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COMPILATION OF
MODEL PROBATE CODE SECTIONS
AND COMPARATIVE HAWAII
STATUTES AND COURT DECISIONS

LEGISLATIVE REFERENCE BUREAU

University of Hawaii

STATE OF HAWAII

COMPILATION OF MODEL PROBATE CODE SECTIONS
AND COMPARATIVE HAWAII STATUTES AND COURT DECISIONS

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LEGISLATIVE REFERENCE BUREAU

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FORWARD

The attached comparison of the sections of the Model Probate Code and the Hawaii statutes and case decisions was prepared in response to the request of the Policy and Judiciary Committees of the Hawaii House of Representatives to determine the extent to which Hawaiian probate law is uncodified and to ascertain the substantive and procedural differences between the two collections of law.

The Model Probate Code is the joint effort of the Probate Law Division of the Section of Real Property, Probate and Trust Law of the American Bar Association and the research staff of the University of Michigan Law School. It is the product of exhaustive research and deliberation directed by leading jurists--R. G. Patton, Lewis Simes, Thomas Atkinson among others--and was drafted with a view to providing a model to be fitted into the probate law of any given state and adapted to it. The Model Probate Code was not intended by its drafters to be a uniform act or a pattern for regimentation. The code committee stated thereto in its report:

"This is a model code, not a uniform act. Its objective is not the attainment of uniformity among the several states, but the improvement of probate procedure wherever revision of probate legislation is sought. Primarily, it is intended as a reservoir of ideas, and of acceptable legislative formulations of those ideas, from which legislative committees may draw the framework of new probate codes. Just as a good form book for wills loses none of its value because the draftsman of a will adapts the form to his particular problems, likewise it is believed that this Code will prove no less valuable though it may be thought advisable to adapt its provisions to the judicial organization and legal system of the particular state."¹

The depth of the code committee's study in preparing the code is best described in their words as follows:

"In presenting this Code as the product of five years of preparation and unremitting toil, it is believed that the viewpoint of no important social group has been overlooked and that the content of every important probate statute now on the books has been considered. It would be too much to say that the Code is free from all imperfection. Yet in presenting it to the Section in its final form, it is the belief of your Committee that either as a code complete in itself, or as a fundamental probate law on which to build a larger legislative superstructure, it can be recommended without qualification to the legislative authorities of any jurisdiction in which probate reform is sought."²

¹Lewis Simes, Model Probate Code, University of Michigan Press, 1946, p. 10.

²ibid., p. 8.

"Though a critical, comparative study was made of existing probate statutes, the task was not limited to a selection of the best type found in the statute books. If no satisfactory legislation could be found as to a problem the Code proceeds upon original lines. Extensive litigation on a question was taken as some indication that the rules of law should be clarified. If the subject matter was of a sort which could be satisfactorily dealt with by statute, legislation was attempted even though none existed before. But not infrequently the problem was of a sort which could only be solved by judicial pronouncement and not by statutory rules."³

The Model Probate Code would, if adopted in whole or in part, do three things for Hawaiian probate law--it would codify and it would make substantive and procedural changes.

Firstly the code, as its name suggests, pulls together and places in one chapter the rules of law relating to all matters of which probate courts have jurisdiction and declares by statute what that law is. A good portion of Hawaiian probate law is ruled by section 1-1, Revised Laws of Hawaii 1955, which states:

"The common law of England as ascertained by English and American decisions is declared to be the common law of the Territory of Hawaii in all cases except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent or established by Hawaiian usage; . . ."

It is not always easy to determine what the above-described common law of England is, in given situations.

In the process of codification, where decisions conflict as to what the English common law is, the code committee has picked that view which in their opinion will be of greater service whether it be, among other ends, to determine an intestate's probable intent or to promote inexpensive yet creditable administration. To illustrate, there is much confusion as to whether the powers and duties of co-representatives are joint, several, joint and several, or joint or several. The committee decided that as to ministerial duties, one may act for all; but that as to important and discretionary matters, joint action is necessary. (See page 135, *infra*.)

In the area of procedural changes, the Model Probate Code would modify Hawaii's common law based probate procedure in the same fashion as the Hawaii Rules of Civil and Criminal Procedure have simplified Hawaii's prior cumbersome and technical criminal and civil procedure. One such simplification is the code's combining the notice initiating administration with notice to creditors.

The code would further streamline procedure by expanding the probate court's jurisdiction to entertain cases currently tried in Hawaii's courts of general jurisdiction. In the administration of a decedent's estate in Hawaii, probate proceedings must be initiated in the probate court; that court's decisions on fact issues dealing with the validity of a will or with the descent of

³ibid., p. 11

property may be retried before a jury in a trial court of general jurisdiction; creditors' claims if contested must be litigated in separate proceedings again in the trial court of general jurisdiction with a separate suit for each contested claim; and title questions must also be adjudicated in proceedings in the trial court of general jurisdiction. Should all the above-listed steps be involved in administering a decedent's estate, four or more separate proceedings must be initiated and concluded. The Model Probate Code would permit all of the above to be heard by the probate court in one proceeding.

As to substantive law, the Model Probate Code presents a number of significant changes. One such change is the abolishment of dower and curtesy and the inclusion of surviving spouses within the intestate succession scheme. This change is a part of a chain of other changes presented by the code and a discussion of the latter best explains the code committee's reasons for abolishing dower and curtesy. The code treats personalty and realty alike--neither has priority over the other in meeting the expenses of administration and debts of decedents; title to both rests in heirs or legatees and only possession lies in personal representatives; sale of both is subject to control by the probate court. Thus the code treats realty and personalty as the Hawaii statute treats personalty alone. To elaborate, section 319-1, Revised Laws of Hawaii 1955, entitles widows "by way of dower, to an absolute property in the one-third part of all his remaining property for personalty owned by him at the date of his death, after the payment of all his just debts"; so does the Model Probate Code subject land to debts of a decedent, limit taking to realty held at his death, and give surviving spouses absolutely all of decedent's interests in realty and not only life estates therein.

A second substantive change is the requirement of court review and allowance before claims against the estate are paid. This is part of the code's pattern of close supervision by the court of the entire probate proceedings. Currently in Hawaii personal representatives themselves review claims for payment and resort to the court only when land must be sold to pay claims of the estate. However, it should be noted that in Hawaii the personal representative's office is subject to audit by court appointed masters at the close of administration. Under the code use of masters would be lessened but the burden of probate judges would be increased.

A number of substantive provisions of the code are dependent upon correlative changes in non-probate areas of the law. For example, the law of creditors' rights which exempts properties, such as the home, up to a certain value and designated personalties is a non-probate subject. The code would adopt these local exemptions and free them from probate administration, however, the code does not attempt to recommend changes in these non-probate areas of the law and no study therein is attempted by the code committee. Hawaii's exemption statute does not free the home from creditors' claims but does free certain designated personalties. Instead in Hawaii a decedent's dependents are entitled to possession of the home so long as the personal representative permits.

Among other code substantive changes are: (1) making the determination of the amounts of fees for personal representatives and their attorneys discretionary with the probate judge in contrast to Hawaii's statutory scale, which is based on the dollar value of gross estates, and (2) dispensing with administration and summary administration provisions, which in effect would negate the need for Hawaii's small estate administration provisions.

Whether to adopt the myriad details presented by the Model Probate Code is a legislative decision and as stated by the code committee in an earlier quote, the code was prepared to be used at state legislatures' pleasure.

References to MPC in the comparative data to follow refer to Lewis Simes, Model Probate Code, University of Michigan Press, 1946.

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MODEL PROBATE CODE

PART 1. GENERAL PROVISIONS

Sec. 1. Short title. This Act shall be known and may be cited as the Probate Code.

MODEL PROBATE CODE

Sec. 2. How Code to take effect.

(a) Effective date. This Code shall take effect and be in force on and after January 1, 19—. The procedure herein prescribed shall govern all proceedings in probate brought after the effective date of the act and also all further procedure in proceedings in probate then pending, except to the extent that in the opinion of the court their application in particular proceedings or parts thereof would not be feasible or would work injustice, in which event the former procedure shall apply.

(b) Rights not affected. No act done in any proceeding commenced before this Code takes effect and no accrued right shall be impaired by its provisions. When a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provision of any statute in force before this Code takes effect, such provision shall remain in force and be deemed a part of this Code with respect to such right.

(c) Severability. If any provision of this Code or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Code which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

COMMENT:

This section could be placed at the very end of the code.

Sec. 3. Definitions and use of terms. When used in this Code, unless otherwise apparent from the context:

- (a) "Child" includes an adopted child but does not include a grandchild or other more remote descendants, nor, except as provided in section 26, an illegitimate child.
- (b) "Claims" include liabilities of the decedent which survive, whether arising in contract or in tort or otherwise, funeral expenses, the expense of a tombstone, expenses of administration and all estate and inheritance taxes.
- (c) "Devise," when used as a noun, means a testamentary disposition of real or personal property or both.
- (d) "Devise," when used as a verb, means to dispose of real or personal property or both by will.
- (e) "Devisee" includes legatee.
- (f) "Distributee" denotes those persons who are entitled to the real and personal property of a decedent under his will or under the statutes of intestate succession.
- (g) "Estate" denotes the real and personal property of the decedent or ward, as from time to time changed in form by sale, reinvestment or otherwise, and augmented by any accretions and additions thereto and substitutions therefor and diminished by any decreases and distributions therefrom.
- (h) "Exempt property" refers to that property of a decedent's estate which is described in section 43 hereof.

No comparable statute, but "children" as used in wills, deeds, etc., limited to immediate offspring, 23 Haw. 213; 27 Haw. 472, includes legally adopted children, 24 Haw. 396, 399, but see 24 Haw. 643. Does not include grandchildren, 29 Haw. 278.

- (i) "Fiduciary" includes personal representative, guardian and testamentary trustee.
- (j) "Heirs" denotes those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the real and personal property of a decedent on his death intestate.
- (k) "Interested persons" means heirs, devisees, spouses, creditors or any others having a property right in or claim against the estate of a decedent being administered. This meaning may vary at different stages and different parts of a proceeding and must be determined according to the particular purpose and matter involved.
- (l) "Issue" of a person, when used to refer to persons who take by intestate succession, includes all lawful lineal descendants except those who are the lineal descendants of living lineal descendants of the intestate.
- (m) "Lease" includes an oil and gas lease or other mineral lease.

-continued-

REVISED LAWS OF HAWAII

UNIFORM FIDUCIARIES ACT

Sec. 189-1. Definition of terms. . . .

"Fiduciary" includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust or estate.

HAWAII REPORTS

Remainder to "heirs" means statutory heirs, which would include his widow where remainderman left no children; if he left children widow is not an "heir", 8 Haw. 392, 463; 10 Haw. 687, 695.

REVISED LAWS OF HAWAII

DESCENT OF PROPERTY

Sec. 318-1. Issue includes whom. The word "issue," as used in this chapter, includes all the lawful lineal descendants of the ancestor.

HAWAII REPORTS

Includes adopted child, 26 Haw. 439.
Does not include illegitimate child, 20 Haw. 722.
"Issue by me begotten" does not include grandchildren, 29 Haw. 278.

Sec. 3, MPC, continued

- (n) "Legacy" means a testamentary disposition of personal property.
- (o) "Legatee" means a person entitled to personal property under a will.
- (p) "Letters" includes letters testamentary, letters of administration and letters of guardianship.
- (q) "Mortgage" includes deed of trust, vendor's lien and chattel mortgage.
- (r) "Net estate" refers to the real and personal property of a decedent exclusive of homestead rights, exempt property, the family allowance and enforceable claims against the estate.
- (s) "Person" includes natural persons and corporations.
- (t) "Personal property" includes interests in goods, money, choses in action, evidences of debt and chattels real.
- (u) "Personal representative" includes executor, administrator, and special administrator.
- (v) "Property" includes both real and personal property.
- (w) "Real property" includes estates and interests in land, corporeal or incorporeal, legal or equitable, other than chattels real.
- (x) "Will" includes codicil; it also includes a testamentary instrument which merely appoints an executor and a testamentary instrument which merely revokes or revives another will.
- (y) The singular number includes the plural; the plural number includes the singular.
- (z) The masculine gender includes the feminine and neuter.

REVISED LAWS OF HAWAII

WILLS

Sec. 322-13. Will includes codicil. The term "will," as used in this chapter, shall be so construed as to include all codicils as well as wills.

LAWS GENERALLY

Sec. 1-22. Number and gender. Words in the masculine gender signify both the masculine and feminine gender, those in the singular or plural number signify both the singular and plural number, and words importing adults include youths or children.

MODEL PROBATE CODE

Sec. 4. Qualifications of judge. No person shall be eligible to the office of judge unless he shall have been admitted to practice in this state for a period of at least five years immediately before assuming his office and shall have practiced law or held judicial office in this state for five years.

Sec. 5. Salaries of judges. The salaries of judges shall be \$ per annum, which shall not be decreased during their respective terms of office.

HAWAII CONSTITUTION

Art. V, Sec. 3. . . . No person shall be eligible to such office justices of the supreme court and the judges of the circuit courts who shall not have been admitted to practice law before the supreme court of this State for at least ten years

Art. V, Sec. 3. . . . They justices of the supreme court and the judges of the circuit courts shall receive for their services such compensation as may be prescribed by law, which shall not be diminished during their respective terms of office, unless by general law applying to all salaried officers of the State

SESSION LAWS OF HAWAII, 1959

Act 215, Sec. 2. The compensation of the circuit court judges of the various circuit courts of the state of Hawaii shall be \$19,000 per year.

COMMENT:

In Hawaii the judges of the trial courts of general jurisdiction are also judges in probate matters, thus MPC, secs. 4 and 5, should be omitted from Hawaii's proposed probate code. The MPC drafters intended that these sections be adopted by states in which the requirements for probate judgeship are not "substantially the same as those for judges in the trial court of general jurisdiction."

MODEL PROBATE CODE

Sec. 6. Jurisdiction. The [] court shall have plenary jurisdiction of the administration, settlement and distribution of estates of decedents, whether consisting of real or personal property or both, the probate of wills, the granting of letters testamentary, of administration and of guardianship, the construction of wills, whether incident to the administration of an estate or as a separate proceeding, the determination of heirship, the administration of testamentary trusts, and the administration of guardianships of minors and other incompetents. It shall have the same legal and equitable powers to effectuate its jurisdiction and to carry out its orders, judgments and decrees, and the same presumptions shall exist as to the validity of such orders, judgments and decrees in probate as in other matters.

REVISED LAWS OF HAWAII

Sec. 215-18. Circuit judges at chambers. The judges of the several circuit courts shall have power at chambers within their respective jurisdictions, but subject to appeal to the circuit and supreme courts, according to law, as follows:

(c) To grant probate of wills, to appoint administrators and guardians, and to compel executors, administrators and guardians to perform their respective trusts and to account in all respects for the discharge of their official duties; to remove any executor, administrator or guardian; to determine the heirs at law of deceased persons and to decree the distribution of intestate estates;

Sec. 215-23. Circuit judges, powers. The several circuit judges shall have power to administer oaths, to compel the attendance of parties and witnesses from any part of the Territory, to compel the production of books, papers and accounts, to make and award all such judgments, decrees, orders and mandates, to issue all such executions and other processes and to take all other steps necessary for the promotion of justice in matters pending before them in chambers, and to take all other steps necessary to carry into full effect all the powers which are or may be given them by law, in like manner as the circuit courts may do in term time.

COMMENT:

The following comparison of powers, listed in the MPC on the one hand and in the Hawaii statutes and in the Hawaii Reports on the other, illustrates the plenary nature of probate court jurisdiction under the MPC in contrast with the limited jurisdiction of Hawaii's circuit court judges sitting in probate.

Sec. 6, COMMENT, continued.

MODEL PROBATE CODE

1. The probate of wills.
2. The construction of wills, whether incident to the administration of an estate or as a separate proceeding.
3. The administration of testamentary trusts.
4. The granting of letters of guardianship and of the administration of guardianships of minors and other incompetents. (MPC, sec. 199, provides that the jurisdiction of the probate court over all matters of guardianship, other than guardians ad litem, shall be exclusive.)
5. The granting of letters testamentary of administration.

REVISED LAWS OF HAWAII 1955 AND HAWAII REPORTS

1. The probate of wills subject to retrial before a jury in the trial court of general jurisdiction on fact questions as to its validity. See RLH 1955, sec. 317-2.
2. The probate court has no jurisdiction to construe a will where the claims of the parties are of a strictly legal character and no trust is involved except to such incidental extent as may be necessary in the exercise of their general jurisdiction over the ordinary administration of estates. The legislature has not manifested an intention to confer the jurisdiction to construe a will in all its parts on circuit judges sitting in probate, 24 Haw. 148, 150-1.
3. Circuit judges sitting at chambers in probate are without jurisdiction to appoint a testamentary trustee, 33 Haw. 799, 806. In a case involving a testamentary trust the court held that there is a clear line of demarcation between probate and equity jurisdictions, and it must be regarded as definitely settled that a circuit judge sitting in a proceeding essentially "probate" in character has no authority to appoint a trustee or to compel a trustee, as distinguished from an executor or administrator, to account, 23 Haw. 32, 35.
4. The appointing and removing of guardians and compelling performance of their trust, but a probate court cannot determine title to land in guardianship proceedings, 13 Haw. 575, 581.
5. Same.

Sec. 6, COMMENT, continued.

6. The administration, settlement and distribution of estates of decedents, whether consisting of real or personal property or both. Extent of this jurisdiction illustrated as follows:

- (a) MPC, sec. 143, provides that probate courts shall adjudicate creditors' claims.
- (b) MPC, sec. 130, provides that personal representative may petition for disclosure and determination of title to personal and real property and adjudicate rights therein in Probate Court.

6. To compel executors and administrators to perform their respective trusts and to account in all respects for the discharge of their official duties. Extent of this jurisdiction illustrated as follows:

- (a) Sec. 317-25, RLH 1955, provides that creditors must initiate separate action against the executor as administrator.
- (b) Sec. 317-14, RLH 1955, provides that heirs or devisees may themselves, or jointly with the personal representation maintain an action or suit for the possession of real estate or for quieting title thereto.

In arguing for probate jurisdiction over testamentary trusts, the Code Committee comments at pp. 46-47:

• • •
"The chief reason for giving a probate court jurisdiction over testamentary trust is that the judge's familiarity with the decedent's estate from which the trust is set up enables him to decide questions about the trust with a fuller appreciation of the factual problems involved than would another judge. Sometimes, however, an inter vivos trust has been set up by a testator prior to his death which has a very close relation to a trust set up by his will. Indeed, the provisions in the will may be such that it is difficult to determine whether there is a separate testamentary trust or whether the testator has merely increased the corpus of the inter vivos trust. To take care of these and similar situations, it would be desirable to have a statute in the general procedural or court organization sections of the statutes of a state which would permit the transfer of a testamentary trust to a judge or court handling a related inter vivos trust or vice versa. No such provision is included in this Code because its scope would be somewhat broader than probate matters."

On the powers of the probate court the Code Committee further states at p. 47 in its comments that MPC, sec. 60, specifically provides for declaratory judgments in the construction of a will.

MODEL PROBATE CODE

Sec. 7. Distribution of business. In all counties in which the court is composed of two or more judges, such court shall provide by local rule for the distribution of the business of the court between the judges and also for the order of business.

REVISED LAWS OF HAWAII

Sec. 213-1.5. Administration. . . .

He ~~/the chief justice/~~ shall possess the following powers, subject to such rules as may be adopted by the supreme court:

"(b) In a circuit court with more than one judge, (1) to make assignments of calendars among the circuit judges for each term of court and, as deemed advisable from time to time, to change assignments of calendars or portions thereof (but not individual cases) from one judge to another, and (2) to appoint one of the judges, for each term of court, as the administrative judge to manage the business of such court, subject to the rules of the supreme court and the direction of the chief justice; . . ."

Sec. 214-13. Rules. The supreme court may, from time to time, make rules for regulating the practice and conducting the business of such court, and also rules consistent with existing laws governing the administration of other courts, and thereafter revise such rules at its discretion.
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COMMENT:

RLH 1955, sec. 213-1.5, which was enacted in 1959 places calendar assignment powers in the supreme court chief justice.

MODEL PROBATE CODE

REVISED LAWS OF HAWAII

Sec. 8. Court open at reasonable hours. The court shall be open for the transaction of probate business at all reasonable hours.

Sec. 215-8. Terms; held when. The terms of the circuit courts shall be as follows: In the first circuit, at Honolulu, on the second Monday of January; in the second circuit, at Wailuku, on the second Monday of January; in the third circuit, at Hilo, on the second Wednesday of January; in the fifth circuit, at Lihue, on the second Wednesday of January.

Sec. 215-9. Special. Any circuit judge may, with the written approval of the chief justice, appoint special terms of his court, at other times, whenever he deems it essential to the promotion of justice.

Sec. 215-10. Length of term and what cases may be tried when. The terms of the circuit courts may continue and be held, subject to adjournment from time to time, until the times fixed by law for the commencement of their next terms respectively; provided that Sundays and legal holidays shall be excepted; . . . provided, further, that the circuit court of the second circuit shall hold sessions on the island of Molokai and the circuit court of the third circuit shall hold sessions at Kona and Kohala at least twice in each year, and, shall hold additional sessions at such places or other places within their respective circuits as often as the respective circuit judges deem such sessions to be essential to the promotion of justice, for the trial of such cases as do not require a jury, and, that no grand jury shall be summoned for such sessions.

Sec. 215-11. At chambers, summer trial, when. Except for reasons which may be deemed sufficient by the circuit judge in chambers, the trial of a contested cause or proceeding before any circuit judge in chambers shall not be commenced during the months of July and August unless upon consent of all parties.

Sec. 8, continued.

COMMENT:

The above quoted RLH provisions indicate that terms of circuit courts in Hawaii may run till the commencement of their next annual terms. Thus as is currently the practice in Hawaii, the circuit courts are open for business all year round.

The necessity for prompt attention by probate courts is well stated by the Code Committee at p. 47:

"Due to the nature of its business, the court should not be subject to the strictures of terms of court, but should be open at all reasonable hours for the conduct of probate business. Fiduciaries must be appointed promptly in order to preserve the estates; and emergencies in administration may arise at any time which require a prompt decision."

MODEL PROBATE CODE

Sec. 9. Disqualification of judge.

(a) When and how judge disqualified. When any judge or his spouse shall be related within the third degree of consanguinity according to the civil law to any of the parties or their attorneys, shall have drawn the will of the decedent, or shall be interested or have been counsel in any probate proceeding or any matter therein, the same shall be grounds for disqualifying such judge from acting in such proceeding or the particular matter with respect to which his disqualification exists. When grounds for disqualification exist, the judge may refuse to act as judge therein; or, upon the filing of a petition to disqualify such judge, stating the grounds therefor, by any person interested in the estate or the particular matter with respect to which his disqualification exists, the judge must not act therein.

REVISED LAWS OF HAWAII

Sec. 213-3. Disqualification of judge; relationship, pecuniary interest, previous judgment, bias or prejudice.

(a) No person shall sit as a judge in any case in which his relative by affinity or consanguinity within the third degree is counsel, or interested either as a plaintiff or defendant, or in the issue of which the said judge has, either directly or through such relative, any pecuniary interest; nor shall any person sit as a judge in any case in which he has been of counsel or on an appeal from any decision or judgment rendered by him.

(b) Whenever a party to any suit, action or proceeding, whether at law, in equity, criminal or special proceeding, makes and files an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall be disqualified from proceeding therein. Every such affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed before the trial or hearing of the action or proceeding, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one affidavit; and no affidavit shall be filed unless accompanied by a certificate of counsel of record that the affidavit is made in good faith. Any judge may disqualify himself by filing with the clerk of the court of which he is a judge a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

COMMENT:

RLH 1955, sec. 213-3, is a general disqualification statute whereas MPC, sec. 9, deals with disqualifications arising in probate proceedings. However, each disqualification listed in MPC, sec. 9, falls under one category or another of RLH 1955, sec. 213-3.

MODEL PROBATE CODE

Sec. 9. Disqualification of judge.

(b) How another judge obtained; validity of his acts.

When any judge shall be disqualified, or unable to act as judge due to illness or absence from the county, or when in his opinion the interest of the public or of any person interested in any matter requires that another judge act in his stead, such judge or the presiding judge, if any, may request another judge of a court of record of the same or another district to act in his place; but in either case, if all persons or their attorneys interested in the proceeding or matter shall agree by written stipulation, a member of the bar having the same qualifications as are required for judge may be requested and appointed to act as judge therein. All orders, judgments and decrees made by such acting judge shall have the same force and effect as if made by the regular judge.

COMMENT:

MPC, sec. 9(b), should be omitted from the proposed Hawaii probate code. It is contra to the Hawaii Constitution provision placing decisions relating to temporary assignment from one circuit to another in the supreme court chief justice.

HAWAII CONSTITUTION

Art. V, Sec. 3. The governor shall nominate and, . . . appoint . . . the judges of the circuit courts.

Art. V, Sec. 5. The chief justice of the supreme court shall be the administrative head of the courts. He may assign judges from one circuit court to another for temporary service. . . .

REVISED LAWS OF HAWAII

Sec. 213-1.5. Administration. . . .

He ~~/the~~ chief justice/ shall possess the following powers, subject to such rules as may be adopted by the supreme court:

"(a) To assign circuit judges from one circuit to another;

"(b) In a circuit court with more than one judge, (1) to make assignments of calendars among the circuit judges for each term of court and, as deemed advisable from time to time, to change assignments of calendars or portions thereof (but not individual cases) from one judge to another, and (2) to appoint one of the judges, for each term of court, as the administrative judge to manage the business of such court, subject to the rules of the supreme court and the direction of the chief justice;"

MODEL PROBATE CODE

Sec. 10. Power of courts to make rules. The [supreme court/ may, on the recommendation of the majority of the [judges/, or on its own motion, promulgate rules and forms of procedure for probate proceedings, not inconsistent with the provisions of this Code. Each [/ court may promulgate rules and forms of procedure for probate proceedings, not inconsistent with the provisions of this Code nor with such rules and forms as are promulgated by the [supreme court/. If in any probate proceeding a situation arises which is not provided for by any statute or rule of procedure, the court may formulate and declare a rule of procedure for that particular case.

COMMENT:

From MPC, p. 49:

" . . . Much of the proceedings in matters of probate is administrative in character and not adversary. It is believed, therefore, that rules of civil procedure designed primarily for adversary proceedings should not be applied."

REVISED LAWS OF HAWAII

Sec. 214-13. Rules. The supreme court may, from time to time, make rules for regulating the practice and conducting the business of such court, and also rules consistent with existing laws governing the administration of other courts, and thereafter revise such rules at its discretion. . . .

Sec. 215-29. Power to make and revise rules. The judges of the several circuit courts, with the approval of the supreme court, shall have power to make, promulgate and from time to time revise and amend rules for regulating the practice and conducting the business of the circuit courts and circuit judges at chambers of and in the several judicial circuits, in all matters not otherwise expressly provided; provided that in no case shall such rules purport to impose costs not expressly authorized by statute.

HAWAII REPORTS

The circuit court of the first circuit, in the absence of the exercise of the statutory power, has inherent power to make rules for the conduct of its own business, 19 Haw. 319, 320.

MODEL PROBATE CODE

Sec. 11. Powers of clerk.

(a) Ministerial matters. The clerk shall have power to take acknowledgments, administer oaths, and to certify and authenticate copies of instruments, documents and records of the court, and to perform the usual functions of his office.

(b) Notices of hearing. Subject to control of the judge, the clerk shall have power to issue notices and to make all necessary orders for the hearing of any petition or other matter to be heard in the court.

REVISED LAWS OF HAWAII

Sec. 218-8. Powers of clerks. The clerks of the courts of record shall have power to issue process, administer oaths, take depositions and perform all other duties pertaining to their office; they shall also be ex officio masters in chancery. A clerk shall attend and record the proceedings at all sittings of courts of record, and in proceedings before a circuit judge in chambers shall, if there is no official reporter in attendance, record the oral evidence adduced when so required by the judge.

Sec. 317-12. Time of hearing and notice of petitions for probate of wills or for letters of administration. Upon filing of a petition for the probate of a will or for letters of administration, the clerk of court shall fix the time of hearing thereon, which shall be not less than twenty nor more than thirty days after the date of the filing of the petition. Notice of the time and place of hearing on the petition shall be given by publication once in each of three successive weeks in such newspaper as the clerk may determine, the first publication to be not less than twenty days prior to the date of hearing; provided, that when in the opinion of the judge the value of the estate does not exceed \$1,000 and no injustice will result to any one, he may by order direct the clerk to shorten the time of the notice, or he may by order direct that the notice be given by posting as provided in the order instead of by publication. . . .

Sec. 317-31. Time of hearing and notice of petitions for approval of final accounts, distribution of estates and discharge of executors and administrators. Upon the filing of a petition for approval of final accounts, distribution of estate and discharge of an executor or administrator, the judge or clerk shall fix the time of hearing

(c) Judicial powers. If a matter is not contested, the clerk may hear and determine it and make all orders, judgments and decrees in connection therewith which the judge could make, subject to be set aside or modified by the judge at any time within thirty days thereafter; but if not so set aside or modified such orders, judgments and decrees shall have the same effect as if made by the court or judge.

COMMENT:

From MPC, p. 50:

"In most states clerks of probate courts have been given some judicial powers, or are authorized to exercise judicial powers under special circumstances, as in the absence of the judge, or in noncontentious matters. This is believed justified in the interests of the efficient conduct of the business of the court, provided that general supervision or revision of the acts of the clerk is adequately provided for . . ."

thereon. Notice of the time and place of hearing on such petition shall be given by publication at least once in each of four successive weeks in such newspaper as the judge or clerk may determine . . .

RULES OF THE CIRCUIT COURT OF THE FIRST CIRCUIT

Rule 9. Setting of motions, ex parte matters, etc.

(b) Noncontested divorce suits, noncontested probate matters, ex parte motions and other ex parte matters, will be heard upon having the same placed on the judge's docket by the attorney.

MODEL PROBATE CODE

REVISED LAWS OF HAWAII

Sec. 12. Application to court by verified petition. Every application to the court, unless otherwise provided, shall be by petition signed and verified by or on behalf of the petitioner. No defect of form or substance in any petition, nor the absence of a petition, shall invalidate any proceedings.

Sec. 317-10. Sworn petition. All applications for probate of wills, or for letters of administration, shall be by sworn petition, in which the party shall set forth all the facts upon which his application rests.

COMMENT:

In Hawaii the only applications presented to the probate court which must be verified are the applications for probate of wills or for letters of administration whereas the MPC requires that all applications be verified. The Code Committee rationalizes their position as follows at p. 51:

"In civil procedural rules there has been a modern tendency to do away with a requirement of verification of pleadings. See, for example, Fed. Rules Civ. Proc., Rule 11. However, in probate matters the situation is believed to call for verification. Often the proceeding is ex parte or is not contested and little or no evidence is introduced other than the verified petition. Moreover, in such a case, if the petitioner is present in court, the verified petition not only may be accepted in lieu of his testimony, but may be substituted for a written record of such testimony.

". . . It should be noted that it /the last line of this section/ merely states that such a defective petition or the absence of a petition does not make the proceeding void. It does not prevent an opposing litigant from insisting upon the filing of an amended petition, nor does it dispense with proof of the necessary facts."

MODEL PROBATE CODE

Sec. 13. Filing objections to petition. Any interested person, on or before the day set for hearing, may file written objections to a petition previously filed, and, upon special order or general rule of the court, objections to such petition must be filed in writing as a prerequisite of being heard by the court.

Sec. 14. Notice.

(a) When notice to be given. No notice to interested persons need be given except as specifically provided for in this Code or as ordered by the court. When no notice is required by this Code, the court may require such notice as it deems desirable by a general rule or by an order in a particular case.

(b) Kinds of notice required. Unless waived and except as otherwise provided by law, all notices required by this Code to be served upon any person shall be served as the court shall direct, by rule or in a particular case, either

- (1) By delivering a copy of the same at least seven days before the hearing to such person personally; or
- (2) By publishing once in each week for three weeks consecutively in some newspaper printed and circulating in the county where said court is held, the first day of publication to be at least thirty days prior to the date set for hearing; or in case there be no newspaper printed in said county, then in some newspaper published in this state and designated by the judge or clerk, circulating in the county where the proceeding is pending; or
- (3) By registered mail, requesting a return receipt signed by addressee only, addressed to such person located in the United States at his address stated in the petition for the hearing, to be posted by depositing in any United States post office in this state at least fourteen days prior to the date set for hearing in said notice; or
- (4) By any combination of two or more of the above.

In all cases where service by publication is ordered, but personal service or service by registered mail is not ordered, all persons whose names and addresses are given

Sec. 213-10. Publication of notices and process. All notices or process required or permitted by law, by the rules of any court or by judicial order to be published or advertised in judicial proceedings in the Territory shall be published or advertised in a newspaper or newspapers having a general circulation within the county in which such judicial proceedings are commenced or had.

When such notices or process are required to be published or advertised once or more in a given interval for or in a successive number of such intervals, the use of the word, "successive," shall not be construed to require publication in more than the stated number of intervals; for example, a requirement of publication "once a week for (or in) three successive weeks," shall require but three publications.

Sec. 14, MPC, continued.

in the petition shall be served by ordinary mail in the same manner and with the same requirements as provided herein for service by registered mail except that no registration shall be required.

(c) By whom service made. Service by publication and by registered and ordinary mail shall be made by the clerk at the instance of the party who requires such service to be made. Personal service may be made in any part of this state by any competent person.

(d) Service on attorney. If an attorney shall have entered his appearance in writing for any party in any probate proceeding or matter pending in the court, all notices required to be served on the party in such proceeding or matter shall be served on the attorney and such service shall be in lieu of service upon the party for whom the attorney appears.

RULES OF THE CIRCUIT COURT OF THE FIRST CIRCUIT

Rule 6. Service of Papers and Proof Thereof:

(b) Manner of Service. If a party is represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court.

COMMENT:

The various statutes governing probate proceedings in Hawaii provide the following variety of notices:

- (1) Sec. 317-31, RLH 1955 - notice by publication at least once in each of four successive weeks in a newspaper selected by the judge or clerk.
- (2) Sec. 317-31, RLH 1955 - notice by posting of said notice.
- (3) Sec. 338-46, RLH 1955 - notice by such other method, if any, as the judge may, in his discretion, prescribe, e.g., registered mail.
- (4) Sec. 317-15, RLH 1955 - notice by personal service.

When other sections of the MPC merely state that notice must be given, without specification, Code Sec. 14:

" . . . provides the different kinds of notices from which the court makes a selection. This selection may be made in each particular case or by a rule of court. Moreover, in any case where the Code requires no notice, the court may in its discretion order notice or may make a general rule as to notice in any class of cases. The kind of notice so ordered is to be determined by the court. For example, a court order could make express provision for service by ordinary mail, or for service in any other reasonable manner whether expressly provided for in subsection (b) hereof or not. Under sec. 11(b) the clerk may, subject to the control of the court and any standing rules of court, direct the manner of service." From MPC, p. 53.

MODEL PROBATE CODE

Sec. 15. Proof of service. Proof of service in all cases requiring notice, whether by publication, mailing or otherwise, shall be filed before the hearing. Service made by a private person shall be proved by the affidavit of the person; service made by the clerk or other official shall be proved by certificate or return of service. In the case of service by registered mail, the return receipt shall be attached to the proof of service if a receipt has been received; if no receipt has been received the court may, in its discretion, order further service on the party.

RULES OF THE CIRCUIT COURT OF THE FIRST CIRCUIT

Rule 12. Proof of Publication: Whenever the publication in a newspaper of any summons, process, notice or order shall be required, evidence of such publication shall be given by the affidavit of the editor, publisher, manager, foreman, clerk or printer of such newspaper, not interested in the suit, action, matter or proceeding to which such publication relates, to which affidavit shall be attached a copy of such summons, process, notice or order, and which affidavit shall also specify the dates and times when and the newspaper in which the publication was made. The publisher shall file said affidavit with the clerk before the time fixed for hearing.

Rule 6. Service of Papers and Proof Thereof:

(c) Proof of service. Proof of service may be by written acknowledgment of service on the fly leaf of the original, by a certificate signed by the party serving appearing also on the fly leaf of the original, by affidavit of the person making service, or by any other proof satisfactory to the court, unless otherwise provided by law or by the Hawaii Rules of Civil Procedure. A party who has been prejudiced by failure to receive due notice or to be served, or who has been prejudiced by reason that service was made by mail, may apply to the court for appropriate relief.

MODEL PROBATE CODE

Sec. 16. Waiver of notice. Any person legally competent who is interested in any hearing in a probate proceeding may in person or by attorney waive in writing notice of such hearing. A guardian of the estate or a guardian ad litem may make such a waiver on behalf of his ward, and a trustee may make such a waiver on behalf of the beneficiary of his trust. A consul or other representative of a foreign government, whose appearance has been entered as provided by law on behalf of any person residing in a foreign country, may make such waiver of notice on behalf of such person. Any person who submits to the jurisdiction of the court in any hearing shall be deemed to have waived notice thereof.

MODEL PROBATE CODE

Sec. 17. Stenographic record. The judge may of his own motion, or on the request of an interested person, direct the stenographer of his court to attend any hearing in a probate proceeding and make a stenographic record of the same.

REVISED LAWS OF HAWAII

Sec. 218-12. Duties of reporters, first circuit. The duties of each reporter shall be to attend upon the court and write down all the testimony of witnesses in shorthand, together with the proceedings and objections and exceptions of counsel, exclusive of argument, the rulings of the court charge to the jury and any other matter which the court may require him to report. . . . In any hearing of probate of will or administration matter the judge may, in his discretion, order the reporter to supply and file, without charge and within a reasonable time, a certified statement of such testimony as relates to the names, ages and genealogies of heirs. . . .

MODEL PROBATE CODE

Sec. 18. Jury trial.

(a) Right to jury trial; waiver. Whenever the right to trial by jury is guaranteed by the constitution of this state, any person entitled thereto may file a written demand for trial by jury prior to the hearing of the issues of fact. The right to trial by jury is waived if a demand is not so filed, or if the person claiming the right fails to appear at the hearing or fails to object to trial by the court before evidence is commenced.

(b) When not of right. When, under subsection (a) hereof, there is no right to trial by jury or if the right is waived, the court in its discretion may call a jury to decide any issues of fact, but the verdict in such case shall be advisory only.

HAWAII CONSTITUTION

Art. 1, Sec. 10. In suits at common law where the value in controversy shall exceed one hundred dollars, the right of trial by jury shall be preserved. The legislature may provide for a verdict by not less than three-fourths of the members of the jury.

REVISED LAWS OF HAWAII

Sec. 317-1. No jury in first instance. Matters of probate and of administration shall be heard and determined by the judge having jurisdiction thereof, without the intervention of a jury.

Sec. 317-2. Jury on appeal, when. Whenever the value of the estate of any deceased person exceeds \$500, any person claiming, before any judge sitting as a court of probate, such estate, or any part thereof, or any interest therein, by virtue of any will or testamentary devise, or by virtue of the statutes of descent of property in the Territory, who may deem himself aggrieved, by the decision of such probate judge at chambers, may, upon taking his appeal to the circuit court, if any matter of fact is in issue, move the appellate court that the issue of fact may be tried by a jury, and his motion shall not be denied.

HAWAII REPORTS

A motion for a jury trial must be made, not in the probate court, but in the circuit court after an appeal is taken to that court, 43 Haw. 304.

Sec. 317-3. Same. When an appeal is taken by the party against whom judgment has been rendered by the judge of probate at chambers, the appellee may likewise move the court that any issue of fact may be tried by a jury, and his motion shall not be denied.

COMMENT:

In comparing the Hawaii probate statutes and the MPC provisions regarding jury trials, fact questions should be divided into the following three categories:

1. Fact questions arising in common law actions,
2. Fact questions touching validity of wills or descent of property, and
3. Other fact questions.

Common law fact questions are adjudicated in probate proceedings with right to jury trial therein under the Code, to illustrate the adjudication of creditors' claims and the determination of title in disclosure proceedings. In Hawaii these common law causes of action are adjudicated, not in probate proceedings, but by initiating separate suits in the court of general jurisdiction.

By Hawaiian legislation passed in 1864, probate court decisions touching upon the validity of wills and of descent of property could be appealed to the circuit court sitting as a court of general jurisdiction for a jury trial. (See 3 Haw. 614, 9 Haw. 253.)

It should be noted in this regard that by an appellant so requesting a jury trial, an appellee may likewise move the court that any issue of fact may be tried by a jury, and his motion shall not be denied.

In Hawaii fact questions under category 3 are not tried by jury. However, while the MPC does not give a right to jury trial in categories 2 or 3 above, the court in its discretion may call a jury whose decision would be purely advisory.

Sec. 18, COMMENT, continued.

The Code Committee explains its view as follows, at p. 54-55:

"Most of the questions of fact likely to arise in connection with probate matters can be decided more satisfactorily by the judge than by the jury and at less expense. Therefore, if it were not for the possibility of violating constitutional provisions which preserve the right to jury trial, it would be desirable to provide that there shall be no trial by jury except under the circumstances stated in subsection (b) hereof. It is clear that there was no right of trial by jury in England in chancery or in the ecclesiastical courts, which were the predecessors of probate courts. But certain steps in a modern proceeding for the administration of the estate of a decedent may be regarded as merely proceedings at law which, for convenience, have been transferred to the court having jurisdiction of probate matters. Most important among these are the adjudication of creditors' claims and the determination of title in disclosure proceedings. This section seeks to insure that the constitutional right to trial by jury is not violated and at the same time to minimize as far as possible the use of the jury.

". . .

