publication requirements in the IAEA that created unnecessary expenses for the majority of estates without providing corresponding benefits."[75]

2. A Law Professor Criticizes the Probate Code but Gives the IAEA the Benefit of the Doubt

UC College of Law, San Francisco Professor Russell Niles reviewed the actions of the 1973 committee with a critical eye. He observed that the pre-1973 Probate Code changes praised by the committee in its Report had been "piecemeal, often restricted to a specific section relating to a topic of current public interest."[76] With some generosity, Professor Niles gave the committee the benefit of the doubt on its failure to recommend adoption of UPC Article III and its informal probate procedure, by observing that the jury was still out on the IAEA, which had been in effect just four years when he was writing in 1979. He observed that the IAEA had "been criticized for not going far enough in allowing independent administration, but until the statute has been given a fair trial, pressing for adoption of Article III of the UPC hardly is realistic."[77]

It seems fair to conclude now, with the benefit of decades of hindsight, that California's enactment of the IAEA did not go far enough in the direction of independent administration to stem the tide of massive avoidance of California's formal probate system through the revocable trust.

3. Norman Dacey Rejects California's Approach and Extols the Benefits of the Revocable Trust

Dacey, himself, took issue with both the UPC and with California's 1973 committee. He argued that the UPC could never succeed because it was a creature of a probate system that needed to be demolished.

> The problem is that the probate apparatus is so utterly corrupt that as a reform vehicle the [Uniform Probate] Code just could not deal with it adequately. Some structures—old, rickety, and dangerous—do not lend themselves to patchwork repair and repainting. Successful redevelopment begins with their demolition. That's what the probate system needs—demolition.[78]

He wrote that the sponsors of the UPC 'report that from the start it has met with determined opposition from those who profit, financially or politically, from the present system.'[79]

He criticized the California Bar's rejection of the UPC as a product of a California Bar that had been "long a vigorous opponent of probate reform . . . ."[80] Dacey told his millions of readers that the revocable trust was "a legal wonder drug which will give you permanent immunity from the [probate] racket."[81] He explained that it was completely private and would never be seen by a probate judge. "It is a boon to those who seek privacy. Unlike a will, its terms are not disclosed to a probate court, and its assets and the identity of the person to receive them are closely guarded secrets."[82] The revocable trust was, he wrote, an efficient document that would not be contested. "The inter vivos trust makes the assets available to the rightful heirs immediately, thus eliminating the unfair pressures which a will contest might impose upon them."[83]

While Dacey and others extolled probate avoidance and the UPC drafters recognized the reality of probate avoidance, California's lawyers and legislators fiddled. The result was that—by the middle of the 1970s—more and more

Californians faced with "a nineteenth-century code"[84] opted for a revocable trust.

E. STRIKE TWO–1980–THE PROBATE REFORMATION OFFERED BY THE UPC IS AGAIN REJECTED

As the 1970s ended, the tide of the revocable trust revolution was flowing in California, but it might have been quieted. In 1980, the legislature directed the Law Revision Commission to study whether California should adopt all or part of the UPC.[85] In response, the Commission recommended some small changes to the Probate Code, but it did not recommend adoption of the informal probate procedures of UPC Article III.[86]

During the Law Revision Commission's consideration of UPC Article III, Professor Wellman, an advocate for the UPC, suggested that—if California was unwilling to eliminate its existing law and simply adopt Article III—then California could adopt Article III and let it exist alongside existing California law. This, he argued, would give Californians the choice of court-supervised administration or court-free administration—let the best system win.[87]

An objection to this proposal was that "[t]he integration of the two bodies of law would be quite complex as a drafting matter."[88] This objection would prove ironic in the coming years, as the California legislature and California attorneys struggled to deal with the complexity inherent in dealing with both the laws of probate administration and the developing laws of trust administration.

F. THE 1980S AND 1990S–THE FULL EMBRACE OF THE REVOCABLE TRUST IN CALIFORNIA BEGINS

1. Using the Evils of Probate to Sell Revocable Trusts

Throughout the 1980s, the number of clients desiring and obtaining living trusts in California exploded. Lawyers who lived through the period will remember burgeoning numbers of advertisements endorsing living trusts in newspapers, not to mention countless seminars conducted by lawyers and some non-lawyers in places ranging from senior centers to churches to country clubs. These seminars presented California's antiquated probate system as a whipping boy, held up as the reason for clients to sign a living trust as soon as possible. Seeking to sell a revocable trust, an attorney might tell an audience at that time: "If a probate of your $100,000 house would cost from $3,000 to $6,000 depending on whether the executor takes a commission, doesn't it make sense to pay me $1,000 now, to draft you a living trust?"[89]

The probate system that citizens had been trained to hate became a sales tool. And it still is.

2. Codification of Statutes Regarding Trusts

By 1990, about seven years after the Law Revision Commission rejected the UPC in part because it wanted to avoid the confusion of "integrating two bodies of law,"[90] the use of trusts had become prevalent enough that the legislature enacted the Trust Law, to be operative July 1, 1991.[91] The codification of statutes beginning to give clarity to the administration of revocable trusts after death was arguably a logical legislative reaction to the plethora of revocable trusts being administered in California. However, the codification also began the formalization of two different systems of dealing with the passage of property—probate administration and trust administration.

In 1994, a few years after the Trust Law was enacted, the legislature passed Asssembly Bill No. 3686 which became Part 1 of Division 11 of the Probate Code, entitled "Rules for Interpretation of Instruments."[92] When it was proposed, Assembly Bill No. 3686 was described as a move toward uniformity of the law for wills and revocable trusts, that is, "AB 3686 would enact express statutory guidelines applying the existing rules for the construction of wills to the construction of trusts."[93]

Ironically, given that the 1973 Committee had rejected the UPC largely on the articulated basis that it did not provide enough protection for persons beneficially interested in a decedent's estate, "[t]he legislation [did] not make trusts subject to the family protection provisions of Part 3 of Division 6 of the Probate Code (probate homesteads and family allowances)."[94]

G. Strike Three–1995-1996–The Frustrations of Living with Two Post-Death Administration Systems, Another Rejection of the UPC, and Rejection of a Proposal for Elective Informal Probate

1. 1994 and 1995: The Frustration of Two Systems; the UPC is Rejected Again

In December 1994, as trusts created in the 1970s and 1980s began to mature, EXCOMM announced that it was studying a way to resolve the logical conflict of living in a state with two completely different systems of passing a decedent's assets to the next generation, each with its own set of governing statutes. The hope was that "[t]he end result would be to have the same rules applicable to the transmission of property at death regardless of whether the decedent's assets pass under a living trust or under a will."[95] Echoing the words used two decades earlier by the

UPC Joint Editorial Board Response,[96] EXCOMM stated the problem as follows:

> But if the sole purpose of the living trust is to act as a will substitute, why should a person have to incur the costs (and live with the inconvenience) of funding and administering a living trust just to avoid probate? Why shouldn't people be able to use a will (a purely ambulatory document) to dispose of their estates but at the same time avoid court supervision by simply electing to do so?[97]

EXCOMM hoped to be able to sponsor a legislative proposal that would: "a. [m]ake the court supervised administration of decedents' estates purely elective, at least in testate estates, and/or b. [i]mpose a requirement that some minimal notice be given to heirs and beneficiaries in living trust administrations."[98]

A year later, "due to the widespread use of revocable living trusts," EXCOMM continued this effort by appointing a committee to study whether the UPC concept of informal probate administration "has a place in California's Probate Code."[99] The new committee began by agreeing with the basic assumption indulged by the 1973 committee (again without citation to authority) that the "California Probate Code is good."[100] The new committee was not charged with recommending adoption of the UPC itself, but was instructed to focus instead on whether it would make sense to make the UPC's informal probate administration elective in California, i.e., essentially the proposal that Professor Wellman had made to the Law Revision Commission in 1980.[101]

A member of the EXCOMM committee interviewed Professor Wellman, who was still interested in bringing California into the UPC fold.[102] Wellman reported that states that had adopted the UPC were satisfied with it. "In his interview, Professor Wellman reported that he knows of no state that adopted informal administration, and then later reversed its decision."[103] At the outset of the EXCOMM committee's work, there seemed to be general consensus among committee members that "[i]nformal administration works quite well in the states surveyed, and has gained nearly universal acceptance by estate counsel and their clients."[104] The committee's study showed "no reports of fraud or abuse," and "[n]o reports of an increase in estate litigation as a result of the informal administration procedures were encountered."[105]

Given these findings, one might expect that some sort of movement toward informal administration would have gained traction in California, or at least in EXCOMM.

The Winter 1995 issue of the *Quarterly* featured an extensive analysis of the proposal to make informal administration elective in California. That is, "an alternative to court supervised probate administration"[106] would be available if chosen by the parties. The analysis was presented in "pro" and "con" fashion.

Those opposed to the proposal emphasized that "[i]n smaller estates unsophisticated beneficiaries need court protection."[107] They argued that statutory fees and commissions were "protections" from overcharges.[108] They argued that the "mandatory creditors claim procedures" should not be eliminated.[109] They argued that there were too many forces arrayed against the proposal ("probate referees; county clerks, probate judges and examiners; creditors; title companies; banks; and bonding companies"), and that consideration of the proposal "will cause AARP and HALT to try to introduce the UPC."[110] They pointed out that "New York and 27 other states have not adopted the UPC."[111] As their ancestors had done in 1973, they relied on the IAEA. "IAEA is very similar, and works well. If anything, just streamline it."[112] Finally, they argued that adoption of the proposal could lead to the demise of court probate departments, and, "[i]f so, probate and trust petitions would have to be heard on the general civil calendar."[113]

Those supporting the proposal emphasized that the public was demanding changes to the system, that the proposal was "elective and flexible," that the proposal would promote efficiency in the courts, and that "over time [the proposal] will decrease the practices of unethical trust mills that sell products based on consumers' fear of probate . . . ."[114] They agreed that the existing probate system was not broken, but accepted that it was "under attack, because the public perceives that the court procedures are too costly and time consuming, especially in cases where protection is not needed or wanted by the beneficiaries."[115] They countered the argument that probate is necessary to protect unsophisticated beneficiaries by pointing out that "[t]he experience of at least 22 other states, including Texas and Michigan, indicates that court supervision is not needed."[116] In addition, the proposal gave parties interested in an estate the option to seek court supervision. "When the beneficiaries or Executors need help, they ask for it; but when they have only routine work to do, they are not burdened with court hearings and delays."[117] Finally, they denied that the proposal would shut down court probate departments. "A separate probate department will still be required to handle probate, trust, guardianship and conservatorship matters, just as a separate family law department handles its specialized matters."[118]

In Spring 1996, the *Los Angeles Daily Journal* conducted a poll that reached 1,900 attorneys inquiring into support for making probate elective in California.[119] The result was: 290 respondents had no opinion, 191 opposed the idea, and 59 supported it.[120] At the same time it was more and

more evident that the piecemeal development of the laws governing post-death trust administration meant that the laws applicable to probate administration as opposed to trust administration were diverging in complicated and haphazard ways. A contemporaneous article in the *Quarterly* noted, "[t]he laws applicable to trusts in a given situation can differ greatly from the laws applicable to estates in a comparable or identical situation. More often, these differences are accidents of statutory evolution rather than the result of deliberate legislative action."[121] The authors observed, "[i]t would be conceptually neater if the Probate Code rules regarding estates and trusts were the same."[122]