"By the great weight of authority there is no constitutional right to jury trial of a will contest. . . . Many jurisdictions, however, grant jury trial of right by statute. . . . This is not recommended; but if it were thought to be desirable, a subsection to this effect could be added to section 18, and appropriate changes made in subsection (a) and (b) . . ."

MODEL PROBATE CODE

Sec. 19. Vacation and modification of judgments. For good cause, at any time within the period allowed for appeal after the final termination of the administration of the estate of a decedent or ward, the court may vacate or modify its orders, judgments and decrees, or grant a rehearing therein, except that no such power shall exist as to any orders, judgments or decrees from which an appeal has been taken, prior to a final disposition thereof on such appeal or to set aside the probate of a will after the time allowed for contest thereof. No vacation or modification under this section shall affect any act done or any right acquired in reliance on any such order, judgment or decree.

COMMENT:

The Code Committee states at p. 56:

"One of the reasons for the inferior position of probate courts in our system of judicial organization has been their lack of power over their own orders and judgments such as exists in courts of general jurisdiction. It is true that over a long period of years some small amount of control has been granted with respect to particular orders and usually for short periods of time; but it has been wholly inadequate for the needs. Obviously some effective control is necessary in the interests of efficient administration. The very fact of the ex parte nature of much of probate procedure makes this highly desirable.

"If the need for such control is granted, the time element is also important. A few statutes have restricted this control to a time corresponding to the period allowed for filing a motion for a new trial; others to a period corresponding to the time for taking an appeal. In view of the fact that an administration proceeding is one proceeding consisting of many steps or stages which are inextricably connected and related, it seems advisable to extend this control throughout the entire proceeding and also for a time thereafter corresponding to the time for taking an appeal.

"It is not intended that this power be arbitrary, but must depend for its exercise upon the existence of facts constituting 'good cause.' Furthermore, the exercise of such power may not affect acts done or rights acquired in reliance on any order judgment or decree prior to its vacation or modification.

"In addition to statutory provisions such as this for relief against a judgment or decree, there are rules of equity giving relief from the judgment of a court of general jurisdiction in certain cases of fraud, duress and error.

". . . As will be seen from sec. 6 of this Code, the court having jurisdiction in probate matters is a court of general jurisdiction. Hence, the relief provided for in sec. 19 hereof is supplementary to the relief given in equity against judgments in the absence of statute."

Sec. 19, COMMENT, continued.

In Hawaii equity relief as mentioned in the last sentence above is the only relief possible from judgments of probate courts. If the relief sought is the revocation of the probate of a will, however, petitions should be presented to the circuit court sitting in probate, not as an equity court or more properly a court of general jurisdiction. In 13 Haw. 216 the court held that the general rule is that equity may relieve against every species of fraud and so may set aside or annul decrees or judgments obtained through fraud, but that it cannot set aside or annul for fraud decrees or judgments admitting wills to probate is an exception established almost as firmly as the rule itself, such jurisdiction is to be exercised by the circuit judge sitting in probate. Then in 25 Haw. 70 the court further discussed equity relief and held that a decree admitting a will to probate can be set aside by the probate court only upon sufficient cause shown, which involves both cause why the will should not be sustained and cause why the petitioner did not make a contest at the original hearing; that the power of a probate court to set aside a decree admitting a will to probate is equal to that of a court of equity on a bill filed for relief against a judgment or decree for fraud or mistake; that the sole grounds of relief in equity against a judgment of a court of law are for accident, fraud, mistake or surprise, and where on account of one or more of these causes it would be against conscience to execute the judgment.

Sec. 20. Appeals.

(a) Appeal to /supreme court/ permitted. Except as provided in subsection (b) hereof, a person aggrieved by an order, judgment or decree of the [] court, in proceedings under the provisions of this Code, may obtain a review of the same by the /supreme court/.

(b) Orders which are not appealable. There shall be no appeal from any order removing any fiduciary for failure to give a new bond or to render an account as required by the court, nor from an order appointing a special administrator, nor from an order granting a rehearing, nor, by any person except the widow or children affected thereby, from an order granting an allowance to the widow or children of a decedent pending settlement of the estate or setting apart exempt personal property to them.

(c) When appeal heard with appeal from decree of final distribution. When an appeal is taken with respect to any appealable order, judgment or decree in the administration of a decedent's estate, made prior to the decree of final distribution, other than an order admitting or denying the probate of a will or appointing or refusing to appoint a personal representative, the [] court may, in its discretion, order that the appeal be stayed until the decree of final distribution is made and that the appeal be heard only as a part of any appeal which may be taken from the decree of final distribution. This subsection shall not apply to guardianships and testamentary trusts.

(d) When appeal from decree of final distribution includes appeal from prior orders. When an appeal is taken from the decree of final distribution in the administration of a decedent's estate, all prior appealable orders, judgments and decrees to which the appellant has filed objections in writing within five days after the order, judgment or decree was rendered and from which an

Sec. 208-3. From circuit judges in chambers. Appeals shall be allowed from all decisions, judgments, orders or decrees of circuit judges in chambers, to the supreme court, except in cases in which the appellant is entitled to appeal to a jury, whenever the party appealing shall file notice of his appeal, and pay the costs accrued within ten days after the filing of the decision, judgment, order or decree appealed from; provided, however, that in any case in which the law allows an appeal from the decision, judgment, order or decree of a judge in chambers to be tried before a jury, the judge whose decision, judgment, order or decree is appealed from shall not preside at the trial of such appeal before a jury.

Appeals may be allowed upon like terms as to payment and deposit of costs, by the circuit judge in his discretion from decrees overruling demurrers or from interlocutory judgments, orders or decrees whenever the circuit judge may think the same advisable for the more speedy termination of litigation. The refusal of the circuit judge to allow an appeal from an interlocutory judgment, order or decree shall not be reviewable by any other court.

HAWAII REPORTS

Order appointing special administrator is interlocutory and not appealable, 22 Haw. 712, 714.

Orders concerning annual or intermediate accounting given ex parte are not final and may be modified or annulled before final distribution, 18 Haw. 542, 546; but are appealable as to an interested party who appears and objects, 18 Haw. 542, 546.

On an appeal from an order approving the accounts of an executor matters therein not objected to before the circuit judge may be questioned in the supreme court, 18 Haw. 542.

appeal has not theretofore been taken, except orders admitting or denying the probate of a will or appointing a personal representative shall, at the election of the appellant, be reviewed. The appellant shall indicate such election by clearly stating in the appeal the orders, judgements and decrees which he desires to have reviewed.

(e) Stay. An appeal shall stay other proceedings in the court from which the appeal is taken unless, or to the extent that, such court finds that neither the interested persons nor the court will be prejudiced and by order permits other proceedings to be had.

(f) When fiduciary not required to give appeal bond. No appeal bond shall be required of a fiduciary when he appeals on behalf of the estate.

(g) Applicability of general appellate rules. Except as provided in this section, the provisions as to time, manner, notice, appeal bonds, stays, scope of review and all other matters relating to appellate review shall be determined by the rules applicable to appeals to the supreme court in equity cases except that in cases where jury trial has been had of right, the rules applicable to the scope of review in jury cases shall apply.

RULES OF THE SUPREME COURT OF THE TERRITORY OF HAWAII

Rule 1. Procedure. Entry of Cases on Docket.

(a) The Hawaii Rules of Civil Procedure. The Hawaii Rules of Civil Procedure, whenever applicable, are hereby adopted as a part of the rules of this court with respect to appeals in actions of a civil nature. Except when a rule by the provisions thereof is inapplicable, wherever the word "appeal" is used herein, it shall be applicable to every proceeding in this court other than an original action. . . .

REVISED LAWS OF HAWAII

Sec. 317-4. Evidence on appeal to jury. On all appeals from a decision of a probate judge at chambers, whether the same is tried before a jury or before the court, without the intervention of a jury, the record of the court below may be read as testimony, and either party shall be at liberty to introduce such further testimony as he may be enabled, and also to re-examine orally before such court or jury on such appeal, any witnesses whom he may have produced and examined on the original hearing at chambers.

Sec. 20, continued.

COMMENT:

The following shows that in Hawaii the appellate rules applicable to probate proceedings and to civil actions differ and that the MPC and the Hawaii civil actions rules are similar:

<u>MODEL PROBATE CODE</u>	<u>HAWAII RULES OF CIVIL PROCEDURE</u>	<u>HAWAII PROBATE PROCEDURE</u>
(1) Appeals allowed from order denying or admitting a will to probate, orders appointing or refusing to appoint a personal representative; and court given discretion as to other orders, judgments or decrees as to whether appeal stayed until decree of final distribution made.	(1) Appeals taken from "judgments," H.R.C.P. Rule 54(a).	(1) Appeals allowed from all "judgments, orders or decrees," RLH 1955, sec. 208-3.
(2) Scope of review and all other appellate matters determined by rules applicable to appeals to the supreme court in equity cases which in Hawaii is governed by H.R.C.P. Rule 52(a).	(2) Fact findings not set aside upon appeal unless they are "clearly erroneous," H.R.C.P. Rule 52(a).	(2) In all appeals the appellate court shall hear additional testimony and shall permit oral re-examination of witnesses examined in the original probate hearing, RLH 1955, sec. 317-4.
(3) Upon appeal only orders, judgments and decrees to which objection filed in probate court reviewed.	(3) Actions of the circuit court as to which no objections are interposed are not subject to appellate review, H.R.C.P. Rule 46, 43 Haw. 299.	(3) Under our practice no exceptions need be noted to the ruling of a circuit judge sitting at chambers; furthermore, on appeal from a circuit judge sitting in probate, objections not made before the circuit judge may be made in the Supreme Court, and the latter court may itself raise objections not made by the parties, 26 Haw. 774, 779.

The above comparison shows that MPC, sec. 20, discards the notion of an appeal from the probate court as a trial de novo.

In discussing this section the Code Committee states at p. 58:

Sec. 20, COMMENT, continued.

"The provisions of subsections (c) and (d) for postponing appeals as to particular orders are designed to mitigate the evils involved in permitting numerous appeals to the supreme court in the same probate proceeding. . . ."

The Code Committee further states in "Appendix A Statutory Notes on Various Sections of the Model Probate Code" at p. 251:

"4. One appeal to bring up all errors. The normal procedure in decedents' estate proceedings requires an appeal from each 'final' order made, with the result that there may be many appeals during the settlement of a single estate. There may, for instance, be an appeal from the probate of the will, the appointment of the personal representative, decisions on claims, accountings, the degree of final distribution, and perhaps other matters. The Model Probate Code formulates a method analogous to appeals in civil actions, so that errors saved by proper objections may be brought up together on appeal from the decree of final distribution. Although there are obvious differences between a probate proceeding and a civil action, they are not so essentially different that the same methods of appeal cannot be used in both types of proceeding. There are, however, certain decisions in the course of administration of an estate which are so fundamental to the whole proceeding that it is necessary to permit an appeal from them before continuing with the administration. The decision of the probate of the will and the appointment of the personal representative clearly form the basis upon which all other steps in the administration may depend, and therefore appeals on these matters should not be delayed. Other matters, however, will not so materially affect succeeding steps in the administration that a review of them is essential before the estate is fully administered."

Insofar as equity and law appeals are the same in Hawaii, subsection (g) should be modified to read as follows:

(g) Applicability of general appellate rules. Except as provided in this section, the provisions as to time, manner, notice, appeal bonds, stays, scope of review and all other matters relating to appellate review shall be determined by the rules applicable to appeals to the supreme court.

MODEL PROBATE CODE

Sec. 21. Records. The court shall keep the following records:

- (a) An index in which files pertaining to estates of deceased persons shall be indexed under the name of the decedent, and those pertaining to guardianships under the name of the ward; after the name of each file shall be shown the file number and the book and page of the register.
- (b) A register, in which shall be listed in chronological order under the name of the decedent or ward, all documents filed or issued and all orders, judgments and decrees made pertaining to the estate, the date thereof, and a reference to the volume and page of any other book in which any record shall have been made of such document.
- (c) A record of wills, properly indexed, in which shall be recorded all wills admitted to probate with the certificate of probate thereof;
- (d) A record of bonds, properly indexed, in which shall be recorded all bonds filed;
- (e) A record of letters, properly indexed, in which shall be entered all letters issued;
- (f) A record of probate proceedings, which shall contain the minutes of the proceedings, and all orders, judgments and decrees of the court.

REVISED LAWS OF HAWAII

Sec. 218-4. Custody; disposition of exhibits. The clerks of the supreme and circuit courts shall have the custody of all records, books, papers, moneys, exhibits and other things pertaining to their respective courts.

. . .

Sec. 317-11. Certain records, copies to supreme court. The chief clerks of the circuit courts of the second, third and fifth circuits shall file with the supreme court certified copies of all petitions for probate of wills and for the issuance of letters of administration, and also, certified copies of all orders of distribution.

Sec. 21, continued.

COMMENT:

The probate records kept by the clerks of the various circuit courts in Hawaii differ from those listed in MPC, sec. 21 only in that (1) a letters issued record and (2) a separate court orders, judgments and decrees register are not kept.

Current Hawaii record keeping practices are adequate and insofar as (1) letters issued and (2) orders, judgments and decrees are kept in the files of each respective proceeding, making copies thereof and putting the originals in separate records seem unnecessary. Important papers as wills and bonds are kept by the circuit court clerks in vaults and this accords with the view of the Code Committee at p. 252:

" . . . In general, it may be said that the purpose of making records is the preservation of documents and information. The filing of the various papers is sufficient preservation in some cases, but the danger of loss or intentional removal of such important documents as wills and bonds warrants their duplication by copying them into the court records."

PART II. INTESTATE SUCCESSION AND WILLS

INTESTATE SUCCESSION

Sec. 22. General rules of descent. The net estate of a person dying intestate shall descend and be distributed as follows:

- (a) Share of surviving spouse. The surviving spouse shall receive the following share.
 - (1) One-half of the net estate if the intestate is survived by issue; or
 - (2) The first five thousand dollars and one-half of the remainder of the net estate, if there is no surviving issue, but the intestate is survived by one or more of his parents, or of his brothers, sisters or their issue; or
 - (3) All of the net estate, if there is no surviving issue nor parent nor issue of a parent.
- (b) Shares of others than surviving spouse. The share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, shall descend and be distributed as follows:
 - (1) To the issue of the intestate; if they are all in the same degree of kinship to the intestate they shall take equally, or if of unequal degree, then those of more remote degrees shall take by representation.
 - (2) If there is no surviving issue of the intestate, then to the surviving parents, brothers and sisters and the issue of deceased brothers and sisters of the intestate. Each living parent of the intestate shall be treated as of the same degree as a brother or sister, and shall be entitled to the same share as a brother or sister. Issue of deceased brothers and sisters shall take by representation.

DOWER AND CURTESY

Sec. 319-1. Dower. Every woman shall be endowed of one-third part of all the lands owned by her husband at any time during marriage, in fee simple, or in freehold, unless she is lawfully barred thereof. She shall also be entitled, by way of dower, to an absolute property in the one-third part of all his remaining property owned by him at the date of his death, after the payment of all his just debts. The interests to which the wife is entitled in accordance with this section in the husband's real and personal property shall not apply to, and nothing in this section shall be deemed to give to the wife any interest in, the husband's interest in community property, real or personal.

HAWAII REPORTS

Life estate only, 26 Haw. 417, 421.

REVISED LAWS OF HAWAII

Sec. 319-16. Curtesy; election between curtesy and will. In case the wife dies first and intestate, then except as in this section provided, her property shall immediately descend to her heirs, but shall be in all cases, whether she die testate or intestate, subject to a life interest in the husband in one-third of the wife's lands owned by her in fee simple or in freehold at the date of her death. The husband shall also, whether the wife die testate or intestate, be entitled, by way of curtesy to an absolute property in the one-third part of all the wife's remaining property owned by her at the date of her death, after the payment of all her just

- (3) If there is no surviving parent or brother or sister of the intestate, then to the issue of brothers and sisters. If such distributees are all in the same degree of kinship to the intestate they shall take equally, or if of unequal degree, then those of more remote degrees shall take by representation.
 - (4) If there is no surviving issue, or parent of the intestate, or issue of a parent, then to the surviving grandparents of the intestate equally.
 - (5) If there is no surviving issue, or parent, or issue of a parent, or grandparent of the intestate, then to the issue of deceased grandparents in the nearest degree of kinship to the intestate per capita without representation. The degree of kinship shall be computed according to the rules of the civil law; that is, by counting upward from the intestate to the nearest common ancestor and then downward to the relative, the degree of kinship being the sum of these two counts.
 - (6) If there is no person mentioned in the preceding five parts of this subsection, then to the State of .
- (c) Meaning of representation. "Representation" refers to a method of determining distribution in which the takers are in unequal degrees of kinship with respect to the intestate, and is accomplished as follows: after first determining who are in the nearest degree of kinship of those entitled to share in the estate, the estate is divided into equal shares, the number of shares being the sum of the number of living persons who are in the nearest degree of kinship and the

debts. During the life of the wife the husband shall have no curtesy right inchoate or otherwise in the wife's property. If any provisions are made for the widower in the will of his wife, he shall be subject to the same requirements with respect to election between his curtesy and the provisions of the will, or taking under both, as is a widow in similar circumstances under the provisions of sections 319-14 and 319-15.

No husband who has, for one year or upwards, previous to the death of his wife, wilfully and utterly deserted his wife, or wilfully neglected or refused to provide suitable maintenance for his wife, shall be entitled to any right or interest in his wife's property by way of curtesy.

The interests to which the husband is entitled in accordance with this section in the wife's real and personal property shall not apply to, and nothing in this section shall be deemed to give the husband any interest in, the wife's interest in community property, real or personal.

DESCENT OF PROPERTY

Sec. 318-4. General rules of descent. (a) Issue, lineal descendants. The property shall be divided equally among the intestate's children, and the issue of any deceased child by right of representation, and if there is no child of the intestate living at his death, his estate shall descend to all his other lineal descendants; and if all such descendants are in the same degree of kindred to the intestate, they shall share the estate per capita, that is, equally; otherwise they shall inherit per stirpes, that is, by each of the children taking a share, and the grandchildren, the children of a deceased child taking a share, to be afterwards divided among themselves.

Sec. 22, MFC, continued.

number of persons in the same degree of kinship who died before the intestate, but who left issue surviving; each share of a deceased person in the nearest degree shall in turn be divided in the same manner among his surviving children and the issue of his children who have died leaving issue who survive the intestate; this division shall continue until each portion falls to a living person. All distributees except those in the nearest degree are said to take by representation.

Sec. 318-4, RLH, continued.

(b) Widow; father and mother; brothers and sisters. If the intestate leaves no issue, his estate shall descend one-half to his widow, and the other half to his father and mother as tenants in common; and if he leaves no widow, nor issue, the whole shall descend to his father and mother, or to either of them if only one is alive.

If he leaves no issue, nor father, nor mother, his estate shall descend one-half to his widow, and the other half to his brothers and sisters, and to the children of any deceased brother or sister by right of representation. If he leaves no issue, nor father, nor mother, nor widow, his estate shall descend to his brothers and sisters, and to the children of any deceased brother or sister by right of representation.

(c) Husband; father and mother; brothers and sisters. If the intestate is a woman and leaves no issue, her estate shall descend one-half to her husband, and the other half to her father and mother as tenants in common, and if she leaves no husband, nor issue, the whole shall descend to her father and mother, or to either of them if only one is alive; if she leaves no issue, nor father, nor mother, her estate shall descend one-half to her husband and the other half to her brothers and sisters, and to the children of any deceased brother or sister by right of representation. If she leaves no issue, nor father, nor mother, nor husband, her estate shall descend to her brothers and sisters, and to the children of any deceased brother or sister by right of representation.

(d) Widow or husband. If the intestate leaves no issue nor father, mother, brother or sister, nor descendants of any deceased brother or sister, the estate shall descend to the intestate's widow, if any; or in case the intestate is a woman, to her husband, if any.

(e) Otherwise, next of kin. If the intestate leaves none of such relatives surviving, nor widow, nor husband, the estate shall descend in equal shares to the next of kin in equal degree, but no person shall be entitled, by

Sec. 22, continued.

Sec. 318-4, RLH, continued.

right of representation to the shares of such next of kin who have died; provided, that if the estate comes through either parent of the deceased intestate, the brothers and sisters of that parent and their respective heirs shall be preferred to those of the other parent.

Sec. 318-5. From unmarried minor child. If the intestate dies leaving several children, or leaving one child, and the issue of one or more others, and any surviving child dies under age not having been married, all the estate that came to the deceased child by inheritance from the deceased parent, shall descend in equal shares to the other children of the same parent, and to the issue of any other deceased children, who have died, by right of representation.

If at the death of such child who dies under age, not having been married, all the other children of his parent are also dead, and any of them has left issue, the estate that came to the child by inheritance from his parent, shall descend to all the issue of the other children of the same parent; and if all the issue are in the same degree of kindred to the child, they shall share the estate equally; otherwise they shall take according to the right of representation.

Sec. 318-14. Escheat to Territory. If the intestate leaves no kindred, his estate shall escheat to the Territory.

Sec. 318-15. Escheat to owner of ahupuaa, etc. Upon the decease of any person owning, possessed of, or entitled to any estate of inheritance or kuleana in any land or lands in the Territory, leaving no kindred surviving, all such land and lands shall thereupon escheat and revert to the owner of the ahupuaa, ili or other denomination of land, of which such escheated kuleana had originally formed a part.

LEGISLATIVE REFERENCE BUREAU

1931

STATE OF HAWAII

Sec. 22, continued

COMMENT:

MPC, sec. 22, differs from the corresponding provisions of the RLH as follows:

(1) MPC, sec. 22(a), is a substitute for sec. 318-4(b), (c) and (d), RLH 1955, whereby a widow or widower takes half of an intestate's net estate if no issue of the intestate survives or all if issue and other relatives do not survive and is also a substitute for the dower and curtesy provisions of secs. 319-1 and 319-16, RLH 1955. In instances where issue does survive, surviving spouses in Hawaii would only have dower or curtesy interests and generally where estates are solvent, these life interests would be substantially smaller than the shares of the surviving spouse under the MPC. The latter shares would, however, be subject to decedent's debts.

(2) Whereas RLH, sec. 318-4(e), permits all persons of the blood of the intestate, however remote, to take as heirs, MPC, sec. 22(b), cuts off remote kin beyond grandparents and their issue. The Code Committee states at p. 62:

"... This is believed to accord with the wishes of the average person who dies intestate. Relatives may be so distant that the decedent might well prefer that his property go to the state rather than to such relatives. The present English statute of descent and distribution recognizes this principle. . . . Some American states also cut off the lines of inheritance short of the most remote relative of the blood of the intestate."

(3) RLH, sec. 318-4(e), applies the "ancestral estate" doctrine or the favoring of the branch of the intestate's family from whom the property was inherited to persons inheriting as next of kin. They can inherit only if they can show a relationship to the original purchaser. The MPC makes no distinction between ancestral and non-ancestral property. The Code Committee observed that most states have repealed their statutory adaptation of the common law "ancestral estate" doctrine and states thereto at p. 62:

"It is believed that such a distinction only complicates land titles and does not serve to carry out any wish of the intestate."

Sec. 22, COMMENT, continued.

(4) Under RLH, sec. 318-4(b), parents take in preference to brothers and sisters; however, MPC, sec. 22(b), provides that parents take equally with brothers and sisters.

Any revision of Hawaii's intestate succession pattern should be undertaken with the following Code Committee observation expressed at p. 63 in mind:

"It is, of course, recognized that any scheme of intestate succession is, to some extent, arbitrary. It should in the main express what the typical intestate would have wished had he expressed his desires in the form of a will or otherwise. This is a highly speculative matter, and legislators may deem it desirable to modify the scheme herein set out."

MODEL PROBATE CODE

Sec. 23. Partial intestacy. If part but not all of the estate of a decedent is validly disposed of by will, the part not disposed of by will shall be distributed as provided herein for intestate estates.

HAWAII REPORTS

Where will is limited in operation to a part only of testator's estate, general administration will be granted of remainder as of an intestate estate, 4 Haw. 513.

Sec. 24. Kindred of the half blood. Kindred of the half blood shall inherit the same share which they would have inherited if they had been of the whole blood.

Sec. 312-8. Kindred of half blood. The kindred of the half blood shall inherit equally with those of the whole blood in the same degree; provided, that where the inheritance came to the intestate by descent, devise or gift, of some one of his ancestors, all those who are not of the blood of such ancestor, shall be excluded from such inheritance.

HAWAII REPORTS

Definitions: "Ancestor" means any one from whom estate was immediately inherited by deceased, including son or wife of deceased, 9 Haw. 393; 20 Haw. 567.

COMMENT:

The MPC does not include the ancestral doctrine in the intestate succession scheme of MPC, sec. 22, and in the half blood rule of MPC, sec. 24.

In Hawaii the ancestral estate doctrine is applied to inheritance by kindred of the half blood and to inheritance by next of kin other than surviving spouse, issue, parents or brothers and sisters and their children (see Hawaii comparison to MPC, sec. 22).

The ancestral estate clause of the half blood statute has operated to completely exclude half blood relatives of an intestate so long as any remote relative of the ancestor exists, 13 Haw. 716; 15 Haw. 648. This result prompted the Code Committee to observe at p. 64: "This proviso for ancestral estate does not logically fit in with the half blood statute."

MODEL PROBATE CODE

Sec. 25. Afterborn heirs; time of determining relationships. Descendants and other relatives of the intestate, begotten before his death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived him. With this exception, the descent and distribution of intestate estates shall be determined by the relationships existing at the time of the death of the intestate.

REVISED LAWS OF HAWAII

Sec. 318-9. Posthumous children. Posthumous children shall, in all cases, inherit the same as if they had been born during their father's lifetime.

COMMENT:

While section 318-9, RLH 1955, limits taking to posthumous children, MPC, sec. 25, expands taking to posthumous collaterals who are in embryo at the time of the intestate's death.

MODEL PROBATE CODE

Sec. 26. Illegitimate children. For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants and collaterals, in all degrees, and they may inherit from him. Such child shall also be treated the same as if he were a legitimate child of his mother for the purpose of determining homestead rights, the distribution of exempt property and the making of family allowances. When the parents of an illegitimate child shall marry subsequent to his birth, such child shall be deemed to have been made the legitimate child of both of the parent for purposes of intestate succession.

REVISED LAWS OF HAWAII

Sec. 318-6. To illegitimate child. Every illegitimate child shall be considered as an heir to his mother, and shall inherit her estate, in whole or in part, as the case may be, in like manner as if he had been born in lawful wedlock.

HAWAII REPORTS

Not heir of mother's parents, 20 Haw. 722.

REVISED LAWS OF HAWAII

Sec. 318-7. From illegitimate persons. If any illegitimate person dies intestate, without leaving lawful issue, or a widow, his estate shall descend to his mother; but if he leaves a widow, she shall take one-half, and his mother the other half, and if his mother is not living, but his widow is, then the widow shall take one-half, and the remaining half shall go to his brothers and sisters in equal parts, the children of any deceased brother or sister taking by right of representation. In default of surviving brothers or sisters, or their issue, such one-half shall go to the brothers and sisters of his mother in equal shares, the issue of any such brother or sister who is deceased, taking by right of representation. In default of any relatives as are in this section mentioned, the half, and the whole in the event that he leaves no widow, shall go to his next of kin. No action at law or other process shall hereafter be commenced or prosecuted on behalf of the Territory to recover or hold any property which but for this section, might have been held to have escheated to the Territory.

Sec. 26, continued.

RLH, continued.

REVISED LAWS OF HAWAII

Sec. 57-24. Legitimation.

(a) All children born out of wedlock, irrespective of the marriage of either parent to another, become legitimate on the marriage of the parents with each other and are entitled to the same rights as those born in wedlock and shall take their father's name as a family name, and a Christian name suitable to their sex. . . .

COMMENT:

At common law illegitimate persons inherit from spouses and descendants and they likewise inherit from him.

The MPC and the RLH expand the above inheritance scheme relating to illegitimate persons as follows:

	MODEL PROBATE CODE	REVISED LAWS OF HAWAII
Inheritance <u>by</u> illegitimate persons.	From mothers and maternal kindred, both descendants and collateral.	From mothers.
Inheritance from illegitimate persons.	By mother and maternal kindred, both descendants and collateral.	By mother, brother and sisters or their issue by representation, brothers and sisters of mother or their issue by representation, next of kin.
Inheritance through illegitimate persons.	Mother and maternal kindred, both descendants and collateral.	-----

It is not clear whether the clause "his brothers and sisters" of sec. 318-7, RLH 1955, includes descendants of intestate's father. MPC, sec. 26, clearly excludes such kindred.

Sec. 27. Adopted children. For the purpose of inheritance to, through and from a legally adopted child, such child shall be treated the same as if he were the natural child of his adopting parents, and he shall cease to be treated as the child of his natural parents for purposes of intestate succession.

Sec. 331-16. Effect of adoption. A legally adopted child shall be considered to be a natural child of the whole blood of the adopting parent or parents under the provisions of chapter 318, relating to the descent of property, and the former legal parent or parents of an adopted child and any other former legal relatives or next of kin shall not be considered to be related to such child under such provisions; and for all other purposes an adopted child and his adopting parent or parents shall sustain towards each other the legal relationship of parents and child and shall have all the rights and be subject to all the duties of that relationship, the same as if the child were the natural child of such adopting parent or parents, and all such duties and rights as between such child and its former legal parent or parents shall cease from the time of the adoption; provided, that if the child is adopted by a person married to a legal parent of the child, the full reciprocal rights and duties which theretofore existed between such legal parent and the child, and the rights of inheritance as between the child and such legal parent and the legal relatives of such parent, shall continue, notwithstanding the adoption, subject only to the rights acquired by and the duties imposed upon the adoptive parent by reason of the adoption. A child legally adopted under the laws of any state or territory of the United States or under the laws of any nation shall be accorded the same rights and benefits in all respects as a child adopted under the provisions of this chapter.

COMMENT:

Because Hawaii's adoption statute covers the subject matter of MFC, sec. 27, the latter should be omitted from the proposed Hawaii

Probate Code.

MODEL PROBATE CODE

Sec. 28. Persons related to intestate through two lines. A person who is related to the intestate through two lines of relationship, though under either one alone he might claim as next of kin, shall, nevertheless, be entitled to only one share which shall be the share based on the relationship which would entitle him to the larger share.

COMMENT:

This MPC section is an application of the merger doctrine whereby rights of lesser dignity or importance cease to have an independent existence.

Sec. 29. Advancements.

(a) In general. If a person dies intestate as to all his estate, property which he gave in his lifetime as an advancement to any person who, if the intestate had died at the time of making the advancement, would be entitled to inherit a part of his estate, shall be counted toward the advancee's intestate share, and to the extent that it does not exceed such intestate share shall be taken into account in computing the estate to be distributed. Every gratuitous inter vivos transfer is deemed to be an absolute gift and not an advancement unless shown to be an advancement.

(b) Valuation. The advancement shall be considered as of its value at the time when the advancee came into possession or enjoyment or at the time of the death of the intestate, whichever first occurs.

(c) Death of advancee before intestate. If the advancee dies before the intestate, leaving a lineal heir who takes from the intestate, the advancement shall be taken into account in the same manner as if it had been made directly to such heir. If such heir is entitled to a lesser share in the estate than the advancee would have been entitled had he survived the intestate, then the heir shall only be charged with such proportion of the advancement as the amount he would have inherited, had there been no advancement, bears to the amount which the advancee would have inherited, had there been no advancement.

Sec. 318-10. Advancements; effect of. If an advancement has been made by an intestate to any of his children by settlement or portion of real or personal estate, or both, the value thereof shall be reckoned for the purposes of this section only, as part of the real and personal estate of the intestate, descendible to his heirs, and to be distributed to his next of kin, according to law.

If the advancement is equal or superior to the amount or share which the child would be entitled to receive, of the real and personal estate of the deceased, as above reckoned, then the child and his descendants shall be excluded from any share in the real and personal estate of the intestate.

If the advancement is not equal to such share, the child and his descendants shall be entitled to receive so much only of the personal estate, and to inherit so much only of the real estate of the intestate, as shall be sufficient to make all the shares of the children, in the real and personal estate and advancement, equal as nearly as can be estimated.

Sec. 318-11. Advancement; valuation of. The value of any real or personal estate so advanced, shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing; otherwise, the value shall be estimated according to the worth of the property when given.

Sec. 318-12. What not advancements. The maintaining or educating, or the giving money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement.

COMMENT:

MPC, sec. 29, expands the scope of the advancement rule to advancements to all heirs from the advancements to any of his children provision of sec. 318-10, RLH 1955. Further, the Code Committee states at p. 66 that: ". . . in accordance with secs. 3(j) and 22 hereof a surviving spouse is an heir and therefore can be an advancee."

Sec. 29, COMMENT, continued.

It is not clear whether paragraphs two and three of sec. 318-10, RLH 1955, which charges "the child and his descendants" for advancements, excludes descendants only if they take by representation or also when they take per capita.

There are cases holding that advancements to children should be charged to grandchildren only when the latter take by representation since in per capita taking the theory is taking in one's own right and not in place of another. The Code Committee takes a contrary view and by subsection (c) charges grandchildren with advancements to their parents when they take per capita. The Code Committee states at p. 67: ". . . But there would seem to be no sound reason why [a grandchild] should not be charged with the advancement here as well as in the case where he took by representation."

As to determining the value of advancements, the general rule is stated by sec. 318-11, RLH 1955—if the value is stated in the writing accompanying the gift, then that value is controlling; but if not so stated, then the value at the time of the gift governs. However, if possession by the advancee is to be delayed, there are decisions holding that the advancement should then be valued as of the date the donee obtains possession and enjoyment. Likewise if the advancer retains a life estate and remains in possession, the value should be taken as of the time of his death. MPC, sec. 29(b), adopts this view.

The Code Committee concluded at p. 67: ". . . An advancement is only to be recognized when the decedent dies intestate as to all his property."

MODEL PROBATE CODE

Sec. 30. Alienage. In making title by descent, it shall be no bar to a person that he, or any person through whom he traces his descent, is, or has been an alien.

COMMENT:

At common law an alien could not pass or take realty by will or intestacy, whereas personalty could be so passed or taken. This rule may be changed by statute or federal treaty. Thomas Atkinson, member of the Code Committee and a noted wills authority, states at p. 93 of his text titled Atkinson on Wills:

"However, all state limitations upon transmission of property by or to aliens must fall when the Federal government has recognized broader inheritance provisions by treaties. The treatymaking power is superior to the rights of the various states to fix the property and inheritance rights of aliens by statute or court decision. . . ."

MPC, sec. 30, removes the common law disability of aliens to pass or take realty.

MODEL PROBATE CODE

Sec. 31. Dower and curtesy abolished. The estates of dower and curtesy are hereby abolished.

COMMENT:

From MPC, sec. 31, p. 68:

"Estates of curtesy and dower tend to clog land titles and make alienation more difficult. Moreover, at the present time, when so much of the wealth of a decedent is likely to be in the form of bonds and shares, these estates do not make adequate provision for a surviving spouse. For this reason, this section, which is in accordance with modern statutory trends, abolishes dower and curtesy. . . .

"The substitutes for dower and curtesy provided in the Model Code are sec. 22(a), the share of the surviving spouse in case of intestacy, and sec. 32, the spouse's share in case of election against the will. While these shares are ordinarily much more liberal than dower in case of a solvent estate, they are both subject to the decedent's debts.

". . . It should be noted that accrued rights are excepted by sec. 2(b) hereof. Hence, to the extent that existing dower or curtesy interests are deemed accrued rights, they are excepted from the operation of this Code."

TAKING AGAINST WILL

Sec. 32. When surviving spouse may elect to take against the will. When a married person dies testate as to any part of his estate, a right of election is given to the surviving husband or wife solely under the limitations and conditions hereinafter stated.

- (a) Extent of election. The surviving spouse may elect to receive the share in the estate that would have passed to him had the testator died intestate, until the value of such share shall amount to \$5,000, and of the residue of the estate above the part from which the full intestate share amounts to \$5,000, one-half the estate that would have passed to him had the testator died intestate.
- (b) Effect of election. When a surviving spouse elects to take against the will, he shall be deemed to take by descent, as a modified share, such part of the net estate as comes to him under the provisions of this section.

Sec. 319-14. Election between dower and will. If any provision is made for a widow in the will of her husband, she shall . . . make her election . . . to take under the will, or be endowed of the estate as provided in section 319-1, but she shall not be entitled to both, unless it plainly appears by the will to have been the intention of the testator that she should have such provision in addition to her dower.

HAWAII REPORTS

Election to take under will does not bar right of dower in lands aliened during coverture, 4 Haw. 113, 115.

REVISED LAWS OF HAWAII

Sec. 319-16. Curtesy; election between curtesy and will. . . . If any provisions are made for the widower in the will of his wife, he shall be subject to the same requirements with respect to election between his curtesy and the provisions of the will, or taking under both, as is a widow in similar circumstances under the provisions of sections 319-14 and 319-15.

. . .

COMMENT:

The Code Committee explains the operation of MPC, sec. 32(a), as follows at pp. 69-72:

" . . .

"In determining how much the surviving spouse is to receive under this section, reference must first be made to section 22. Two illustrations will show how this application is made. Suppose the net estate is \$12,000 and the decedent is survived by a

Sec. 32, COMMENT, continued.

wife and one or more children. Under section 22(a) (1), if there were no will, the wife would receive one-half the net estate, or \$6,000. In electing to take against the will she receives that amount up to \$5,000, and half of the remainder of her intestate share under section 22(a) (1). This remainder would be \$1,000 (the difference between \$5,000 and \$6,000), half of which would amount to \$500. Therefore, the total share which she may elect to take against the will is \$5,500. Or suppose the decedent's net estate is of the value of \$8,000, and he is survived by a widow and a brother. Under section 22(a) (2) the widow would receive as an intestate share the first \$5,000 of the estate and half the residue, or \$1,500, a total of \$6,500. Under section 32, in electing to take against the will she receives the first \$5,000 of the amount she otherwise would take as an intestate share, and half of the remainder of such amount. Half of this remainder is \$750, making her total share upon election against the will \$5,750.

" . . .

"In view of the fact that there is no single accepted theory on which statutory provisions for the election of a surviving spouse are based and that a satisfactory statute could be drawn based on entirely different theories from those involved in the above section, it seems desirable to present, as an alternative, the following provisions, which can be substituted for section 32 hereof:

"Sec. 32. When surviving spouse may elect to take against the will. When a married person dies testate as to any part of his estate, a right of election is given to the surviving husband or wife solely under the limitations and conditions hereinafter stated.

'(a) Net estate not over \$20,000. If the value of the net estate does not exceed \$20,000 and the value of all legacies and devises given absolutely to the surviving spouse plus the value of any portion of the net estate undisposed of by the will which passes to the surviving spouse as an intestate share is less than half the value of the net estate, then the surviving spouse may elect to receive that amount which, when added to the value of such items, will equal one-half the value of the net estate. In so electing, the surviving spouse is deemed to renounce any legacies and devises not given absolutely.

'(b) Net estate over \$20,000. If the value of the net estate exceeds \$20,000, the surviving spouse may act under the provisions of one or the other, but not both, of the following subdivisions:

'(1) Election to receive one-half with life income from a trust credited at value of principal. If the value of the net estate exceeds \$20,000 and if the total value of the legacies and devises given to the surviving spouse, when valued in the manner hereinafter stated, plus the portion of the net estate undisposed of by the will which passes to the surviving spouse as an intestate share, is less than half the value of the net estate, then the surviving spouse may elect to receive, in addition to all legacies and devises given to him by the will and the intestate share in any portion of the net estate undisposed of by the will, the difference between the value of such items and the value of half the net estate. When, by the terms of the will, property of the net estate is left in trust with the income to be paid to the surviving spouse for life, the value of such gift, for purposes of determining the amount the surviving

spouse is entitled to receive under the will, shall be the value of the principal from which such income is to be paid. All other legacies and devises given to the surviving spouse from the net estate shall be valued at the actual value of the interests given to the surviving spouse.

- (2) Election to receive \$10,000 in value absolutely. If the value of the net estate exceeds \$20,000 the surviving spouse may nevertheless treat the net estate as if it were of the value of not over \$20,000 and make an election in accordance with the provisions of subdivision (a) hereof, provided, however, that the total value of all items which the surviving spouse may receive from the net estate when this election is made shall be \$10,000 and no more.

- (c) Effect of election. When a surviving spouse elects to take against the will, he shall be deemed to take by descent, as a modified share, such part of the net estate as does not come to him by the terms of the will.'

"The alternative provisions just stated proceed on the theory that, except in larger estates, a surviving spouse should receive one-half of the estate of a deceased spouse. However, they also follow a modern trend to limit the surviving spouse to a life interest in a trust of half of the estate which the surviving spouse may elect to receive. It is believed that in the case of a smaller estate one spouse probably contributed about as much to its accumulation as the other. Moreover, such a share is in recognition of the strong moral obligation to provide support for a surviving wife. However, it is likely that larger estates were acquired by the testator from some ancestor; and it is deemed fair to permit him to pass them on pretty much as he wishes after he has made adequate provision for the maintenance of the surviving spouse. The plan of limiting the spouse to life interests in the case of larger estates follows legislation in New York and Massachusetts. See Mass. Ann. Laws (1932) c. 191, sec. 15, and N. Y. Dec. Est. Law, sec. 18.

"The general scheme of this proposed substitution is as follows: If the value of the net estate does not exceed \$20,000, the surviving spouse is entitled to take absolutely one-half the net estate. This amount is first satisfied by crediting to the surviving spouse any part of the net estate which is undisposed of by the will and which comes to him or her by intestate succession. The surviving spouse is also credited with all legacies and devises given absolutely. These are regarded as being received under the will. If this does not make up one-half, the surviving spouse can elect to take against the will a sufficient additional amount to equal one-half. In so doing the surviving spouse renounces all legacies and devises not given absolutely, such as leases, legal life estates, determinable fees, and future interests. If the value of the net estate exceeds \$20,000, the surviving spouse may elect against the will in either of two ways. He may elect to take \$10,000 absolutely in the same manner as if the estate were valued at \$20,000. In that case, he receives no more, regardless of how large the estate is. The other election against the will gives the surviving spouse one-half of the net estate; but he must take all interests given under the will even though they are not absolute interests. Furthermore, if the will gives the surviving spouse a beneficial interest for life in a trust, that gift is credited to the share of the surviving spouse at the value of the principal from which the life income is payable, and not at the value of the life estate. Thus, it is possible for a testator in an estate in excess of \$20,000 in value, however large it may be, to set up a trust with half his estate, giving his wife only the income for life from that half. The wife must then either accept the beneficial interest under the trust or be limited to taking \$10,000 absolutely.

Sec. 32, COMMENT, continued.

"It should be observed that, although the proposed substitution is quite liberal in permitting a surviving spouse to demand a large share in the estate, it goes much farther than most statutes in compelling a surviving spouse to take what is given under the will. Thus, the tendency to upset a testamentary scheme by an election is minimized as far as is consistent with an adequate provision for the surviving spouse.

"By way of comparison, it may be noted that section 32 represents an older but simpler solution of the problem. The proposed substitution is more complicated but goes much farther in leaving a testator's will intact. In both sections, the amounts stated are necessarily somewhat arbitrary and may be varied to suit local needs."

. . .

Subsection (b) of MPC, sec. 32, was inserted by the Code Committee "to eliminate a prolific source of litigation," MPC, p. 69. For in Hawaii curtesy and dower interests are not estates by descent. In 10 Haw. 687, the Hawaii supreme court held that surviving spouses take by descent only when no children survive and that dower and curtesy rights are not estates by descent. Thus when one elects in Hawaii to take against the will and to take his dower or curtesy share, the taking is not by descent. The Code eliminates dower by MPC, sec. 31, and by MPC, sec. 32(b), provides that the election to take against the will results in taking by descent.

MODEL PROBATE CODE

Sec. 33. Gifts in fraud of marital rights.

(a) Election to treat as devise. Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

(b) When gift deemed fraudulent. Any gift made by a married person within two years of the time of his death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary.

COMMENT:

MPC, sec. 33, provides that decedents cannot do by inter vivos transfers what they cannot do by will — cut off surviving spouses. Protecting spouses against such gratuitous inter vivos transfers has been accomplished in many jurisdictions by court decisions; however, the basis and extent of this protection is not clear. Atkinson states at pp. 116-7 of his text

titled Atkinson on Wills:

"There are several conceivable solutions for this mooted problem. On the one hand any transfer by a married person might be subject to his spouse's forced share interest, except transfers that are made for fair consideration. This position might interfere with the practice of public and private charity. It would be unthinkable to extend the full dower principle to personal property. At the other extreme it would be possible to take the position that any inter vivos transfer should be effective so as to deprive the spouse and that restrictions should be solely upon testamentary disposition. In the majority of cases self interest of the owner spouse will probably be sufficient protection for the surviving spouse, but death-bed dispositions, revocable transfers, and various types of connivance occur often enough to present a real problem. . . . It has been suggested that the provisions of the Federal Estate Tax Law, wherein certain interests held by the decedent in his lifetime but which do not pass from him by succession are deemed part of his gross estate for tax purposes, provide an analogy for the solution of the present problem. Thus, it could be provided by statute that the surviving spouse should be entitled to his share in all property in which the deceased spouse once held an absolute interest but had transferred so as

Sec. 33, COMMENT, continued.

to retain a power of revocation, a joint interest, or even an ordinary life estate. More complete protection would result if to these categories were added all transfers made to defeat the spouse, though some persons would object to this upon the grounds stated above /of difficulty of determination/. The solution of this important problem deserves, and ultimately must receive, more attention than has been given to it in the past."

MFG, sec. 33, is an attempt to solve the aforementioned problem; however, it does not define "gifts in fraud of marital rights."

The Committee rationalizes the omission as follows at p. 73:

"This section makes no attempt to define the expression 'in fraud of marital rights.' It is believed that only by judicial decision can that be done. Among the situations which courts would have to classify in this connection is that where a married person sets up an inter vivos trust reserving to himself a life estate and a power to revoke the trust. It has sometimes been held that such a transfer could be set aside at the instance of the surviving spouse, particularly where it deprived the settlor of most of his estate. It is sometimes said that the transfer is set aside because it is illusory. . . . But it is believed to be more satisfactory to say that it is fraudulent as to the share of the surviving spouse. A similar problem arises where a married person sets up a so-called savings bank trust. It is believed that no statute could adequately indicate all cases which might properly be regarded as actually or constructively fraudulent as to the share of the surviving spouse.

"Subsection (b) lays down an aid in determining whether a gift is fraudulent where the proof is slight. Under this section it is possible to show that a gift made within two years of the death of a married person is not fraudulent, but the burden of proof is upon the person asserting the absence of fraud."

Sec. 34. Notice of right to elect. It shall be the duty of the clerk of the court, within one month after the will of a married person is admitted to probate, to mail a written notice, directed to the testator's surviving spouse at his last known residence address, informing him of the date before which a written election must be filed by or on behalf of such surviving spouse in order to take against the will.

Sec. 35. Time limitation for filing election. The election by a surviving spouse to take the share hereinbefore provided may be made at any time within one month after the expiration of the time limited for the filing of claims; provided that if, at the expiration of such period for making the election, litigation is pending to test the validity or to determine the effect or construction of the will, or to determine the existence of issue surviving the deceased, or to determine any other matter of law or fact which would affect the amount of the share to be received by the surviving spouse, the right of such surviving spouse to make an election shall not be barred until the expiration of one month after the final determination of the litigation.

Sec. 36. Form of election; filing. The election to take the share hereinbefore provided shall be in writing, signed and acknowledged by the surviving spouse or by the guardian of his estate and shall be filed in the office of the clerk of the court. It may be in the following form:

Sec. 319-15. Effect of failure to elect. If the widow fails to make her election within the time hereinabove specified, the executor of the will shall immediately apply to the probate court for an order citing the widow to appear and make her election within a time fixed by the court. If the widow, having been so cited, fails to make her election in writing filed in the court within the time fixed by the court, or if, whether she has been so cited or not, she fails to make her election in writing filed in the court before the administration of the estate has been closed and the executor discharged, she shall be conclusively presumed to have reserved her dower.

Sec. 319-14. Election between dower and will. . . . she shall, within six months after probate of the will, make her election, in writing filed in the probate court having jurisdiction of her deceased husband's estate to take under the will, or be endowed of the estate . . .

Sec. 319-16. Curtesy; election between curtesy and will. . . . If any provisions are made for the widower in the will of his wife, he shall be subject to the same requirements with respect to election between his curtesy and the provisions of the will, . . . as is a widow in similar circumstances under the provisions of sections 319-14 and 319-15.

Secs. 34-36, MPC, continued.

I, A. B., surviving wife /or husband/ of C. D., late of the county of _____ and state of _____ do hereby elect to take my legal share in the estate of the said C. D., and I do hereby renounce all provisions in the will of the said C. D. inconsistent herewith.

/Acknowledgment/

Signed,
/Signature/

COMMENT:

As to the form of election provided for by MPC, sec. 36, the Code Committee states at p. 74:

"If the alternative form proposed in the comment to section 32 is used, the following sentence should be added to the form of election, immediately before the signature:

'If it is determined that the net estate exceeds /20,000/ in value, I elect to take against the will under the terms of section 32(b) (1) /or section 32(b) (2)/."

MODEL PROBATE CODE

Sec. 37. Right of election personal to surviving spouse. The right of election of the surviving spouse is personal to him. It is not transferable and cannot be exercised subsequent to his death; but if the surviving spouse is incompetent, the court may order the guardian of his estate to elect for him.

COMMENT:

Atkinson on Wills, p. 120:

"In general the right to elect is personal to the surviving spouse. However, if he is a minor or is mentally incompetent, an election may be made by the court having jurisdiction over his estate in accordance with the best interests of the survivor. The election cannot be made by his guardian, unless legislation so provides. If the surviving spouse dies without making an election the right to elect is gone and cannot be exercised by his personal representative. . . ."

MODEL PROBATE CODE

Sec. 38. Election not subject to change. An election by or on behalf of a surviving spouse to take the share provided in section 32 hereof once made shall be binding and shall not be subject to change except for such causes as would justify an equitable decree for the rescission of a deed.

MODEL PROBATE CODE

Sec. 39. Waiver of a right to elect. The right of election of a surviving spouse hereinbefore given may be waived before or after marriage by a written contract, agreement or waiver signed by the party waiving the right of election, after full disclosure of the nature and extent of such right, provided the thing or the promise given to such waiving party is a fair consideration under all the circumstances. This written contract, agreement or waiver may be filed in the same manner as hereinbefore provided for the filing of an election.

COMMENT:

MPC, sec. 39, states the common law rule as to waiver of the right to elect against the will. The Code Committee explains at p. 75:

"It is clear that at common law the right of a surviving spouse to take an intestate share against the will may be waived under certain circumstances. But the rules applied to determine the validity of the waiver are unique and involve something quite distinct from the requirements for the execution of a simple contract. This section is designed to express the common-law doctrine."

MODEL PROBATE CODE

Sec. 40. Election by surviving spouse to take under will. When a surviving spouse makes no election to take against the will, he shall receive the benefit of all provisions in his favor in the will, if any, and shall share as heir, in accordance with the provisions of sections 22 and 23 hereof, in any estate undisposed of by the will. By taking under the will or consenting thereto, he shall not thereby waive the rights of homestead, to exempt property or to a family allowance, unless it clearly appears from the will that the provision therein made for him was intended to be in lieu of such rights.

COMMENT:

The Code Committee states at p. 76 that:

"The first sentence of this section is in accord with the general rule that mere expressions in a will of intent to disinherit an heir do not exclude him from the inheritance; there must be an effective devise of the entire estate to someone else. . . ."

On the surviving spouse's share in intestate property in partial intestacy situations, Atkinson observed that there are a number of unfair case decisions. On pp. 122-3, Atkinson on Wills, he stated:

". . . Curious results have been reached in case of election where part of the decedent's property does not pass under the will. There is little express legislation as to the spouse's share in the intestate property in this event though statutes under which a testamentary provision is deemed in lieu of dower have been thought to have a bearing upon the matter and of course the provisions of particular wills may be of vital consideration. Some cases take the position that the spouse who elects to take under the will is not permitted to share in the intestate property, while if he elects to defeat the will he gets his full intestate share of the intestate property. Both of these positions are unjust and the situation should be just reversed. Holding that the spouse who supports the will is deprived of his intestate share is often based upon a too literal interpretation of the election statutes and is directly in the face of the statutes of descent and distribution which cover all cases of intestacy — partial as well as entire. If the spouse elects to take against the will he should take only his dower or forced share of the intestate property because that is the interest which the law gives him if he elects to take against the will."

MPC, sec. 40, states the law to be as Atkinson suggests above.

Sec. 41. Pretermitted children.

(a) Children born or adopted after will made. When a testator fails to provide in his will for any of his children born or adopted after the making of his last will, such child, whether born before or after the testator's death, shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will that such omission was intentional, or unless when the will was executed the testator had one or more children known to him to be living and devised substantially all his estate to his surviving spouse.

(b) Children believed to be dead when will made. If, at the time of the making of his will, the testator believes any of his children to be dead, and fails to provide for such child in his will, the child shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will or from other evidence that the testator would not have devised anything to such child had he known that the child was alive.

COMMENT:

Sec. 322-10, RLH 1955, codifies the common law revocation by operation of law rule of which Atkinson states at p. 428 of

Atkinson on Wills:

"This doctrine has been said to rest upon a presumed change of testamentary intent, but a more tenable ground is that there is such a radical change in the testator's situation that the law should regard the will as revoked regardless of the wishes of the individual testator. Accordingly, his intention is immaterial and parol evidence is inadmissible to show that testator did not intend that his will should be revoked by his marriage followed by birth of issue."

MFC, sec. 41, rests upon presumed changes of testamentary intent, thus the will is not revoked but the omitted child takes an intestate share. The Committee states at pp. 76-7:

Sec. 322-10. By marriage and birth or by adoption of child. If, after the making of a will, the testator marries and has a child born to him or marries and legally adopts a child, and no provision is made in the will for such contingency, such marriage and birth, or such marriage and adoption, shall operate as a revocation of the will.

Sec. 41, MPC, COMMENT, continued.

"Most pretermitted heir statutes are designed, not to force a moral obligation upon a parent, but to carry out a testator's probable intent. If this is their purpose, then subsection (b) should be limited to the one fact situation therein stated, for it is very unlikely that a testator would, by accident or mistake, omit to provide for a living child in his will, except in the case covered by that subsection. In subsection (b), since extrinsic evidence is necessary to show that the testator believed his child to be dead, it is only reasonable to allow extrinsic evidence as to his intent to exclude the child. In subsection (a), however, an intent to exclude the child will rarely exist; if it is to be proved, it must be shown from the will.

"The last clause in subsection (a) is designed to apply to the following situation. Suppose A has a small estate and feels that he should devise substantially all of it to his wife. He, therefore, so states in his will giving his two children, B and C, one dollar each, and the residue to his wife. Before his death a third child, D, is born. If it were not for the last clause in subsection (a), D would take as a pretermitted heir, but B and C would not. To avoid this obviously unfair result, the last clause was inserted;

"It should be noted that subsection (a) covers only cases where the last will is made before the child is born or adopted. Thus, if a testator makes a will and afterward has children born or adopted and still later executes a second will or a codicil to his will, the facts do not come within subsection (a).

"This section makes no provision for omitted grandchildren or more remote issue. See section 3(a)."

HOMESTEAD, EXEMPT PROPERTY AND FAMILY ALLOWANCE

Sec. 42. Homestead. At any time after the return of the inventory the court, of its own motion or upon application, shall set apart the homestead to the persons entitled thereto. The homestead so set apart shall not be subject to administration and shall be exempt from all claims against the estate excepting any lien thereon at the time of the decedent's death. The title to the land set apart for the homestead property shall pass, subject to the right of homestead, the same as other property of the decedent and shall be included in the decree of final distribution.

Sec. 43. Distribution of exempt property. The surviving spouse or minor children of a decedent shall be entitled absolutely to such personal property of the estate as may be exempt from execution or forced sale under the constitution and laws of this state or such other personal property as shall be selected, of the total appraised value of ~~/\$2000/~~, whichever is greater, any portion or all of which may be taken in money. Such property shall belong to the surviving spouse, if any, otherwise to the minor children in equal shares. The selection shall be made by the surviving spouse, if living; otherwise by the guardian of the estate of each minor child for such child, or by the court. At any time after the return of the inventory the court, of its own motion or upon application, shall set apart the exempt property to the persons entitled thereto. Such property shall not be subject to administration and shall be exempt from all claims against the estate except any lien thereon at the time of the decedent's death.

Sec. 44. Family allowance. In addition to the right to homestead and exempt property the surviving spouse and minor children of a decedent shall be entitled to a reasonable allowance in money out of the

Sec. 317-21. Allowance for family, dependents. Pending the administration of the estate of a deceased person, provision may be made for the maintenance and support of the family of the deceased person as follows:

(a) When a person dies, leaving a widow or widower or other members of his or her family living in his or her home, who were being maintained and supported by the decedent at the time of his or her death, such person or persons shall be entitled to have possession of the home and of all the wearing apparel and other personal effects and household furniture and effects of the decedent, until such time as the executor or administrator in his discretion terminates such possession.

(b) The court or judge shall make such reasonable allowance out of the estate as is necessary, for the persons enumerated in subsection (a) of this section, and for other members of the decedent's family, maintained and supported by him or her, according to their circumstances and the relationship which they bear to the decedent, during the progress of the administration of the estate, which allowance, in case of an insolvent estate, shall not be longer than one year after granting letters testamentary or of administration.

(c) Any allowance made by the court or judge in accordance with the provisions of this section shall be paid in preference to all other charges, except funeral charges and expenses of administration, and any such allowance whenever made, may, in the discretion of the court or judge, take effect from the death of the decedent.

Sec. 44, MPC, continued.

estate for their maintenance during the period of administration according to their previous standard of living, which allowance must not continue for longer than one year in the case of an insolvent estate. Such allowance may be made upon petition at any time after the filing of the inventory, but a temporary allowance may be made prior thereto in case of great need. The allowance so ordered may be made payable in one payment or in periodic installments, and shall be payable to the surviving spouse, if living, for the use of such surviving spouse and the minor children; otherwise to the guardians or other persons having the care and custody of any minor children; but in case any minor child shall not be living with the surviving spouse, the court may make such division of the allowance for maintenance as it deems just and equitable.

COMMENT:

Hawaii does not exempt the home from creditors' claims and entitles a person's surviving spouse and family only to possession of the home until the personal representative terminates such use.

Thus before Hawaii enacts MPC, sec. 42, it will be necessary for the legislature to enact a homestead exemption statute. The Code Committee states thereto at p. 79: "But such a task is obviously far beyond that undertaken in this Code." This would necessitate the legislature's (1) defining homestead -- is it to be a fee interest or only a possessory estate? -- and (2) placing a maximum value limitation to the homestead exemption. MPC, sec. 42, does not define homestead nor state the operational limitations of this exemption.

Hawaii does have, however, a statute exempting certain specified personal property from creditors' claims. It is sec. 233-65, RLH 1955, but Hawaii's probate statutes do not give surviving spouses and minor children legal title to such property; decedents' families would be entitled to use only at the personal representatives' discretion. Further, the personalty subject to families' use upon the owners' death are only "wearing apparel and other personal effects and household furniture and effects." Sec. 233-65,

Sec. 44, COMMENT, continued.

RLH 1955's specific list of personal property exempt from creditors' claims includes among others "two oxen" and "one half of the wages due every laborer". The Code would exempt the list in sec. 233-65.

The Code Committee states thereto at p. 80:

"... Many of these exemption statutes are now archaic and in view of the tendency to permit a selection of other property or money in lieu of the property so exempt, such a provision is incorporated here. It permits the greatest degree of flexibility in accordance with the needs and desires of the individual members of the family. It also permits the selection of articles of sentimental family value and of an automobile for family use."

MPC, sec. 44, providing for a family allowance applies under the MPC only to "the surviving spouse and minor children of deceased" whereas sec. 317-21(b), RLH 1955, applies to the surviving spouse, "other members of [deceased's] family living in his or her home, who were being maintained and supported by the decedent" and "other members of the decedent's family maintained and supported by him or her."

On the payment priorities of the interests protected by MPC, secs. 42 through 44, the Code Committee states at p. 81:

"... See sec. 142, providing that administration and funeral expenses have priority over the family allowances; but the homestead and exempt property are not liable for these expenses, and do not constitute assets for any purpose except to benefit the family."

MODEL PROBATE CODE

REVISED LAWS OF HAWAII

EXECUTION AND REVOCATION OF WILLS

Sec. 45. Who may make. Any person of sound mind eighteen years of age or older may make a will.

Sec. 322-1. Age; sound mind. Every person of the age of twenty years and of sound mind may dispose of his estate both real and personal by will.

Sec. 46. Who may witness.

(a) Any person competent to be a witness generally in this state may act as attesting witness to a will.

(b) No will is invalidated because attested by an interested witness; but any interested witness shall, unless the will is also attested by two disinterested witnesses, forfeit so much of the provisions therein made for him as in the aggregate exceeds in value, as of the date of the testator's death, what he would have received had the testator died intestate.

(c) No attesting witness is interested unless the will gives to him some personal and beneficial interest.

Sec. 322-5. Gifts to witness. All beneficial devises, legacies and gifts whatever, made or given in any will to a subscribing witness thereto, shall be void, unless there are two other competent subscribing witnesses to the same; but a mere charge on the estate of the testator for the payment of debts, shall not prevent his creditors from being competent witnesses to his will.

Sec. 322-6. To heirs who are witnesses. If any witness, to whom any beneficial devise, legacy or gift, is made or given, would have been entitled to any share of the estate of the testator, in case the will had not been established, then so much of the share as would have descended or been distributed to the witness, as will not exceed the devise or bequest made to him in the will, shall be saved to him, and he may recover the same of the devisees or legatees named in the will; in proportion to and out of all the parts devised or bequeathed to them.

HAWAII REPORTS

An interested attesting witness is qualified to prove execution of a will, though his legacy thereunder is void,
26 Haw. 186, 195.

MODEL PROBATE CODE

Sec. 47. Execution. The execution of a will, other than a holographic or nuncupative will, must be by the signature of the testator and of at least two witnesses as follows:

- (a) Testator. The testator shall signify to the attesting witnesses that the instrument is his will and either
 - (1) Himself sign, or
 - (2) Acknowledge his signature already made, or
 - (3) At his direction and in his presence have someone else sign his name for him, and
 - (4) In any of the above cases the act must be done in the presence of two or more attesting witnesses.
- (b) Witnesses. The attesting witnesses must sign
 - (1) In the presence of the testator, and
 - (2) In the presence of each other.

REVISED LAWS OF HAWAII

Sec. 322-3. Writing; signature; witness. No will shall be valid, unless it is in writing and signed by the testator, or by some person in his presence and by his express direction, and attested by two or more competent witnesses subscribing their names to the will, in the presence of the testator.

MODEL PROBATE CODE

Sec. 48. Holographic will. No witness to a holographic will is necessary, but the signature and all its material provisions must be in the handwriting of the testator and his handwriting must be proved by two witnesses.

HAWAII REPORTS

Will with no witnesses refused probate, 1 Haw. 297; but holographic will valid by laws of place of testator's domicile at time of death, admitted to ancillary probate, 10 Haw. 80, 34 Haw. 559.

MODEL PROBATE CODE

HAWAII REPORTS

Sec. 49. Nuncupative will.

(a) A nuncupative will may be made only by a person in imminent peril of death, whether from illness or otherwise, shall be valid only if the testator died as a result of the impending peril, and must be

- (1) Declared to be his will by the testator before two disinterested witnesses;
- (2) Reduced to writing by or under the direction of one of the witnesses within thirty days after such declaration; and
- (3) Submitted for probate within six months after the death of the testator.

(b) The nuncupative will may dispose of personal property only and to an aggregate value not exceeding one thousand ~~/ \$1000 /~~ dollars, except that in the case of persons in active military, air or naval service in time of war the aggregate amount may be ten thousand ~~/ \$10,000 /~~ dollars.

(c) A nuncupative will neither revokes nor changes an existing written will.

Verbal or nuncupative wills, since in accordance with custom of early days, held to be valid to convey both realty and personalty, 2 Haw. 82. Prior to the enactment of the organic laws of 1846, a verbal will might be made, 4 Haw. 571, 576.

COMMENT:

Verbal wills cannot be currently executed in Hawaii.

MODEL PROBATE CODE

REVISED LAWS OF HAWAII

Sec. 50. Foreign execution. A will executed outside this state in a manner prescribed by this Code, or a written will executed outside this state in a manner prescribed by the law of the place of its execution or by the law of the testator's domicile at the time of its execution, shall have the same force and effect in this state as if executed in this state in compliance with the provisions of this Code.

Sec. 322-7. Foreign executed wills. A last will and testament, executed without this Territory in the mode prescribed by law, either of the place where executed or of the testator's domicile, shall be deemed to be legally executed, notwithstanding the provisions of sections 322-3 to 322-6, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this Territory, provided, the last will and testament is in writing and subscribed by the testator.

COMMENT:

Sec. 322-7, RLH 1955, refers merely to "the testator's domicile" without specifying whether it is to be domicile at the time of execution or of death. MPC, sec. 50, specifies it to be at the time of execution. The Hawaii statute in question was enacted in 1929 and it was based on the Uniform Wills Act, Foreign Executed. That Act was declared obsolete in 1940 by the Conference of Commissioners on Uniform State Laws; and in 1942 the Model Execution of Wills Act was promulgated, sec. 7 of which is MPC, sec. 50.

The Code Committee states at p. 81:

"Sections 45 to 50 inclusive are sections 2 to 7 inclusive of the Model Execution of Wills Act."

MODEL PROBATE CODE

Sec. 51. Revocation by written will or by act on document. A will, or any part thereof, can be revoked

- (a) By a written will; or
- (b) By being burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself or by another person in his presence and by his direction. If such act is done by any person other than the testator, the direction of the testator and the facts of such injury or destruction must be proved by two witnesses.

Sec. 52. Revocation of nuncupative will. A nuncupative will or any part thereof can be revoked by another nuncupative will.

Sec. 53. Change in circumstances; divorce. If after making a will the testator is divorced, all provisions in the will in favor of the testator's spouse so divorced are thereby revoked. With this exception, no written will, nor any part thereof, can be revoked by any change in the circumstances or condition of the testator.

Sec. 54. Specific provisions for revocation exclusive. No will, nor any part thereof, can be revoked except as specifically provided in sections 51 to 53 hereof.

REVISED LAWS OF HAWAII

Sec. 322-8. Revocation, mode of. No will shall be revoked, unless by burning, tearing, canceling or obliterating the same, with the intention of revoking it, by the testator or by some person in his presence, and by his direction, or by some other will in writing, executed as prescribed in this chapter; but nothing contained in this section shall prevent the revocation implied by law, from subsequent changes in the condition or circumstances of the testator.

Sec. 322-10. By marriage and birth or by adoption of child. If, after the making of a will, the testator marries and has a child born to him, or marries and legally adopts a child, and no provision is made in the will for such contingency, such marriage and birth, or such marriage and adoption, shall operate as a revocation of the will.

Sec. 322-11. By marriage of woman. A will executed by any woman shall be deemed revoked upon her thereafter entering into marriage, and shall not be revived by the death of her husband.

HAWAII REPORTS

A will executed by a woman who, at the time of its execution, was married and undivorced is not, under sec. 322-11, RLH 1955, to be deemed revoked on her subsequent divorce and marriage to another man, 32 Haw. 826.

Secs. 51-54, continued.

COMMENT:

MPG, secs. 53 and 54, restrict revocation by circumstances only to subsequent divorce. Under current Hawaii law, divorce is not a change of circumstance calling for revocation by operation of law, see 32 Haw. 826 above. The last clause of sec. 322-8, RLH 1955, providing for "revocation implied by law from subsequent changes in the condition or circumstances" is objectionable to the Code Committee since it is all inclusive and indefinite. They state at p. 83:

"... Such a doctrine introduces an undesirable element of uncertainty into the question of the validity of a duly executed will. No revocation by circumstances should be permitted except on such grounds as are specifically named in the statute and these grounds should be as few as possible. Section 54 of this Code makes the grounds for revocation named in the statute exclusive."

Then arguing for the elimination of secs. 322-10 and 322-11, RLH 1955, the Committee states at p. 84:

"In a number of jurisdictions, marriage of the testator, or marriage and birth of issue, revoke a will. Such a provision is believed to be unnecessary in this Code. Section 32 allows a surviving spouse to elect to take a share of the estate against the will. And sec. 41 provides for afterborn children taking an intestate share against the will. These sections are believed to be adequate to protect a surviving spouse or afterborn children. The only extrinsic circumstance which revokes a will, under the provisions of this Code, is a divorce. Legislation to the effect that divorce revokes a will is not common, but does exist in a few states."

MODEL PROBATE CODE

Sec. 55. Revival of revoked or invalid will. No will, nor any part thereof, which shall be in any manner revoked, or which shall be or become invalid, can be revived otherwise than by a re-execution thereof, or by the execution of another will in which the revoked or invalid will or part thereof is incorporated by reference.

REVISED LAWS OF HAWAII

Sec. 322-9. Effect on prior will. If, after the making of any will, the testator duly makes and executes a second will, the destruction, canceling or revocation of the second will shall not revive the first will, unless after such destruction, canceling or revocation, the first will is duly republished.

Sec. 322-3.5. Incorporation by reference. An existing document, book, record or memorandum may be incorporated in a will by reference, if referred to as being in existence at the time the will is executed. . . .

MISCELLANEOUS PROVISIONS

Sec. 56. Will to operate on after-acquired property.

Any estate, right or interest in land or other things acquired by the testator after the making of his will may pass thereby and in like manner as if title thereto was vested in him at the time of making the will, unless the contrary manifestly appears by the will to have been the intention of the testator.

Sec. 322-12. Presumption against intestacy. Every

devise, purporting to be a devise of all the real or personal estate of the testator, shall be construed to convey all the real or personal estate belonging to him at the time of his decease, unless it clearly appears by the will that he intended otherwise.

COMMENT:

As regards wills operating on after-acquired property, in 31 Haw. 259 the Hawaii Supreme Court said at p. 263:

"The contention set forth in the bill that land acquired by Akahi between the date of the execution of her will and the date of her death did not pass under the will is, it need hardly be stated, unfounded. It is well settled in Hawaii that a will takes effect as of the death of the testator and, in the absence of provisions to the contrary, affects property owned by him immediately prior to his death."

The court concluded its point by quoting sec. 322-12, RLH 1955, above.

Sec. 57. Failure of testamentary provisions by lapse or otherwise.

(a) General rule. If a devise of real or personal property, not included in the residuary clause of the will, is void, is revoked, or lapses, it shall become a part of the residue, and shall pass to the residuary devisee, unless a contrary intent is indicated by the terms of the will.

(b) Avoidance of failure of devise when devisee dies before testator. Unless a contrary intent is indicated by the will, when any adopted child of the testator or blood relative within the fourth degree

(1) Is designated as a devisee, or

(2) Would have been a devisee under the terms of a class gift, had he survived the testator,

and such adopted child or blood relative dies after the making of the will and before the testator leaving issue surviving the testator, or is dead at the making of the will leaving issue surviving the testator and the fact of his death is unknown to the testator, then such issue as represent the deceased devisee shall be deemed substituted for him so as to take the interest under the will which their deceased ancestor would have taken had he survived.

COMMENT:

MPC, sec. 57(b), is an anti-lapse statute which like the intestacy provisions of MPC, sec. 22, attempts to determine the probable intent of the average testator if he considered the possibility of his surviving the legatee or devisee. Hawaii has no such statute.

The Code Committee observed that most lapse statutes are silent as to its application to class gifts. There are courts holding for and against such application. The Code Committee states thereto at p. 86:

" . . . Most courts, however, do apply lapse statutes to class gifts where a potential member of the class dies before the testator but after the will is executed. The reason would seem to be that to do so helps to effectuate the testator's desires.

A general residuary clause in a will is a gift of all that is left after the gifts specified or designated have been paid or satisfied, its function being to embrace everything not otherwise effectually given, including lapsed legacies and devises, 22 Haw. 510, 515.

Sec. 57, COMMENT, continued.

"The most serious difficulty in applying lapse statutes arises where a potential member of the class dies before the will is executed. In the case of a devise to a named person who dies before the will is made, such as a testamentary gift of a piece of land or a sum of money to A, it is evident that the testator supposed A was alive when he made his will or A would not have been named as a devisee. Therefore, in a proper case, it would effectuate the testator's intention to apply the lapse statute to the devise to A. But suppose the testator devises a portion of his estate 'to the children of A,' and at the time the will is executed A has four children, and has had two others who died more than ten years before the execution of the will, leaving issue. It would seem highly unlikely that the testator would intend to include the children already dead within the phrase 'children of A.' Indeed, practically the only case in which he would intend to include potential members of the class dead when the will is executed is a case where he does not know they are dead. This section of the Code limits the application of the lapse statute to such cases, and is believed to avoid most of the litigation concerning class gifts which commonly arises in connection with such statutes.

"As to what issue 'represent the deceased devisee,' see the definition of 'representation' in sec. 22(c) hereof."

MODEL PROBATE CODE

Sec. 58. Renunciation by heir or devisee. An heir or devisee may renounce the succession to the real and personal property of a decedent, but the renunciation shall be subject to the rights of creditors of the heir or devisee and of the taxing authorities. In case of an effective renunciation by the heir, the property shall descend as if he had died before the decedent.

COMMENT:

Hawaii does not have a renunciation statute and therefore the common law rule applies. The Code Committee discusses the common law and its relation to sec. 58 as follows at pp. 86-87:

"At common law a devisee could renounce but an heir could not as to land. The rule as to the devisee is here stated principally because it might otherwise be implied that a statute as to renunciation by the heir repeals the common law rule permitting a devisee to renounce. No good reason is perceived why the heir as well as the devisee should not be permitted to renounce.

"However, neither the heir nor the devisee should be permitted to prejudice his creditors or the taxing authorities by a renunciation. The common law is not clear as to whether the devisee is able to defeat the rights of creditors and taxing authorities. Hence, this section makes express provision on that point.

"The effect of the renunciation by a devisee on other distributees of the decedent's estate is a matter of common law and is too complex a matter to be dealt with satisfactorily in a statute. Thus, if the interest renounced is a life estate, the whole question of the acceleration of future interests is involved. . . . Moreover, if the interest renounced is an interest in joint tenancy in fee simple, it would commonly devolve upon other joint tenants. If the interest renounced is given in severalty in fee simple or absolutely, it would ordinarily fall into the residuary estate unless it were a part of the residuary estate or there were no residuary clause in the will. In the latter case, the renounced interest would commonly devolve upon the heir."

MODEL PROBATE CODE

Sec. 59. Deposit of will with court in testator's lifetime.

(a) Deposit of will. A will may be deposited by the person making it, or by some person for him, with any court, to be safely kept until delivered or disposed of as hereinafter provided. The clerk of the court, on being paid the fee of one dollar therefor, shall receive and keep such will, and give a certificate of deposit for it.

(b) How enclosed. Every will intended to be deposited as aforesaid shall be enclosed in a sealed wrapper, which shall have indorsed thereon "Will of," followed by the name of the testator. The clerk of the court shall indorse thereon the day when, and the person by whom, it was delivered. The wrapper may also be indorsed with the name of the person to whom the will is to be delivered after the death of the testator. It shall not be opened or read until delivered to a person entitled to receive it, or otherwise disposed of as hereinafter provided.

(c) To whom delivered. During the lifetime of the testator, such will shall be delivered only to him, or to some person authorized by him by an order in writing duly proved by the oath of a subscribing witness. After his death, the clerk shall notify the person named in the indorsement on the wrapper of the will, if there be a person so named, and deliver it to him.

(d) When will to be opened. If the will is not delivered to a person named in the indorsement on the wrapper, it shall be publicly opened in the court within thirty days after notice of the testator's death, and be retained by the court until offered for probate. Notice shall be given to the executor named therein and to such other persons as the court may designate. If the proper venue is in another court, the will shall be transmitted to such court; but before such transmission a true copy thereof shall be made and retained in the court in which the will was deposited.

COMMENT:

From MPC, p. 88:

"Statutes of this kind appeared early in American statute books. . . . Many states still have such legislation. The principal object of enacting such a statute is to protect a testator who fears that his will may be lost or wrongfully destroyed before it can be probated. . . .

"It is possible that a provision might be added to the effect that the court should keep an index of all wills deposited under the provisions of this section. . . . However, in many localities little use will be made of this section, and if the wills deposited under it are filed alphabetically, that would seem to be sufficient. If something more is thought desirable, this can be taken care of by rule of court." (emphasis supplied)

Sec. 60. Construction of will. The court in which a will is probated shall have jurisdiction to construe it at any time during the administration. Such construction may be made on the petition of the personal representative or of any other person interested in the will; or, if a construction of the will is necessary to the determination of an issue properly before the court, the court may construe the will in connection with the determination of such issue. When a petition for the construction of a will is filed, notice of the hearing thereon shall be given to interested persons.

Probate court has jurisdiction to construe will only to the incidental extent necessary in the exercise of their general jurisdiction over the ordinary administration of estates, 24 Haw. 148.

PART III. ADMINISTRATION OF DECEDENTS' ESTATES

PROBATE AND GRANT OF ADMINISTRATION

Sec. 61. Venue.

(a) Proper county. The venue for the probate of a will and for administration shall be

- (1) In the county in this state where the decedent had his domicile at the time of his death.
- (2) If the decedent had no domicile in this state, then in any county wherein he left any property or into which any property belonging to his estate may have come.

(b) Proceedings in more than one county. If proceedings are commenced in more than one county; they shall be stayed except in the county where first commenced until final determination of venue in the county where first commenced. If the proper venue is finally determined to be in another county, the court, after making and retaining a true copy of the entire file, shall transmit the original to the proper county. The proceeding shall be deemed commenced by the filing of a petition; and the proceeding first legally commenced shall extend to all of the property of the estate in this state.

(c) Transfer of proceeding. If it appears to the court at any time before the decree of final distribution in any proceeding that the proceeding was commenced in the wrong county or that it would be for the best interests of the estate, the court, in its discretion, may order the proceeding with all papers, files and a certified copy of all orders therein transferred to another [] court which other court shall thereupon proceed to complete the administration proceeding as if originally commenced therein.

Sec. 215-21. Limitations. The power and jurisdiction of circuit courts and circuit judges in chambers relating to causes of a civil nature as defined in sections 215-17 and 215-18, shall be limited as follows:

(d) Proceedings for the probate of wills, for the appointment of administrators and trustees of the estates of deceased persons, for the admeasurement of dower and for all matters relating to the administration and settlement of estates of deceased persons, shall be brought only in the circuit where the deceased had his last domicile; provided, that if the deceased was last domiciled without the Territory, the proceedings may be brought in any circuit in which there is estate to be administered; . . .

COMMENT:

The Code Committee discusses MPC, sec. 61(b) and (c), at pp. 90-91 as follows:

" . . .

"Subsection (b) is designed to resolve conflicts between probate courts of different counties in the same state

"As between concurrent proceedings, it is a common provision of statutes to provide for priority in favor of the one 'first commenced' or some similar phrase. But all too often there is no statement as to what constitutes the commencement of a proceeding. This has resulted in two views, diametrically opposed, one holding that the proceeding is commenced by the filing of a petition, the other that the proceeding is not commenced until the court acts on the petition by appointing a personal representative. A few statutes explicitly provide that the filing of the petition operates as a commencement of the proceeding. Others resolve priority upon the filing of a petition in cases where there is an alternative venue. The last sentence of subsection (b) is intended to define the manner in which and the point of time when a proceeding is commenced. In addition it provides that one administration extends to all property of the estate throughout the state, in order to preclude the practice of having an administration in every county in which any property of the decedent is located.

"Subsection (c) providing for transfer of venue is intended to make possible the transfer at any time of a proceeding to another county when it is in the best interests of the estate or when it appears that the proceeding was commenced in the wrong county. Thus convenience, the prime purpose of venue, is made possible during the entire period of administration."

Sec. 62. Character of proceeding. The administration of the estate of a decedent from the filing of the petition for probate and administration or for administration until the decree of final distribution and the discharge of the last personal representative shall be considered as one proceeding for purposes of jurisdiction. Such entire proceeding is a proceeding in rem. No notice shall be jurisdictional except as provided in sections 69 and 70.

The jurisdiction of the probate court ceases when an executor has made his final settlement, 31 Haw. 163, 175.

COMMENT:

From MPC, pp. 91-92:

" . . . It has . . . frequently been held that the entire course of administration is one proceeding, thus eliminating any jurisdictional requirements as to subsequent notice. . . . the scheme contemplated in this Code [and under sec. 317-14, RLH 1955] assumes that the court takes jurisdiction of the land of the decedent as well as his personalty from the start. It is true, special provisions are hereafter made for notice of proceedings to sell land. But it would seem that they should be comparable to an execution sale pursuant to a money judgment in a civil action at law, in that they constitute one step in a judicial proceeding already initiated. Thus in the example of the execution sale no notice is necessary for jurisdiction to complete the sale. The proceeding is still a unit though a will of the same decedent is later discovered and probated or though a successor personal representative is appointed and qualifies. However, this section does not apply where adverse interests of third parties in the estate are being litigated. See secs. 130 and 162 hereof.

"Throughout this Code the term 'proceeding,' when used in connection with probate or administration matters, indicates the entire course of probate and administration of an estate. However, the term 'proceedings' is often used to indicate various steps which are only parts of such proceeding."

Sec. 63. Duty of custodian of will; liability. After the death of a testator the person having custody of his will shall deliver it to the court which has jurisdiction of the estate. Every person who wilfully refuses or fails to deliver a will after being duly ordered by the court to do so shall be guilty of contempt of court. He shall also be liable to any party aggrieved for the damages which may be sustained by such refusal or failure.

Sec. 64. Petition for probate and appointment of personal representative; who may petition. Any interested person may petition the court of a proper county

- (a) To have the will admitted to probate, whether the same is written or unwritten, in his possession or not, is lost, is destroyed or is without the state;
- (b) For the appointment of an executor if one is designated in the will;
- (c) For the appointment of an administrator, if no executor is designated in the will, or if the person so named is disqualified or unsuitable, or refuses to serve, or if there is no will.

A petition for probate may be combined with a petition for the appointment of an executor or administrator; and a person interested in either the probate of the will or in the appointment of a personal representative may petition for both.

COMMENT:

Sec. 317-6, RLH 1955, provides that the custodian of a will "shall apply" to the circuit court for probate of such will. MFC, sec. 63, provides that such custodian "shall deliver" the will to the court and further provides legal sanctions to enforce obedience thereto.

Insofar as creditors are listed in sec. 317-13, RLH 1955, among those entitled to petition for administration, they are included within the phrase "some person in behalf of those interested" of sec. 317-6, RLH 1955, listing those who shall petition for probate of wills.