EXCOMM as a whole then met with Berkeley Law Professor Edward Halbach and Judge Arnold Gold.[123] Professor Halbach, who had been a Reporter for the UPC and who also served on the 1973 California committee, the majority of which had rejected the UPC in 1973,[124] strongly supported informal elective administration. He did "not see any great problems arising in jurisdictions which have adopted the UPC,"[125] and said that some of his colleagues saw failure to adopt the UPC as a "big mistake."[126] Focusing on practitioners, Professor Halbach pointed out that many attorneys draft revocable trusts for their clients even when they "see lots of problems in revocable trusts."[127] "If they did not have to deal with probate, many more people would use a will."[128] Ultimately, he said, "[l]ess administration leads to less difficulty, unless there are problems – and if there are problems, then the attorney will take the estate through the more deliberate system."[129] Finally, Professor Halbach noted that "[h]is colleagues in Japan, Europe, and Singapore all think that what we [Californians] do in probate is kind of silly."[130]

Judge Gold reported that the Probate and Mental Health Section of the California Judges Association had voted unanimously to oppose the proposal to make informal administration elective.[131] The minutes of the meeting report that "[t]he Judges' opposition was philosophical in that the notion was not thought to be correct – you could modify independent administration and accomplish the same goals."[132] The minutes also observed, "[n]o one is surprised to see Professor Halbach and Judge Gold disagree. . . . Professor Halbach mentions that when the UPC was first considered, Judges continually opposed it."[133]

The judges' opposition to elective informal probate was essentially death to the cause. This was particularly unfortunate because their suggestion that modification of the IAEA would accomplish the goal of providing California citizens with a version of elective informal administration was beside the point. The primary goal of the proposal for elective informal administration was to establish a system that would depend on a will, and also be independent of the probate court. Since independent administration under the IAEA is a creature of court-supervised formal administration, modification of independent administration, without also making the procedure elective, meant that it could never be free of court supervision.

By the summer of 1996, EXCOMM had decided not to go forward with the proposal for elective informal probate administration even though exploration of the idea had consumed vast amounts of effort,[134] and even though the idea had generated significant support at the outset. The surprising depth of emotion that the proposal to adopt elective informal probate administration generated in the estate planning and probate community is evident in EXCOMM's statement of its decision not to proceed with proposing legislation to adopt elective informal probate administration:

> The reason for appointing the committee was the perception that there should be more similarity between the procedures for administering a living trust following the death of a settlor of that trust and the administration of a decedent's estate . . . . *The consideration of this proposal has opened gulfs within the Bar in general and within the Executive Committee itself that have gone beyond the usual collegial disagreements on any given issue. .... The occasional passionate conviction with which people have approached this proposal would shock our colleagues in other areas of practice who view trusts and estates work as somnolent at best*. One thing is clear: there is no consensus among the Bar or among the judiciary as to the proposal, and it does not appear likely that a consensus could be achieved.[135] (Emphasis added.)

With the advantage of hindsight and having witnessed the rise and ultimate dominance of the living trust as the preferred attorney-drafted estate planning tool, it is astonishing that the proposal to make less formal probate *even possible* in California would be a proposal that had probate practitioners at each other's throats. In a world in which thousands of living trusts were being administered outside the probate court and in which millions of dollars passed via joint tenancy and other probate-free mechanisms, what harm could have been done by offering the possibility of elective probate administration to the smaller and smaller numbers of California citizens who found themselves burdened with a probate administration?

Ironically, the conversations that led to the rejection of elective probate administration led directly to attempts to make trust administration more formal, that is, to put "administration of revocable trusts on more even footing with decedent's [sic] estates."[136] A first step in this direction was the growing notion that trust administration should

be made less private: "As a byproduct of [the informal administration committee's] work, a question arose regarding Revocable Living Trusts. Should notice be given when a living trust becomes irrevocable?"[137] So, instead of decreasing overall complexity for the citizenry by offering elective probate administration, in the 1990s, California moved in the direction of increasing overall complexity by beginning to make trust administration more formal.

H. 2007-Strike Four-Elective Probate Administration Is Rejected Again

1. *The First 2007 Proposal for Elective Administration*

By 2007, frustration with the perceived need to draft revocable trusts for people with simple estates who only wanted to avoid probate and who could have had a will that could have been administered through an informal probate administration procedure had again boiled up.[138]

The Editor of the *Quarterly* introduced the topic to the *Quarterly's* readers by observing, "[F]or decades, California estate planning attorneys have been using trusts – an instrument few clients really understand – as a substitute for the instruments that clients really want, wills and powers of attorney."[139] And, so, TEXCOM formed another committee to study the viability of an elective probate process.