Sec. 317-6. Probate of will. In all cases in which any person, whether a citizen of the Territory or otherwise, dies, in any part of the Territory, leaving a will in the Territory of his property within its jurisdiction or abroad, or has died abroad and there left a will bequeathing or disposing of his property in the Territory, the person named as executor of such will, or the person to be benefited thereby, or the person in whose charge the same was deposited or some person in behalf of those interested, shall apply to a circuit judge for probate of such will, and for citation of the witnesses thereto, and of the next of kin of the deceased.

Sec. 317-8. Letters of administration. In like manner, the person entitled and desirous to administer, according to the priority of right hereinafter prescribed, upon the estate of any person dying intestate in the Territory, and leaving property therein, or dying abroad and leaving property in the Territory shall apply by petition to a circuit judge for power to administer thereon.

Sec. 65. Contents of petition for probate and appointment of personal representative. A petition for probate of a will or for the original appointment of a general personal representative or for both shall state:

- (a) The name, age, domicile and date of death of the decedent;
- (b) The names, ages and residence addresses of the heirs and devisees, if any, so far as known or can with reasonable diligence be ascertained;
- (c) The probable value of the real and of the personal property;
- (d) If the decedent was not domiciled in the state at the time of his death, what property is within the county in which the petition is filed;
- (e) If the decedent died testate and the will has not been delivered to the court, the contents of the will, either by attaching a copy of it to the petition, or, if the will is unwritten, lost, destroyed or suppressed, by including a statement of the provisions of the will so far as known;
- (f) The names and residence addresses of the persons, if any, named as executors; and
- (g) If the appointment of a personal representative is sought, the name and residence address of the person for whom letters are prayed; and his relationship to the decedent or other facts, if any, which entitle such person to appointment.

COMMENT:

From MPC, pp. 93-4:

"It may be deemed desirable for the judges having probate jurisdiction to promulgate standard forms for petitions for probate and for the appointment of a personal representative. This can be done under the powers given in sec. 10 of this Code."

Sec. 317-10. Sworn petition. All applications for probate of wills, or for letters of administration, shall be by sworn petition, in which the party shall set forth all the facts upon which his application rests.

MODEL PROBATE CODE

Sec. 66. Demand for notice of proceedings for probate or appointment of personal representative. If any interested person desires to be notified before a will is admitted to probate or before a general personal representative is appointed, he may file a demand for notice with the court. No demand for notice is effective unless it contains a statement of the interest of the person filing it, and his address or that of his attorney. After filing the same, no will shall be admitted to probate and no personal representative shall be appointed, other than a special administrator, until the notice provided for in section 69 hereof has been given.

Sec. 67. Request for special notice of hearings. At any time after the issuance of letters, any person interested in the estate may, in person or by attorney, serve upon the personal representative, or upon his attorney, and file with the clerk of the court where the proceedings are pending, with a written admission or proof of such service, a written request, stating that he desires written notice by ordinary mail of the time and place of all hearings on the settlement of accounts, on final distribution, and on any other matters for which any notice is required by law, by rule of court or by an order in the particular case. The applicant for such notice must include in his written request his post office address or that of his attorney. Unless the court otherwise directs, upon filing such request such person shall be entitled to notice of all hearings for which any notice is required as aforesaid, or of such of those hearings as he designates in his request.

COMMENT:

In Hawaii notice by publication is required before hearings for probate of wills or for the appointment of personal representatives. Under MPC, sec. 68, such notice is not necessary; however, MPC, sec. 66, gives those desiring such notice an opportunity to file a demand for same. The Code Committee states at p. 94 thereto:

Sec. 66-67, COMMENT, continued.

"This section has been developed from the devise used in the English ecclesiastical and probate courts, known as a caveat. The caveat is also provided for in a number of jurisdictions in this country. Where, as in this Code, provision is made for probate and grant of administration without notice, the caveat, or something comparable to it, is a desirable safeguard for the protection of interested persons who otherwise may not have notice of the hearing. There is no reason, however, why the caveat should not be applied to the appointment of the personal representative as well as to the probate of the will. Provision for this has accordingly been made in this section of the Code."

Should any interested person wish notice to other probate proceedings, MPC, sec. 67, provides for filing such requests with the court.

Sec. 68. Hearing on petition without notice. Upon filing the petition for probate or for the appointment of a general personal representative, if no demand for notice has been filed as provided in section 66, and if such petition is not opposed by any interested person, the court may, in its discretion, hear it forthwith or at such time and place as it may direct, without requiring notice.

Sec. 317-12. Time of hearing and notice of petitions for probate of wills or for letters of administration. Upon filing of a petition for the probate of a will or for letters of administration, the clerk of court shall fix the time of hearing thereon, which shall be not less than twenty nor more than thirty days after the date of the filing of the petition. Notice of the time and place of hearing on the petition shall be given by publication once in each of three successive weeks in such newspaper as the clerk may determine, the first publication to be not less than twenty days prior to the date of hearing; provided, that when in the opinion of the judge the value of the estate does not exceed \$1,000 and no injustice will result to any one, he may by order direct the clerk to shorten the time of the notice, or he may by order direct that the notice be given by posting as provided in the order instead of by publication. This section shall not apply to petitions for the appointment of temporary administrators.

COMMENT:

From MPC, pp. 95-6:

"This and the sections which immediately follow it are drawn on the theory that it is desirable to permit a summary hearing on an application for probate or administration, and that such hearing is permissible without any notice whatever. This was the English probate in common form and has been followed in a considerable number of states. It is still a part of the English probate system. On the other hand, a large number of states require notice before any hearing can be had other than for a grant of special administration. A hearing without notice permits an immediate supervision of the estate of the decedent as soon as his death occurs. In jurisdictions requiring notice that result may be obtained only when a special administrator is appointed,—often a cumbersome and expensive procedure. On the other hand, it may be said that in the summary proceeding without notice, there is danger that unscrupulous persons get control of the estate. However, this danger is largely obviated by the fact that the judge may always, in his discretion, require notice before the hearing. Moreover, control by an improper person is not likely to continue long in view of the provision of section 70 requiring notice of the appointment of the personal representative as soon as letters are issued. . . .

"If a court should deem it advisable, a general rule requiring notice in all cases unless otherwise ordered could be promulgated under the provisions of sections 10 and 14 hereof."

MODEL PROBATE CODE

Sec. 69. Notice of hearing on petition.

(a) When and to whom notice given. If the petition for probate or for the appointment of a general personal representative is opposed, or if a demand for notice has been filed, under the provisions of section 66 hereof, the court must, and in all other cases the court may, fix a time and place for a hearing on such petition, and direct

- (1) That notice be given by publication and
- (2) That a copy of such notice be served personally or by registered mail on each heir and devisee whose name and address is known and on each person who has filed such demand for notice.

(b) Notice to alleged decedent. If it appears by the petition or otherwise that the fact of the death of the person whose estate is to be administered may be in doubt, or on the written demand of any interested person, a copy of the notice of the hearing on said petition shall be sent by registered mail to the last known residence address of the alleged decedent.

(c) Form of notice. The publication of notice required by this section shall include a notice to creditors of the decedent to file their claims in the court or be forever barred; and shall be substantially in the following form:

In the court, county,
State of .

Estate of , deceased

To all persons interested in the Estate of ,
and to the said , if he be not deceased:

You are hereby notified that a petition has been filed in said court /to admit to probate the will of , and /
for the appointment of a personal representative for said estate;
that said petition will be heard at on the
day of , 19 , or at such subsequent time or other
place to which said hearing may be adjourned or transferred.

All persons having claims against said estate are hereby notified to file the same in said court within four months from the date of the first publication of this notice or be forever barred.

Date

Clerk of the Court for
 County,

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Sec. 317-23. Creditors' claims; advertisement; barred when. Immediately after the appointment of any executor or administrator of any estate, he shall advertise in such newspaper or newspapers as the court directs, once in each of four successive weeks, a notice directed to all creditors of the deceased, . . . to present their claim with proper vouchers or duly authenticated copies thereof, . . . within four months from the first day of publication. . . .

Sec. 69, continued.

COMMENT:

From MPC, p. 97:

"This section makes provision for notice when there is a contest or when a demand for notice has been filed, or when the court determines that it would be desirable. If notice is ordered, then this notice accomplishes two things: it notifies interested parties of the beginning of the proceeding; it also notifies creditors to come in and present their claims. In this way the expense of a separate publication of notice to creditors is eliminated. The part of the notice which is bracketed is to be omitted if there is no will.

"This section is designed to give the court jurisdiction over the property even if the person whose estate is to be administered be not deceased. Subsection (b) provides for notice to him; and the form set out in subsection (c) provides that he be made a party. It should be pointed out that, under the provisions of sec. 81, infra, even if the court has jurisdiction over the presumed decedent when he is not, in fact, dead, he has a very good chance of recovering back his property. However, his attack on the probate proceeding must be direct; he cannot make a collateral attack. Thus, the personal representative who has acted in good faith is protected."

MODEL PROBATE CODE

Sec. 70. Notice of appointment of personal representative. In all cases where notice by publication of the hearing on the petition for probate or for the appointment of a general personal representative has not been given, the clerk shall, as soon as general letters are issued, cause to be published a notice of the appointment of the personal representative, in which shall be included a notice to creditors of the decedent to file their claims in the court or be forever barred. A copy of such notice shall also be served personally or by registered mail on each heir and devisee whose name and address is known. Such notice shall be in substantially the following form:

In the [] court of _____ county,
State of _____.

Estate of _____, deceased

To all persons interested in the Estate of _____,
and to the said _____, if he be not deceased:

You are hereby notified that on the _____ day of _____,
19____, the last will of _____ was admitted to probate
and that _____ was appointed the
/executor/ administrator of the estate of _____,
deceased.

All persons having claims against said estate are hereby
notified to file the same in said court within four months from
the date of the first publication of this notice or be forever
barred.

Date _____

Clerk of the [] Court for
_____ County, _____

Sec. 70, continued.

COMMENT:

From MPC, p. 98:

"This is the notice which is to be given if the first hearing is without notice by publication. Thus notice is given to interested persons in all cases very early in the proceeding, and in time to make good any objections they may have to the probate or to the appointment of the personal representative."

MODEL PROBATE CODE

Sec. 71. Search for alleged decedent. Whenever there is any doubt that the person whose estate is to be administered is dead, the court, upon application of any interested person, may direct the personal representative to make search for the alleged decedent in any manner which the court may deem advisable, including any or all of the following methods:

- (a) By inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;
- (b) By notifying officers of justice and public welfare agencies in appropriate locations of the disappearance of the alleged decedent;
- (c) By engaging the services of an investigation agency.

COMMENT:

From MPC, p. 99:

"This section is inserted because the proceeding makes the alleged decedent a party and is intended to bind him. If the court exercises a sound discretion in ordering notice as provided in this section, it is clear that due process requirements are complied with in so far as the alleged decedent's property is concerned. Indeed, the inclusion of the decedent as a party to the notice by publication would seem to amount to a compliance with due process requirements. See the comment to sec. 81.

"This section is modeled after sec. 5 of the Uniform Absence as Evidence of Death and Absentees' Property Act as promulgated by the Conference of Commissioners on Uniform State Laws. It does not, however, take the place of the uniform act. This section would be used only where the alleged decedent is believed to be dead and where it is desirable to have the whole matter determined in one probate proceeding."

MODEL PROBATE CODE

Sec. 72. How will is contested. Any interested person may contest the probate of a will by stating in writing the grounds of his objection thereto and filing the same in the court.

COMMENT:

From MPC, p. 99:

"No attempt is made to enumerate the grounds of contest. See, however, sec. 80. This section, of course, implies the well-recognized proposition that a part of a will can be contested."

MODEL PROBATE CODE

HAWAII REPORTS

Sec. 73. Time within which contest must be filed.
No will can be contested unless the grounds of objection are filed within the periods hereinafter provided.

- (a) If the ground of objection is that another will of the decedent has been discovered, the ground of objection must be filed before final distribution of the estate is decreed and within the period stated in section 83.
- (b) If the contest is on any other ground, and
 - (1) If notice of the hearing of the petition for probate has been given as provided in section 69, the grounds of objection must be filed at or before the time of the hearing on the petition for probate.
 - (2) If notice of the hearing of the petition for probate has not been given as provided in section 69, the grounds of objection must be filed within four months after the first publication of the notice of appointment of the personal representative.

Diota at 5 Haw. 150, 151: Circuit judge in probate may revoke probate of will even after the time for appeal has elapsed upon a showing of good grounds, e.g. the existence of an after-discovered will.

COMMENT:

MPC, sec. 73, classifies grounds for contesting wills into two classes: (1) after-discovered wills and (2) other grounds. The latter would include, among others, improper execution, lack of testamentary capacity, undue influence or revocation.

On the former category, see comment to MPC, sec. 75.

As to the second category, insofar as the Hawaii supreme court referred to probate proceedings as in rem proceedings binding upon all in 25 Haw. 70, the rule in MPC, sec. 73(b) (1), may be said to also prevail in the islands.

MODEL PROBATE CODE

Sec. 74. Notice of contest.

(a) Contest before probate. If a statement of grounds of objection to admitting the will to probate is filed before it has been admitted, and the court has already ordered the notice provided for in section 69, no further notice is necessary unless ordered by the court. If the court has not already ordered the notice provided for in section 69, the notice therein provided for shall be given, and the notice shall further state that the will is being contested.

(b) Contest after probate. If a statement of objection to admitting the will to probate is filed after the will has been admitted and within the time limitations stated in section 73, the court shall fix a time and place for hearing the same and shall direct that notice be given to each heir and devisee whose place of residence is known, and, if the grounds for contest include the presentation of another will, to each devisee in such other will, whose place of residence is known, and to such other persons as the court may direct.

COMMENT:

See comment to MPC, sec. 75.

MODEL PROBATE CODE

Sec. 75. Will subsequently presented for probate.

(a) Where original petition not yet heard. If, after a petition for the probate of a will or for the appointment of a general personal representative has been filed, and before such petition has been heard, a petition for the probate of a will of the decedent, not theretofore presented for probate, is filed, the court shall hear both petitions together and determine what instruments, if any, should be admitted to probate or whether the decedent died intestate.

(b) Where one will already admitted or administration granted. If, after a will has been admitted to probate or after letters of administration have been granted, a petition for the probate of a will of the decedent, not theretofore presented for probate is filed, the court shall determine whether the former probate or the former grant of letters should be revoked and whether such other will should be admitted to probate or whether the decedent died intestate.

(c) Time limitation on probate under this section. No will shall be admitted to probate under the provisions of this section unless it is presented for probate before the court decrees final distribution of the estate.

(d) Character of proceedings under this section; notice. When a will is presented for probate under the provisions of this section, the proceedings shall be deemed a part of the proceedings for probate or for administration already initiated. If notice by publication has been ordered as provided in section 69 or in section 70, no further notice by publication is necessary unless ordered by the court; but the court shall direct that notice of the hearing be given to each heir and to each devisee in this or in any other will offered for or admitted to probate, whose place of residence is known, and to such other persons as the court may direct.

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Circuit judge in probate may revoke probate of will even after the time for appeal has elapsed upon a showing of good grounds, e.g. the existence of an after-discovered will, 5 Haw. 150.

COMMENT:

From MPC, pp. 101-102:

"This section and sections 73 and 74 on contest overlap somewhat, but all are necessary. A subsequently presented will may have a double function; it may revoke a prior will, and thus be the basis of a contest of that prior will, and it may also contain dispositive provisions which the proponent wishes to have recognized by securing its probate. Sections 73, 74 and 75 all take the position that the contest of the old will and the probate of the new are both determined at the same hearing.

"However, the attempted probate of another will may not necessarily constitute a contest of the first. Thus, if the testator makes one will disposing of all his real estate and another will disposing of all his personal estate, these wills are obviously not inconsistent. Nevertheless, since the order admitting the first of these wills to probate would be a determination that such will was the testator's last and only will and that as to all property not covered by it he died intestate, it would be necessary to reopen the order or judgment made at the first hearing, but it would not be necessary to revoke the probate of the first will.

"Much confusion exists in the statutes and cases as to the matter of introducing a subsequent will. Some jurisdictions bar it by the ordinary period of contest; others allow it to be introduced after the period for contest has expired; some allow it to be probated at any time. Logically, it would seem that it does not differ from any other newly discovered evidence, and that time limitations on contest should apply to it. On the other hand, if a later will is discovered before the order of distribution, it seems reasonable that it should be admitted. This Code takes the latter position."

In Hawaii the only time limitation on petitioning for probate of wills is the five years after death statute discussed in

MPC, sec. 83, *infra*. Thus, an after-discovered will is ample ground for revocation of the probate of prior wills within such period.

MODEL PROBATE CODE

Sec. 76. Testimony of subscribing witnesses. If the probate of a written, attested will is contested, at least two of the subscribing witnesses shall be examined if they are within the state and competent and able to testify. If the will is not contested, at least one of the subscribing witnesses shall be examined if such witness is within the state and competent and able to testify.

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Sec. 322-4. Competency of witnesses. If the subscribing witnesses to a will are competent at the time of attesting its execution, their subsequent incompetency, from whatever cause it may arise, shall not prevent the probate and allowance of the will, if it is otherwise satisfactorily proved.

Sec. 317-6. Probate of will. . . . executor of such will, or the person to be benefited thereby, or the person in whose charge the same was deposited or some person in behalf of those interested, shall apply to a circuit judge for probate of such will, and for citation of the witnesses thereto, and of the next of kin of the deceased. (emphasis supplied)

MODEL PROBATE CODE

Sec. 77. Proof of written attested will by other evidence. The provisions of section 76 as to the testimony of subscribing witnesses shall not exclude the production of other evidence at the hearing on the petition for probate; and the due execution of the will may be proved by such other evidence.

COMMENT:

From MPC, pp. 102-103:

"Common-law rules as to the proof of the execution of wills are assumed to be in force without the necessity of any statute. Thus, if attesting witnesses are not available, it is possible to prove the genuineness of their signatures and to raise a presumption that the will was duly executed. . . . This section is designed to indicate that such rules are in force."

MODEL PROBATE CODE

Sec. 78. Commission to take testimony of subscribing witnesses. When it is inconvenient for one or more of the subscribing witnesses to a written, attested will to be present at a hearing with respect to the probate of such will, or where such witness or witnesses are without the state, the court may, if there be no contest, issue a commission to take the testimony of such witness or witnesses, either without notice or upon such notice as the court shall direct. If there is a contest with respect to the probate of the will, a commission may be issued in accordance with the practice in civil actions.

HAWAII RULES OF CIVIL PROCEDURE

Rule 81(g). Depositions and Discovery. Chapter V of these rules, relating to depositions and discovery, shall apply to proceedings listed in subdivision (a) of this Rule 81 which includes probate proceedings, except that in any such proceeding: (1) the court may by order direct that said Chapter V shall not be applicable to the proceeding if the court for good cause finds that the application thereof would not be feasible or would work an injustice; and (2) if the proceeding be ex parte any deposition therein upon oral examination or upon written interrogatories shall be pursuant to motion and order of court, rather than pursuant to notice as set forth in subdivision (a) of Rule 30 or subdivision (a) of Rule 31, and in any such case the order of court shall, for all purposes relating to said Chapter V, take the place of said notice.

COMMENT:

In Hawaii the deposition provisions of the Hawaii Rules of Civil Procedure apply to probate proceedings. The difference between Civil Procedure Rule 81(g) and MPC, sec. 78, is that in ex parte proceedings, the latter gives the court the option to require notice, whereas the former requires ~~only~~ ^{an} examination in court.

MODEL PROBATE CODE

Sec. 79. Proof of holographic or nuncupative will.

Proof of holographic and nuncupative wills are subject to the requirements of sections 48 and 49 of this Code.

COMMENT:

From MPC, p. 103:

"This provision is inserted because of the terms of the Model Execution of Wills Act, which appears as secs. 45 to 50 of this Code."

Hawaii does not recognize holographic and nuncupative wills.

MODEL PROBATE CODE

Sec. 80. Proof required for probate and for grant of administration.

(a) On petition for probate. On a petition for the probate of a will, if the court finds that the testator is dead and that the will was executed in all respects according to law when the testator was competent to do so and was not acting under undue influence, fraud or restraint, and does not find that the will was revoked the will shall be admitted to probate as the last will of the testator.

(b) On petition for appointment of personal representative. On a petition for the appointment of an executor or general administrator the court shall determine whether the deceased died testate or intestate and shall grant letters accordingly or, on proper grounds, may deny the petition.

COMMENT:

MPC, sec. 80, codifies the unwritten law in Hawaii. However, Hawaii probably requires more conclusive proof of death than that intended by the Code, (for by the provisions of MPC, sec. 81, decedents are made parties to probate proceedings and they are consequently bound by probate or grant of administration. In Hawaii if alleged decedents are alive, then probate or grants of administration are void.

MODEL PROBATE CODE

Sec. 81. Effect of probate or grant of administration.
If the court determines the facts as provided in section 80, such order shall, if uncontested or unappealed from, be final, subject to the following exceptions:

- (a) It may be reopened at any time prior to the decree of final distribution for the purpose of admitting a will to probate not theretofore presented to the court;
- (b) It may be vacated or modified for good cause as provided in section 19;
- (c) The finding of the fact of death shall be conclusive as to the alleged decedent only if (1) the notice of the hearing on the petition for probate or for the appointment of a personal representative is sent by registered mail addressed to the alleged decedent at his last known residence address and (2), when search is ordered for the alleged decedent as provided in section 71, the court finds that the search was made. If such notice is sent and search made, and the alleged decedent is not dead, he may nevertheless at any time recover the estate from the personal representative if it be in his hands, or he may recover the estate or its proceeds from the distributees, if either be in their hands.

HAWAII REPORTS

" . . . the probate of a will after notice as required by law is in the nature of a judgment in rem, binding on all persons like other judgments, and can be set aside only upon sufficient cause shown, which involves both cause why the will should not be sustained and cause why the petitioner did not make a contest at the original hearing. . . . There is no period of limitation prescribed in our statute for barring such actions, . . . neither does the fact that there is no period of limitation for barring such action excuse

Sec. 81, continued.

Hawaii Reports, continued.

the petitioner from bringing his case within the rules applicable to actions in equity for setting aside ordinary judgments. The power of a probate court to set aside a decree admitting a will to probate is equal to that of a court of equity on a bill filed for relief against a judgment or decree for fraud or mistake." 25 Haw. 70, 75.

COMMENT:

In Hawaii after a will has been probated or letters granted to a personal representative, all fact questions stated in MPC, sec. 80, except death may be questioned only in direct proceedings to set aside the probate of the will. As stated in 25 Haw. 70 above, the direct proceedings to set aside the probate of a will is actually an equity suit to relieve against judgments or decrees procured by fraud or mistake. The Code does not preclude such equity relief (see comments to MPC, sec. 19).

However, in addition to equity relief the Code provides by MPC, sec. 81(a) and (b), that orders of probate and appointments of personal representatives may be reopened prior to decrees of final distribution or they may be vacated or modified within the period allowed for appeal.

As to the fact of death of persons whose estates are being administered, American courts generally hold in presumed death cases that if those presumed to have died should appear after letters testamentary or of administration are granted, then the letters and the entire administration proceedings are void. The situation is described as follows in Atkinson on Wills, pp.

599-600:

" . . . The owner can recover his property from the heirs or others who have possession thereof, his debts though the debtors have paid the personal representative, or even the value of the property from the administrator who has completely administered it and has been discharged. The leading case upon this doctrine is *Scott v. McNeal*, 154 U. S. 347, which decided that since there was no notice to the alleged deceased in the proceedings to grant administration, his property was

Sec. 81, COMMENT, continued.

taken without due process of law. It is undoubtedly true that the ordinary statutory procedure assumes that the property owner is dead and the notice contemplated is merely for the benefit of those interested in his estate, but if the statutes provide for adequate notice to him and for other reasonable safeguards of his interests, and there is compliance with these provisions, the court should have power to determine the jurisdictional fact of death as well as that of domicile and this determination should not be subject to collateral attack. However, the courts generally have contented themselves with declaring that the letters are absolutely void if the owner of the estate is not dead. For this reason, they have been rather strict in requiring clear proof of death before granting letters of administration, and have even refused to require the alleged decedent's debtor to pay an administrator when there is substantial doubt as to the fact of death."

MPC, sec. 81, makes the decedent a party to the proceedings in accordance with the due process requirements stated by the U. S.

Supreme Court in Scott v. McNeal.

The Code Committee discusses MPC, sec. 81, as follows at pp. 104-5:

"The effect of the first part of this section is to say that the order admitting a will to probate determines that it is the last and only effective will of the testator and that the order granting administration to a personal representative, when no will is admitted to probate, determines that the decedent died intestate. Hence, any presentation of a will at a later time can be made only by reopening the order admitting the first will to probate or the order granting administration. However, the later will may be admitted by reopening the order at any time before the decree of final distribution is made.

"The third exception to the conclusiveness of these orders is with respect to the fact of death. According to the decision in the case of Scott v. McNeal, 154 U. S. 34, 14 S. Ct. 1108 (1894), an ordinary probate proceeding in which the alleged decedent is not made a party and is not given notice does not bind him, and he may attack the whole proceeding collaterally. This is because due process requirements have not been complied with. But if reasonable notice is given to the alleged decedent, and he is made a party to the proceeding, he is bound. The form of notice provided for in this Code makes the alleged decedent a party; and if the steps referred to in exception (c) hereof are taken, he would receive reasonable notice. This simply means that he is bound by the proceeding and cannot attack it collaterally. But, according to the provisions of this section, he can recover his property back to the extent that it is in the hands of the personal representative or distributees. He cannot recover it back from creditors, and the personal representative is protected to the extent that he acted in good faith."

MODEL PROBATE CODE

Sec. 82. Certificate of probate. When proved as herein provided, every written will, if in the custody of the court, shall have endorsed thereon or annexed thereto a certificate by the court of such order of probate. If for any reason a written will is not in the custody of the court, or if the will is oral, the court shall find the contents thereof, and the order admitting the will to probate shall state the contents and a certificate shall be annexed as above provided. Every will certified as herein provided, or the record thereof, or a duly certified transcript of the record, may be read in evidence in all the courts within this state without further proof.

REVISED LAWS OF HAWAII

Sec. 224-22. Probate of will. The probate of a will or codicil, or letters of administration with the will or codicil annexed, shall be prima facie evidence of the original will or codicil, in like manner as if the original were produced and proved in due course of law.

MODEL PROBATE CODE

Sec. 83. Time limit for probate and administration.

In addition to the limitations of time provided in section 73 hereof, no written will shall be admitted to probate and no administration shall be granted unless application is made to the court for the same within five years from the death of the decedent; and no oral will shall be admitted to probate except in accordance with the provisions of section 49 hereof.

REVISED LAWS OF HAWAII

Sec. 317-5. Five years limitation, unless minor interested. No will shall be allowed to be proved after the expiration of five years from the death of the testator; provided, that where any minor is interested in the estate, one year shall be allowed after his arrival at legal age, to cause the will to be proved and allowed.

HAWAII REPORTS

Ancillary probate allowed after five years from death of testator, since sec. 317-5, RLH 1955, "was intended only to limit the time within which original proof might be made, and that it does not apply to cases of ancillary proof." 10 Haw. 80.

COMMENT:

From MPC, p. 106:

"The five-year limitation laid down in this section is designed to take care of situations where there has been no probate or grant of administration during the period of five years. It is not intended to modify the restrictions laid down in secs. 73 to 75, except to the extent that it sets an outside limit of five years. This section is intended to prohibit and to render ineffective any grant of letters if the petition is filed after five years. Section 135(d) and this section both have legal effect after the five-year period. By the operation of these sections the heirs may deal with the property as owners after the five-year period."

MODEL PROBATE CODE

Sec. 84. Devolution of estate at death. When a person dies, his real and personal property, except exempt property and homestead interests, passes to the persons to whom it is devised by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as his heirs; but it shall be subject to the possession of the personal representative and to the election of the surviving spouse and shall be chargeable with the expenses of administering the estate, the payment of other claims and allowances to the family, except as otherwise provided in this Code.

REVISED LAWS OF HAWAII

Sec. 317-14. Possession and control of real estate pending administration; distribution; determination of heirs. The executor or administrator is entitled to the possession and control of the real estate of the decedent . . . until such possession and control is terminated by order of court. . . . The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action or suit, for the possession of the real estate or for quieting the title thereto, or for the registration of the title thereof against anyone except the executor or administrator, but shall not be required to do so.

. . .

Sec. 317-27. Real estate; sale. The real property of a decedent shall be subject to sale by the administrator, or by the executor unless power to sell is given by the will, only when authorized by the court. The court may authorize such sale for payment of expenses of administration, family allowance, estate and inheritance taxes or debts, or whenever such sale appears to the court to be for the best interests of the estate and not inconsistent with the will, whether or not the personal property of the estate has been exhausted.

. . .

COMMENT:

At common law title and possession to personalty vests in personal representatives to pay lawful claims against the estate and to distribute the balance to the legatees or distributees. This is the law in Hawaii as to personalty.

Title to realty locally vests in heirs as devisees but by sec. 317-14, RLH 1955 possession passes to personal representatives.

MODEL PROBATE CODE

Sec. 85. No will effectual until probated. Except as provided in sections 86 and 87 hereof, no will shall be effectual for the purpose of proving title to, or the right to the possession of, any real or personal property, disposed of by the will, until it has been admitted to probate.

COMMENT:

At common law probate of a will is necessary for beneficiaries of personalty bequests to acquire title — the theory being that title to personalty is vested in the personal representative until distribution to the beneficiaries.

As to realty, the cases are in conflict. All states hold that title to realty vests immediately upon the death of the testator in the devisees; however, states differ on the necessity of probate to prove that title. Most states hold that wills may be probated only in probate courts and that in the absence of probate, the heirs at law are the owners of the land. Devisees under unprobated wills, therefore, cannot put into evidence such wills in ejectment actions, partition proceedings, or in suits to quiet title.

A few states, however, do permit devisees to introduce into evidence unprobated wills and to test their validity in ejectment or other title proceedings.

Hawaii's position on the proof of title question is unclear.

Where title or possession is not involved but tort or constructive trust is in question, MPC, sec. 85, would not apply. Atkinson on Wills discusses this point at pp. 504-5 as follows:

"... in most jurisdictions a trust would be imposed in favor of a devisee under a suppressed will which could not be probated. The legatee under an unprobated will may also recover damages from one who suppressed the instrument and prevented its probate. Likewise, a beneficiary under a prior unprobated will may contest a later will. Perhaps these exceptional cases are not contrary to the general rule announced, for in neither situation is the plaintiff relying on title to any specific property under the unprobated will, and in both cases there is sufficient reason why the will has not been probated."

Sec. 85, COMMENT, continued.

The Code Committee discusses the intent of MPC, sec. 85, as follows:

"Statutes of this general character are common. Some even go so far as to say that no will shall be effectual to pass real or personal estate until it has been admitted to probate. But it is uniformly held that this is a matter of the production of evidence and does not prevent the passing of title at the time of testator's death.

"It is not the purpose of this section to preclude the use of an unprobated will to prove a tort or to establish a constructive trust in a proper case. Thus an unprobated will might be introduced in evidence to secure a remedy for actual fraud or duress. But the mere fact that a will was not presented for probate within the statutory time for contest or for probate, or that its existence was not known within that time, would furnish no basis for imposing a constructive trust in favor of beneficiaries of the unprobated will.

"It would seem moreover, that such indirect remedies as an action for tort or a constructive trust would rarely be needed under this Code, for an after discovered will may be introduced at any time until final distribution. See sec. 75. Likewise, sec. 19 is very liberal in permitting the reopening of an order or decree for cause."

MODEL PROBATE CODE

DISPENSING WITH ADMINISTRATION

COMMENT:

The dispensing with administration provisions of MPC, secs. 86 and 87 and MPC, secs. 88 through 91 do not bind creditors, devisees and heirs of decedents. They merely release decedents' debtors and others holding property belonging to such decedents from liability to the above-mentioned three categories of interested parties. Hawaii does not have statutes dispensing with administration.

Secs. 317-50 through 58, RLH 1955, and sec. 317-59, RLH 1955, provide instead for summary administration of small estates by circuit court clerks. MPC, sec. 92, also provides for summary administration, however, by court appointed personal representatives. In Hawaii the gross value of the estate determines whether the summary procedures are applicable, whereas under the MPC the summary procedure is applicable only if the gross estate does not exceed total claims against the estate.

Sec. 86. Collection of small estates by distributees upon affidavit. The distributees of an estate shall be entitled thereto without awaiting the appointment of a personal representative or the probate of a will when

- (a) No petition for the appointment of a personal representative is pending or has been granted, and
- (b) Thirty days have elapsed since the death of the decedent, and
- (c) The value of the entire assets of the estate, not including homestead and exempt property, does not exceed (\$1,000), and
- (d) There is furnished to any person owing any money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property or right, an affidavit showing the existence of the foregoing conditions

Secs. 86-92, MPC, continued.

and the right of the distributees to receive such money or property or to have such evidences transferred.

Sec. 87. Same; effect of affidavit; release; suit. The person making payment, delivery, transfer or issuance pursuant to the affidavit described in section 86 shall be released to the same extent as if made to a personal representative of the decedent and he shall not be required to see to the application thereof or to inquire into the truth of any statement in the affidavit, but the distributees to whom payment, delivery, transfer or issuance is made shall be answerable therefor to any person having a prior right and be accountable to any personal representative thereafter appointed. If the person to whom such affidavit is delivered refuses to pay, deliver, transfer, or issue the property as above provided, it may be recovered or compelled in an action brought for such purpose by or on behalf of the distributees entitled thereto, upon proof of the facts required to be stated in the affidavit.

COMMENT:

From MPC, p. 107:

" . . .

"Sections 86 and 87 are intended to cover the small estate in which administration is neither had nor contemplated. It is intended merely to enable the surviving family of a decedent to collect assets of the estate without the necessity of resorting to administration. . . . Being limited to estates not exceeding \$1,000, they will for the most part be utilized to collect bank deposits, wage claims, insurance proceeds and the like, and to transfer registered securities and automobiles. They are not intended, however, to preclude the subsequent granting of an administration if the same be desired. Where there is a surviving spouse or minor child, they will ordinarily be entitled to such assets absolutely as exempt property irrespective of the existence of creditors. On the other hand, if the surviving heirs are not so closely related to the decedent, such assets may be subject to administration, and the distributees to whom such assets are paid or delivered will be accountable to a personal representative, if one should be appointed subsequently. A lapse of thirty days is required before this section may be employed, in order to afford creditors an opportunity to demand administration. Of course, the distributees may prevent the initiation of administration by paying creditors who otherwise might insist upon administration."

Secs. 86-92, MPC, continued.

Sec. 88. Petition for order of no administration. If the value of the entire assets of an estate, not including homestead and exempt property, does not exceed (\$2,500) and does not exceed the amount to which the surviving spouse and minor children of the decedent are entitled as a family allowance, there may be filed by or on behalf of the surviving spouse or minor children a petition in any court of proper venue for administration, or if a petition for the appointment of a personal representative has been filed but not yet granted, then in the court where such petition has been filed, praying the court to make a family allowance and to make an order that no administration shall be necessary. The petition shall state the names of the heirs or devisees, a list of creditors of the estate together with the amounts of the claims so far as the same are known, and a description of all real and personal property belonging to the estate, together with the estimated value thereof according to the best knowledge and information of the petitioner, and the liens and encumbrances thereon, with a prayer that the court make a family allowance and that, if the entire assets of the estate are thereby exhausted, the same be set aside to the surviving spouse, if there be one, otherwise to the minor children.

Sec. 89. Same; hearing and order. Upon the filing of a petition for no administration the court may hear the same forthwith without notice, or at such time and upon such notice as the court may require. Upon the hearing of the petition, if the court finds that the facts contained therein are true and that the expenses of the last illness, funeral charges and expenses of the proceeding have been paid or secured, the court shall make a family allowance and, if the entire assets of the estate are thereby exhausted, shall order that no administration be had in the estate and shall assign to the surviving spouse or, if there be no surviving spouse, then to the minor children the whole of the estate, subject to the liens and encumbrances thereon.

Secs. 86-92, MPC, continued.

Sec. 90. Same; effect of order. The order that no administration be had on the estate shall, until revoked, constitute sufficient legal authority to all persons owing any money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property or right belonging to the estate and to persons purchasing or otherwise dealing with the estate, for payment or transfer to the persons described in the order as entitled to receive the estate without administration.

Sec. 91. Same; proceedings to revoke order. At any time within one year after the making of an order of no administration, any person interested in the estate may file a petition to revoke the same alleging that other property has been discovered, or that property belonging to the estate was not included in the petition for no administration, or that the property described in the petition was improperly valued, and that if said property were added, included or properly valued, as the case may be, the total value of the property would exceed that necessary to justify the court in ordering no administration. Upon proof of any of such grounds, the court shall revoke the order of no administration; but the order of no administration shall not be revoked on these grounds after the expiration of one year from the date of the order. In case of any contest as to the value of any property, the court may appoint two appraisers to appraise the same in accordance with section 120 of this Code.

COMMENT:

From MPC, pp. 107-8:

" . . .

"Sections 88-91 provide a method for the summary distribution of a small estate to the surviving spouse or minor children where the same, exclusive of homestead and exempt property, would otherwise be entirely consumed in the payment of a family allowance. The upper limit of \$2,500 is suggested as a maximum value of an estate to which these sections should apply. In

Secs. 86-92, COMMENT, continued.

these estates, also, ordinary creditors would not share and consequently there is no reason why distribution cannot be made immediately. These provisions are not a required, but only an optional, course of procedure. They have the advantage of providing a judicial method of accomplishing their purpose, whereas the procedure contemplated by secs. 86 and 87 is entirely without judicial supervision."

From MPC, pp. 109-10:

"... [sec. 88] is intended to be applicable if there is real as well as personal property, and whether the decedent died testate or intestate. If there is a will, its probate will not affect the right to pursue the procedure provided in this section. . . . The procedure for making a family allowance is provided by sec. 44."

From MPC, p. 111:

"... [sec. 91] contemplates a direct attack upon the order of no administration in the probate court. It is in addition to the remedy by appeal. But it embodies reasons some of which would not be available by appeal; and, because the petition may have been granted without notice, a longer time is allowed.

"If an order of no administration is revoked, the court may then grant administration upon the filing of a petition therefor."

REVISED LAWS OF HAWAII

PART III. UNADMINISTERED SMALL ESTATES;

ESTATES IN CORONER'S CHARGE

Sec. 92. Summary proceedings for small estates after personal representative appointed. Whenever, after the inventory and appraisal has been filed by a personal representative, it is established that the estate of a decedent, exclusive of the homestead and exempt property and family allowances to the surviving spouse and minor children, does not exceed an amount sufficient to pay the claims of classes 1 to 6 inclusive, the personal representative upon order of the court shall pay the same in the order provided and thereafter present his account with an application for the

Sec. 317-50. Clerk of circuit court to administer. Whenever by reason of the death of any person domiciled or residing in the Territory, testate or intestate, there are moneys or funds due and payable to the estate of such person or other property belonging to such estate of a total value not exceeding \$1,500, and an executor or administrator of such estate has not been appointed, the clerk of the circuit court of the circuit in which such person was residing or domiciled at the time of his death may, upon the verified petition of such clerk or of any person interested,

Secs. 86-92, MPC, continued.

settlement and allowance thereof. Thereupon the court, with or without notice, may adjust, correct, settle, allow or disallow such account and, if the account is settled and allowed, decree final distribution, discharge the person representative and close the administration.

Sec. 317-50, RLH, continued.

obtain an order authorizing him to administer such estate, and as such administrator he shall collect and receive such money, funds or other property of such estate and administer the same. Such order may be made without notice or hearing if it appears from the verified petition or any affidavit in support thereof, that sufficient grounds exist therefor; provided, that proof of such grounds shall, nevertheless, be made at the hearing for the determination of the persons entitled to distribution provided for by section 317-55, or at any other hearing. Except as otherwise specifically required or authorized by law or where he may be interested as an heir, legatee or devisee, no clerk of any circuit court shall act as administrator of any estate where the value of the same, wheresoever situate, is in excess of \$1,500; but this prohibition shall not prohibit the clerk from proceeding with the administration of any estate valued in excess of \$1,500 where such excess first becomes known subsequent to his appointment as administrator, provided such excess does not exceed \$500.

No fees shall be allowed the clerk, save and except as set forth in section 317-57.

Sec. 317-52. Publication by clerk of appointment as administrator; notice to creditors, heirs, etc. Upon such appointment the clerk shall publish such fact by posting a notice thereof at the front entrance of the circuit court house of the circuit and by advertising such notice in the English language at least once in a newspaper of general circulation in such circuit, such notice to state briefly that all creditors of the deceased must file with the clerk duly verified claims within sixty days from the date of such publication, and that all persons claiming to be heirs of the estate are requested to file with the clerk notice of such claims within the period. The judge of the court may direct that the advertising of the notice in a newspaper need not be made if he deems the same unnecessary.

Sec. 317-53. Presentation of claims of creditors. All creditors of such deceased persons shall present their claims, duly verified under oath, to the clerk within sixty days from the date of publication.

Sec. 317-54. Claims barred when. All claims of creditors not filed within the period of sixty days from the date of such publication shall be forever barred.

Sec. 317-55. Duties of clerk and distribution. The clerk shall make diligent effort to ascertain the names and whereabouts of the heirs-at-law, or the whereabouts of the devisees or legatees, as the case may be, of the deceased person and present evidence relating thereto to the court having jurisdiction of the proceedings. After the expiration of sixty days after such publication the clerk shall pay or distribute the money, funds or property of the estate, or any balance thereof, after the payment of creditors' claims presented within the time limited in section 317-54, either as an allowance for the support and maintenance of the widow or the dependents of the deceased or both, as authorized by the court or to or among such persons as may be found by the judge of the court sitting at chambers in probate, to be the persons entitled thereto as legatees, devisees or distributees, the share of any hospitalized mentally ill or mentally deficient or epileptic to be paid to the institution of which he is a patient as a ward of the Territory for his maintenance and care and in case of a minor heir, if his share is less than \$500, to his natural guardian or to some suitable person having the maintenance and care of such minor as trustee for such minor to be used for the care and benefit of such minor and upon filing a proper receipt for such payment shall be thereby relieved, acquitted and discharged from any and further liability therefor.

Sec. 317-56. Undistributed proceeds or balances, disposition. When any balance remains in the hands of the clerk, after payment of all creditors' claims presented within the time limited in section 317-54, and no heirs-at-law, or devisees or legatees of the decedent, entitled to such balance, can be located after reasonable search and inquiry, the clerk, after the expiration of one year after such publication, shall report such fact to the court, which shall forthwith enter an order escheating such property to the treasurer of the Territory, and the clerk thereupon shall immediately deposit the money or funds, or any balance, with the treasurer of the Territory. The treasurer of the Territory, at any time within five years after the entry of such order of escheat, may authorize the payment out of the general funds of the Territory of any amount so escheated to any person who establishes to the satisfaction of the treasurer of the Territory that he is morally entitled thereto as an heir, devisee or legatee of such decedent, and such person shall be entitled to receive the amount thereof out of any moneys in the treasury not otherwise appropriated, upon warrant drawn by the auditor of the Territory.

Sec. 317-57. Exemption from costs. All proceedings had under and by virtue of this part, shall be free from all costs of court and administrator's fees, except that the clerk may charge the actual expense for advertising the notice specified in section 317-52, the advertising, posting or service fees required in carrying out any order of the court, including orders relating to the sale of real or personal property, and any expenses reasonably necessary for the preservation, disposal, distribution and administration of the assets of the estate, together with a fee of five per cent, on the inventoried gross assets of the estate when the assets reach the inventoried value of \$1,000 or more, the fee to be paid to the treasurer of the Territory as a government realization from any available assets of the estate.

Secs. 86-92, MPC, continued.

RLH, continued.

Sec. 317-59. Estates less than \$300. Upon the death of any person dying intestate and leaving only personal property in the Territory and whose estate wheresoever situated does not exceed \$300 and where an administrator has not been appointed, a clerk of the circuit court of the circuit wherein such person was domiciled or if not domiciled in the Territory, the circuit wherein he was residing or had personal property at the time of his death, may, upon the filing with the clerk by any interested person of an affidavit setting forth the above facts, the names of the heirs if known and other pertinent facts as required by the clerk, collect or otherwise reduce to possession or turn into cash all assets of the estate. If after payment of funeral expenses as a preferred claim against the estate there are assets remaining, the clerk shall give notice to creditors and heirs as provided by section 317-52 by posting, or if there are sufficient funds, by posting and advertising, and if after the period and distribution of assets to creditors of deceased persons who have filed proper claims there are assets remaining, then the clerk upon the facts contained in the affidavit as to heirship, shall deliver the assets to the heirs in accordance with the statutes of descent of the Territory. If no creditors or heirs appear or are found within sixty days of the notice, the clerk shall convert all personal property into cash and forthwith deposit the same with the treasurer of the Territory.

COMMENT:

From MPC, p. 108:

" . . .

"Section 92 differs from the preceding sections in that it applies to estates in which administration has been commenced but which are so small in size that general creditors will not share in their distribution. A summary and early distribution is thus provided."

Secs. 86-92, COMMENT, continued.

From MPC, p. 112:

"The above section . . . contemplates a minimum of administration. It differs from the preceding sections which actually dispense with administration, in that it contemplates some administration by a personal representative under the supervision of the court until it appears that further administration is unnecessary. See sec. 142 for the classification of claims."

MODEL PROBATE CODE

ADJUDICATED COMPROMISE OF CONTROVERSIES

Sec. 93. Agreement to compromise controversies authorized. The compromise of any contest or controversy as to

- (a) Admission to probate of any instrument propounded as the last will of any decedent,
- (b) The construction, validity or effect of any such instrument,
- (c) The rights or interests in the estate of the decedent of any person, whether claiming under a will or as heir,
- (d) The rights or interests of any beneficiary of any testamentary trust, or
- (e) The administration of the estate of any decedent or of any testamentary trust,

whether or not there is or may be any person interested who is a minor or otherwise without legal capacity to act in person or whose present existence or whereabouts cannot be ascertained, or whether or not there is any inalienable estate or future contingent interest which may be affected by such compromise, shall, if made in accordance with the provisions of this Code, be lawful and binding upon all the parties thereto, whether born or unborn, ascertained or unascertained, including such as are represented by trustees, guardians of estates and guardians ad litem; but no such compromise shall in any way impair the rights of creditors or of taxing authorities.

Sec. 94. Compromise agreement to be executed and delivered to the court; appointment of guardian ad litem.

(a) Execution of compromise agreement by competent persons. The terms of such compromise shall be set forth in an agreement in writing which shall be executed by all competent persons having interests or claims which will or may be affected by such compromise, except those who may be living but whose present existence or whereabouts is unknown and cannot after diligent search be ascertained.

Secs. 93-95, MPC, continued.

(b) Submission to court for execution by fiduciaries.

Any interested person may then submit the agreement to the court for its approval and for the purpose of directing the execution thereof by the personal representative of the estate, by the trustees of every testamentary trust which will be affected by the compromise, and by the guardians of the estates of minors and other incompetents and of unborn and unascertained persons and of persons whose present existence or whereabouts is unknown and cannot after diligent search be ascertained, who might be affected by the compromise.

(c) Appointment of guardian ad litem. If there shall be any person who, if living, has an interest which may be affected by such compromise but whose present existence or whereabouts cannot after diligent search be ascertained, or who is a minor or otherwise incompetent and has no guardian of his estate, or if there is any future contingent interest which might be taken by any person not then in being and which might be affected by the compromise, the court shall appoint a guardian ad litem to represent such person.

Sec. 95. Order approving agreement and directing execution by fiduciaries. Upon due notice, in the manner directed by the court, to all interested persons in being, or to their guardians, and to the guardians of all unborn persons who may take contingent interests by the compromise, and to the personal representative of the estate and to all trustees of testamentary trusts which would be affected by the compromise, the court shall, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries is just and reasonable, make an order approving the agreement and directing the fiduciaries and guardians ad litem to execute such agreement. Upon the making of such order and the execution of the agreement, all further disposition of the estate shall be in accordance with the terms of the agreement.

COMMENT:

Insofar as there are jurisdictions holding that probate courts owe a duty to testators to see that their wills if valid are admitted to probate, e.g., *In re Dardis' Will*, 135 Wis. 457, 115 N.W. 332, legislation on compromise agreements dealing with the validity or effects of wills and other controverted matters with respect to estates is desirable.

Further there are jurisdictions holding that after infants become of age they may attack judgments entered upon court approved compromises made by their next friends or guardians ad litem. The foolishness of this holding is discussed in 27 American Jurisprudence, p. 852 as follows:

" . . . It would seem to be clear that if the court has effective power to authorize a compromise of an infant's rights, it should have power to bind the infant equally with the adult, and to limit his right to object to the same legal causes and to the same time as those to which the adult is limited, bearing in mind, of course, that the infant necessarily has a greater range of attack for fraud or collusion. If an infant is to have an opportunity after he becomes of age, perhaps fifteen or twenty years later, to attack for mere error a decree entered with the sanction of the court upon a compromise, it would seem that it is idle to talk about the power of the court to authorize compromise in such cases."

The Hawaiian statutes do not completely clarify the above situations.

PERSONAL REPRESENTATIVES

Sec. 96. Persons entitled to domiciliary letters.

(a) Order of persons entitled. Domiciliary letters testamentary or domiciliary letters of general administration may be granted to one or more of the persons herein-after mentioned, natural or corporate, who are not disqualified, in the following order:

- (1) To the executor or executors designated in the will;
- (2) To the surviving spouse or next of kin, or both, or to some person or persons nominated by them or any of them, as the court may, in its discretion, determine;
- (3) If there are no executors nor a surviving spouse nor any next of kin, or if none of such persons files a petition for letters within thirty days after the death of the decedent, then to any other qualified person.

(b) Who are disqualified. No person is qualified to serve as a domiciliary personal representative who is

- (1) Under twenty-one years of age;
- (2) Of unsound mind;
- (3) A convicted felon, either under the laws of the United States or of any state or territory of the United States;
- (4) A non-resident of this state who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate and caused such appointment to be filed with the court;
- (5) A corporation not authorized to act as a fiduciary in this state;
- (6) A person whom the court finds unsuitable.

Sec. 317-13. Appointment of administrators, priority.
In the appointment of administrators upon the property of deceased persons, the following order of priority shall be observed:

- (a) The husband of a deceased wife;
- (b) The wife of a deceased husband;
- (c) The children being major;
- (d) The father of a deceased child, whether major or minor;
- (e) The mother of a deceased child, whether major or minor;
- (f) The brothers and sisters of the deceased;
- (g) The cousins germane of the deceased;
- (h) Any bona fide creditor applying for administration;

Provided, the judge may for satisfactory cause disregard the order of priority. If neither the surviving spouse nor any child being major wish to accept appointment as administrator, such surviving spouse or child may nominate another to act as administrator, and the person nominated may be appointed by the judge without regard to the order of priority set forth herein.

Sec. 317-9. Residence qualifications, executors, administrators, guardians. Every executor and administrator appointed by any court of the Territory, whether or not appointed pursuant to the express provisions of a will and every guardian appointed by any court of the Territory, including any co-executor or co-administrator or co-guardian, in order to be qualified for such fiduciary office, shall be either an individual residing in the Territory or a trust company organized under the laws of the Territory.

Sec. 96, continued.

Sec. 317-9, RLH, continued.

The provisions hereof shall not apply to any executor, administrator or guardian who has been duly appointed, whether by court or otherwise, or who may be acting under a will admitted to probate, prior to May 12, 1943, or who may be appointed by court or who may be acting under a will admitted to probate subsequent to that date pursuant to the express provisions of the will of a decedent who has died prior to that date.

In case, subsequent to that date, any executor, administrator or guardian to whom the provisions hereof are applicable becomes disqualified under the provisions hereof, by reason of giving up residence within the Territory or otherwise, then his office as such fiduciary shall become vacant, and in such case, unless the order or instrument under which he has been acting otherwise makes lawful provision applicable in the case of a vacancy in such office, or unless any circuit judge sitting at chambers and having jurisdiction over the estate or ward expressly authorize any such executor, administrator or guardian to continue to hold such office under such conditions as the judge may see fit to impose, such vacancy may be filled by any circuit judge sitting at chambers and having jurisdiction over the estate or ward.

COMMENT:

The above MPC and RLH provisions differ in the following particulars:

1. The former does not mandate observance of a preference list in the appointment of personal representatives, rather it permits such observance.
2. The RLH places creditors on the preference list, whereas under the MPC creditors would fall in the "other qualified person" category.
3. The MPC permits the appointment of non-residents as personal representatives under restricted circumstances, RLH prohibits such appointment.

Sec. 96, COMMENT, continued.

The Code Committee comments on points (1) and (3) as follows at pp. 116-7:

" . . .

"No fixed order of preference seems very satisfactory and for that reason the section has been made as flexible as possible, giving the court a wide discretion.

"The above section permits non-resident personal representatives. In some jurisdictions the personal representative must always be a resident. In others there is no requirement that the personal representative be a resident. Still others, like the section presented herewith, take a middle ground, and permit a non-resident personal representative subject to restrictions. It would seem that it is occasionally desirable to have a non-resident act as personal representative. Numerous situations could be suggested where that would be true. For example, the decedent may have resided near the state line and the bulk of his estate may be in the adjoining state. Or his relatives, or those who knew him best and on whom he relied in business matters, may reside just over the state line. It would be unfortunate to preclude them from qualifying as personal representatives."

MODEL PROBATE CODE

Sec. 97. When letters to be issued. When a duly appointed personal representative has given such bond as may be required and the bond has been approved by the court, letters under the seal of the court shall be issued to him.

Sec. 98. When personal representative may be removed. When the personal representative becomes mentally incompetent, disqualified, unsuitable or incapable of discharging his trust, has mismanaged the estate, failed to perform any duty imposed by law or by any lawful order of the court, or has ceased to be a resident of the state without filing the authorization of an agent to accept service as provided by section 96(b) hereof, then the court may remove him. The court on its own motion may, or on the petition of any person interested in the estate shall, order the representative to appear and show cause why he should not be removed. The removal of a personal representative after letters are duly issued to him does not invalidate his official acts performed prior to removal.

Sec. 99. Appointment of successor personal representative. When a personal representative dies, is removed by the court, or resigns and such resignation is accepted by the court, the court may, and if he was the sole or last surviving personal representative and administration is not completed, the court shall, appoint another personal representative in his place.

Sec. 100. Successor personal representative and administrator with will annexed: rights and powers. When a successor personal representative or an administrator with the will annexed is appointed, he shall have all the rights and powers of his predecessor or of the executor designated in the will, except that he shall not exercise powers given in the will which by its terms are personal to the executor therein designated.

COMMENT:

These sections codify Hawaiian practice.

MODEL PROBATE CODE

Sec. 101. Powers of surviving personal representative.

Every power exercisable by joint personal representatives may be exercised by the survivor of them when one is dead or by the other when one appointment is terminated by order of the court, unless the power is given in the will and its terms otherwise provide as to the exercise of such power.

COMMENT:

This section reflects the general rule.

MODEL PROBATE CODE

Sec. 102. What powers of personal representatives joint and what several. Where there are two or more personal representatives, the following powers can be exercised only by all of them:

- (a) To institute suit on behalf of the estate;
- (b) To employ an attorney;
- (c) To carry on the business of the deceased;
- (d) To vote corporate shares of the estate;
- (e) To exercise those powers given by the will which, by the terms of the will, are to be exercised only by all of the personal representatives, or by all the survivors of them.

All other powers can be exercised by any one of the personal representatives, unless the will otherwise provides.

COMMENT:

Hawaii does not have a statute dealing with powers of joint personal representatives. The rationale of MPC, sec. 102, is stated at pp. 852-4 of Atkinson on Wills:

" . . .

"There has been much dispute and confusion as to whether the interests, powers and duties of corepresentatives are joint, several, joint and several, or joint or several; the matter is best approached by considering the various specific problems, without attempting to lay down an a priori concept of the relationship. . . .

" . . .

"One corepresentative may act for all with regard to matters which are ministerial or do not involve discretion. Thus, one may sell or assign a note payable to the decedent, or release a debt due to the estate, or make a sale of personalty belonging to the estate. He may not, however, by borrowing money for the estate bind his corepresentatives. . . .

"In the case of certain important and discretionary matters, however, one corepresentative may not act alone. Such acts as the selling of realty, the carrying on of the deceased's business, the selection of counsel for the state, and the voting of stock owned by the deceased, are examples of powers which must be exercised by all. . . ."

Sec. 103. Compensation. If a testator by will makes provision for the compensation of his executor or administrator, that shall be taken as his full compensation unless he files in the court a written instrument renouncing all claim for the compensation provided by the will before qualifying as personal representative. The personal representative, when no compensation is provided in the will, or when he renounces all claim to the compensation provided in the will, shall be allowed such compensation for his services as the court shall deem just and reasonable. Additional compensation may be allowed for his services as attorney and for other services not required of a personal representative. An attorney performing services for the estate at the instance of the personal representative shall have such compensation therefor out of the estate as the court shall deem just and reasonable. Such compensation may be allowed at the final settlement; but at any time during administration a personal representative or his attorney may apply to the court for an allowance upon the compensation of the personal representative and upon attorney's fees. If the court finds that the personal representative has failed to discharge his duties as such in any respect, it may deny him any compensation whatsoever or may reduce the compensation which would otherwise be allowed.

Sec. 219-17. Fees and expenses of executors, administrators, trustees and guardians. Upon all moneys and other property received in the nature of revenue or income of the estate, such as rents, interest, dividends and general profits, executors, administrators, trustees and guardians, except trustees of a charitable trust, shall be allowed as commissions payable out of the income received during each year, seven per cent for the first \$5,000 and five per cent for all over \$5,000 such commissions to be payable as and when such income is received, but not oftener than once a year.

Upon the principal of the estate, executors and administrators shall be allowed as commissions payable out of the principal at the close of administration, five per cent of the first \$1,000, four per cent for the next \$9,000, three per cent for the next \$10,000, and two per cent for all over \$20,000, the amount of such principal for this purpose to be the appraised value of the estate as of the death of the decedent. For the purpose of computing such commissions on such principal there shall be deducted from the appraised value of any real property included in the estate the amount of any existing indebtedness secured by lien upon such real property duly recorded prior to the death of the decedent and which shall have been foreclosed and the real property covered by the same sold at any time during the administration of the estate; and in case the estate includes real property subject to an agreement of sale duly recorded prior to the death of the decedent such commissions shall be calculated on the appraised value of the balance due from the vendee on account of the purchase price thereof.

• • •

Such further allowances may be made as the court deems just and reasonable for services performed in connection with sales or leases of real estate, contested or litigated claims against the estate, the adjustment and payment of extensive or complicated estate or inheritance taxes, the preparation of estate and income tax returns, the carrying

Sec. 103, continued.

Sec. 219-17, RLH, continued.

on of the decedent's business pursuant to an order of court or under the provisions of any will, litigation in regard to the property of the estate or such other special services as may be necessary for the executor, administrator, trustee or guardian to perform, prosecute, or defend. All contracts between an executor, administrator, trustee or guardian and an heir, devisee, legatee, ward, or a beneficiary other than the creator of the trust, for higher compensation than is allowed in this section shall be void.

These provisions shall apply as well to future accounting in existing estates as to new estates.

Sec. 219-18. Attorneys' fees for ordinary proceedings; extraordinary services. Attorneys for executors and administrators, shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as are allowed by section 219-17 as commissions upon the principal of the estate to executors and administrators, and such further amounts as the court may deem just and reasonable for extraordinary services.

HAWAII REPORTS

Statutory commissions are provided for the proper and faithful execution of trusts and when an administrator does not perform the duties devolved upon him by his appointment he is not entitled to commissions, 26 Haw. 243.

Likewise an allowance of counsel fees may be refused where the services for which the allowance was claimed were unnecessary in connection with the performance of the duties of the representative, 26 Haw. 243.

Sec. 103, continued.

COMMENT:

Sec. 219-17, RLH 1955, sets the amounts personal representatives and attorneys conducting the ordinary probate proceedings receive for their services. However, MPC, sec. 103, leaves the fixing of fees to the discretion of the court. The Code Committee discusses the various provisions of MPC, sec. 103, as follows at pp. 119-20:

" . . . In view of the wide variety of situations which may determine the amount of fees, a hard and fast rule expressed in the statute seems undesirable. If it be thought helpful to have some sort of standard percentage basis to guide the court in ordinary cases, the local court may establish this by a rule of its own.

"The idea of the executor renouncing his fee and accepting the fee fixed by the court is embodied in a number of statutes in various states. . . . While at first blush it may appear to go too far in overriding testamentary intent, it is believed that it is justified. Primarily, this is based upon the propositions that the court, for the benefit of all persons interested in the estate, exercises a sound discretion to appoint a suitable personal representative, and that the estate will be administered in a more competent manner if an adequate fee is paid. If we were to say that the testator should be able to set a low fee and compel his executor to accept that amount or renounce the office, then unsatisfactory results might follow. This executor might be the most highly qualified to administer the estate, and an inferior administrator would be appointed who would receive a larger fee than the person named in the will. While this might not often happen, it is entirely possible that the testator might name a series of executors to be appointed according to a given order of preference, none of them to receive more than the low fee named in the will. By this means he could name all the competent persons in the community and thus preclude adequate payment for the services of administering his estate by any well qualified person. Yet it is clear that the law should not allow a testator to deny to the administrator all compensation beyond the amount he should name. If he could do that he could provide in his will that no fee whatever should be paid to any person for administering his estate. And it would be but one step further for him to provide that his estate should not be administered at all. It is believed that the only place to draw the line is at the point where this section draws it."

MODEL PROBATE CODE

HAWAII REPORTS

Sec. 104. Allowance for defending will. When any person designated as executor in a will, or the administrator with the will annexed, defends it or prosecutes any proceedings in good faith and with just cause for the purpose of having it admitted to probate, whether successful or not, he shall be allowed out of the estate his necessary expenses and disbursements including reasonable attorney's fees in such proceedings.

"The rule . . . that any reasonable costs and expenses incurred by executors in probating a will, even if contested, is the one which should be followed in this Territory. But these expenses should be reasonable. There is no question but that the executors in this instance acted in good faith." 16 Haw. 575, 579 (1905).

Circuit judge in probate has incidental authority to allow out of an estate attorney's fees incurred in litigation involving contests over probate of wills, 25 Haw. 337, 341.

COMMENT:

From MPC, p. 120:

"If a personal representative prosecutes or defends in proceedings to construe a will, he can recover expenses and attorney's fees without a statute such as this. This section is necessary only because, if probate is denied, it might be claimed that a personal representative named in it or defending it is not entitled to expenses and attorney's fees."

MODEL PROBATE CODE

Sec. 105. Special administrators. For good cause shown a special administrator may be appointed pending the appointment of an executor or a general administrator or after the appointment of an executor or a general administrator without removing the executor or general administrator. A special administrator may be appointed without notice or upon such notice as the court may direct. The appointment may be for a specified time, to perform duties respecting specific property, or to perform particular acts, as stated in the order of appointment. The special administrator shall make such reports as the court shall direct, and shall account to the court upon the termination of his authority. Otherwise, and except as the provisions of this Code by terms apply to general personal representatives, and except as ordered by the court, the law and procedure relating to personal representatives in this Code shall apply to special administrators. The order appointing a special administrator shall not be appealable.

REVISED LAWS OF HAWAII

Sec. 317-19. Temporary administrator may pay claims; family allowance. Probate courts are authorized to order temporary administrators where the interest of other creditors would not be adversely affected, to pay lawful claims against the estate and a family allowance in all cases where an appointment of an administrator or an executor is held up by reason of contest.

Sec. 317-17. Continuance of the business of a decedent.
(a) The judge having jurisdiction of the estate may, . . . authorize the personal representative, or appoint a trustee, to continue any business of the decedent, for such period and with such powers as the judge may deem advisable. . . .
(b) The judge having jurisdiction of the estate may, . . . authorize the personal representative, or appoint a trustee, to organize, or join with others in the organization of a corporation to carry on the business of the decedent on such terms as the court may deem advisable, and to contribute all or part of the property of the estate which was invested in the business at the time of the death of the decedent as the capital to such corporation and accept stock in the corporation in lieu thereof, such stock to be held upon the same terms as the property of the estate.

. . .

BOND OF PERSONAL REPRESENTATIVE

Sec. 106. Personal representative to give bond.

Except as provided in section 107, every personal representative shall, before entering upon the duties of his office and within such time as the court directs, execute and file a bond, procured at the expense of the estate, with sufficient surety or sureties in such amount as the court finds necessary for the protection of interested parties, conditioned upon the faithful discharge of all duties of his trust according to law, including his duty to account as provided in section 172. In the absence of special circumstances, the court shall fix the bond in the amount of the value of any part of the estate which it can determine from examination that the personal representative might easily convert during the period of administration plus the value of the gross annual income of the estate.

Sec. 219-20. Expense of bond.

Any . . . executor, administrator, . . . or other fiduciary required by law or the order of any court or judge to give a bond or other obligation as such, may include as a part of the lawful and chargeable expense of executing his trust such reasonable sum, paid a company authorized under the laws of the Territory to become surety on such bond or obligation, for becoming his surety thereon, as may be allowed by the court in which, or a judge before whom, he is required to account, not exceeding one per cent per annum on the amount of such bond.

COMMENT:

The common law in Hawaii and MPC, sec. 106, require administrators and executors not exempted by will to file bonds before qualifying for office. At common law the amount of these bonds is determined by the estimated value of the personal estate of decedents. MPC, sec. 106, modifies the above personal estate value rule by stating that in the absence of special circumstances the amount of the bond should be equal to that part of the estate which can be easily converted plus the value of the gross annual income of the estate.

In discussing the special circumstances to be considered in determining the amount of bonds, the Code Committee states at pp. 121-2:

Sec. 106, COMMENT, continued.

". . . it is believed to be impossible to determine fairly in all cases the amount of the bond by a fixed rule. The character of the assets, the fact that the personal representative is the principal distributee and that there are no debts, the fact that other assets may soon be received, and many other factors may well enter into the discretion of the court in determining the amount of the bond. However, the determination of the amount should not be capricious; and in the absence of special circumstances, the rule laid down in the last sentence of this section should be followed. Since, under sec. 115 the amount of the bond may be increased if a sale takes place, it may be desirable to take the probability of such sale into consideration in fixing the original bond if it is reasonably certain that the sale will take place and its approximate terms can be anticipated.

"This and the succeeding sections on bonds of personal representatives apply to special administrators, as well as general administrators and executors. See sec. 3(u). Under this section, the bond of a special administrator may be fixed at a nominal amount, since the very circumstances calling for the appointment of a special administrator may also constitute the 'special circumstances' referred to in this section."

Sec. 107. When bond not required.

(a) Provisions of will. When, by the terms of the will, the testator expresses a wish that no bond shall be required of the executor, no bond shall be required unless the court, for good cause, finds it proper to require it; but the court, for good cause, may at any subsequent time require a bond to be given.

(b) Deposit of collateral by personal representative. A personal representative may at any time turn over to and deposit with the clerk of the court cash or collateral in an amount and nature satisfactory to the court in lieu of all or a part of the amount of his bond. The clerk shall be liable for the safekeeping thereof and shall pay out or deliver the same only on order of the court.

(c) Deposit of personal assets of estate. Personal assets of the estate may be deposited with a domestic banking or trust company upon such terms as may be prescribed by order of the court. The amount of the bond of the personal representative may be reduced in proportion to the value of the assets so deposited; or the court may, if the assets so deposited be deemed sufficient, accept the deposit in lieu of requiring a bond of the personal representative.

(d) Corporate fiduciary as personal representative. If the personal representative is a trust company or bank existing or doing business under the laws of this state, the deposit of cash or collateral with the state treasurer required by such laws may, if satisfactory to the court, be accepted in lieu of requiring a bond.

COMMENT:

Under the MPC, although the will provides executors need not give bonds, the court is empowered to require it for good cause. Hawaii's statute on the other hand does not give the court such discretion. The reason for the discretion given by the Code is for the protection of creditors.

Insofar as Hawaii does not have provisions requiring the deposit of cash or collateral with the state treasurer, MPC, sec. 107(d), should be omitted. Hawaiian probate practice also does not provide for diminution of the amounts of bonds as provided by MPC, sec. 107(b) and (c).

Sec. 317-29. Bond; confirmation. Every executor or administrator so authorized to sell real property shall give bond to the judge, . . . provided, that no such bond shall be required from an executor appointed without bond by a will . . .

MODEL PROBATE CODE

Sec. 108. Agreement between personal representative and surety as to deposit of assets. It shall be lawful for the personal representative to agree with his surety for the deposit of any or all moneys and other assets of the estate with a bank, safe deposit or trust company, authorized by law to do business as such, or other depository approved by the court, if such deposit is otherwise proper, in such manner as to prevent the withdrawal of such moneys or other assets without the written consent of the surety, or on order of the court made on such notice to the surety as the court may direct.

COMMENT:

There is authority for the contention that deposits subject to the joint control of personal representatives and their bondsmen are not authorized and consequently the representatives are subject to losses from bank failures. See Jones v. O'Brien, 58 S. D. 213, 235 N. W. 654 (1931).

In the light of the above, the Code Committee states at p. 123:

" . . . While some courts have held that such an agreement as to withdrawals is valid without any statute, there is authority to the contrary; and it is believed that this statute should be included in order to remove any doubt about the matter."

Hawaii has no such statute.

MODEL PROBATE CODE

Sec. 109. Obligees of bond; joint and several liability. The bond of the personal representative shall run to /the State of to the use of/ all persons interested in the estate and shall be for the security and benefit of such persons. The sureties shall be jointly and severally liable with the personal representative and with each other.

COMMENT:

In Hawaii the practice is to have the bonds run to the judge of the probate court.

MODEL PROBATE CODE

Sec. 110. Bonds of joint personal representatives.

When two or more persons are appointed personal representatives of the same estate and are required by the provisions of this Code to give a bond, the court may require either a separate bond from each or one bond from all of them. No personal representative shall be deemed a surety for another personal representative unless the terms of the bond so provide.

Sec. 111. Affidavit of personal sureties. Each personal surety shall execute and file with the court an affidavit that he owns property subject to execution, of a value over and above his liabilities, equal to the amount of the bond, and shall include in such affidavit the total amount of his obligations as surety on other official or statutory bonds. If the amount of his bond exceeds \$1,000, the affidavit shall also state

- (a) An adequate description of the real property within this state offered by him as security, which identifies it sufficiently to establish the lien of the bond thereon as hereinafter provided;
- (b) The total amount of the liens, unpaid taxes and other encumbrances against each property offered;
- (c) The assessed value of such property offered, its market value and the value of the equity over and above all encumbrances, liens and unpaid taxes;
- (d) That the equity of such real property offered is equal to the amount of the bond.

Sec. 7-21. Justification of sureties. Whenever by any law, regulation, . . . order of court, . . . any person shall be required to give any written bond or undertaking . . . for the indemnity or security of any person, party or any officer . . . there shall be attached to such bond or undertaking an affidavit of each of the sureties thereon, duly verified by oath, from which it shall appear that the sureties have property situate within the Territory subject to execution and that the sureties taken together are worth in such property the amount of the penalty specified in the bond or undertaking, over and above all of their debts and liabilities. In default of such justification no such bond or undertaking shall be accepted. . . .

Sec. 112. Approval of bond by judge. No bond of a personal representative shall be deemed sufficient unless it shall have been examined and approved by the judge, or in his absence by the clerk, and the approval endorsed thereon in writing. Before giving approval the judge or clerk may require evidence as to the value and character of the assets of personal sureties, including an abstract, certificate of other satisfactory evidence of title of every tract of real property which is offered as security. In the event that the bond is not approved, the personal representative shall, within such time as the judge or in his absence the clerk may direct, secure a bond with satisfactory surety or sureties.

Sec. 7-21. Justification of sureties. . . . such corporation may be accepted as surety on such bonds in lieu of the personal sureties hereinbefore required, whenever, in the opinion of the officer or officers whose duty it is to approve such bond, the rights of all parties in interest will be fully protected. . . .

COMMENT:

In Hawaii the court clerk may not act in the probate judge's stead to examine nor to approve the bonds.

MODEL PROBATE CODE

Sec. 113. Bond as lien on real property of personal surety; recording of lien. Upon the approval and recording of the bond of a personal surety, when the amount of such bond exceeds \$1,000, a lien on the real property of the surety in this state, offered in the affidavit of the surety, shall arise as security for the performance of the obligation of the bond. The clerk of the court shall, before letters are issued to the personal representative, cause to be recorded in the office of the register of deeds of each county in which may be located any real property as set forth in the affidavit of the surety, a statement signed by the clerk, giving a sufficient description of the land, the name of the principal and sureties, the amount of the bond, and the name of the estate and the court in which the bond is given. The register of deeds shall record such statement, either in the book of liens or in a suitable book provided for liens on real property of sureties. All such recorded statements shall be duly indexed in such manner that the existence and character of the liens may conveniently be determined.

COMMENT:

Hawaii has no like section and the Code Committee states re MPC, sec. 113, at pp. 125-6:

"The effect of this section, together with provisions in secs. 111, 112, 116 and 117, is to require each personal surety, on bonds fixed in an amount in excess of \$1,000, to give a lien on one or more tracts of his own real estate within the state as security for the performance of the obligation of the bond. The advantages of such a statute are obvious. If the title of the prospective bondsman to real estate is investigated, and if the bond becomes a lien on such real estate when it is approved by the court, the danger of loss from financial irresponsibility of the bondsman is largely eliminated. Certainly in large metropolitan areas where 'straw' bondsmen are common, strong arguments can be made for the adoption of such legislation. On the other hand, the probable result of such a statute is that corporate bondsmen would be secured in most cases, and the personal bondsman who acts as such without charging a fee would be relatively uncommon. In rural areas the use of personal bondsmen is likely to be more satisfactory, and in states having no cities of any considerable size it may be thought undesirable to adopt this feature of the Code. . . .

Sec. 113, COMMENT, continued.

"If it is deemed best not to require a specific lien on the real estate of the personal bondsman, the Code can be enacted with the following changes: Omit all except the first sentence of sec. 111. In sec. 112, omit the following phrase at the end of the second sentence, 'including an abstract, certificate or other satisfactory evidence of title of every tract of real property which is offered as security.' Omit all of sec. 113. In sec. 116 omit subsection (b). Omit all of sec. 117."

Sec. 114. Letters deemed revoked on failure to give bond. If at any time a personal representative fails to give a bond as required by the court, within the time fixed by the court, some other person shall be appointed in his stead. If letters have been issued, they shall be revoked.

Sec. 115. Court may increase or decrease bond. The court may at any time increase or decrease the amount of the bond of the personal representative when good cause therefor appears. In the absence of special circumstances, the court shall increase the bond on a sale of real property, or of personal property which could not easily be converted.

Sec. 317-29. Bond; confirmation. Every executor or administrator so authorized to sell real property shall give bond to the judge, with sufficient sureties, conditioned to sell the same and dispose of the proceeds in the manner provided by law; provided, that no such bond shall be required . . . from an executor or administrator who has already given a sufficient bond. . . .

COMMENT:

These sections apply during the administration of the estate and do not relate to qualification bonds.

MODEL PROBATE CODE

Sec. 116. Release of sureties before estate fully administered.

(a) Release for cause. For good cause, the court may, before the estate is fully administered, order the release of the sureties of the personal representative, and require the personal representative to furnish a new bond.

(b) Release of personal surety who has given lien on real property. If a personal surety who has given a lien on specific real property as security applies to the court to have the lien released, the court shall order the release requested, if sufficient other real property of the surety is substituted on the same terms and conditions as required for the lien to be discharged. If such personal surety who requests the release of the lien does not offer a lien on other real property, the court shall order the personal representative to offer other security within a reasonable time to be fixed in the order, and upon the approval of such new security, the court shall order the release of such personal surety.

(c) Extent of liability of original and new sureties. The original sureties shall be liable for all breaches of the obligation of the bond up to the time of filing of the new bond and approval thereof by the court, but not for the acts and omissions of the personal representative thereafter. The new bond shall bind the sureties thereon with respect to acts and omissions of the personal representative from the time when the sureties on the original bond are no longer liable therefor or from such prior time as the court directs.

COMMENT:

Hawaii's statutes are silent re release of sureties. The Code Committee discusses MPC, sec. 116, at p. 127:

Sec. 116, COMMENT, continued.

"In some states a surety may be released at any time on his request, without a showing of cause. . . . As far as the corporate surety is concerned, it is felt that it should not be allowed to resign at the very moment when it is needed. Therefore under the provisions of this section such a surety may be released only when there is good cause. The same reasoning applies to the personal surety, with one exception. If the personal surety who has given a lien on land wishes to dispose of the land it may be desirable to discharge the lien. Subsection (b) provides for this situation, requiring the discharge of the lien upon the request of the surety."

The exception mentioned in the quotation above does not apply in Hawaii under its current statutes for the bonds of personal sureties do not give rise to liens on their realty. (See MFC, sec. 113.)

MODEL PROBATE CODE

Sec. 117. Recording of release of lien. The lien on the real property of a personal surety shall be cancelled of record by the /register of deeds/ upon filing with him a certified copy of the order duly discharging the surety or releasing the lien.

Sec. 118. Suit on bond.

(a) Execution of bond deemed an appearance. The execution of the bond of a personal representative shall be deemed an appearance by the surety in the proceeding for the administration of the estate including all hearings with respect to the bond.

(b) Summary enforcement in proceeding for administration. Subject to the provisions of subsection (c) hereof, the court may, on breach of the obligation of the bond of the personal representative, after notice to the obligors in the bond and to such other persons as the court directs, summarily determine the damages as a part of the proceeding for the administration of the estate, and by appropriate process enforce the collection thereof from those liable on the bond. Such determination and enforcement may be made by the court upon its own motion or upon application of a successor personal representative, or of any other personal representative, or of any other interested person. The court may hear the application at the time of settling the accounts of the defaulting personal representative or at such other time as the court may direct. Damages shall be assessed on behalf of all interested persons and may be paid over to the successor or other non-defaulting personal representative and distributed as other assets held by the personal representative in his official capacity.

(c) Enforcement by separate suit. If the estate is already distributed, or if, for any reason, the procedure to recover on the bond provided in subsection (b) hereof is inadequate, any interested person may bring a separate suit in a court of competent jurisdiction on his own behalf for damages suffered by him by reason of the default of the personal representative.

(d) Bond not void upon first recovery. The bond of the personal representative shall not be void upon the first recovery, but may be proceeded upon from time to time until the whole penalty is exhausted.

The surety of the bond of the executrix, by signing the bond and by not stipulating for an opportunity to object to any proceedings, intrusted the representation of their principal's rights and interests to the principal himself, 22 Haw. 403.

Sec. 118, MPC, continued.

(e) Denial of liability by surety; intervention. If the court has already determined the liability of the personal representative, the sureties shall not be permitted thereafter to deny such liability in any action or hearing to determine their liability; but the surety may intervene in any hearing to determine the liability of the personal representative.

COMMENT:

Hawaii does not have the summary enforcement procedure provided by MPC, sec. 118(b), which procedure the Code Committee states at p. 129 to have been suggested by the provision on bonds in the Federal Bankruptcy Act. As to the separate suit provisions of subdivision (c), the Code Committee states on the same page:

" . . . As there is a provision for separate suit, under the Federal Act, a similar provision is made in this section of the Probate Code. It is believed that separate suits would rarely be brought, but that occasionally it would be impracticable to bring a summary action as a part of the probate proceeding."

In Hawaii, suits on the bonds of personal representatives are started by the probate judge to whom the bond runs in the court of general jurisdiction.

MODEL PROBATE CODE

Sec. 119. Limitation of action on bond. Proceedings upon the bond of a personal representative shall not be brought subsequent to two years after his discharge.

REVISED LAWS OF HAWAII

Sec. 241-1. Six years. The following actions shall be commenced within six years next after the cause of such action accrued, and not after:

(a) Actions for the recovery of any debt founded upon any contract, obligation or liability, excepting such as are brought upon the judgement or decree of some court of record;

. . . .

COMMENT:

It seems that in Hawaii the general statute of limitations on contract causes of action of six years applies to actions based on the bonds of personal representatives.

INVENTORY

Sec. 120. Inventory and appraisalment.

(a) Requirements as to inventory. Within two months after his appointment, unless a longer time shall be granted by the court, every personal representative shall make and return a verified inventory and appraisalment in one written instrument, of all the property of the decedent which shall come to his possession or knowledge, including a statement of all encumbrances, liens and other charges on any item. Such property shall be classified therein as follows:

- (1) Real property, with plat or survey description, and if a homestead, designated as such;
- (2) Furniture, household goods, and wearing apparel;
- (3) Corporation stocks described by certificate numbers;
- (4) Mortgages, bonds, notes and other written evidences of debt, described by name of debtor, recording data, and other identification;
- (5) Bank accounts, insurance policies and money;
- (6) All other personal property accurately identified, including the decedent's proportionate share in any partnership, but no inventory of the partnership property shall be required.

(b) Requirements as to appraisalment. At the time administration is granted, the court shall appoint two suitable, disinterested persons, as appraisers, to whom the personal representative shall exhibit the inventory. The appraisers shall determine and state in figures opposite each item contained in the inventory the fair net value thereof, as of the date of decedent's death, after deducting the encumbrances, liens and charges thereon, and forthwith deliver such inventory and appraisalment, certified by them under oath, to the personal representative who shall file it with the court. The appraisers shall be allowed such reasonable fees, necessary disbursements and expenses as may

Inventories are not required in our courts until after probate, and then they are required to be made under oath. They are supposed to contain a full and true exhibit of the entire assets of the testator, whether they may have actually come to the possession of the executor or not. An inventory under our practice is regarded not as conclusive, but as prima facie evidence of the property that has come to the possession, or under the control of the executor, 2 Haw. 683, 688.

Sec. 120-123, MPC, continued.

be fixed by the court, which shall be paid by the personal representative as expenses of administration.

(c) Dispensing with appraisers in certain cases. If the inventory shows that the estate consists solely of personal assets of definitely liquidated values, or of property of negligible value, the court may in its discretion accept the verified appraisal of the personal representative in lieu of appraisal by appraisers; and in such case the court need not appoint appraisers, or may revoke their appointment if already made.

COMMENT:

From MPC, pp. 130-2:

"The purpose of an inventory and appraisal is to make a record of the property belonging to the estate, to indicate its presumptive value and to furnish the basis upon which the personal representative makes his accounts and for which he is chargeable. It also indicates to creditors and other persons interested in the estate the nature and extent of the property.

"The above section is taken largely from Minn. Stat. (1941) secs. 525.33 and 525.331 and Kan. Gen. Stat. (Supp. 1943) secs. 59-1201, 59-1202. The idea of the inventory and appraisal being one instrument is implicit in the Minnesota and Kansas statutes. . . .

"Provisions for the time of filing the inventory and appraisal vary from one to three months. The earlier filing seems preferable. However, most of the states providing for the shorter period are those in which a notice (up to one month) precedes the probate of the will and grant of letters. This ordinarily affords additional time to the interested persons to ascertain the nature and extent of the property belonging to the estate. Under this Code, administration may be granted without any notice. Hence, a two-month period was thought to be necessary but ample to make and return the inventory and appraisal.