Much as Professor Wellman had proposed in 1996, this 2007 committee proposed that the existing formal probate administration system could remain on the books and could "be utilized for those estates where Elective Administration is either unavailable or inappropriate."[140] If the decedent's will provided for elective administration or if the beneficiaries unanimously requested elective administration, then "the court would not supervise the administration of the estate unless a beneficiary filed a petition requesting the court's intervention."[141] Thus, if elective administration governed a case, the court would be "passive" as in the UPC.[142]

The debate over elective administration played out in the *Quarterly*. The supporters of elective administration emphasized that the personal representative would be responsible to the beneficiaries as a fiduciary and "would allow Californians to forgo formal court-supervised administration of a decedent's estate, a government service designed for their own protection, but one which Californians have decided is not worth the delay and cost."[143]

As in earlier debates, the opponents of elective administration focused on the need to protect parties with a beneficial interest in a decedent's estate. They emphasized that adoption of the proposed system would redound to the benefit of the strong over the weak. "If this proposal is adopted," they argued, "people who need the protection of the probate court likely would not receive it."[144] Doubling down, they asserted, "Elective Administration would eliminate the protection probate courts have historically provided to the emotionally devastated who are struggling to cope with the death of a parent or loved one."[145] They suggested that sophisticated family members would con their less sophisticated siblings and others to agree to elective administration and then take advantage of them.

Supporters replied that sophisticated family members could already take advantage of others in the revocable trust context, "yet the opponents do not suggest that trust administration should be subject to court supervision,"[146] and in any case, "the risk of coerced agreement to Elective Administration would be outweighed by the savings of money and time afforded beneficiaries and the savings of court time and resources."[147] More importantly, the supporters of elective administration argued, all Californians deserved the choice to have a formal or an informal administration:

> The proponents [of elective administration] believe that [the choice between formal and informal administration] should be open to everyone, rather than be subject to the vagaries of whether a decedent chose a will or a trust. Property passing by reason of a person's death should be transferable in the same manner regardless of the form of testamentary document the decedent used.[148]

To counter this, the opponents of elective administration again turned to the probate court's alleged role as a protector of the weak. "The proposal would de facto strip the protective function from the court in these proceedings, so decedents' estates would be treated like any business transaction."[149] In support of their argument that formal administration was crucial for the protection of the weak, the opponents of elective administration stated, "[t]he probate court was established to protect the unsophisticated and grieving from the greedy and manipulative."[150] After the foregoing debate in the *Quarterly* and after a few polls of trusts and estates attorneys, the proponents of elective administration realized that they did not have sufficient support to proceed further with their original proposal.[151]

2. *Alternative Proposals for Elective Administration Also Fail*

After the initial 2007 proposal for elective administration died, the supporters of elective administration searched for a compromise position that would have sufficient support

within the estate planning community to proceed to the legislature.

In 2009, TEXCOM adopted a legislative proposal for a more limited version of elective administration that would have permitted elective administration in five circumstances: (1) an individual petitioner is the sole beneficiary of the will; (2) the petitioner is a trustee; "and is the *sole* devisee of the decedent's will entitled to distribution," (original emphasis); (3) the will is a pour-over and the petitioner is a trustee who is the sole residuary beneficiary of the will; (4) the estate is intestate and the petitioner is the sole heir; and (5) all beneficiaries are adults and all have consented to elective administration.[152]

This proposal was taken to the legislature for consideration, but a sponsor was not found, and it was never considered by the legislature.[153] At that point, the effort to adopt a form of elective probate administration in California died.

VI. HOW STRONG IS THE ARGUMENT THAT THERE ARE "PERSONS BENEFICIALLY INTERESTED IN A DECEDENT'S ESTATE" WHO NEED THE BLANKET PROTECTION OF THE FORMAL PROBATE SYSTEM?

A. The Repeated Use of the "Protection" Argument to Defend Formal Administration

The notion that California's formal probate administration system must remain intact to protect people was the key argument that the California committee made when it finally rejected the UPC in 1973. The same argument has been repeated to counter proposals for probate reformation that have been advanced in the intervening fifty years. The argument deserves analysis.

The 1973 Report identified several "persons beneficially interested in the estate," who needed the protection of California's formal probate administration system. Specifically, it identified, "widows and widowers, children and other beneficiaries, creditors and taxing authorities."[154] It added that adoption of the UPC would eliminate the need for inheritance tax referees and would reduce the need for the public administrator.[155] The report did not identify legal publishers, probate attorneys or the probate courts as among the "persons beneficially interested in the estate." It did, however, devote substantial attention to defending California's statutory fee system.[156]

B. Widows, Widowers, and Children

The most sympathetic parties that the 1973 committee identified as being protected by California's formal system of administration were the decedent's surviving spouse and/or children. The Probate Code provided the family (then and now) with a probate homestead and a family allowance.[157]

These remedies, though, were not automatic and could involve substantial evidentiary proof, argument and attorney's fees. In addition, it is not clear that widows, widowers, and children actually required the blanket protection of a formal probate administration in 1973. It is less clear that they require that protection today. The probate homestead and the family allowance hearken back to the day when the patriarch died with a home in his own name, leaving a non-working widow and children homeless and unsupported. As society has evolved to one in which both spouses work, many people are urban renters, many homes are owned in joint tenancy, and various cash benefits (ranging from life insurance to pension plans and Social Security) are available to survivors—these expensive and formal remedies are less and less important.

The proof that modern families do not require a public policy enforcing either the family allowance or the probate homestead is in the pudding. In spite of the huge increase in revocable trusts, the legislature has never seen fit to impose either the probate homestead or the family allowance on post-death trust administration. Indeed, the initial Trust Law specifically did not provide these remedies, and the California Law Revision Commission's later expression of interest in expanding family protection to the trust context has not led to legislation.[158]

Of course, it may be the case that—even today—the occasional widow or widower or child may need and be benefited by either a probate homestead or a family allowance or both. However, that the occasional person may be helped by the remedies contained in the formal probate system is not a reason to impose that system on every California family that finds itself in the probate court. It is, in fact, an argument for elective probate administration. That is, if a family were to need a formal probate administration to establish a family allowance or a probate homestead, it could have one, but no family would be required to go through formal probate.