"A few statutes provide for a complete inventory of any partnership property to be included in the inventory of the individual decedent's estate. In view of the special nature of partnership property and of its primary liability for the payment of partnership debts, it was thought better not to require such an inventory. Hence, an appraisal of the decedent's proportionate interest only is provided in the above section. . . .

"The Kansas statute mentioned above provides for a separate listing of homestead and exempt property. Whether such property is homestead or exempt property would seem to require judicial determination necessitating some action by the court, rather than such a classification by appraisers or the personal representative.

"A long statement as to the qualifications of appraisers is deemed unnecessary. They are merely required to be suitable and disinterested. Also, an oath by the appraisers before entering upon their duties is believed unnecessary. Their certificate of the appraisal under oath seems sufficient. As in the case of compensation for personal representatives, a reasonable compensation for the appraisers is to be determined by the court.

Sec. 120-123, COMMENT, continued.

"Where the property belonging to the estate is located in counties other than where administration is taken but some statutes provide that the court, or the judge of the probate court of such other county, may appoint residents of such other county as appraiser for the property located therein. . . . Other statutes contemplate the appraisal of all property wherever located by the same appraisers, and such is the effect of sec. 120(b) hereof.

"A few statutes provide for a listing of claims against the estate along with the inventory. This serves to indicate the net worth of the estate, but it cannot be more than guess work by the personal representatives in many cases, since a much longer time is given to creditors to establish their claims. No such provision is included in the above section.

" . . .

"Statutes in a few states, notably those having the community property system, provide for a separate statement of all property held by husband and wife together. In view of the tendency to subject property held by the entirety or in joint tenancy to inheritance taxes, a provision requiring a separate statement of any property held in joint tenancy, by the entirety or by the community might be added in certain states."

Sec. 121. Supplementary inventory and appraisement.

Whenever any property not mentioned in the inventory comes to the knowledge of a personal representative, he shall either make a supplemental inventory thereof and cause such property to be appraised, such supplemental inventory and appraisement to be returned within thirty days after the discovery thereof, or include the same in his next accounting, unless the court shall order a particular manner of return.

Sec. 122. Debt of executor. The naming of any person executor in a will shall not operate as a discharge or bequest of any right of action which the testator had against such executor, but such right of action, if it survives, shall be included among the assets of the decedent in the inventory. If the personal representative is or becomes insolvent, debts owed to the decedent shall not be deemed assets in his hands in determining the liability on his bond.

Sec. 123. Inventory and appraisement as evidence. Inventories and appraisements may be given in evidence in all proceedings, but shall not be conclusive, and other evidence may be introduced to vary the effect thereof.

COLLECTION AND MANAGEMENT OF ASSETS

Sec. 124. Possession. Every personal representative shall have a right to, and shall take, possession of all the real and personal property of the decedent except the homestead and exempt property of the surviving spouse and minor children. He shall pay the taxes and collect the rents and earnings thereon until the estate is settled or until delivered by order of the court to the distributees. He shall keep in tenantable repair the buildings and fixtures under his control and may protect the same by insurance. He may maintain an action for the possession of the real property or to determine the title to the same.

Sec. 317-14. Possession and control of real estate pending administration; distribution; determination of heirs. The executor or administrator is entitled to the possession and control of the real estate of the decedent and to receive the rents, issues and profits thereof until such possession and control is terminated by order of court. He may make all necessary or proper expenditures for the care and protection thereof, including taxes and repairs on the buildings and other improvements thereon while under his control, for which purpose he may use such rents, issues and profits so far as necessary and available, the net balance thereof to be paid by him to the respective heirs or devisees entitled to such real estate, on the final distribution of the estate or on the prior order of the judge. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action or suit, for the possession of the real estate or for quieting the title thereto, or for the registration of the title thereof against anyone except the executor or administrator, but shall not be required to do so.

HAWAII REPORTS

"One of the first duties of an executor of an estate is to reduce the property of the deceased to possession. Where such property includes debts due the decedent his duty is to collect such debts and in so doing he is bound to use that diligence which an ordinarily prudent man would exercise in the management of his own affairs. . . ."
27 Haw. 655, 661.

COMMENT:

In the absence of statute as to personalty in Hawaii the common law rule prevails - the view that title and right to possession of personal property pass to the personal representative.

MFC, sec. 124, would change Hawaiian law only in that personal representatives will not have title to personalty but it would pass to devisees and heirs.

MODEL PROBATE CODE

Sec. 125. Assets for payment of creditors' claims.

The real and personal property liable for the payment of debts of a decedent shall include all property transferred by him with intent to defraud his creditors or any of them, or transferred by any other means which is in law void as against his creditors or any of them; and the right to recover such property, so far as necessary for the payment of the debts of the decedent, shall be exclusively in the personal representative, who shall take such steps as may be necessary to recover the same. Such property shall constitute general assets for the payment of all creditors; but no property so transferred shall be taken from anyone who purchased it for a valuable consideration, in good faith and without knowledge of the fraud.

COMMENT:

Atkinson on Wills describes the problem of transfers by decedents in fraud of creditors as follows at p. 639:

"When the deceased conveyed property in his lifetime in order to defraud his creditors, the transfer may be set aside for the benefit of the latter, provided that there are not sufficient other assets to satisfy their claims. However, the conveyance can only be set aside to the extent that it is necessary to pay the debts, and the deceased's legatees, distributees, heirs or devisees are not allowed to share in the amount so recovered, as the deceased himself would not be permitted to do so. Most jurisdictions allow the personal representative to prosecute the suit for the benefit of creditors, though in some the action must be brought by the creditors themselves. Assets of this nature may be used only for the satisfaction of creditors' claims and the surplus, if any, must be returned to the defendant, rather than distributed to the beneficiaries of the estate."

MPC, sec. 125, names the personal representative as the party to bring suit in behalf of creditors.

MODEL PROBATE CODE

Sec. 126. Compromise. When it appears for the best interest of the estate, the personal representative may on order of the court effect a fair and reasonable compromise with any debtor or other obligor, or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of such encumbered assets from the owner thereof in satisfaction of the indebtedness secured by such lien, if it appears for the best interest of the estate and if the court shall so order. In the absence of prior authorization or subsequent approval of the court, no compromise shall bind the estate.

COMMENT:

From Atkinson on Wills, pp. 645-6:

"In absence of statute, an executor or administrator may compromise a debt without previous court sanction, provided this is advantageous to the estate. The latter question is not ordinarily passed upon until the presentation of the representative's accounts. Due to this fact the representative runs the risk that he may be charged with making an unwise settlement. Accordingly, it is advisable to secure court approval in advance before effecting a compromise, and statutes often provide for this procedure. This court sanction will ordinarily protect the executor or administrator against subsequent claims that the settlement was not a prudent one."

From MPC, p. 135:

". . . The second sentence [of MPC, sec. 126] is a counterpart of sec. 147 and that part of sec. 149 which provides for conveyances by the personal representative of property belonging to the estate to the holder of an encumbrance, in satisfaction thereof, in whole or in part."

Sec. 127. Conversion.

(a) When realty treated as personalty. Unless foreclosure shall have been completed and the redemption period shall have expired prior to the death of a decedent, real property mortgages, the interest in the mortgaged premises conveyed thereby and the debt secured thereby or any real property acquired by the personal representative in settlement of a debt or liability shall be deemed personal assets in the hands of his personal representative and be distributed and accounted for as such, but any sale, mortgage, lease or exchange of any such real property shall be made pursuant to sections 150 to 171 inclusive unless otherwise provided in the will.

(b) When personalty treated as realty. In all cases of a sale of real property by a personal representative upon order of the court the surplus of the proceeds of such sale remaining on the final settlement of the account shall be considered as real property and disposed of among the persons and in the same proportions as the real property would have been if it had not been sold.

Sec. 317-27. Real estate; sale. . . . In every such case of a sale of real property and payment of part of all of the proceeds for any of the aforesaid purposes the residue of the proceeds, if any, shall be considered as real property and, together with any available personal property of the estate, equal, so far as the same is sufficient, in inventoried value to the amount of the proceeds so expended in said payment, shall be distributed among the same persons and in the same proportions as the real property would have been if it had not been sold, so that the values of the portions of the estate received by the persons entitled to share therein shall, as nearly as possible, amount to the same as if personal instead of real property had been sold. In every such case of sale of real property without payment of any part of the proceeds for any of the aforesaid purposes, the proceeds shall be considered as real property and shall be distributed among the same persons and in the same proportions as the real property would have been if it had not been sold. . . .

COMMENT:

The common law view that as between realty and personalty the latter should be first used to pay expenses and claims against decedents' estates is recognized by sec. 317-27, RLH 1955. The Code on the other hand treats both realty and personalty alike. See MPC, sec. 150, and comment thereto.

The Code Committee discusses MPC, sec. 127, at p. 136:

" . . . As real and personal property are treated alike in this Code, this section is unnecessary for most purposes and will be infrequently applied. But it may nevertheless be desirable in cases where a will distinguishing between real and personal property must be construed in connection with the administration of an estate. . . ."

MODEL PROBATE CODE

Sec. 128. Abandonment of property. When any property is valueless, or is so encumbered, or is in such condition that it is of no benefit to the estate, the court may order the personal representative to abandon it.

MODEL PROBATE CODE

Sec. 129. Property embezzled or converted. If any person embezzles or converts to his own use any of the personal property of a decedent before the appointment of a personal representative, such person shall be liable to the estate for the value of the property so embezzled or converted. No person shall be charged as executor de son tort.

COMMENT:

On executor de son tort, Atkinson on Wills states at pp. 570-1:

"At common law a creditor could recover from the heir who intermeddled with decedent's personalty, or indeed from any person guilty of such conduct. This recovery was based on the doctrine of executor de son tort, or that the law would consider that the intermeddler had assumed the liabilities of executor to the extent of value of the property taken. The doctrine and the name applied regardless of whether the decedent died testate or intestate, but it had no application to taking possession of land, nor to intermeddling with personalty after the appointment of the personal representative.

"Of course the personal representative may recover from the intermeddler, regardless of whether the act took place before or after the plaintiff's appointment. Today in many states the doctrine of executor de son tort is expressly abolished by statute, and in others recovery by the creditor is deemed out of line with the statutory court supervision over presentment, allowance and payment of claims. Here the creditor's course will be to secure the appointment of a personal representative whose duty will be to collect the purloined assets and pay claims in the regular course. . . ."

On mPC, sec. 129 the Committee states at p. 137:

"The term 'any person,' as used in this section, includes the personal representative. . . ."

MODEL PROBATE CODE

REVISED LAWS OF HAWAII

Sec. 130. Disclosure and determination of title to property. Upon the filing of a petition by the personal representative or any other person interested in the estate, alleging that any person has, or is suspected to have, concealed, embezzled, converted or disposed of any real or personal property belonging to the estate of a decedent, or has possession or knowledge of any such property or of any instruments in writing relating to such property, the () court, upon such notice as it may direct, may order such person to appear before it for disclosure, and may finally adjudicate the rights of the parties before the court with respect to such property. In so far as concerns parties claiming an interest adverse to the estate, such procedure for disclosure or to determine title is an independent proceeding and not within section 62 hereof.

317-20. Banks, fiduciaries to disclose property of decedents, when; penalty. Every banking house, fiduciary company, agent or trustee, as soon as practicable after the receipt of a written statement, verified by the oath of the person making the same, showing: the death of a person for whom such fiduciary holds property, that the person making such statement is a kinsman of such deceased, together with the relationship which existed, and that such person claims to be an heir of such deceased, shall disclose to the person making such statement the nature and kind of property so held.

Any fiduciary company, agent or trustee, refusing so to disclose the nature and kind of property so held, shall be fined not more than \$500.

COMMENT:

In the absence of Hawaiian statutes, personal representatives in Hawaii proceed in either law or equity to recover property belonging to decedents' estates. MPC, sec. 130, permits probate court to try claims in favor of the estates as it does claims against them by MPC, sec. 143.

The Code Committee discusses MPC, sec. 130 as follows at pp. 137-8:

"The term 'any person,' as used in this section, includes the personal representative. . . . Legal or equitable remedies are always available to recover property belonging to the estate. Most estates, however, provide some summary proceedings in the probate court for making discovery. Some make such proceedings plenary, empowering the court, after a hearing, to determine title and compel the surrender of such property. Some statutes are very elaborate in describing the procedure to be followed. In line with the more recent codes, the details of such procedure are not incorporated in this section, but left to the general sections on procedure. It is contemplated, however, that the proceeding be had in the court exercising probate jurisdiction and adequate notice be given and full opportunity be afforded to present evidence both in support of and in opposition to the petition. If the person mentioned in the petition has knowledge

COMMENT, continued.

only, but not possession, of the property, the rights of third persons cannot be affected without making them parties.

"This section does not allow recovery on a chose in action owed to the decedent. No good reason is perceived why the personal representative should not proceed in the usual way by independent action to recover against the obligor.

"It should be noted that, wherever this section is applied to determine the title to real or personal property as between the parties, it resembles an action at law in ejectment or replevin. For that reason it may well be that the person proceeded against could insist on a constitutional right to a jury trial. . . . If it is desired to make sure that a jury trial could be secured in the matter involved in this section, the following language could be added at the end of sec. 130: 'Any interested person is entitled to a jury trial of the issues of fact in accordance with the provisions of section 18.' It should be noted that, even though this addition is not made, a jury trial could be secured on an issue of fact within this section under the provisions of sec. 18, provided the court determines that it is within the protection of the constitutional provision as to jury trial."

Hawaii's disclosure statute calls for non-judicial disclosure and further is limited only to banks and fiduciaries. HPC, sec. 130 applies not to banks and fiduciaries but to those suspected of having concealed, embezzled, converted or disposed decedents' property and to those having knowledge of or instruments dealing with such property; consequently petitions calling for disclosure must be filed in the probate courts.

Sec. 131. Continuation of business. Upon a showing of advantage to the estate, the court may authorize the personal representative to continue any business of the decedent for the benefit of the estate; but if the decedent died testate and his estate is solvent, the order of the court shall be subject to the provisions of the will. The order may be with or without notice. If notice is not given to all interested persons before the order is made, notice of the order shall be given within five days after the order, and any such person not previously notified by publication or otherwise may show cause why the order should be revoked or modified. The order may provide:

- (a) For the conduct of the business solely by the personal representative or jointly with one or more of the decedent's surviving partners, or as a corporation to be formed by the personal representative;
- (b) The extent of the liability of the estate, or any part thereof, or of the personal representative, for obligations incurred in the continuation of the business;
- (c) As to whether liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate set aside for use in the business or to the estate as a whole; and
- (d) As to the period of time for which the business may be conducted, and such other conditions, restrictions, regulations and requirements as the court may order.

Sec. 317-16. Continuance of partnership. When at the time of his death the decedent was a member of a partnership, and under the terms of the will of the decedent the executor is authorized to continue the business of the partnership, or under the terms of the articles or agreement of partnership provision is made for the continuance of the partnership after the death of any partner, or if it appears to be to the best interests of the estate, the executor or administrator may, by order of the probate court made either ex parte or upon such notice as the court may direct, under such terms, conditions and agreements as may be approved by the court, and with the approval of the remaining partner or partners, be authorized to become or continue to be a limited partner in the partnership upon compliance with the provisions of chapter 186 relating to limited partnerships.

Sec. 317-17. Continuance of the business of a decedent. (a) The judge having jurisdiction of the estate may, upon the application of the personal representative, or of any creditor of the decedent or of any heir, legatee or devisee, authorize the personal representative, or appoint a trustee, to continue any business of the decedent, for such period and with such powers as the judge may deem advisable. The term "business" as used herein includes any business or occupation, mercantile, manufacturing, agricultural or otherwise, except a profession, in which the decedent was engaged at the time of his death, either alone or in partnership with others.

(b) The judge having jurisdiction of the estate may, upon the application of the personal representative, or of any creditor of the decedent, or of any heir, legatee or devisee, authorize the personal representative, or appoint a trustee, to organize, or join with others in the organization of a corporation to carry on the business of the decedent on such terms

Sec. 131, continued.

Sec. 317-17, RLH, continued.

as the court may deem advisable, and to contribute all or part of the property of the estate which was invested in the business at the time of the death of the decedent as the capital to such corporation and accept stock in the corporation in lieu thereof, such stock to be held upon the same terms as the property of the estate.

(c) No order shall be entered pursuant to paragraphs (a) and (b) of this section if the provisions of the will of the testator expressly provide to the contrary, except upon the application of the personal representative or of a creditor and unless the judge believes that the carrying on of a business of the decedent is advisable for the protection of the interests of the creditors.

(d) Upon application by the personal representative or by any creditor or any heir, legatee or devisee, the judge having jurisdiction of the estate may order the personal representative or trustee to discontinue and wind up the business, and make such orders as to the business or the conduct thereof as the court may deem advisable.

(e) Any order pursuant to this section may be made on an ex parte hearing or upon such notice as the judge may determine.

(f) Claims arising from the continuance of a business of the decedent under authority pursuant to this section shall be considered expenses of administration, but shall be satisfied only out of the assets of the business.

Sec. 132. Contract to convey or lease land.

(a) Procedure applicable to cases generally. When any person legally bound to make a conveyance or lease dies before making the same, the court, with or without notice, may direct the personal representative to make the conveyance or lease to the person entitled thereto. A petition for this purpose may be made by any person claiming to be entitled to such conveyance or lease, or by the personal representative, or by any other person interested in the estate or claiming an interest in the real property or contract, and shall show the description of the land and the facts upon which such claim for conveyance or lease is based. Upon satisfactory proofs the court may order the personal representative to execute and deliver an instrument of conveyance or lease to the person entitled thereto upon performance of the contract.

(b) Warranties and recording. If the contract for a conveyance requires the giving of warranties, the deed to be given by the personal representative shall contain the warranties required. Such warranties shall be binding on the estate as though made by the decedent but shall not bind the personal representative personally. A certified copy of the order may be recorded with the deed of conveyance in the office of the (register of deeds) of the county where the land lies, and shall be prima facie evidence of the due appointment and qualification of the personal representative, the correctness of the proceedings and the authority of the personal representative to make the conveyance.

(c) Conveyance or lease under testamentary power. If a personal representative has been given power by will to make a conveyance or lease, he may, in lieu of the foregoing procedure, and without order of the court, execute a conveyance or lease to the person entitled thereto upon performance of the contract.

Sec. 317-18. Authority of executors and administrators to convey real estate. When any person who is bound by a contract in writing to convey any real estate dies before making the conveyance, the executor of his will or the administrator of his estate shall have power and authority upon receiving the consideration for the real estate, or the balance of the consideration if a part thereof has been paid to the decedent during his lifetime, or without receiving any consideration if the entire consideration has been paid to the decedent during his lifetime, to convey the real estate in like manner as the decedent if living ought to have conveyed it, and every conveyance so made by the executor or administrator shall be effectual to pass title to the real estate as fully as if made by the decedent himself.

COMMENT:

Sec. 317-18 is in itself sufficient authority for personal representatives to convey real estate. MPC, sec. 132, requires additional authority--either by courts or by decedents' wills.

The Code Committee discusses MPC, sec. 132, as follows at p. 140:

"If the inventory describes the contract binding the decedent to make such a conveyance or lease, this may be sufficient to justify the court in ordering the conveyance without notice under subsection (a).

"The last sentence of subsection (b) is highly significant as a method of simplifying land title problems by making the deed and order of court, in and of themselves, adequate and sufficient evidence to be recorded and shown on an abstract of title for the purpose of showing a marketable title. This is intended to eliminate the necessity of showing the appointment of the personal representative, his qualifications, and the numerous other orders in an administration proceeding usually regarded as necessary to meet the requirements of a marketable title.

". . . /This section's/ primary purpose is to provide for a simple and expeditious method for conveying the legal title to land under a contract made by the decedent as vendor during his lifetime but which remained uncompleted at the time of his death. The power to do this is essentially equitable and is one which the probate court would not be able to exercise in the absence of statute. It involves the completion of a contract which the decedent himself would have been under obligation to complete had he been alive. The kind and manner of notice to be given is to be provided for by the order of court in setting the petition for hearing."

MODEL PROBATE CODE

Sec. 133. Investment of funds. Subject to his primary duty to preserve the estate for prompt distribution, and to the terms of the will, if any, the personal representative shall, whenever it is reasonable to do so, invest the funds of the estate and make them productive. Such investments shall be restricted to the kinds of investments permitted to trustees by the laws of this state.

COMMENT:

The common law authorizes investments according to the general rule of prudence; MPC, sec. 133, on the other hand, restricts investments to designated types of securities.

MODEL PROBATE CODE

Sec. 134. Bank deposits. Whenever it is consistent with a proper administration of the estate, the personal representative may deposit, as a fiduciary, the funds of the estate in a bank in this state as a general deposit, either in a checking account or in a savings account.

COMMENT:

In place of the common law requirement of deposits in "safe banks", the Code requires deposits in "a bank in this state". Otherwise MPC, sec. 134, reflects the common law.

CLAIMS

Sec. 135. Limitations on filing of claims.

(a) Statute of nonclaim. Except as provided in section 136, all claims against a decedent's estate, other than expenses of administration and claims of the United States, but including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedents unless filed with the court within four months after the date of the first published notice to creditors.

(b) Statute of limitations. No claim shall be allowed which was barred by any statute of limitations at the time of decedent's death.

(c) When statute of nonclaim not affected by statutes of limitation. No claim shall be barred by the statute of limitations which was not barred thereby at the time of the decedent's death, if the claim shall be filed within four months after the date of the first published notice to creditors.

(d) Claims barred when no administration commenced. All claims barrable under the provisions of sub-section (a) hereof shall, in any event, be barred if administration of the estate is not commenced within five years after the death of the decedent.

(e) Liens not affected. Nothing in this section shall effect or prevent any action or proceeding to enforce any mortgage, pledge or other lien upon property of the estate.

Sec. 317-23. Creditors' claims; advertisement; barred when. Immediately after the appointment of any executor or administrator of any estate, he shall advertise . . . a notice directed to all creditors of the deceased, . . . to present their claim with proper vouchers or duly authenticated copies thereof, even if the claim is secured by mortgage on real estate, to him, either at his residence or at his place of business or at such other place as he may designate, within four months from the first day of publication. If such a claim is not presented within four months from the first day of publication of the notice, it shall be forever barred and the executor or administrator shall not be authorized to pay it. Any claim otherwise proper shall be allowed, as a claim against the deceased or the community of which the deceased was a member or both, in accordance with law, notwithstanding that the claim may fail to designate or may improperly designate the obligor or obligors on the claim. A creditor, even though he has not filed his claim, holding as security therefor either real or personal property, may foreclose upon the security so held.

Sec. 317-24. Claims barred not to be paid. It shall not be lawful to allow any claim that is barred by the statute of limitations of the Territory.

HAWAII REPORTS

Claims by government not barred by the statute limiting the time within which claims may be presented against estates of deceased persons, 4 Haw. 366.

Mortgagee may foreclose although he did not present his claim within the time required, 3 Haw. 477; 14 Haw. 527; 17 Haw. 49.

COMMENT:

MPC, sec. 135 (a) includes contingent and unliquidated claims among the claims to be cut off by the non-claim statute. In the absence of statutory law, the cases are in conflict; Atkinson on Wills describes the situation as follows at p. 700:

"Legislation which merely provides that 'all claims' shall be presented does not usually require that contingent claims shall be presented. However, some statutes specifically require contingent, as well as other, claims to be presented. In most jurisdictions having statutes of the latter type the claim must be presented although it is not liquidated in amount. Some courts however hold that even under legislation of the latter sort, an unliquidated sum which may never become due is not even a contingent claim within the meaning of the statute. A few statutes provide that claims may be presented within a certain period after becoming due. These do not require the presentation or filing of claims while they are in the contingent stage. . . ."

MPC, sec. 135(c) could clarify another area of conflict - the case where the statute of limitations expires after the date of the decedent's death but before the statute of nonclaim. To quote from Atkinson on Wills again at p. 690:

". . . Some courts have held that a claim may be barred after death by the general statute although the nonclaim period has not expired, although others hold that the claimant has the full nonclaim period within which to present his claim regardless of whether the general statute would have constituted a bar if the debtor had not died."

The Code Committee discusses MPC, sec. 135, as follows at pp. 142-3:

"This section covers the usual statute of nonclaim, statutes of limitations, and cases where a conflict may result if both are applied. The language of subsection (a) is traditional except that it includes claims of the state or any subdivision thereof. . . . Compare subsection (d) with sec. 83, which prohibits the appointment of a personal representative and the probate of a will after five years.

"The older view was that the purpose of a nonclaim statute is to protect the personal representative, and that it does not prevent a creditor from asserting his claim against an heir, devisee or legatee who has received assets. This view, however, is abandoned today, at least to the extent that most claims, other than contingent claims, are barred as to distributees as to the personal representative by the operation of the nonclaim statute. In the case of the contingent claim, however, the position has been taken that it is unfair to the creditor to compel him to file before he is certain either of the amount or of the existence of his claim. And since the distributee is a donee and not a bona fide purchaser, it is thought that he should be liable whenever the contingent claim becomes absolute. . . . On the other hand, the tendency of modern legislation is definitely to bar contingent claims along with other claims by the operation of the nonclaim statute. . . . If contingent claims are not barred, the distributee can never spend his legacy or his inheritance safely; for he would never know when such claim would be asserted against him. Moreover, such provisions are in accordance with the policy of the Federal Bankruptcy Act and

Sec 135, COMMENT, continued

with modern legislation for the liquidation of corporations. Death of a debtor is a hazard which all creditors should assume, and if the creditor seeks to avoid it, he can do so by taking security for his claim. The provisions of this section are in accordance with this view, and bar the contingent creditor who does not file. It is true, the court may then make an order to the effect that the claim, if the contingency happens, will constitute a liability of the distributees; and on a distribution under such circumstances, distributees would be reluctant to spend their legacies, but at least they know the character of the claim. Under the older view they have no way of knowing what claims may be asserted against them at some future time.

• • •
"Subsection (e) includes judgment liens which arose before the death of the decedent. The lien would be treated as a secured claim under sec. 139. But compare sec. 145 as to judgment where there is no lien."

MODEL PROBATE CODE

Sec. 136. Commencement of separate action or revivor equivalent to filing of claim. The provisions of section 135 shall not preclude the commencement or continuance of separate actions against the personal representative as such for the debts and other liabilities of the decedent, if commenced or revived within the periods stated in section 135. Any action pending against any person at the time of his death, which survives against the personal representative, shall be considered a claim duly filed against the estate from the time such action is revived. Any action commenced against a personal representative as such after the death of the decedent shall be considered a claim duly filed against the estate from the time such action is commenced. Nothing in this section shall impair the individual liability of the personal representative for his own acts and contracts in the administration of the estate.

COMMENT:

In the absence of statute, causes of action which survive either party to a suit require the initiation of new action against or by the personal representative. MPC, sec. 136, provides that suits against a person which survives his death may be revived without starting a new action.

The Hawaii Rules of Civil Procedure provides for such substitution of parties by Rule 25(a). A like procedural rule for probate may be adopted by the Hawaii Supreme Court.

Sec. 137. Form and verification of claims.

(a) General requirements. No claim shall be allowed against an estate on application of the claimant unless it shall be in writing, describe the nature and the amount thereof, if ascertainable, and be accompanied by the affidavit of the claimant or someone for him that the amount is justly due, or if not yet due, when it will or may become due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant, except as therein stated. If the claim is contingent, the nature of the contingency shall also be stated.

(b) Requirements when claim founded on written instrument. If a claim is founded on a written instrument, the original or a copy thereof with all indorsements must be attached to the claim. The original instrument must be exhibited to the personal representative or court, upon demand, unless it is lost or destroyed, in which case its loss or destruction must be stated in the claim.

COMMENT:

From MPC, p. 144:

"This section provides the form to be followed in filing every kind of claim. . . . For the meaning of 'offsets,' see sec. 144 hereof and comment thereto."

Sec. 317-23. Creditors' claims; . . .
. . . to present their claim with proper vouchers or duly authenticated copies thereof, . . .

HAWAII REPORTS

No statutory requirement as to form. Claims need only show existing indebtedness together with nature and amount of debt, 26 Haw. 615, 617.

MODEL PROBATE CODE

Sec. 138. Claims not due. Upon proof of a claim which will become due at some future time, the court shall allow it at the present value thereof, and payment may be made as in the case of an absolute claim which has been allowed; provided, if the obligation upon which such claim was founded was entered into before the effective date of this Code, payment may be made as above, if the creditor agrees thereto; otherwise the court may order the personal representative to retain in his hands sufficient funds to satisfy the claim upon maturity, or if the distributees shall give a bond to be approved by the court for the payment of the creditor's claim in accordance with the terms thereof, the court may order such bond to be given in satisfaction of such claim and the estate may be closed.

COMMENT:

From .PC, p. 145:

" . . . The first sentence of this statute expresses the general policy to be achieved by it. It is restricted by its terms to claims which are certain to become due in the future, but does not include contingent claims. As to the contracts entered into before the effective date of this statute, however, it would be unconstitutional. The second sentence is added to provide an alternative method for the payment of such unmatured claims and has the effect of making the section comply with constitutional requirements. Compare sec. 2(b)."

MODEL PROBATE CODE

Sec. 139. Secured claims. When a creditor holds any security for his claim the security shall be described in the claim. If the claim is secured by a mortgage, pledge or other lien which has been recorded, it shall be sufficient to describe the lien by date, and refer to the volume, page and place of recording. The claim shall be allowed in the amount remaining unpaid at the time of its allowance, and the judgment allowing it shall describe the security. Payment of the claim shall be upon the basis of the full amount thereof if the creditor shall surrender his security; otherwise payment shall be upon the basis of one of the following:

- (a) If the creditor shall exhaust his security before receiving payment, then upon the full amount of the claim allowed less the amount realized upon exhausting the security; or
- (b) If the creditor shall not have exhausted or shall not have the right to exhaust his security, then upon the full amount of the claim allowed less the value of the security determined by converting the same into money according to the terms of the agreement pursuant to which the security was delivered to the creditor, or by the creditor and personal representative by agreement, arbitration, compromise or litigation, as the court may direct.

REVISED LAWS OF HAWAII

Sec. 317-23. Creditors' claims. . . .to present their claim with proper vouchers or duly authenticated copies thereof, even if the claim is secured by mortgage on real estate, . . . A creditor, even though he has not filed his claim, holding as security therefor either real or personal property, may foreclose upon the security so held.

Sec. 139, continued.

COMMENT:

Insofar as the Hawaii statute does not make a choice, both of the rules discussed immediately below in Atkinson on Wills on pp. 712-3 apply:

"The manner of computing rights of a secured creditor of an insolvent estate has given rise to much difference of opinion. In absence of particular statutory provision there is no reason why the rule should not be the same as in the case of insolvency of a living person. There are two principal positions taken by the courts. The first is the so-called chancery rule, under which the secured creditor is entitled to the full benefit of the security and also may prove the full amount of the claim and obtain his pro rata share thereof along with unsecured creditors. Of course he is not permitted to recover more than the amount of his claim from these two sources. The second is the bankruptcy rule which allows the secured creditor to take advantage of his security and also be entitled to a pro rata share from the general assets on the difference between the amount of the debt and the sum realized from the security. The chancery rule is upon the wane and is generally thought to operate unduly to the advantage of secured creditors. A secured creditor may waive his security and proceed for a pro rata share of the general assets even though this works to the detriment of other creditors." / In re Estate of Butterfield, 196 Iowa 633, 195 N.W. 188, 1923, the security was homestead property and hence not available to general creditors./

MFC, sec. 139 would follow the bankruptcy rule as stated in the Code Committee's comments at p. 146:

". . . The alternative methods for payment follow the principle laid down in the Bankruptcy Act, sec. 57(h), and the Uniform Act Governing Secured Creditors' Dividends in Liquidation Proceedings. Any state desiring to adopt or having already adopted the Uniform Act should simply provide at this place in its probate code that the allowance and payment of secured claims shall be made pursuant to the provisions of that act."

MODEL PROBATE CODE

Sec. 140. Contingent claims. Contingent claims which cannot be allowed as absolute debts shall, nevertheless, be filed in the court and proved. If allowed as a contingent claim, the order of allowance shall state the nature of the contingency. If such claim shall become absolute before distribution of the estate, it shall be paid in the same manner as absolute claims of the same class. In all other cases the court may provide for the payment of contingent claims in any one of the following methods:

- (a) The creditor and personal representative may determine, by agreement, arbitration or compromise, the value thereof, according to its probable present worth, and upon approval thereof by the court, it may be allowed and paid in the same manner as an absolute claim.
- (b) The court may order the personal representative to make distribution of the estate but to retain in his hands sufficient funds to pay the claim if and when the same becomes absolute; but for this purpose the estate shall not be kept open longer than two years after distribution of the remainder of the estate has been made; and if such claim has not become absolute within that time, distribution shall be made to the distributees of the funds so retained, after paying any costs and expenses accruing during such period and such distributees shall be liable to the creditor to the extent of the estate received by them, if such contingent claim thereafter becomes absolute. When distribution is so made to distributees, the court may require such distributees to give bond for the satisfaction of their liability to the contingent creditor.

Sec. 140, MPC, continued.

- (c) The court may order distribution of the estate as though such contingent claim did not exist, but the distributees shall be liable to the creditor to the extent of the estate received by them, if the contingent claim thereafter becomes absolute; and the court may require such distributees to give bond for the performance of their liability to the contingent creditor.

COMMENT:

As state in the comments to MPC, sec. 135, the words "all claims" does not include contingent claims. Atkinson on Wills describes the problem as follows at pp. 701-2:

"It is reasonable that a court should construe its statutes if possible so as not to require the presentment of purely contingent claims. Usually the devices to secure the payment of unmatured claims are unfitted for contingent claims. It is unreasonable to postpone the final settlement of the estate until the contingency has occurred, for this may not happen until many years after decedent's death, or indeed may never take place. Moreover even a careful holder of a contingent claim might fail to present or file it in case it arises upon a warranty or bond, the breach of which has not yet occurred. Finally, if such claims are filed their number and tentative nature might cause perplexities in the administration without corresponding advantage. A much better practice is to omit the requirement of presenting or filing contingent claims but to permit suit upon the obligation against the heirs in case the contingency occurs after administration is completed. This remedy is often allowed either by statute or upon equitable principles."

MPC, sec. 140 does not follow Atkinson's suggestion - of omitting the requirement of presenting or filing contingent claims and permitting subsequent suit against heirs. Instead the Code requires filing but gives the court alternatives in providing for payment thereof.

MODEL PROBATE CODE

Sec. 141. Payment of contingent claims by distributees; contribution. If a contingent claims shall have been filed and allowed against an estate and all the assets of the estate including the fund, if any, set apart for the payment thereof, shall have been distributed, and the claim shall thereafter become absolute, ~~the~~ creditor shall have the right to recover thereon in the [] court against those distributees whose distributive shares have been increased by reason of the fact that the amount of said claim as finally determined was not paid out prior to final distribution, provided an action therefor shall be commenced within six months after the claim becomes absolute. Such distributees shall be jointly and severally liable, but no distributee shall be liable for an amount exceeding the amount of the estate or fund so distributed to him. If more than one distributee is liable to the creditor, he shall make all distributees who can be reached by process parties to the action. By its judgment the court shall determine the amount of the liability of each of the defendants as between themselves, but if any be insolvent or unable to pay his proportion, or beyond the reach of process, the others, to the extent of their respective liabilities, shall nevertheless be liable to the creditor for the whole amount of his debt. If any person liable for the debt fails to pay his just proportion to the creditor, he shall be liable to indemnify all who, by reason of such failure on his part, have paid more than their just proportion of the debt, the indemnity to be recovered in the same action or in separate actions.

COMMENT:

MPC, sec. 141, provides the procedure of collection under MPC, sec. 140(b) and (c), when estate assets have been distributed before contingent claims have become absolute.

MODEL PROBATE CODE

Sec. 142. Classification of claims and allowances.

At the time of their allowance, all claims and allowances shall be classified in one of the following classes. If the applicable assets of the estate are insufficient to pay all claims and allowances in full, the personal representative shall make payment in the following order:

1. Costs and expenses of administration.
2. Reasonable funeral expenses.
3. Allowance made to the surviving spouse and children of the decedent.
4. All debts and taxes having preference under the laws of the United States.
5. Reasonable and necessary medical expenses of the last sickness of the decedent, including compensation of persons attending him.
6. All debts and taxes having preference under the laws of this state; but no personal representative shall be required to pay any taxes on any property of the decedent unless such taxes are due and payable before possession thereof is delivered by the personal representative pursuant to the provisions of the Code.
7. All other claims allowed.

No preference shall be given in the payment of any claim over any other claim of the same class, nor shall a claim due and payable be entitled to a preference over claims not due.

REVISED LAWS OF HAWAII

Sec. 317-21. Allowance for family dependents. . . .

(c) any allowance made by the court or judge in accordance with the provisions of this section shall be paid in preference to all other charges, except funeral charges and expenses of administration,

HAWAII REPORTS

Expenses of last illness not entitled to preference over ordinary debts, 19 Haw. 144. Claim of Territory for taxes given preference over other claims, 26 Haw. 679, 690.

Sec. 142, continued.

COMMENT:

MPC, p. 149:

"The statutes on classification of claims vary somewhat in their method of classification. The above section (1) provides that each claim shall be classified upon its allowance and (2) specifies the order of priority in the payment of expenses of administration, claims and allowances in case the estate is insolvent. . . . It should be noted that the allowance under 3 is that referred to in sec. 44 hereof; but it does not include the homestead and exempt property referred to in secs. 42 and 43, since the latter are not liable for the expenses of administration nor for funeral expenses, and do not constitute assets for any purpose except to benefit the family.

"It should be pointed out that the first three classes of claims and allowances designated in this section are not debts of the decedent. Under federal statutes as interpreted by the courts, debts due to the United States must be satisfied before other debts due from the deceased. . . . For this reason, debts owed to the United States are placed in the fourth class, ahead of all other debts owed by the decedent."

MODEL PROBATE CODE

Sec. 143. Allowance of claims.

(a) In general. Except as provided in subsection (b) hereof, no claimant shall be entitled to payment unless his claim shall have been duly filed and allowed by the court. Each court may provide by rule for the hearing and disposition of claims filed therein, or may set any individual claim or claims for hearing irrespective of rule. Upon the adjudication of any claim the court shall allow it in whole or in part, or disallow it. The order allowing the claim shall have the effect of a judgment and bear interest at the legal rate, unless the claim provides for a higher rate in which case the judgment shall be rendered accordingly. Except in case of the personal representative's own claim, any claim which is approved by him in writing and which has been duly filed, may be allowed by the court at any time without formal hearing.

(b) Expenses of administration. Claims for expenses of administration may be allowed upon application of the claimant or of the personal representative, or may be allowed at any accounting, regardless of whether or not they have been paid by the personal representative.

REVISED LAWS OF HAWAII

Sec. 317-23. Creditors' claims: If such a claim is not presented within four months from the first day of publication of the notice, it shall be forever barred and the executor or administrator shall not be authorized to pay it.
. . .

Sec. 317-25. Suits on rejected claims, commenced when. If any claim is rejected by the executor or administrator he shall give written notice of such rejection to the creditor, and action must be brought upon it against the executor or administrator within two months after such notice is given, or within two months after the same becomes due, or it will be forever barred.

HAWAII REPORTS

An administrator is not authorized to pay a claim which is not presented according to law, 17 Haw. 514.

COMMENT:

From MPC, p. 150:

" . . . In a number of jurisdictions, the statutes guarantee a jury trial in a litigation to determine a claim. Indeed, it is entirely possible that it might be held that actions on claims are within constitutional guaranties of trial by jury. See comment to sec. 18 hereof. If it is desired to insure a jury trial of issues of fact concerning claims, the following sentence should be added to sec. 143(a): 'Either the creditor or the personal representative is entitled to a jury trial of common law issues of fact in accordance with the provisions of sec. 18.' Of course, a jury trial can be secured under the provisions of sec. 18 without this sentence, if the court is convinced that the situation is within existing constitutional guaranties.

"As to claims of the personal representative, see sec. 146 hereof. As to the individual liability of the personal representative for expenses of administration, see sec. 136."

MODEL PROBATE CODE

Sec. 144. Offsets to claims. On or before the hearing on any claim, the personal representative shall file a statement of all offsets claimed against the creditor. Upon the hearing of claims and offsets the court shall determine the amount due by and against the estate and shall render judgment in favor of or against the estate for the net amount. If a judgment is rendered against a claimant for any net amount, execution may issue in the same manner as on judgments in civil cases. An offset may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the claim of the creditor.

COMMENT:

In Hawaii creditors must bring separate actions in the circuit courts sitting as courts of general jurisdiction when their claims have been rejected by personal representatives. Accordingly the Hawaii Rules of Civil Procedure will apply, specifically rules 13 and 14 on counterclaims, cross-claims and third-party practice.

The Code Committee discusses MPC, sec. 144 as follows at p. 151:

"The last sentence of sec. 144 is substantially the same as Federal Rules of Civil Procedure, Rule 13 (c). The word 'offset' has been used here and in sec. 137 instead of 'counterclaim' which appears in the Federal Rules. . . . As indicated in the above section it includes unliquidated claims and claims for specific property."

MODEL PROBATE CODE

HAWAII REPORTS

Sec. 145. Execution and levies prohibited. No execution shall issue upon nor shall any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but the provisions of this section shall not be construed to prevent the enforcement of mortgages, pledges or liens upon real or personal property in an appropriate proceeding.

A judgment creditor is not entitled to a priority of payment, over creditors by simple contract, out of the estate of a party deceased insolvent, 1 Haw. 143.

COMMENT:

MPC, p. 151:

"This section withdraws the estate of a decedent from ordinary execution by creditors and subjects it solely to the orderly process of administration. This may be implied from the other provisions of the Code but is included here to remove all doubts as to the matter and also to specifically authorize such executions as are necessary for the enforcement of liens upon the property of the estate. . . ."