C. Other Beneficiaries

Another party that the 1973 committee identified as protected by California's formal system of administration was "other beneficiaries." Read in context, i.e. that formal probate administration is required to protect "widows and widowers, children and other beneficiaries," the "other beneficiaries" category can be seen as a make-weight category. That is, if "other beneficiaries" require formal probate administration, then every beneficiary requires formal probate administration.

This cannot be the case. The surviving business executive, the surviving probate lawyer, the surviving probate judge, and the surviving banker do not require formal probate. The notion that "other beneficiaries" deserve the protection of formal probate administration assumes either that personal representatives cannot be trusted or that a large segment of the population is naïve and cannot protect itself. The huge number of people who embrace alternatives to probate reveals that the people, themselves, do not believe that they require the protection of formal probate. The argument that formal probate administration is required in all estates for the protection of "other beneficiaries" "implies that the protection which the court provides . . . is necessary because the personal representatives . . . are not sufficiently capable or trustworthy to manage the estate property on their own."[159] Moreover, that those same protections are not available in a trust administration defeats the argument.

D. Creditors

A less sympathetic party that the 1973 committee identified as protected by California's formal system of administration was the decedent's creditors. The probate system—then and now—requires identification of and notification to creditors, followed by a system aimed at insuring that they are paid. "Many of the details of American probate procedure, as well as much of its larger structure, would not exist but for the need to identify and pay off creditors."[160] Again, though, the two main substitutes for formal probate—joint tenancy and the revocable trust—did not and do not provide protection for creditors.[161] When the California committee published its 1973 Report, there were no statutes protecting creditors with claims against property held in a decedent's trust. Since then, both case law and statutes have clarified that, while a personal representative in a probate has duties to creditors, the trustee of a revocable trust has no such duties.[162]

Just as the modern California family generally no longer requires the probate homestead or the family allowance, so too the creditor protection found in the Probate Code can be seen as an historical appendage that is not required in the current economic world. The success of the revocable trust, joint tenancy, and other methods of probate avoidance reveals that major creditors have adapted to probate avoidance and no longer require the ability to file claims against decedent's estates. The reasons that major creditors have not objected to the loss of the remedies available to them in a formal probate include the sometimes cost-prohibitive expense of pursuing a probate claim, the existence of credit life insurance, voluntary payment of debts by families, high interest rates and other charges, and changes in data processing and the business environment.[163] In a seminal article on probate avoidance, the author concluded that, due to the foregoing factors:

> In the late twentieth century, creditor protection and probate have largely parted company. Had this development been otherwise, the rise of the will substitutes could not have occurred. . . . . If modern creditors had needed to use probate very much, they would have applied their considerable political muscle to suppress the nonprobate system. Instead, they have acquiesced without struggle, as have the most powerful of creditor-like agencies, the federal and state revenue authorities.[164]

The drafters of the UPC separately concluded that "creditors of decedents posed more of an imagined than a real problem."[165] Noting that drafts of the UPC had circulated widely and had drawn comments from many sources, "no representative of commercial creditors ever so much as wrote us a letter. [So we] concluded they did not care what the probate code says."[166] John Hartog, who shepherded the initial phases of the proposals for elective administration through TEXCOM in and around 2005 reports, similarly, that he did not hear anything from creditors as the proposal was publicized and reviewed.[167]

It is true that creditors take advantage of the probate collection system when a probate has been opened, but who can blame them? They grab the low hanging fruit. The creditors who apparently still need a court-supervised collection system are the smaller creditors who find themselves surprised when their debtor dies. Even today, if an estate has not been opened, these creditors are left to their own devices and the devices of their lawyers.

E. Taxing Authorities

Perhaps the least sympathetic category of interested parties that the 1973 committee identified as protected by the formal probate system was the taxing authorities. However, just as with creditors generally, the taxing authorities have adjusted to probate avoidance and have found methods of collecting taxes that do not require access to decedents' estates through formal probate. If taxing authorities required formal probate administration to collect money owed by decedents, then we could expect that they—like creditors—"would have applied their considerable political muscle to suppress the nonprobate system."[168]

VII. CONCLUSION

It appears that California's system of formal probate administration is here to stay. Our examination of the history suggests, though, that the following questions might require further examination and consideration:

1. Is it sound public policy for California, today, to have two competing systems of post-death administration—one for trust administration and one for probate administration? Two systems that can be understood only by those who specialize in probate and trust administration?
2. Can California's formal system of probate administration be justified because it is necessary to protect persons who are beneficially interested in the estate of a decedent, and if so, who are the persons who are being protected?
3. Is it sound public policy to require citizens who have no disputes regarding administration and distribution to pay the fees and costs imposed by California's formal system of probate administration?
4. Which side of the probate reform argument should bear the burden of proof?
5. Can the IAEA ever simplify formal administration enough to induce Californians to rely on wills and powers of attorney rather than revocable trusts as their primary estate planning vehicles?
6. What vested interests support formal probate administration? Does protection of any or all of those interests support the retention of formal probate administration and the continued rejection of an elective procedure?

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01 *Talent In Action* (Dec. 1973) Billboard, at p. 28.

02 State Bar of Cal., The Uniform Probate Code: Analysis and Critique (Mar. 1973) p. xxxiv.

03 Kmiec, *Probate Reform: California's Declaration of Independent Administration* (1977) 50 So. Cal. L.Rev. 155, 155-156; see also Response of the Joint Editorial Board for the Uniform Probate Code To the State Bar of California's "The Uniform Probate Code: Analysis and Critique" (Feb. 1974) pp. iv-v, ("Response") prepared by Richard V. Wellman, formerly Chief Reporter for the Uniform Probate Code and at that time Educational Director for the Joint Editorial Board (referred to herein as "Response.")