MODEL PROBATE CODE

Sec. 146. Claims of personal representative. If the personal representative is a creditor of the decedent, he shall file his claim as other persons and the court may appoint any suitable person, whether interested in the estate or not, to represent the estate on the hearing thereof.

MODEL PROBATE CODE

Sec. 147. Compromise of claims. When a claim against the estate has been filed or suit thereon is pending, the creditor and personal representative may, if it appears for the best interests of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated. In the absence of prior authorization or subsequent approval by the court, no compromise shall bind the estate.

COMMENT:

Atkinson on Wills, p. 704:

" . . . At common law the representative has power to compromise claims against the estate, but some statutes require court sanction for such settlements. Of course if the compromise is in bad faith, or is not for the best interest of the estate, the representative will be denied credit in his account for the expenditure, and the same is true in case of payment of a claim to which there is a valid defense."

Sec. 148. Payment of claims. Upon the expiration of four months after the date of the first published notice to creditors and the final adjudication of all claims filed against the estate, the personal representative shall proceed to pay the claims allowed against the estate in accordance with the provisions of this Code. If it appears at any time that the estate is or may be insolvent, that there are insufficient funds on hand, or that there is other good and sufficient cause, the personal representative may report that fact to the court and apply for any order that he deems necessary in connection therewith. Prior to the expiration of such period of four months, the personal representative shall pay such of said claims as the court shall order, and the court may require bond or security to be given by the creditor to refund such part of such payment as may be necessary to make payment in accordance with the provisions of this Code, but all payments made by the personal representative without order of court shall be at his own peril.

Sec. 317-23. Creditors' claims; advertisement; barred when.
. . . Any claim otherwise proper shall be allowed, as a claim against the deceased or the community of which the deceased was a member or both, in accordance with law, . . .

Sec. 317-26. Other suits, commenced when. Executors and administrators shall in no case be liable to suit until the expiration of four calendar months after probate, or the granting of letters of administration, except in cases of rejected claims as provided in section 317-25.

COMMENT:

Atkinson on Wills, pp. 714-5:

"As already pointed out, the executor or administrator at common law was faced with the twin hazards: (1) of exhausting the estate in payment of claims of an inferior class and therefore having to pay late claims of a superior class from his own pocket, and (2) being caught in the technicalities of pleading insufficiency of assets and thus be held liable to a creditor by way of a procedural penalty. Even if he submitted to administration in equity, the estate might not arrive in that court in time to avoid these pitfalls.

"Today, however, the personal representative who follows the course outlined by law receives ample protection. In many jurisdictions he pays the debts only upon court order which will not be made until the time for proving claims has expired. . . . In jurisdictions where claims must be allowed by the court, the representative receives greater protection as the court will not order payment until the nonclaim or special priority statute has run, and at any rate the order to pay claims protects the personal representative."

MODEL PROBATE CODE

Sec. 149. Encumbered assets. When any assets of the estate are encumbered by mortgage, pledge or other lien, the personal representative may pay such encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance or may convey or transfer such assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has filed a claim, if it appears to be for the best interest of the estate and if the court shall so order. The making of such payment shall not increase the share of the distributee entitled to such encumbered assets.

COMMENT:

MPC, p. 153:

" . . . The following related sections of this Code should be noted: sec. 126, as to a compromise in lieu of foreclosure of a lien; sec. 135, as to the inapplicability of the nonclaim statute to liens; sec. 139, as to marshalling assets in satisfaction of secured claims; sec. 143, as to a hearing on claims; sec. 161, as to a sale of mortgaged real property subject to the lien, and sec. 189, as to the exoneration of encumbered property."

MODEL PROBATE CODE

HAWAII REPORTS

SALES, MORTGAGES, LEASES, EXCHANGES

In General

Sec. 150. No priority between real and personal property.
In determining what property of the estate shall be sold, mortgaged, leased or exchanged for any purpose provided in section 152, there shall be no priority as between real and personal property, except as provided by the will, if any, or by order of the court or by the provisions of section 184.

Debts are to be paid primarily out of cash and personalty in which widow has no dower, 18 Haw. 588, 590.

If the personalty of an estate is insufficient to pay expense of administration the real property of the decedent shall be subject to sale by the executor or administrator when authorized by the court for that purpose, 31 Haw. 163, 177.

COMMENT:

MPC, p. 153:

"Since the historical distinction between real and personal property is becoming less important, and because of the widespread tendency to subject real property to the possession and control of the personal representative during the period of administration to the same extent as personal property, as is done in secs. 84 and 124 of this Code, it is desirable to express this assimilation in connection with sales and similar transactions"

MODEL PROBATE CODE

REVISED LAWS OF HAWAII

Sec. 151. When power given in will. When power to sell, mortgage, lease or exchange property of the estate has been given to any personal representative under the terms of any will, the personal representative may proceed under such power, or may proceed under the provisions of this Code, as he may determine.

Sec. 317-29.5. Sales under direction of will. When property is directed by a will to be sold, or authority is given in the will to sell property, the executor may sell the same either at public auction or private sale, and with or without notice, as he may determine; but he must make a return of sales and obtain confirmation thereof as in other cases. In either case no title passes unless the sale is confirmed by the court; but the necessity of the sale, or its advisability and benefit to the estate, need not be shown. If directions are given in the will as to the mode of selling, or the particular property to be sold, or the person eligible to so purchase, or any other specific directions, such directions must be observed.

COMMENT:

MPC, p. 154:

"The purpose of this section is to recognize as valid testamentary provisions to sell, mortgage, lease or exchange property, and also to provide that the personal representative may nevertheless proceed under the terms of this Code. The latter course may be deemed by him to be for the best interest of the estate, or the power given to him may be doubtful or inadequate. . . ."

MODEL PROBATE CODE

Sec. 152. Transfer under court order; purposes. Any real or personal property belonging to an estate may be sold, mortgaged, leased or exchanged under court order when necessary for any of the following purposes:

- (a) For the payment of claims allowed against the estate;
- (b) For the payment of any allowance made to the surviving spouse and minor children of the decedent;
- (c) For the payment of any legacy given by the will of the decedent;
- (d) For the payment of expenses of administration;
- (e) For the payment of any gift, estate, inheritance or transfer taxes assessed upon the transfer of the estate or due from the decedent or his estate;
- (f) For making distribution of the estate or any part thereof;
- (g) For any other purpose in the best interests of the estate.

REVISED LAWS OF HAWAII

Sec. 317-27. Real estate; sale. The real property of a decedent shall be subject to sale by the administrator, or by the executor unless power to sell is given by the will, only when authorized by the court. The court may authorize such sale for payment of expenses of administration, family allowance, estate and inheritance taxes or debts, or whenever such sale appears to the court to be for the best interests of the estate and not inconsistent with the will, whether or not the personal property of the estate has been exhausted. . . . For the purposes of this section, real property includes a leasehold interest in real property with an unexpired term of ten years or longer or a leasehold interest in real property together with an option to purchase the leased premises or some part thereof.

HAWAII REPORTS

Realty may be sold to pay expenses of administration, 31 Haw. 16

COMMENT:

At common law personal representatives had title to decedents' personalty and they did not need court authority to sell mortgage or pledge same. However, personal representatives only had possession of realty and could not sell same unless wills gave them power of sale or unless personalty was insufficient to pay debts of the decedent. Statutes consequently gave courts power to authorize sale of realty by the personal representatives. This is the law in Hawaii.

The MPC gives personal representatives only possession to personalty and treats realty and personalty alike, therefore the provisions authorizing sale, mortgage, pledge and exchange cover both.

The Code Committee discusses this and other aspects of MPC, sec. 152 as follows at pp. 154-5:

"In the absence of provisions in the will, a statute was necessary to authorize a sale in all cases where the decedent had not taken affirmative steps to make the land liable for his debts. Gradually these purposes have been broadened, many of the statutory purposes appearing in current statutes being that expressed in (g), viz., for any purpose beneficial to the estate. Thus if a small tract of land were to be divided among many heirs or devisees, some of whom were under disabilities, a serious problem of marketability would be presented if it were distributed to them in kind. Under this section it could be sold by the personal representative and the proceeds distributed, thus eliminating a difficult and otherwise expensive problem for the interested persons. . . .

"It should be noted that a sale cannot be ordered solely on the ground that there is any rule of law to the effect that it is necessary to make distribution in cash. See sec. 190 hereof."

MODEL PROBATE CODE

Sec. 153. Order to sell, mortgage or lease to be refused if bond given. An order authorizing a personal representative to sell, mortgage or lease real or personal property for the payment of obligations of the estate shall not be granted if any of the persons interested in the estate shall execute and file in the court a bond in such sum and with such sureties as the court may approve, conditioned to pay all obligations of the estate to the extent that the other property of the estate is insufficient therefor, within such time as the court shall direct. An action may be maintained on such bond **by** the personal representative on behalf of any person interested in the estate who is prejudiced by breach of any obligation of the bond.

MODEL PROBATE CODE

Sec. 154. Terms of sale. In all sales of real or personal property, the court may authorize credit to be given by the personal representative for a period not exceeding one year from the date of his qualification and for an amount not exceeding fifty per cent of the purchase price, the payment of which shall be secured by notes or bonds with approved sureties or by a purchase money mortgage. If credit is authorized, the order shall specify the time of payment, the minimum rate of interest on deferred payments and the manner in which such payments shall be secured. If the estate is solvent, credit may be extended by the personal representative for a time longer than one year with the written consent of the distributees.

MODEL PROBATE CODE

Sec. 155. When personal representative may purchase.

Any personal representative may purchase, take a mortgage on, lease or take by exchange, real or personal property belonging to the estate, but such transaction shall always be reported to the court and be subject to confirmation.

COMMENT:

The common law re sales to personal representatives is stated in Atkinson on Wills on p. 666:

"Following the general principle applicable to fiduciaries, an executor or administrator may not sell property to himself even at public sale. Nor may he sell the property to his spouse, or to a straw man who retransfers to the personal representative. Sales to the representative are merely voidable, however, and they may be either avoided or ratified by the persons interested in the estate. Furthermore, the representative may purchase the property with the consent of these parties. . . ."

MPC, sec. 155 changes the above and the Code Committee states thereto at p. 156:

"This section modifies the common law rule as to the fiduciary duty owed by a trustee or personal representative. However, in the interests of benefit to the estate, a few statutes have relaxed the common law rule by provisions of this kind. . . . Since such transactions are to be reported to the court and confirmed, this section is believed to be desirable. Of course, report and confirmation would be required without this section in the case of real property (see sec. 166), but in the case of personal property it is not generally required. See sec. 158."

MODEL PROBATE CODE

Sec. 156. Purchase by holder of lien. At any sale of real or personal property upon which there is a mortgage, pledge or other lien, the holder thereof may become the purchaser and may apply the amount of his lien on the purchase price in the following manner. If no claim thereon has been filed or allowed, the court, at the hearing on the report of sale and for confirmation of the sale, may examine into the validity and enforceability of the lien or charge and the amount due thereunder and secured thereby and may authorize the personal representative to accept the receipt of such purchaser for the amount due thereunder and secured thereby as payment pro tanto. If such mortgage, pledge or other lien is a valid claim against the estate and has been allowed, the receipt of the purchaser for the amount due him from the proceeds of the sale is a payment pro tanto. If the amount for which the property is purchased, whether or not such claim was filed or allowed, is insufficient to defray the expenses and discharge his mortgage, pledge or other lien, the purchaser must pay an amount sufficient to pay the balance of such expenses. Nothing permitted under the terms of this section shall be deemed to be an allowance of a claim based upon such mortgage, pledge or other lien.

COMMENT:

MPC, p. 157:

" . . . [This section] includes liens on property owned by the estate for the payment of which the estate was not liable, as where the decedent purchased property subject to a mortgage but did not assume its payment, or where a mortgagee could have filed a claim but did not do so."

MODEL PROBATE CODE

Sec. 157. Validity of proceedings. No proceedings for sale, mortgage, lease, exchange or conveyance by a personal representative of property belonging to the estate shall be subject to collateral attack on account of any irregularity in the proceedings if the court which ordered the same had jurisdiction of the estate.

COMMENT:

MFC, p. 157:

"This section is the modern version of a statute intended to be a substitute for the Massachusetts statute of 1836 based upon the philosophy of that time that probate courts were courts of limited and inferior jurisdiction, but that their sales should be upheld unless defective in certain particulars. The above section . . . is predicated upon the assumption that probate courts now have the same superior status within their sphere as do courts of general jurisdiction. It should be noted that, according to sec. 62 hereof, failure to give the required notice is not jurisdictional and therefore under sec. 157 would not invalidate the transfer."

MODEL PROBATE CODE

Personal Property

Sec. 158. Sale, mortgage or lease of personal property.

A personal representative may file a petition to sell, mortgage or lease any personal property belonging to the estate. The petition shall set forth the reasons for the application and describe the property involved. The petition may be heard with or without notice as the court may direct. Notice of the hearing, if required, shall state briefly the nature of the application and shall be given as provided in section 14 hereof. At the hearing and upon proof of the petition the court may order the sale, mortgage or lease of the property described or any part thereof, at such price and upon such terms and conditions as the court shall require. No report or confirmation of such transaction shall be necessary except as required by section 155 or as required by the court; but no sale, mortgage or lease, except as provided in section 159, shall be valid unless prior authorization or subsequent approval of the court is secured.

COMMENT:

MFC, p. 158:

"If report and confirmation are ordered the procedure in sec. 166 would be followed."

MODEL PROBATE CODE

Sec. 159. Sales of perishable or depreciable property.
Perishable property and other personal property which will depreciate in value if not disposed of promptly, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to provide allowance to the surviving spouse and children pending the receipt of other sufficient funds, may be sold without notice, and title shall pass without confirmation; but the personal representative shall be responsible for the actual value of the property unless, after making a report of such sale, and on a proper showing, the court shall approve the sale.

Sec. 160. Sale, mortgage or lease of real and personal property as a unit. Whenever it is for the best interests of the estate, real and personal property of the estate may be sold, mortgaged or leased as a unit, but the provisions of this Code with respect to the sale, mortgage or lease of real property shall apply so far as may be.

Real Property

Sec. 161. Petition to sell, mortgage or lease real property; notice; hearing. A personal representative may file a petition to sell, mortgage or lease any real property belonging to the estate. The petition shall set forth the reasons for the application and describe the property involved. It may apply for different authority as to separate parts of the property; or it may apply in the alternative for authority to sell, mortgage or lease. Upon the filing of the petition, the court shall fix the time and place for the hearing thereof, provided, however, that as to any real property which was last appraised at not more than \$500, the court may, in its discretion, hear the petition without notice. Notice of the hearing shall state briefly the nature of the application and shall be given as provided in section 14 hereof. At the hearing and upon satisfactory proofs, the court may order the sale, mortgage or lease of the property described or any part thereof. When a claim secured by a mortgage on real property is, under the provisions of this Code, payable at the time of distribution of the estate or prior thereto, the court with the consent of the mortgagee may, nevertheless, order the sale of the real property subject to the mortgage, but such consent shall release the estate should a deficiency later appear.

Sec. 317-28. Petition. The executor or administrator shall present to the judge having jurisdiction of the estate a petition setting forth the condition of the estate, and the facts and circumstances tending to show the necessity or expediency of the sale. If it appears to the judge either that it is necessary or that it would be advisable and for the benefit of the estate that the real property or any part thereof be sold, and that sufficient notice of the proposed sale has been given to the persons interested in the estate, the judge may authorize the executor or administrator to sell the real property either at private sale or at public auction on such terms as the judge shall order.

Sec. 317-29. Bond; confirmation. Every executor or administrator so authorized to sell real property shall give bond to the judge, with sufficient sureties, conditioned to sell the same and dispose of the proceeds in the manner provided by law; provided, that no such bond shall be required from an executor appointed without bond by a will or from an executor or administrator who has already given a sufficient bond. He shall use his utmost endeavors to dispose of the real property in such manner as will be most for the advantage of the estate. . . .

COMMENT:

MPC, p. 159:

" . . . As to the matter of increasing the bond of the personal representative on a sale, see sec. 115 hereof. To the effect that notice is not jurisdictional, see sec. 62 hereof."

Sec. 162. Quieting adverse claims. Upon any petition to sell or mortgage real property the court shall have power to investigate and determine all questions of conflicting and controverted title, remove clouds from any title or interest involved, and invest purchasers or mortgagees with a good and indefeasible title to the property sold or mortgaged. When the petition to sell or mortgage seeks such relief notice shall be given as in civil actions of like nature and the court is authorized to issue appropriate process and notices in order to obtain jurisdiction to so proceed against adverse parties.

Sec. 163. Order for sale, mortgage or lease of real property. The order shall describe the property to be sold, mortgaged or leased and may designate the sequence in which the several parcels shall be sold, mortgaged or leased. An order for sale shall direct whether the property shall be sold at private sale or public auction, and, if the latter, the place or places of sale. If real property is to be sold it shall direct that the same shall not be sold for less than the appraised value; or if real property is to be leased, it shall direct that the same shall not be leased for less than the appraised rental value. An order of sale shall direct whether the sale shall be for cash or for cash and deferred payments, and the terms on which such deferred payments are to be made. If real property is to be mortgaged, it shall fix the maximum amount of principal, the maximum rate of interest, the earliest and latest date of maturity, and shall direct the purpose for which the proceeds shall be used. An order for sale, mortgage or lease shall remain in force until terminated by the court, but no sale or lease shall be made after one year from the date of the order unless the real property or rental value thereof shall have been reappraised under order of the court within three months preceding the sale or lease.

Sec. 317-14. Possession and control of real estate pending administration; distribution; determination of heirs. . . . The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action or suit, for the possession of the real estate or for quieting the title thereto, or for the registration of the title thereof against anyone except the executor or administrator, but shall not be required to do so.

Sec. 317-28. Petition. . . . the judge may authorize the executor or administrator to sell the real property either at private sale or at public auction on such terms as the judge shall order.

MODEL PROBATE CODE

Sec. 164. Appraisement of real property. Before any personal representative shall sell or lease any real property he shall, unless the court directs that he be permitted to use the appraisal filed with the inventory, have it appraised by two disinterested persons appointed by the court, who are residents of the county in which at least part of it lies. The appraisers shall appraise such real property or its rental value, as the case may be, at its full and fair value, and forthwith deliver the appraisement certified by them under oath to the personal representative.

COMMENT:

MPC, p. 161:

"Corresponding to sec. 120 providing for the making of an inventory and appraisement, two appraisers only are provided for. . . ."

By practice in Hawaii, probate judges do require appraisals.

MODEL PROBATE CODE

Sec. 165. Sales at public auction. In all sales of real property at public auction the personal representative shall give notice thereof particularly describing the property to be sold, and stating the time, terms, and place of sale. The notice shall be published once a week for three consecutive weeks in some newspaper, authorized to publish legal notices, of the county in which the real property is situated, but if no newspaper is published in the county or the real property is appraised at not more than \$500, the personal representative may, in lieu of publication, post a copy of the notice in three public places in the county where the real property or some part thereof lies, at least two weeks before the sale is made. If the notice is published, the date set for the sale shall not be earlier than one day nor later than seven days after the date of the third publication of notice. Proof of publication or posting shall be filed before confirmation of the sale. If the tracts to be sold are contiguous and lie in more than one county, notice may be given and the sale made in either county. The personal representative may adjourn the sale from time to time, if for the best interests of the estate, but not for longer than three months in all. Every adjournment shall be announced publicly at the time and place fixed for the sale.

REVISED LAWS OF HAWAII

Sec. 317-29. Bond confirmation. . . .

If a sale being presented to the judge for confirmation is a private sale, the judge shall require a notice of such sale to be posted in an appropriate place in the courthouse of the circuit wherein the matter is pending and also of the circuit wherein the property is located, if they be different, at least fifteen days prior to considering such confirmation, such notice to set forth a description of the property, including the tax key number, the proposed sale price including the terms of payment, a description of any encumbrances thereon, the date of the confirmation hearing and a solicitation for sealed bids thereon or any other information required by the judge. The judge may also require that such notice be published at least twice in a newspaper in the circuit where the property is located, the last publication to be at least fifteen days prior to considering such confirmation. If a written offer in an amount at least ten per cent more on the first \$10,000 of the selling price and five per cent more on the amount of the selling price in excess of \$10,000 is made to the judge by a responsible person, who may be the original offerer, prior to the hearing of confirmation, the judge, upon the hearing of confirmation, shall permit the original offerer to make a further offer, and if such new offer shall be in an amount at least five per cent more than the highest written offer made to the judge, then the judge shall, in such manner as he shall determine, permit the original offer and the person making such highest written offer to make additional higher offers and shall confirm the sale to the one of such persons making the highest offer finally received; but if the original offerer shall not make a further offer as herein provided, then the judge may accept such highest written offer and confirm the sale to the person making such offer.

MODEL PROBATE CODE

REVISED LAWS OF HAWAII

Sec. 166. Report and confirmation. Within ten days after making any sale, mortgage or lease of real property, the personal representative shall make a verified report of his proceedings to the court, with the certificate of appraisement in case special appraisal is required, and with proof of publication or posting in case the sale is made at public auction, which report shall state that he did not directly or indirectly acquire any beneficial interest in the real property, or the lease thereof, except as stated in his report. Any person interested in the estate desiring to object to confirmation may file objections in writing, setting forth the reasons therefor. The court shall examine said report and if satisfied that the sale, mortgage or lease has been at the price and terms most advantageous to the estate and in all respects made in conformity with law and ought to be confirmed, shall confirm the same and order the personal representative to make a deed, mortgage, lease or other proper instruments to the person entitled thereto; but no report shall be confirmed within five days after the filing thereof unless all persons interested in the estate shall in person, or by attorney or guardian, consent in writing to such confirmation, or unless, in the opinion of the court, such delay would not be for the best interests of the estate. Such instrument shall refer to the order of sale, mortgage or lease by its date, and the court by which it was made, and shall transfer to the grantee, mortgagee or lessee all the right, title and interest of the decedent granted by the instrument, discharged from liability for all debts and obligations incident to the administration of the estate, except encumbrances assumed. If not satisfied that the sale, mortgage or lease has been made in conformity with law or that it is for the best interests of the estate, the court may reject the sale, mortgage or lease or require a re-execution of the order upon such terms and conditions as it may direct.

Sec. 317-29. Bond; confirmation. . . . The executor or administrator shall obtain from the judge an order of confirmation of the sale before making conveyance of the real property sold. The order confirming the sale shall be given upon affirmative proof that the executor or administrator has fully complied with the order of the judge authorizing the sale and that the selling price was a fair and just price for the property sold.

MODEL PROBATE CODE

Sec. 167. Execution of conveyance or other instrument by personal representative; recording. Upon the confirmation of any sale, mortgage or lease in accordance with section 166, the personal representative shall execute a conveyance to the grantee or mortgagee or a lease with the lessee according to the order of confirmation. A certified copy of the order may be recorded with the deed or other instrument in the office of the register of deeds of the county where the land lies, and shall be prima facie evidence of the due appointment and qualification of the personal representative, the correctness of the proceedings and the authority of the personal representative to execute the instrument.

COMMENT:

MPC, p. 163:

"This section corresponds to sec. 132 providing for a conveyance by the personal representative under a land contract executed by the decedent. The purpose of both of these sections is to simplify land title problems by making the deed of the personal representative and the order of the court confirming the transaction adequate and sufficient evidence to be recorded and shown on the abstract of title for the purpose of showing a marketable title, thus eliminating the necessity of showing all the antecedent steps at the probate proceedings.

"No attempt is made to set out in this Code the rules with respect to the rights of purchasers where the title of the decedent totally fails. Common law doctrines deal with that situation adequately; and it would be unsatisfactory to state them in statutory form. . . ."

MODEL PROBATE CODE

Sec. 168. Taxes not to be liens in hands of transferee.

The lien of the state for inheritance or estate taxes shall not extend to any interest acquired by a purchaser, mortgagee, or lessee through any transfer made by a personal representative under a power contained in a will or under order of the court.

COMMENT:

MPC, p. 164:

"The purpose of this section is to make it clear that the disposition of property for the payment of taxes shall pass title to such property free from such claims. Otherwise purchasers would not buy and the purpose of authorizing the disposition of property would be thwarted."

MODEL PROBATE CODE

Sec. 169. Brokers' fees and title documents. In connection with the sale, mortgage, lease or exchange of property, the court may authorize the personal representative to pay, out of the proceeds realized therefrom or out of the estate, the customary and reasonable auctioneers' and brokers' fees and any necessary expenses for abstracting, title insurance, survey, revenue stamps and other necessary costs and expenses in connection therewith.

MODEL PROBATE CODE

Sec. 170. Platting. When it is for the best interests of the estate in order to dispose of real property, the court, upon application by the personal representative or any other interested person, may authorize the personal representative, either alone or together with other owners, to plat any land belonging to the estate in accordance with the statutes in regard to platting.

Sec. 171. Exchange of property. Whenever it shall appear upon the petition of the personal representative or of any person interested in the estate to be to the best interests of the estate to exchange any real or personal property of the estate for other property, the court may authorize the exchange upon such terms and conditions as it may prescribe, which may include the payment or receipt of part cash by the personal representative. If personal property of the estate is to be exchanged, the proceedings required for the sale of such property shall apply so far as may be; if real property of the estate is to be exchanged, the procedure for the sale of such property shall apply so far as may be.

MODEL PROBATE CODE

ACCOUNTING

Sec. 172. Liability of personal representative.

(a) Property of estate. Every personal representative shall be liable for and chargeable in his accounts with all of the estate of the decedent which comes into his possession at any time, including all the income therefrom; but he shall not be accountable for any debts due to the decedent or other assets of the estate which remain uncollected without his fault. He shall not be entitled to any profit by the increase, nor be chargeable with loss by the decrease in value or destruction without his fault, of any part of the estate.

(b) Property not a part of estate. Every personal representative shall be chargeable in his accounts with property not a part of the estate which comes into his hands at any time and shall be liable to the persons entitled thereto, if

- (1) The property was received, under a duty imposed on him by law in the capacity of personal representative; or
- (2) He has commingled such property with the assets of the estate.

(c) Breach of duty. Every personal representative shall be liable and chargeable in his accounts for neglect or unreasonable delay in collecting the credits or other assets of the estate or in selling, mortgaging or leasing the property of the estate; for neglect in paying over money or delivering property of the estate he shall have in his hands; for failure to account for or to close the estate within the time provided by this Code; for any loss to the estate arising from his embezzlement or commingling of the assets of the estate with other property; for loss to the estate through self-dealing; for any loss to the estate arising from wrongful acts or omissions of his co-representatives which

HAWAII REPORTS

Executrix who withholds, without just excuse for an unreasonable time, money which she should have paid over to the legatees is chargeable with interest, 9 Haw. 342.

MPC, Sec. 172, continued

he could have prevented by the exercise of ordinary care;
and for any other negligent or wilful act or nonfeasance
in his administration of the estate by which loss to the
estate arises.

COMMENT:

MPC, p. 166:

"Section 172(b)(1) covers cases of damages received under wrongful death statutes, or appointed property where the decedent was the donee of a general power of appointment and was insolvent.

"Section 172(b)(2) includes a situation where a personal representative commingles the proceeds of a life insurance policy with assets of the estate, although the estate is not the beneficiary of the policy. . . ."

MODEL PROBATE CODE

Sec. 173. Duty to close estate. Every personal representative shall close the estate as promptly as possible. The time for closing the estate shall not exceed nine months from the filing of the petition of the appointment of a personal representative unless for cause the time is extended by the court.

Sec. 174. When personal representative must account. Every personal representative must file in the court a verified account of his administration

- (a) Upon filing a petition for final settlement;
- (b) Upon the revocation of his letters;
- (c) Upon his application to resign and before his resignation is accepted by the court;
- (d) Annually during the period of administration unless the court otherwise directs;
- (e) At any other time when directed by the court either of its own motion or on the application of any interested person.

Sec. 175. What accounts to contain. Accounts rendered to the court by a personal representative shall be for a period distinctly stated and shall consist of three schedules, of which the first shall show the amount of the property according to the inventory, or, if there be a prior accounting, the amount of the balance of the next prior account, and all income and other property received, and gains from the sale of any property or otherwise; the second shall show payments, charges, losses and distributions; the third shall show the property on hand constituting the balance of such account, if any, by reference to the inventory or otherwise. When an account is filed, the personal representative shall also file receipts for disbursements of assets made during the period covered by the account. The court may provide for an inspection of the balance of assets on hand.

HAWAII REPORTS

Unless exceptional circumstances prevent it, an estate should be closed in about eight months, 18 Haw. 546.

REVISED LAWS OF HAWAII

Sec. 317-30. Accounts of executors or administrators. Every executor or administrator shall file his final accounts within one year after the issuance to him of letters testamentary or of administration, as the case may be, unless, upon written application by him made, further time is allowed by the court or judge having jurisdiction. Every executor and administrator shall file such other accounts at such times as the court or judge may, in its or his discretion, require.

MPC, Secs. 173-5, continued.

COMMENT:

The practice in Hawaii in probate matters is to require periodical accounts from an executor or an administrator if administration is not completed within about eight months. Final accounts are required when the estate is ready to be wound up and the property distributed to those entitled thereto.

On MPC, sec. 175, the Code Committee adds at p. 167:

" . . . See sec. 143(b) as to administration expenses to be allowed at accounting before payment."

MODEL PROBATE CODE

Sec. 176. Account to include petition for settlement and distribution. At the time of filing of an account the personal representative shall petition the court to settle and allow his account; and if the estate is in a proper condition to be closed, he shall also petition the court for an order authorizing him to distribute the estate, and shall specify in the petition the persons to whom distribution is to be made and the proportions or parts of the estate to which each is entitled.

Sec. 177. Hearing on settlement of account; notice. Upon the filing of any account, the matter shall be set for hearing and notice thereof shall be given. If there is also a petition for distribution, it shall be heard at the same time as the account, and the notice of hearing on the account shall so state.

Sec. 178. Objections to account. At any time prior to the hearing on an account of a personal representative, any interested person may file written objections to any item or omission in the account. All such objections shall be specific and shall indicate the modification desired.

Sec. 179. Conclusiveness of order settling account. Upon the approval of the account of a personal representative, the personal representative and his sureties shall, subject to the right of appeal and to the power of the court to vacate its final orders, be relieved from liability for the administration of his trust during the accounting period, including the investment of the assets of the estate. The court may disapprove the account in whole or in part and surcharge the personal representative for any loss caused by any breach of duty.

REVISED LAWS OF HAWAII

Sec. 317-31. Time of hearing and notice of petitions for approval of final accounts, distribution of estates and discharge of executors and administrators. Upon the filing of a petition for approval of final accounts, distribution of estate and discharge of an executor or administrator, the judge or clerk shall fix the time of hearing thereon. Notice of the time and place of hearing on such petition shall be given by publication at least once in each of four successive weeks in such newspaper as the judge or clerk may determine, the last publication to be not less than ten days previous to the time fixed for the hearing; provided, that when in the opinion of the judge the value of the estate to be distributed does not exceed \$1,000 and no injustice will result to anyone, he may by order shorten the time of such notice or he may by order direct that such notice be given by posting as provided in such order instead of by publication. This section shall not apply to petitions by temporary administrators. The notice required to be given in accordance with the provisions of section 317-14 may be combined with the notice required to be given under the provisions hereof.

HAWAII REPORTS

18 Haw. 546: "There is a clear distinction between the annual or periodical and the final accounts. The approval of the one is ex parte and without notice while in the case of the other it can only be made after notice to all concerned. The one is made annually or oftener at the discretion of the judge, the other only when the estate is fully administered. The one is for the information of the judge and the convenience of the administrator or executor in the management of the estate, the other is a final adjudication of the rights and obligations of all concerned. The one is only prima facie correct and is subject to correction for errors or mistakes in it thereafter

MPC, Secs. 176-9, continued.

HAWAII REPORTS, 18 Haw 546, continued.

discovered without an appeal or any direct proceeding to review it or set it aside, . . . the other is conclusive and final unless set aside on an appeal or a direct proceeding therefor or impeached for fraud. The approval of an annual account, being made without notice to any of the parties interested, is not conclusive as against one who does not appear, and in that sense it is not a final order, but, if a party interested does appear and objects and has a hearing on his objections and then appeals, the order is final as to such party, at least in the sense of its being appealable."

MODEL PROBATE CODE

Sec. 180. Statement of receipts and disbursements after final account and before final distribution. Any receipts and disbursements of the personal representative subsequent to the filing of his final account must be reported to the court before making final distribution. A settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court and included in the order of distribution, or the court may treat such statement as a supplementary account and order notice to be given as in other cases of the settlement of accounts.

Sec. 181. Account of deceased or incompetent personal representative. If the personal representative dies or becomes incompetent, his account may be presented by his personal representative or the guardian of his estate to, and settled by, the court in which the estate of which he was personal representative is being administered, and, upon petition of the successor of the deceased or incompetent personal representative, the court shall compel the personal representative or guardian of the deceased or incompetent personal representative to render an account of the administration of the estate of the decedent and the court shall settle the account as in other cases.

MODEL PROBATE CODE

Sec. 182. Partial distribution.

(a) Delivery of specific property to distributee before final decree. Upon application of the personal representative or of any distributee, with or without notice as the court may direct, the court may order the personal representative to deliver to any distributee who consents to it, possession of any specific real or personal property to which he is entitled under the terms of the will or by intestacy, provided that other distributees and claimants are not prejudiced thereby. The court may at any time prior to the decree of final distribution order him to return such property to the personal representative, if it is for the best interests of the estate. The court may require the distributee to give security for such return.

(b) Distribution of part of estate. After the expiration of the time limited for the filing of claims and before final settlement of the accounts of the personal representative, a partial distribution may be decreed, with notice to interested persons, as the court may direct. Such distribution shall be as conclusive as a decree of final distribution with respect to the estate distributed except to the extent that other distributees and claimants are deprived of the fair share or amount which they would otherwise receive on final distribution. Before a partial distribution is so decreed, the court may require that security be given for the return of the property so distributed to the extent necessary to satisfy any distributees and claimants who may be prejudiced as aforesaid by the distribution.

REVISED LAWS OF HAWAII

Sec. 317-14. Possession and control of real estate pending administration; distribution; determination of heirs.

. . . The judge having jurisdiction of the estate may, upon the application of the executor or administrator or of any person claiming as heir or devisee, at any time, by order of court, terminate the possession and control of the executor or administrator as to the whole or any part of the real estate and, in that connection, shall determine the heirs or devisees entitled thereto, and their respective estates or interests. No such order or determination shall be made except after a hearing, of which notice has been given by publication in such newspaper as the judge may order at least once a week for four successive weeks (four insertions), the last publication to be not less than ten days previous to the time appointed for the hearing, and by such additional method, if any, as the judge may, in his discretion, prescribe. Such order shall be conclusive as to the rights of heirs and devisees, subject only to be reversed, set aside, or modified on appeal. A certified copy of such order shall be recorded in the bureau of conveyances, and if the land affected has been registered in the land court, a like copy shall be filed in the office of the assistant registrar of such court.

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". . . in proceedings in rem parties interested in the res are entitled to notice -- to an opportunity to be heard, and without such opportunity cannot be deprived of legitimate property rights. We know of no exception to this rule other than that applying to instruments of crime and articles the possession and use of which are prohibited by law, and which may, under statutory provisions, be seized and destroyed in a summary manner. Under well established rules in this jurisdiction it is immaterial whether the proceeding is called one in rem, or one in personam. An annual or intermediate accounting, such as the one here, had ex parte and without notice, is for

MPC, Sec. 182, continued.

HAWAII REPORTS, continued.

the convenience of the administrator, is not final, but is subject to modification or annulment by the circuit judge sitting in probate, at any time before final distribution. . . .

" . . . If an executor or administrator desires to be relieved of the responsibility of holding funds at any time prior to final accounting, on an ex parte proceeding, he must be certain to correctly inform the court as to the persons entitled to participate in the fund. . . ."
22 Haw. 436.

COMMENT:

MPC, p. 170:

"The two subsections of sec. 182 are designed to accomplish quite different things. The purpose of subsection (a) is to take care of a case where there is a specific thing which can much more conveniently remain in the possession of an heir or devisee than of the personal representative. Thus, a musical instrument, a painting or a valuable piece of furniture would have to be stored by the personal representative at the expense of the estate unless some such provision as this exists. This subsection also applies to real estate so that a specific tract of land may under its terms be turned over to a particular distributee.

"Subsection (b), unlike the preceding subsection, provides for a more or less final distribution of a part of the estate. The partial distribution may consist either in a cash payment or in the distribution of specific real or personal property. Subsection (a), on the other hand, merely involves the handing over of the possession of specific things for all or a part of the period of distribution, and may be employed merely for the convenience of the personal representative."

Sec. 183. Decree of final distribution.

(a) Petition for decree. After the expiration of the time limit for the filing of claims, and after all claims against the estate, including state and federal inheritance and estate taxes, have been finally determined and paid, except contingent and unmatured claims which cannot then be paid, the personal representative shall, if the estate is in a condition to be closed, render his final account and at the same time petition the court to decree the final distribution of the estate. Notice of the hearing of the petition shall be given to all interested persons.

(b) What decree to include. In its decree of final distribution, the court shall designate the persons to whom distribution is to be made, and the proportions or parts of the estate, or the amounts, to which each is entitled under the will and the provisions of this Code, including the provisions regarding advancements, election by the surviving spouse, lapse, renunciation, adjudicated compromise of controversies and retainer. Every tract of real property so distributed shall be specifically described therein. The decree shall find that all state and federal inheritance and estate taxes are paid; and if all claims have been paid, it shall so state; otherwise the decree shall state that all claims except those therein specified are paid and shall describe the claims for the payment of which a special fund is set aside, and the amount of such fund; if any contingent claims which have been duly allowed are still unpaid and have not become absolute, such claims shall be described in the decree, which shall state whether the distributees take subject to them. If a fund is set aside for the payment of contingent claims, the decree shall provide for the distribution of such fund in the event that all or a part of it is not needed to satisfy such contingent claims. If a decree of partial distribution has been previously made, the decree of final distribution shall expressly confirm it, or, for good cause, shall modify said decree and state specifically what modifications are made.

Sec. 317-31. Time of hearing and notice of petitions for approval of final accounts, distribution of estates and discharge of executors and administrators. Upon the filing of a petition for approval of final accounts, distribution of estate and discharge of an executor or administrator, the judge or clerk shall fix the time of hearing thereon. Notice of the time and place of hearing on such petition shall be given . . .

MPC, Sec. 183, continued.

(c) Provisions for deceased distributees. If a distributee dies before distribution to him of his share of the estate, such share may be distributed to the personal representative of his estate, if there be one; or if no administration on his estate is had and none is necessary according to the provisions of sections 86 to 91 inclusive, hereof, the share of such distributee shall be distributed in accordance therewith

(d) Conclusiveness of decree. The decree of final distribution shall be a conclusive determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character of their interests therein, subject only to the right of appeal and the right to reopen the decree. It shall operate as the final adjudication of the transfer of the right, title and interest of the decedent to the distributees therein designated; but no transfer before or after the decedent's death by an heir or devisee shall affect the decree, nor shall the decree affect any rights so acquired by grantees from the heirs or devisees.

(e) Recording of decree. Whenever the decree of final distribution includes real property, a certified copy thereof shall be recorded by the personal representative in every county of this state in which any real property distributed by the decree is situated. The cost of recording such decree shall be charged to the estate.

COMMENT:

MPC, p. 172:

"Under the provisions of this Code, the decree of final distribution, and not the will, is the significant muniment of title. Hence, if real estate is involved, provision is made for recording a copy of the former but not of the latter. If

Sec. 183, continued.

this is done, no one should, or is likely to, purchase real estate in reliance on the will, even though it has been admitted to probate; but he will rely solely on the recorded, certified copy of the decree of distribution.

"It is believed that little would be gained and considerable confusion would result if it were provided, as some states do, that the property may be distributed to the assignee of an heir or devisee. . . . This section does not deny the right of the assignee to pursue an appropriate remedy to reach the interests of his assignor, nor does it prevent his intervention at various stages of the probate proceeding as an interested person under sec. 3(k)."

MODEL PROBATE CODE

Sec. 184. Order in which assets appropriated;
abatement.

(a) General rules. Except as provided in subsection (b) hereof, shares of the distributees shall abate, for the payment of claims, legacies, the family allowance, the shares of pretermitted heirs or the share of the surviving spouse who elects to take against the will, without any preference or priority as between real and personal property, in the following order:

- (1) Property not disposed of by the will;
- (2) Property devised to the residuary devisee;
- (3) Property disposed of by the will but not specifically devised and not devised to the residuary devisee;
- (4) Property specifically devised.

A general devise charged on any specific property or fund shall, for purposes of abatement, be deemed property specifically devised to the extent of the value of the thing on which it is charged. Upon the failure or insufficiency of the thing on which it is charged, it shall be deemed property not specifically devised to the extent of such failure or insufficiency.

(b) Contrary provisions, plan or purpose. If the provisions of the will or the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a) hereof, the shares of distributees shall abate in such other manner as may be found necessary to give effect to the intention of the testator.

MPC, Sec. 184, continued.

COMMENT:

MPC, p. 173:

"A testator may determine the order in which the assets of his estate are applied to the payment of his debts. If he does not, then the provisions of this section lay down rules which may be regarded as approximating his intent. However, his intent may be indicated not only by an express designation of a property or fund or by an express statement of the order in which assets are to be applied, but also by the implied purpose of the devise or by the general testamentary plan. Thus, it is commonly held that, even in the absence of statute, general legacies to a wife, or to persons with respect to which the testator is in loco parentis, are to be preferred to other legacies in the same class because this accords with the probable purpose of the legacies. Moreover, the general testamentary plan is often important in determining matters of abatement when the surviving spouse elects to take against the will. The same may be true where abatement takes place to provide for the share of a pretermitted heir. The provisions of subsection (b) embrace these and other situations of similar character."