04 Hand, *From the Editor* (Fall 2007) 13 Cal. Tr. & Est.Q. No. 3, 3.

05 Orvell, *From the Chair* (Summer 2001) 7 Cal. Tr. & Est. Q. No. 2, 47.

06 *In re Estate of Willey* (1900) 128 Cal. 1; see also the related case *Carpenter v. Cook* (1900) 60 P. 475.

07 *In re Estate of Willey*, *supra*, 128 Cal. at pp. 8-9.

08 This is based upon a search for "revocable trust" in Lexis. The project involved some hand counting, so any attempt to repeat it could result in different totals, but the general trend will not change.

09 Kmiec, *supra*, 50 So.Cal. L.Rev. at p. 158.

10 Haertle, *The History of the Probate Court* (1962) 45 Marq. L.Rev. 546.

11 *Ibid.*

12 Haertle, *supra*, 45 Marq. L.Rev. at p. 546.

13 *Ibid.*

14 *Ibid.*

15 Haertle, *supra*, 45 Marq. L.Rev. at p. 546. (referring to the Statute of Wills, 32 Henry VIII, Ch. 1 (1540) and legislation of Charles II, 12 Charles II, Ch. 24 (1660).)

16 Haertle, *supra*, 45 Marq. L.Rev. at p. 547.

17 *Ibid.*

18 *Ibid.*

19 Kmiec, *supra*, 50 So.Cal. L.Rev. at p. 158, citing Ritchie et. al., Decedents' Estates and Trusts (1971) p. 18-20.

20 Dickens, Bleak House (Centennial Ed. 1953) p. 65.

21 Haertle, *supra*, 45 Marq. L.Rev. at p. 551.

22 Kmiec, *supra*, 50 So.Cal. L.Rev. at p. 158.

23 Ellison, *California and the Nation, 1846-1879: A Study of the Federal Relations of a Frontier Community* (1926) 30 Southwestern Historical Q. 2, 85.

24 *In re Schroeder's Estate* (1873) 46 Cal. 304, 319 ("Our probate system is derived mainly from that of Texas, and in most respects is identical with it."); see also Niles, *Probate Reform in California* (1973) 31 Hastings L.J. 185, 188.

25 Niles, *supra*, 31 Hastings L.J. at p. 188 (citing Turrentine, *Introduction to the California Probate Code* (1959) West's Ann. Prob. Code pp. 8-21).

26 *Ibid.*

27 Niles, *supra*, 31 Hastings L.J. at p. 188. Professor Niles added in this note that "[t]he [California Probate Code] underwent a critical reevaluation in 1931, when the California Code Commission was charged with its revision. The Commission, however, had no authority to do more than clarify and consolidate the code, or conform it to interpretation by the supreme court, hence no substantial revision occurred. . . . The draftsman for the Commission, Professor Perry Evans, was capable of modernizing and improving the [California Probate Code] but thought he lacked the authority to do so." (Citations omitted.)

28 *Ibid.* Cited with approval by the California Law Revision Commission at *Tentative Recommendation Relating to Wills and Intestate Succession* (1982) 16 Cal. Law Revision Com. Rep. 2301, pp. 2318-2319. See also *Estate of Saueressig* (2006) 38 Cal. 4th 1045, 1060, fn. 5.

29 Kmiec, *supra*, 50 So.Cal. L.Rev. at p. 155, fn. 7 and sources cited therein.

30 Walters, *Paperback Talk* (June 1981) N.Y. Times, section 7, p. 31.

31 *Ibid.*

32 Dacey, *How to Avoid Probate! Newly Updated* (1983) , p. 1.

33 Bloom, *The Mess In Our Probate Courts* (October 1966) 89 The Readers Digest No. 534, p. 102. Mr. Bloom extolled the virtues of the living trust and looked forward to the publication of the Uniform Probate Code. Mr. Bloom wrote several other articles regarding reform of the probate system. See McClanahan, *Changing Concepts In The Law of Wills and Probate* (May-June 1973) 48 Cal. State Bar J. 274, 276 n. 9 and sources cited therein.

34 West, The Uniform Probate Code Official Text With Comments (1969). The text was approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in 1969. See also Niles, *supra*, 31 Hastings L.J. at p. 186, fn. 7-8.

35 This is how Professor Edward Halbach explained the UPC to his Trusts and Estates class at Berkeley in 1977.

36 Kmiec, *supra*, 50 So.Cal. L.Rev. at p. 155, fn. 7 and cases and statutes cited therein.

37 The Uniform Probate Code Official Text With Comments, *supra*, at p. 74.

38 Wellman & Gordon, *The Uniform Probate Code: Article III Analyzed in Relation to Changes in the First Nine Enactments* (1975) 1975 Ariz.State L.J. 477, 478.

39 The Uniform Probate Code Official Text With Comments, *supra*, at p. 74.

40 *Id.* at p. 75.

41 *Id.* at p. 82.

42 U. Prob. Code, section 3-103; see also Uniform Probate Code Official Text With Comments, *supra*, at p. 77.

43 U. Prob. Code, section 3-301; see also Uniform Probate Code Official Text With Comments, *supra*, at p. 93.

44 U. Prob. Code, section 3-401; see also Uniform Probate Code Official Text With Comments, *supra*, at p. 101.

45 Wellman & Gordon, *supra*, 1975 Ariz.State L.J. at p. 480.

46 Wellman, *Introduction to the Uniform Probate Code* (1976) 9 Creighton L.Rev. 446, 448.

47 *Id.* at 451.

48 State Bar of Cal., *supra*, at p. xi; see also Response, *supra*, at p. iv.

49 Ad Hoc Committee on Uniform Probate Code, *An Interim Report California and the Uniform Probate Code* (1971) 46 Cal. State Bar J. 289, 291.

50 Niles, *supra*, 31 Hastings L.J. at p. 188. The IAEA was contained in Probate Code section 591, which had subsections 591.1-591.7.

51 Response, *supra*, at pp. iv-v.

52 *Id.* at p. v.

53 McClanahan, *Changing Concepts in the Law of Wills and Probate* (1973) 48 Cal. State Bar J. 274, 276. An editorial note at the beginning of this article points out that "[s]ince completion of this article, the State Bar Committee on Probate trust Law has submitted a 200-page analysis concluding that California should not adopt the Uniform Probate Code." *Id.* at p. 275.

54 Niles, *supra*, 31 Hastings L.J. at p. 187, note 12 (quoting The State Bar of California, The Uniform Probate Code: Analysis and Critique (Mar. 1973) pp. xi-xiii).

55 Professor Niles observed that these vaunted changes "have been piecemeal, often restricted to a specific section relating to a topic of current public interest, such as alienage, adoption, or succession by children born out of wedlock." Niles, *supra*, 31 Hastings L.J. at p. 188 (citations omitted).

56 State Bar of Cal., The Uniform Probate Code: Analysis and Critique, *supra*, at pp. xxxiii-xxxiv.

57 Wellman, *supra*, 9 Creighton L.Rev. at p. 446.

58 *Ibid.*

59 The State Bar of California, *The Uniform Probate Code: Analysis and Critique* (March 1973), *supra*, *at p.* xx.

60 *Id.* at p. xxii.

61 Response, *supra*, at p. 5. See also Kmiec, *supra*, 50 So.Cal. L.Rev. at p. 156.

62 Kmiec, *supra*, 50 So.Cal. L.Rev. at pp. 174-175.

63 *Id.* at p. 156.

64 The rates in 1978 were 7% on the first $1,000, 4% on the next $9,000, 3% on the next $40,000, 2% on the next $100,000 and 1.5% on the next $350,000. Prob. Code, sections 901, 910 (1978). The rates in 1979 were 4% on the first $15,000, 3% on the next $85,000 and 2% on the next $900,000. Prob. Code, sections, 901, 910 (1979).

65 See Response, *supra*.

66 *Id.* at pp. i-iv. The Response quoted James Zartman, of Illinois, as follows:

As one of the principal Illinois critics of the Code, I claim some license to argue that criticizing the Code represents only the first (and

easiest) part of the job which the Code demands of responsible lawyers. The hard part is to fairly judge whether the Code objectives are sound and in the public interest . . . . I believe that the time has come for lawyers to begin to work seriously on basic reforms in the antique, patchwork-quilt systems for the transmission of property at death which most states now employ. *Id.* at pp. iii-iv.

67 Response, *supra*, at p. iv.

68 *Id.* at p. v.

69 *Id.* at p. vi.

70 *Ibid.*

71 Response, *supra*, at p. iv.

72 *Id.* at pp. vi-vii.

73 Kmiec, *supra*, 50 So.Cal. L.Rev. at pp. 166-175.

74 *Id.* at p. 156.

75 *Ibid.*

76 Niles, *supra*, 31 Hastings L.J. at p. 188.

77 *Ibid.*

78 Dacey, *supra*, at p. 24.

79 *Id.* at p. 24 (Dacey does not give a cite for his quotation).

80 *Id.* at p. 25.

81 *Id.* at p. 31.

82 *Id.* at p. 32.

83 *Ibid.*

84 Niles, *supra*, 31 Hastings L.J. at p. 188.

85 Resolution Chapter 37 of the Statutes of 1980. "That chapter directs the Commission to study [w]hether the California Probate Code should be revised, including but not limited to whether California should adopt, in whole or in part, the Uniform Probate Code." Berton, *Letter to the Honorable Edmund G. Brown, Jr., Tentative Recommendation Relating to Wills and Intestate Succession* (1982) 16 Cal. L.Revision Com. Rep. 2301, 2305.

86 *Id.* at pp. 2318-19 (fns. omitted).

87 Sterling, *Memorandum 83-16 to the California Law Revision Commission re Study L-800* (1983) p. 4. <http://www.clrc.ca.gov/pub/1983/M83-016.pdf> [as of May 9, 2023].

88 Sterling, *supra*, at p. 5.

89 There was a time when many clients and potential clients lived in homes valued in the $100,000 range.

90 Sterling, *supra*, at p. 5.

91 Stats 1990, ch. 79 (Assem. Bill No. 759 (1989-1990 Reg. Sess.)). Prob. Code, sections 15000-19530.

92 Prob. Code, sections 21101-21118.

93 Fleck, *Trust Committee—Pending Legislation Alert (AB 3686)* (1994), Est. Planning Tr. & Probate N., Cal. Cont.Ed.Bar, Vol. 14, No. 2, p. 20.

94 Fleck, *supra*, at p. 20.

95 Sullivan, *From the Chair* (Winter 1994) 14 Est. Planning Tr. & Probate News No. 4, p. 3.

96 Response, *supra*, at p. v.

97 Sullivan, *supra*, at p. 3.

98 *Ibid.*

99 Ellis et al., *Informal Decedent's Estate Administration* (1995) 1 Cal. Tr. & Est. Q. No. 3, p. 37.

100 *Ibid.*

101 *Ibid.* It could be that the default system would be formal probate with the possibility of an election into informal probate. It could also be that the default system would be informal probate with the possibility of an election into formal probate.

102 Response, *supra*, at p. 1.

103 Ellis et al., *supra*, at p. 38, n. 5.

104 *Id.* at p. 38.

105 *Id.* at p. 41.

106 Informal Administration Committee, *Executive Committee's Analysis of Proposal for Informal Administration of Decedent's Estates in California* (Winter 1995) 1 Cal. Tr. & Est. Q., No. 4 p. 4.

107 Informal Administration Committee, *supra*, at p. 4.

108 *Ibid.*

109 *Id.* at p. 6.

110 *Ibid.*

111 *Id.* at p. 5.

112 *Id.* at p. 6.

113 *Ibid.*

114 *Id.* at p. 4.

115 *Id.* at p. 6.

116 *Id.* at p. 5.

117 *Ibid.*

118 *Id.* at p. 6.

119 Minutes of the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California ("EXCOMM") (Feb. 3, 1996) p. 9.

120 Minutes of EXCOMM (Mar. 9, 1997) p. 7.

121 Barringer & Lawrence, *Beware: All Fiduciary Law Is Not Created Equal* (April 1996) 17 Est. Planning & Cal. Prob. Rptr., No. 5 p. 136.

122 *Id.* at p. 140.

123 Minutes of EXCOMM (Mar. 9, 1996) p. 2. Professor Halbach was well-known to practitioners at the time. He was the Reporter of the Fourth and Final volume of the Restatement of Law Third, and he and Jerry Casner, a professor at Santa Clara, were the stars of estate planning continuing education panels for decades. Judge Gold was a probate judge in Los Angeles.

124 See Uniform Probate Code Official Text With Comments, *supra*, at p. xxiv; State Bar of Cal., The Uniform Probate Code: Analysis and Critique, *supra*, at p. xii (footnote).

125 Minutes of EXCOMM (Mar. 9, 1996), *supra*, at p. 8.

126 *Ibid.*

127 *Ibid.*

128 *Ibid.*

129 *Ibid.*

130 *Ibid.*

131 Minutes of EXCOMM (Mar. 9, 1996), *supra*, at p. 8.

132 *Id.* at p. 9.

133 *Id.* at p. 8.

134 Sullivan, *From the Chair* (Fall 1995) 1 Cal. Tr. & Est. Q., No. 3 p. 3.

135 *Report of the Executive Committee on the Proposal for Informal Decedent's Estate Administration* (Summer 1996) 2 Cal. Tr. & Est. Q., No. 2 pp. 4-5.

136 Minutes of EXCOMM Squaw Creek Retreat (Apr. 26, 1996) p. 22. These Minutes make reference to a written "Report of the Informal Administration Committee" which cannot be located at this time. (Email from Len Pollack, Secretary of EXCOMM.)

137 *Id.* at p. 15.

138 See Hand, *supra*, at p. 3.

139 *Ibid.* at p. 3.

140 Burger et al., *Executive Committee Proposal for "Elective Administration" of Decedents' Estates* (Fall 2007) 13 Cal. Tr. & Est. Q., No. 3 p. 5.

141 *Ibid.*

142 See Response, *supra*, at p. 21.

143 Burger et al., *supra*, at p. 5.

144 Burger et al., *supra*, at p. 7.

145 *Ibid.*

146 *Id.* at p. 8.

147 *Id.* at p. 5.

148 *Id.* at p. 8.

149 *Ibid.*

150 *Id.* at p. 7.

151 Stern, *From the Chair* (Summer 2008) 14 Cal. Tr. & Est. Q., No. 2 p. 2.

152 Hartog, *A Legislative Proposal for Elective Administration* (Fall 2009) 15 Cal. Tr. & Est. Q., No. 3 pp. 22 et seq.

153 Email exchange with John Hartog & Patrick Kohlmann on Feb. 4-5, 2023.

154 The State Bar of California, The Uniform Probate Code: Analysis and Critique (March 1973), *supra*, at p. xx.

155 *Id.* at p. xxii.

156 Response, *supra*, at pp. 38-40.

157 Response, *supra*, at p. 41. See also Prob. Code, sections 6520-6528 (Probate Homestead) & 6540-6545 (Family Allowance).

158 Langbein, *The Nonprobate Revolution and the Future of the Law of Succession* (1984) 97 Harv. L.Rev. 1108, 1128.

159 Kmiec, *supra*, 50 So.Cal. L.Rev. at p. 159. See also Sterling, *The California Law Revision Commission and Probate and Trust Law Reform* (Fall 2000) Cal. Tr. & Est. Q., Vol. 6, No. 3 pp. 15-16.

160 Langbein, *supra*, 97 Harv. L.Rev. at p. 1120.

161 *Tenhet v. Bos*well (1976) 18 Cal.3d 150. The Legislature recently amended Probate Code section 13551 to overcome the holding in *Kircher v. Kircher* (2010) 189 Cal.App.1105 and clarify that joint tenancy property held with a spouse (so long as it is not held as community property with right of survivorship) also passes to the survivor without liability for debts of the decedent; Prob. Code, section 19000, trust creditor procedure is voluntary.

162 *Id.* at p. 1127.

163 Langbein, *supra*, 97 Harv. L.Rev. at p. 1123.

164 *Id.* at p. 1125.

165 Wellman, *supra*, 9 Creighton L.Rev. at p. 452.

166 *Ibid.*

167 Telephone communication with John Hartog, November 9, 2022. See also Sterling, *The California Law Revision Commission and Probate and Trust Law Reform* (Fall 2000) Cal. Tr. & Est. Q., Vol. 6, No. 3 pp. 15-16.

168 Langbein, *supra*, 97 Harv. L.Rev. at p. 1125.