MODEL PROBATE CODE

Sec. 185. Contribution. When real or personal property which has been specifically devised, or charged with a legacy, shall be sold or taken by the personal representative for the payment of claims, general legacies, the family allowance, the shares of pretermitted heirs or the share of a surviving spouse who elects to take against the will, other legatees and devisees shall contribute according to their respective interests to the legatee or devisee whose legacy or devise has been sold or taken, so as to accomplish an abatement in accordance with the provisions of section 184 hereof. The court shall, at the time of the hearing on the petition for final distribution, determine the amounts of the respective contributions and whether the same shall be made before distribution or shall constitute a lien on specific property which is distributed.

Sec. 186. Determination of advancements. All questions of advancements made, or alleged to have been made, by an intestate to any heir may be heard and determined by the court at the time of the hearing on the petition for final distribution. The amount of every such advancement shall be specified in the decree of final distribution.

Sec. 187. Right of retainer. When a distributee of an estate is indebted to the estate, the amount of the indebtedness if due, or the present worth of the indebtedness, if not due, may be treated as an offset by the personal representative against any testate or intestate property, real or personal, of the estate to which such distributee is entitled; but such distributee shall be entitled to the benefit of any defense which would be available to him in a direct proceeding for the recovery of such debt.

MPC, Sec. 187, continued

COMMENT:

MPC, pp. 174-5:

" . . . The last clause . . . marks a departure from the common-law rule according to which the right of retainer was permitted with respect to debts barred by the statute of limitations or a discharge in bankruptcy. This prevents litigation such as has arisen in connection with these matters. . . . As to the broad meaning of 'offset,' see sec. 144 and comment thereto."

MODEL PROBATE CODE

Sec. 188. Interest on general legacies. General legacies shall bear interest at the legal rate for a period beginning nine months from the filing of the petition for the appointment of a personal representative until the payment of such legacies, unless a contrary intent is indicated by the will.

Sec. 189. Exoneration of encumbered property. When any real or personal property subject to a mortgage is specifically devised, the devisee shall take such property so devised subject to such mortgage unless the will provides expressly or by necessary implication that such mortgage be otherwise paid. The term "mortgage" as used in this section shall not include a pledge of personal property.

COMMENT:

MPC, p. 175:

"The purpose of this section is to abolish the common-law rule that the devisee of specific property subject to an encumbrance is entitled to exoneration out of the personal estate. The basis of the common-law rule that the personal estate has benefited from the creation of the debt all too often has no foundation in fact. The other basis of the rule that the decedent's personalty is the primary fund for the payment of debts is no longer tenable. Furthermore, it is contrary to the express provisions of sec. 150 of this Code.

"The doctrine of exoneration in any case rests upon an expressed or presumed intention. Consequently the terms of the act are restricted to mortgages, which include by definition vendors' liens and deeds of trust. See sec. 3(q) hereof. But pledges of personal property are excluded from the operation of this section.

"... Compare sec. 149 hereof, which deals with the privilege of the personal representative to pay off encumbrances, as distinguished from this section, which deals with the right of the distributee to require the personal representative to pay off encumbrances."

MODEL PROBATE CODE

Sec. 190. Payment to distributees in kind.

(a) When distributees to take in kind. When the estate is otherwise ready to be distributed, it shall be distributed in kind, unless the terms of the will otherwise provide or unless a partition sale is ordered. Except as provided in subsection (b) hereof, any general legatee may elect to take the value of his legacy in kind, and any distributee, who by the terms of the will is to receive land or any other thing to be purchased by the personal representative, may, if he notifies the personal representative before the thing is purchased, elect to take the purchase price or property of the estate which the personal representative would otherwise sell to obtain such purchase price.

(b) Exception where will directs purchase of annuity. If the terms of the will direct the purchase of an annuity, the person to whom the income thereof shall be directed to be paid shall not have the right to elect to take the capital sum directed to be used for such purchase in lieu of such annuity except to the extent that the will expressly provides that an assignable annuity be purchased. Nothing herein contained shall affect the rights of election by a surviving spouse against a testamentary provision as provided in this Code.

Sec. 191. Partition for purpose of distribution. When two or more distributees are entitled to distribution of undivided interests in any real or personal property of the estate, distribution shall be made of undivided interests therein unless the personal representative or one or more of such distributees shall petition the court not later than the hearing on the petition for final distribution, to make partition thereof. If such petition is filed, the court, after such notice to all interested persons as it shall direct, shall proceed to make partition, allot and divide the property in the same manner as provided by the statutes with respect to civil actions for partition, so that each party receives property of a value proportionate to his interest in the whole, and for that purpose the court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party. If partition is made in kind, the court may appoint two commissioners to partition said property, who shall have the powers and perform the duties of (commissioners) in civil actions for partition, and the court shall have the same powers with respect to their report as in such actions. In case equal partition cannot be had between the parties without prejudice to the rights or interests of some, partition may be made in unequal shares and by awarding judgment for compensation to be paid by one or more parties to one or more of the others. Any two or more parties may agree to accept undivided interests. Any sale under this section shall be conducted and confirmed in the same manner as other probate sales. The expenses of the partition, including reasonable compensation to the commissioners for their services, shall be equitably apportioned by the court among the parties, but each party must pay his own attorney's fees. The amount charged to each party shall constitute a lien on the property allotted to him.

Sec. 337-1. Suits for partition. When two or more persons hold or are in possession of real property as joint tenants or as tenants in common, in which one or more of them have an estate in fee, or a life estate in possession, a suit in equity may be brought by any one or more of them in the circuit court of the circuit in which the property is situated, for a partition of the property, according to the respective rights of the parties interested therein, and for a sale of the same or a part thereof if it appears that a partition cannot be made without great prejudice to the owners. The circuit judges of the several circuit courts, sitting at chambers in equity within their respective jurisdictions, shall have power, in any suit for partition, to proceed according to the usual practice of courts of equity in cases of partition, and according to the provisions of this chapter in enlargement thereof. The rights of the several parties, petitioners as well as respondents, may be put in issue and tried and determined in the suit as in this chapter provided.

Sec. 318-13. Procedure if partition undesirable. When any part of the property left by the intestate consists of real estate, and the same is to be divided among several children, and in the opinion of the probate court it is desirable that the real estate or any particular piece thereof be not divided, then the eldest son, and in succession of age after him the other sons, or if he or they renounce or decline the privilege, then the daughters in like succession may, after the property or piece of property has been duly appraised by a court of probate, elect to pay to the others the amount of their shares in money, in order that the land may not be divided. The same rule shall apply where a part of the claimants are children, and the rest are issue of deceased children of the intestate.

Sec. 192. Disposition of unclaimed assets.

(a) Heirs unknown. If there shall be no known heir of the decedent, all of his net estate not disposed of by will shall be ordered paid to the (state treasurer) to become a part of the (state escheat fund), subject to the further provisions of this section.

(b) Unclaimed property or money. If any distributee or claimant cannot be found, the personal representative shall sell the share of the estate to which he is entitled, pursuant to an order of court first obtained; and pay the proceeds to the (state treasurer) to become a part of the (state escheat fund).

(c) Receipts to be given and filed. When the personal representative shall pay any money to the (state treasurer) pursuant to this section, he shall take a receipt therefor and file it with the court with the other receipts filed in the proceeding. Such receipt shall be sufficient to discharge the personal representative in the same manner and to the same extent as though such distribution or payment were made to a distributee or claimant entitled thereto.

(d) Refunds of money so paid. The moneys received by the (state treasurer) pursuant to the provisions of this section shall be paid to the person entitled on proof of his right thereto or, if the (state treasurer) refuses or fails to pay because he is doubtful as to his duties in the premises, such person may apply to the court in which the estate was administered, whereupon the court upon notice to the (state treasurer) may determine the person entitled thereto and order the (treasurer) to pay the same accordingly. No interest shall be allowed thereon and such distributee or claimant shall pay all costs and expenses incident to the proceedings. If such proceeds are not paid or no application is made to the court within seven years after such payment to the (state treasurer), no recovery thereof shall be had.

Sec. 317-32. Procedure to escheat personalty. Whenever the administrator or executor of an estate is unable to discover any living heirs or legatees of his decedent, he shall give notice to all heirs or legatees by publication in such newspaper or newspapers and for such time as the court may direct, but not less than once a week for three successive weeks, of the date of the hearing upon his final accounts and direct all claimants of a distributive share in the estate of his decedent, to appear and present their claims at such hearing or be forever barred; provided, that such date of hearing shall be not less than ninety days after the first publication of such notice.

Claimants to a distributive share in such estate either as heirs or legatees who fail to appear and present their claims at such hearing shall be forever barred of all rights in such estate.

If no claims are presented at the hearing on such final accounts, or if such claims as may be allowed do not exhaust the personalty of the estate, any personal estate remaining after the settlement and approval of the final accounts of the administrator or executor, and the payment of such distributive shares as may be allowed by the court, shall escheat to the Territory and shall upon order of the court be transferred to the treasurer of the Territory by the administrator or executor as a government realization.

Sec. 317-33. Payments into court. When property is distributed to a distributee, legatee, heir or beneficiary who cannot be found, or who refuses to accept the same, or to give a proper voucher therefor, and the same consists of money, or corporate stocks, or bonds, the executor, administrator or trustee may deposit such property, in the name of the person entitled thereto, with the clerk of the circuit court in which the estate is pending in probate, or, in the case of a trust, with the clerk of the circuit court having jurisdiction over the subject matter of the trust, who shall give a receipt therefor and be liable upon his official bond therefor. The receipt shall be deemed and received with the same force and effect as if executed

Sec. 192, continued.

by such distributee, legatee, heir or beneficiary. Any executor, administrator or trustee under this section shall submit to the clerk of court, at the time of making such deposit, an affidavit setting forth the period of time such money, or corporate stocks or bonds have been in affiant's possession. Whenever it appears that the total period of time in which the affiant and the chief clerk have had possession of such money, or corporate stocks, or bonds exceeds seven years, the chief clerk may in such cases, at the direction of the court, prepare an escheat order and escheat such funds immediately to the treasurer of the Territory.

COMMENT:

IPC, p. 179:

"See sec. 22(b)(6) as to escheat."

MODEL PROBATE CODE

Sec. 193. Discharge of personal representative. Upon the filing of receipts or other evidence satisfactory to the court that distribution has been made as ordered in the final decree, the court shall enter an order of discharge. The discharge so obtained shall operate as a release from the duties of personal representative and shall operate as a bar to any suit against the personal representative and his sureties unless such suit be commenced within two years from the date of the discharge.

COMMENT:

MPC, p. 180:

"... There is danger of confusion arising from the language of some statutes, as to the precise significance of the term discharge. As used in this Code, a discharge does not mean that the personal representative is thenceforth absolved from all liability for his acts in his official capacity. As this section clearly indicates, he is not relieved from liability for past acts by a discharge, but merely ceases to be under any further duties to act as personal representative. Therefore, the last clause of this section is needed to bar his liability for past acts by lapse of time, if no suit is brought. Of course, the settlement of the account of a personal representative would be a bar to most proceedings to impose liability for his acts prior to that time. See sec. 179."

MODEL PROBATE CODE

HAWAII REPORTS

Sec. 194. Reopening administration. If, after an estate has been settled and the personal representative discharged, other property of the estate shall be discovered, or if it shall appear that any necessary act remains unperformed on the part of the personal representative, or for any other proper cause, the court, upon the petition of any person interested in the estate and, without notice or upon such notice as it may direct, may order that said estate be reopened. It may reappoint the personal representative or appoint another personal representative to administer such property or perform such acts as may be deemed necessary. Unless the court shall otherwise order, the provisions of this Code as to an original administration shall apply to the proceedings had in the reopened administration so far as may be; but no claim which is already barred can be asserted in the reopened administration.

A circuit judge in equity has power to open estate for accounting and decree proper distribution of assets of an estate where it is claimed that the probate court through fraudulent representation has made a wrongful distribution, 3 Haw. 489.

Circuit judge in probate has authority even after administrator's discharge to require the administrator to pay undisputed claim against the estate, 19 Haw. 232.

COMMENT:

MPC, p. 180:

"Under the provisions of this section, an estate may be reopened solely for the purpose of determining distributees. See comment to sec. 195. In such a case no appointment of a personal representative is necessary."

MODEL PROBATE CODE

Sec. 195. Determination of heirship.

(a) When proceedings may be had. Whenever any person has died leaving property or any interest therein and no administration has been commenced on his estate in this state, nor has any will been offered for probate in this state, within five years after his death, any person claiming an interest in such property as heir or through an heir may file a petition in any court which would be of proper venue for the administration of such decedent's estate, to determine the heirs of said decedent and their respective interests as heirs in the estate.

(b) Contents of petition. The petition shall state

- (1) The name, age, domicile and date of death of the decedent;
- (2) The names, ages and residence addresses of the heirs, so far as known or can with reasonable diligence be ascertained;
- (3) The names and residence addresses of any persons claiming any interest in such property through an heir, so far as known or can with reasonable diligence be ascertained;
- (4) A particular description of the property with respect to which such determination is sought;
- (5) The net value of the estate.

(c) Procedure. Upon the filing of the petition, the court shall fix the time for the hearing thereof, notice of which shall be given to

- (1) All persons known or believed to claim any interest in the property as heir or through an heir of the decedent,
- (2) All persons who may at the date of the filing of the petition be shown by the records of conveyances of the county in which any real property described in such petition is located to claim any interest therein through the heirs of the decedent and
- (3) Any unknown heirs of the decedent.

Sec. 195, continued.

Such notice shall be given by publication and, in addition, personal notice or notice by registered mail shall be given to every such person whose address is known to the petitioner. Upon satisfactory proofs the court shall make a decree determining the heirs of said decedent and their respective interests as heirs in said property.

(d) Certified copy of decree to be recorded. A certified copy of the decree shall be recorded at the expense of the petitioner in each county in which any real property described therein is situated, and shall be conclusive evidence of the facts determined therein as against all parties to the proceedings.

COMMENT:

MPC, pp. 182-3:

"In the administration of a decedent's estate normally the heirs will be determined in connection with the decree of distribution on final settlement. In two situations, however, something more is needed: (1) where the decree of distribution fails to cover some of the property of the estate, either because its existence was unknown at the time of the decree, because it was then believed to have belonged to some person other than the decedent or merely because of a mistake in the wording of the decree; and (2) where no administration has been commenced and the time for commencing administration has, by the provisions of sec. 83, expired. In the first situation, no determination of heirship, as such, is needed. The administration can be reopened under the provisions of sec. 194 solely for the purpose of amending the decree of distribution, and the modifications of this decree will accomplish everything which a separate determination of heirship could accomplish. The provisions of this section are, therefore, limited to the second situation. Here, neither probate nor administration is possible because the five-year limitation provided in sec. 83 operates as a bar. Moreover, under sec. 135(d) all creditors' claims would be barred as no administration is commenced within five years after the decedent's death.

"The sole purpose of this section is to determine the title to the property of the estate or to a designated part of it. Only after the expiration of the five-year period is this possible, since otherwise the rights of creditors must be determined, and the proceeding for the determination of heirship does not deal with creditors' rights. If a determination of heirship is desired prior to the expiration of the five-year period of limitation, a proceeding to administer the estate or to probate the will should be initiated; or, if it has already been initiated and closed, it should be reopened."

PART IV. GUARDIANSHIP--A. GENERAL PROVISIONS

Sec. 196. Definitions and use of terms. When used in Part IV-A, unless otherwise apparent from the context:

- (a) A "guardian" is one appointed by a court to have the care and custody of the person or of the estate, or of both, of an incompetent.
- (b) A "guardian ad litem" is one appointed by a court, in which particular litigation is pending, to represent a ward or an unborn person in that particular litigation.
- (c) An "incompetent" is any person who is
 - (1) Under the age of majority,
 - (2) Incapable by reason of insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness, excessive use of drugs, or other incapacity, of either managing his property or caring for himself or both.
- (d) A "ward" is an incompetent for whom a guardian has been appointed.

Sec. 338-3. Powers and duties of guardians of minors. Every guardian appointed . . . shall have the custody and tuition of the minor, and the care and management of his estate

Sec. 338-6. Testamentary guardian; appointment. Either parent . . . may by will appoint a guardian . . . of the person or property of any of his or her children . . . and every testamentary guardian shall have the same powers and duties as those of a guardian appointed by the court.

Sec. 338-11. Powers and duties of guardians of insane persons. Every guardian so appointed for an insane person shall have the care and custody of the person of the ward, and management of all his estate

Sec. 338-16. Powers and duties, guardian of spendthrift; Every guardian, so appointed for a spendthrift, shall have the care and custody of the person of the ward, and the management of all his estate,

Sec. 338-8. Guardian ad litem; next friend; appointment. Nothing contained in this chapter shall impair or affect the power of any court or judge to appoint a guardian to defend the interests of any minor impleaded in such court or before such judge, or interested in any suit or matter there pending, or their power to appoint or allow any person as next friend for a minor, to commence, prosecute or defend any suit in his behalf;

Sec. 338-3. Powers and duties of guardians of minors. Every guardian . . . shall continue in office until the minor arrives at the age of twenty years,

Sec. 196, continued.

RLH, continued.

Sec. 338-9. Guardians of insane persons and spendthrifts; definitions. The words "insane person" are intended to include every idiot, non-compos, lunatic and distracted person, and the word "spendthrift" is intended to include every one who is liable to be put under guardianship on account of excessive drinking, gaming, idleness or debauchery. These words shall be so construed in all the provisions relating to guardians and wards, contained in this or any other statute.

COMMENT:

MPC, sec. 196, differs from its Hawaii counterpart only in that testamentary guardians or guardians appointed by will are not recognized by the Code and all guardians are appointed by the court.

The use of the word "tuition" in describing the duties of guardians of the person of minors in RLH 1955, sec. 338-3, in contrast with the word "care" regarding guardians of the persons of the insane and spendthrifts in secs. 338-11 and 338-16, RLH 1955, is to emphasize the extra duty of education attached to guardians of minors. The words "care and custody" in MPC, sec. 196, embraces education of minors for MPC, sec. 219, describes one of the duties of the guardians of the person of minors to be "to see that he is properly trained and educated and that he has the opportunity to learn a trade, occupation or profession."

MODEL PROBATE CODE

Sec. 197. Relation of Part IV A to Part IV B. The provisions of Part IV A hereof shall extend to the persons specifically provided for under the terms of Part IV B, known as the Uniform Veterans' Guardianship Act. The provisions of Part IV A shall be cumulative to the provisions of Part IV B; but any conflict arising between Part IV B and other sections of Part IV shall be resolved by giving effect to the law as stated in Part IV B, in cases to which the latter applies.

Sec. 198. Application of other parts of Code. The provisions of Part I hereof, unless therein restricted to decedents' estates, apply to guardianships. Where sections in Part III are specifically incorporated by reference by any section of Part IV they shall be applied as if "decedent" read "ward," "personal representative" read "guardian" and the like, as the case may be, as far as applicable to guardianships and not inconsistent with the provisions of Part IV. In other cases, where no rule is set forth for guardianships in Part IV, the rule regarding decedents' estates in this Code shall likewise apply to guardianships when applicable thereto and not inconsistent with the provisions of Part IV, unless a contrary rule of court is promulgated or declared as provided by section 10 hereof.

COMMENT:

MPC, p. 191:

"Statutes regarding guardianships abound with specific references adopting the procedure in decedents' estates.

...

"Of course, when the guardian administers the estate of his deceased ward under sec. 235 hereof, any of the provisions of Part III might be applied to the administration proceedings contemplated by that section, provided that such provisions of Part III are not inconsistent with the provisions of sec. 235. This application would not be extensive, however, due to the relative simplicity of most estates which would be administered under sec. 235."

MODEL PROBATE CODE

Sec. 199. Jurisdiction: non-statutory guardianships abolished. The jurisdiction of the / / court over all matters of guardianship, other than guardianships ad litem, shall be exclusive, subject to the right of appeal. All forms of guardianship not expressly provided for in this Code, other than guardianships ad litem, are abolished.

REVISED LAWS OF HAWAII

Sec. 215-18. Circuit judges at chambers. The judges of the several circuit courts shall have power at chambers within their respective jurisdictions, but subject to appeal to the circuit and supreme courts according to law, as follows:

(c) . . . to appoint . . . guardians, and to compel . . . guardians to perform their respective trusts and to account in all respects for the discharge of their official duties; to remove any . . . guardian; . . .

Sec. 338-1. Circuit judges have jurisdiction. Circuit judges shall have jurisdiction to appoint guardians for the persons and estates or either of them of minors and others according to law.

HAWAII REPORTS

Hawaii's probate courts in the matter of the care and supervision of the estate of minors possess, except as modified by statute, all the powers which the court of chancery in England originally possessed under the common law, 13 Haw. 257, 262.

COMMENT:

MPC, sec. 199, when considered together with MPC, sec. 196, abolishes testamentary guardianships. As indicated in the discussion in connection with MPC, sec. 196, Hawaii's statutes do provide for testamentary guardians.

MODEL PROBATE CODE

REVISED LAWS OF HAWAII

Sec. 200. Who may be under guardianship. A guardian of the estate may be appointed for any incompetent. A guardian of the person may be appointed for any incompetent except a married minor who is incompetent solely by reason of his minority.

Sec. 338-1. Circuit judges have jurisdiction. Circuit judges shall have jurisdiction to appoint guardians for the persons and estates or either of them of minors and others according to law.

Sec. 338-2. Nomination of guardian for minor; appointment.

Sec. 338-10. . . . appointment of guardian of insane person.

Sec. 338-13. Guardian of spendthrift, . . .

Sec. 338-35. By marriage of female ward; . . . The marriage of any female who is under guardianship as a minor, shall operate as a legal discharge to her guardian so far as the guardianship of the person of the minor is concerned . . .

COMMENT:

In Hawaii only the guardianship of the person of female minors is terminated by marriage whereas under the Code the guardianship of the person of male minors would also be terminated by marriage. The Code Committee states thereto at p. 192:

"The reason why the married minor, who is otherwise competent, is not subject to guardianship of the person is that the control of such a guardian might interfere with the relationship of the married pair and might disrupt the marriage. If a person is legally qualified to marry, it should not be necessary to entrust the custody of his person to a guardian."

Sec. 338-35, RLH 1955, as originally enacted in 1859 provided that guardianships of the estate and person of female minors terminated upon marriage because at common law upon marriage, the estate and person of female minors fell under the control of their husbands. However in 1888, sec. 325-1, RLH 1955, titled "Separate property" was enacted whereby married women retained control of their separate property. Accordingly in 1929 the legislature amended sec. 338-35 so that guardianships of the estate of female minors did not terminate upon marriage, the House Committee on Judiciary explaining on p. 788 of the 1929 House Journal: "The present law has given rise to some confusion which this Bill clears up."

Since the reasons for removing the guardianship of the person of female minors upon marriage also logically applies to male minors, MPC, sec. 200, should be adopted in Hawaii.

MODEL PROBATE CODE

Sec. 201. Venue.

(a) Proper county. The venue for the appointment of a guardian shall be:

- (1) In the county in this state where the incompetent resides;
- (2) If the incompetent does not reside in this state, then in any county wherein there is any property of the incompetent.

(b) Proceedings in more than one county. If proceedings are commenced in more than one county, they shall be stayed except in the county where first commenced until final determination of venue in the county where first commenced. If the proper venue is finally determined to be in another county, the court shall transmit the original file to the proper county. The proceeding shall be deemed commenced by the filing of a petition; and the proceeding first legally commenced to appoint a guardian of the estate, or of the person and the estate, shall extend to all of the property of the incompetent in this state.

(c) Transfer of proceeding. If it appears to the court at any time before the termination of the guardianship that the proceeding was commenced in the wrong county, or that the residence of the ward has been changed to another county, or in case of guardianship of the estate that it would be for the best interest of the ward and his estate, the court, in its discretion, may order the proceeding with all papers, files and a certified copy of all orders therein transferred to another [] court which other court shall thereupon proceed to complete the proceeding as if originally commenced therein.

COMMENT:

In Hawaii venue, or the geographical division in which legal proceedings are had, for the appointment of a guardian is in the circuit where the alleged incompetent is domiciled. The Code provides that venue is in the county (or circuit) of the incompetent's residence, and the Code Committee rationalizes at pp. 193-4: "In most instances it will promote the best interests of the ward if the proceeding takes place in the county of the state where he actually lives."

REVISED LAWS OF HAWAII

Sec. 215-21. Limitations. The power and jurisdiction of circuit courts and circuit judges in chambers relating to causes of a civil nature as defined in sections 215-17 and 215-18, shall be limited as follows:

(e) Proceedings for the appointment of guardians and for all matters concerning the relation of guardian and ward, shall be brought in the circuit in which the person or a majority of such persons are domiciled, in whose behalf such proceedings are begun; provided, that if such person is domiciled without the Territory, or a majority of such persons are so domiciled, the proceedings may be brought in any circuit in which there is estate of such person or persons; . . .

Sec. 201, COMMENT, continued.

Under both the Hawaiian statutes and the MPC, the venue for the probate of a will and the administration of decedent's estates is in the county or circuit wherein the decedent was domiciled. Probate administration involves more or less immediate distribution, but guardianship often involves continuous administration over a considerable period of time. In the latter instance, activity would generally be centered in the place of the ward's residence.

Sec. 202. Qualifications of guardian. A parent shall not be denied appointment as guardian of the person of a minor ward by reason of such parent being under the age of twenty-one. The State Welfare Department or any other public department, bureau or agency of this state or any political subdivision thereof, or any charitable organization of this state, which may be charged with the supervision, control or custody of the incompetent, may be appointed guardian of the person or of the estate or both. With these exceptions no one is qualified to serve as guardian of the person or of the estate who does not have the qualifications of a personal representative under section 96(b) hereof. No one shall be appointed guardian of the person unless he is qualified to have the care and custody, and in case of a minor ward to provide for the training and education of the ward, and, except as provided in this section, unless he is a natural person.

Sec. 317-9. Residence qualifications. . . . guardians. . . . every guardian appointed by any court of the Territory, including any . . . co-guardian, in order to be qualified for such fiduciary office, shall be either an individual residing in the Territory or a trust company organized under the laws of the Territory.

The provisions hereof shall not apply to any . . . guardian who has been duly appointed, whether by court or otherwise, or who may be acting under a will admitted to probate, prior to May 12, 1943, or who may be appointed by court or who may be acting under a will admitted to probate subsequent to that date pursuant to the express provisions of the will of a decedent who has died prior to that date.

In case, subsequent to that date, any . . . guardian to whom the provisions hereof are applicable becomes disqualified under the provisions hereof, by reason of giving up residence within the Territory or otherwise; then his office as such fiduciary shall become vacant, and in such case, unless the order or instrument under which he has been acting otherwise makes lawful provision applicable in the case of a vacancy in such office, or unless any circuit judge sitting at chambers and having jurisdiction over the estate or ward expressly authorize any such . . . guardian to continue to hold such office under such conditions as the judge may see fit to impose, such vacancy may be filled by any circuit judge sitting at chambers and having jurisdiction over the estate or ward.

Sec. 81-45. Guardianship for mentally ill patient. Whenever it appears that any person required by court order to be hospitalized at the hospital has property or interest in property of any description situate in the Territory, and no guardian has been previously appointed, the medical director may make application to the circuit court of the first judicial circuit for the appointment of a suitable person as special guardian of the estate of such person until he is discharged from the hospital or a guardian is appointed under chapter 338. Such special

Sec. 202, continued.

Sec. 81-45, RLH, continued.

guardian may be the business manager or any other suitable employee of the hospital, approved by the medical director. . . .

Sec. 338-5. Small estates; clerk of court to act when. Whenever so requested by a parent, relative or next friend of a minor or insane person whose estate is of a value of less than \$1,500, the court may appoint the clerk of the court of that circuit as guardian of such minor or insane person, who shall serve in such capacity, with the full powers of and under like obligations as other guardians appointed under this chapter, . . . provided, further, that the right of such clerk to act as such guardian shall not be affected by reason of any increase of the estate to an amount in excess of \$1,500 as the result of any accumulations of income accruing from the original principal of the estate or by the increase in value of the principal; provided, further, that if the estate reaches in value the sum of \$3,000 a guardian shall then be appointed under the preceding sections of this chapter.

COMMENT:

Hawaii does not have provisions similar to the second sentence in MPC, sec. 202, above. Under MPC, secs. 96(b) and 202, officials and directors of agencies or institutions may qualify as guardians. The Code Committee states thereto at p. 194: "This matter and the question of what agencies and institutions are permitted to act as guardian may be largely matters of local policy and it may be necessary to alter the wording of the second sentence accordingly."

On the definitions of "supervision, control or custody" and "care and custody," the Committee states at p. 195:

". . . 'Care and custody' indicate the full powers and duties of a guardian of the person. . . . In addition, others, including particularly a parent of a minor, may be 'care and custody' of an incompetent although not appointed guardian. In particular cases, the State Welfare Department, or other agency or organization may, under the law, have more limited 'supervision, control or custody' of an incompetent. Of course one who has 'care and custody' of an incompetent would always have 'supervision, control or custody,' but the reverse would not necessarily be true."

Sec. 203. Preference in granting letters. The parents of an unmarried minor, or either of them, if qualified, shall be preferred over all others for appointment as guardian of the person. Subject to this rule, the court shall appoint as guardian of an incompetent the one most suitable who is willing to serve, having due regard to: (a) any request for the appointment contained in a will or other written instrument executed by the parent for the appointment as guardian of his minor child; (b) any request made by a minor of the age of fourteen years or over for the appointment as his guardian; (c) any request for the appointment made by the spouse of an incompetent; (d) the relationship by blood or marriage to the person for whom guardianship is sought.

Sec. 338-2. Nomination of guardian; appointment. If the minor is under the age of sixteen years, the judge may nominate and appoint his guardian, and if he is of the age of sixteen years or over, he may nominate his own guardian, who, if approved by the judge, shall be appointed accordingly. If the guardian nominated by the minor is not approved by the judge, or if the minor resides without the Territory, or if after being cited by the judge he neglects to nominate a suitable person, the judge may nominate and appoint the guardian, in the same manner as if the minor were under the age of sixteen years. Am. L. 1959, c. 80, s. 1.

Sec. 338-3. Power and duties. Every guardian appointed as aforesaid for minors shall have the custody and tuition of the minor, and the care and management of his estate, . . . provided that the natural guardian of the minor, if competent, shall be entitled to the custody of the person of the minor, and to the care of his education.

Sec. 338-6. Testamentary guardian; appointment. Either parent, with the written consent of the other, or without such consent if the other is dead or incapable of consent or has abandoned the child, may by will appoint a guardian or guardians of the person or property of any of his or her children for the period of the child's minority or for any less period, and every testamentary guardian shall have the same powers and duties as those of a guardian appointed by the court.

Sec. 338-10. Notice, hearing and appointment of guardian of insane person. . . . If after a full hearing it appears to the judge that the person in question is insane, the judge shall appoint a guardian of his person or estate or both, with the powers and duties hereinafter specified . . .

Sec. 203, continued.

RIH, continued.

Sec. 338-14. Notice, hearing, appointment. . . . If after a full hearing it appears to the judge that the person complained of comes within the description contained in section 338-13 [spendthrift], he shall appoint a guardian of his person and estate, with the powers and duties hereinafter specified.

HAWAII REPORTS

Where appointment of guardian is made by will it becomes absolute and circuit judges have no power to make another and different appointment, 31 Haw. 705, 709.

Welfare of child is the guide in appointment of guardian, 11 Haw. 679.

COMMENT:

In Hawaii the statutes provide that a surviving parent may nominate a guardian for his minor child by will and that a minor of the age of sixteen or over may nominate his own guardian subject to the approval of the court. In instances where the court appoints the guardian, the statutes are silent and the court is guided by the "welfare of the incompetent."

Under the MPC all guardians are appointed by the court and MPC, sec. 203, is not intended, except for parents of the person, to state a preference schedule. The Committee states at p. 196:

"Under the first sentence of sec.-203 the court should appoint the parent as guardian of the person if he is qualified and application is made for his appointment. . . . In all other cases, the welfare of the ward is the sole consideration. This section does not require the appointment of the person named in the parent's will nor does it establish any other order of preference. The four factors named in (a) to (d) should be considered by the court, but they are not to be considered in any particular order of priority, nor to the exclusion of other factors, such as the religious faith and race of the proposed guardian of the person and the incompetent. While, if the incompetent's estate is small the court probably will endeavor to select one person to act as both guardian of the person and of the estate, some factors may be of greater weight in the selection of a guardian of the person than in the selection of a guardian of the estate or vice versa. . . ."

MODEL PROBATE CODE

Sec. 204. Petition for appointment of guardian. Any interested person may file a petition for the appointment of himself or some other qualified person as guardian of an incompetent. Such petition shall state:

- (a) The name, age, residence, and post office address of the incompetent;
- (b) The nature of his incapacity in accordance with the classification set forth in section 196(c) hereof;
- (c) The approximate value and description of his property, including any compensation, pension, insurance or allowance to which he may be entitled;
- (d) Whether there is, in any state, a guardian for the person or estate of the incompetent;
- (e) The residence and post office address of the person whom petitioner asks to be appointed guardian;
- (f) The names and addresses, so far as known or can reasonably be ascertained, of the persons most closely related by blood or marriage to the incompetent;
- (g) The name and address of the person or institution having the care and custody of the incompetent;
- (h) The names and addresses of wards for whom any natural person whose appointment is sought is already guardian;
- (i) The reasons why the appointment of a guardian is sought and the interest of the petitioner in the appointment.

REVISED LAWS OF HAWAII

Sec. 338-2. Nomination of guardian; appointment. If the minor is under the age of sixteen years, the judge may nominate and appoint his guardian, and if he is of the age of sixteen years or over, he may nominate his own guardian [am. L. 1959, c. 80, s. 1.]

Sec. 338-10. . . . appointment of guardian of insane person. When the relations or friends of any insane person apply to any of the judges . . . to have a guardian appointed for such person,

Sec. 338-13. Guardian of spendthrift, petition for. . . . his friends or relations may present a complaint to any of the judges hereinbefore mentioned, setting forth the facts and circumstances of the case, and praying to have a guardian appointed for him.

Sec. 338-18. Guardians of nonresidents; appointment. When any minor or other person liable to be put under guardianship according to the provisions of this chapter, resides without the Territory, and has any estate therein, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may apply to a circuit judge in any circuit in which there is property belonging to the minor or other person

Sec. 205. Single guardianship for two or more incompetents. When application is made for the appointment of a guardian for two or more incompetents who are children of a common parent, or are parent and child, or are husband and wife, it shall not be necessary that a separate petition, bond or other paper be filed for each incompetent and the guardianship of all may be considered as one proceeding except that there shall be a separate final accounting when the guardianship terminates as to one ward but not as to the others.

Sec. 215-21. Limitations. The power and jurisdiction of circuit courts and circuit judges in chambers relating to causes of a civil nature as defined in sections 215-17 and 215-18, shall be limited as follows:

(e) Proceedings for the appointment of guardians and for all matters concerning the relation of guardian and ward, shall be brought in the circuit in which the person or a majority of such persons are domiciled, in whose behalf such proceedings are begun; provided, that if such person is domiciled without the Territory, or a majority of such persons are so domiciled, the proceedings may be brought in any circuit in which there is estate of such person or persons; (emphasis supplied)

MODEL PROBATE CODE

Sec. 206. Participation by State Welfare Department. The State Welfare Department of this state may petition the court for the appointment or removal of any guardian of the person or of the estate, and may appear as a party in any hearing involving a guardianship. It may at any time investigate and report to the court concerning the care and custody of a ward and the fitness and conduct of his guardian, and shall make such investigation and report whenever ordered to do so by the court.

COMMENT:

Hawaii's Social Services Department does not have the powers described in MPC, sec. 206.

Sec. 207. Notice of hearing on petition for guardianship. Before appointing a guardian other than a temporary guardian, notice of hearing shall be served upon the following unless they have signed the petition for appointment of the guardian or have waived notice of the hearing:

- (a) The incompetent, if over fourteen years of age;
- (b) The parents if the incompetent is a minor, and the spouse of the incompetent, if any;
- (c) Any other person who has been appointed guardian, or the person having the care and custody of the incompetent, if any;
- (d) At least one of the closest adult relatives of the incompetent by blood or marriage;
- (e) If directed by the court,
 - (1) Any department, bureau or agency of the United States or of this state or any political subdivision thereof, which makes or awards compensation, pension, insurance or other allowance for the benefit of the ward's estate;
 - (2) Any department, bureau or agency of this state or any political subdivision thereof or any charitable organization of this state, which may be charged with the supervision, control or custody of the incompetent;
 - (3) Any interested person.

If the incompetent is over fourteen years of age, there shall be personal service upon him if personal service can be had. Service on others may be had in accordance with section 14 hereof. The court for good cause shown may reduce the number of days of notice, but in every case at least three days' notice shall be given. It shall not be necessary that the person for whom guardianship is sought shall be represented by a guardian ad litem in the proceedings.

Sec. 338-10. Notice, hearing and appointment of guardian of insane person. . . . the judge shall cause notice to be given to the supposed insane person of the time and place appointed for hearing the case, not less than fourteen days before the time so appointed. The judge shall also cause notice to be given to the husband, wife, parent, or any child or children of the supposed insane person, if any there be residing within the jurisdiction of the court. In case it appears by return of the summons or by affidavit to the satisfaction of the judge that no such person can be found, the judge may appoint a guardian ad litem to protect the interest of the supposed insane person and cause such notice to be given to such guardian ad litem. . . .

It is provided, however, that in any case involving a person who is in a comatose state, the notice above provided to such person need not be given if the attending physician endorses the application for guardianship.
[am. L. 1957, c. 290, s. 1.]

Sec. 338-14. Notice, hearing, appointment of guardian for spendthrift. The judge shall cause notice to be given to such supposed spendthrift, of the time and place appointed for hearing the case, not less than fourteen days before the time so appointed. . . .

Sec. 338-18. Guardians of nonresidents: appointment. When any minor or other person liable to be put under guardianship according to the provisions of this chapter, resides without the Territory, and has any estate therein, . . . after notice to all persons interested, to be given in such manner as the judge shall order or as shall be required by law or rule of court, . . .

Sec. 207, continued.

COMMENT:

Hawaii's statutes do not specifically provide for notice in proceedings to appoint guardians for minors; however, to the extent that sec. 338-2, RLH 1955, gives minors age sixteen or over the right to nominate their own guardians, notice to such minors follows.

As to notice to natural guardians of minors, there is no Hawaiian case law in point. However, it has generally been held in other states that guardianship proceedings, ousting parents of the custody of their minor children without notice and an opportunity to be heard, do not preclude such parents from asserting their right to the custody of their children. See 25 American Jurisprudence, p. 30.

The Code Committee elaborates at p. 199 upon MPC, sec. 207's notice requirements as follows:

"... Under this section the court may require notice to the State Welfare Department. . . . Service on the parent or the spouse, and in many cases on the person having care and custody of the incompetent, would obviate compliance with service in accordance with (d) above. Of course, under (e)(3) the court could always order service on any particular person."

Sec. 208. What persons to receive notice of other hearings. Whenever notice of a hearing in a guardianship proceeding is required, notice of hearing shall be served upon the following who do not appear or waive notice of the hearing:

- (a) The guardian of the person;
- (b) The guardian of the estate;
- (c) If directed by the court,
 - (1) Any department, bureau or agency of the United States or of this state or any political subdivision thereof, which makes or awards compensation, pension, insurance or other allowance for the benefit of the ward's estate;
 - (2) Any department, bureau or agency of this state or any political subdivision thereof or any charitable organization of this state, which may be charged with the supervision, control or custody of the incompetent;
 - (3) Any interested person.

COMMENT:

From MPC, p. 199:

"Sections 207 and 233 provide specially for service of notice of hearing on petition for guardianship and notice of hearing upon accounts. Otherwise sec. 14 applies as to manner of service."

Sec. 338-34. Resignation, removal and death. Where any guardian . . . becomes insane or otherwise incapable of discharging his trust, or unsuitable therefor, or where it appears to any of such judges that it would be for the best interests of the minor to remove the guardian of its person, any of the judges, after notice to such guardian and to all others interested, may remove him, . . . (emphasis supplied)

Sec. 338-12. Guardians of insane may complete contracts of wards to convey real property. . . . The conveyance may be authorized or directed only after a hearing of which such notice shall have been given as the judge shall prescribe and which may be by advertisement in a newspaper, by posting, by mailing or otherwise. . . .

Sec. 338-46. Notice. No license to sell real estate shall be granted until notice by public advertisement or otherwise, as the judge shall order, shall have been given to the next of kin of the ward, and to all persons interested in the estate, to appear and show cause why the same should not be granted.

MODEL PROBATE CODE

Sec. 209. Request for special notice of hearings. At any time after the issuance of letters of guardianship,

- (a) Any department, bureau or agency of the United States or of this state or any political subdivision thereof, which makes or awards compensation, pension, insurance or other allowance for the benefit of the ward's estate, or
- (b) Any department, bureau or agency of this state or any political subdivision thereof or any charitable organization of this state, which may be charged with the supervision, control or custody of the incompetent, or
- (c) Any interested person

may, in person or by attorney, serve upon the guardian or upon his attorney, and file with the clerk of the court where the proceedings are pending, with a written admission or proof of service, a written request stating that he desires written notice of all hearings on petitions for the settlement of accounts, for the sale, mortgage, lease or exchange of any property of the estate, for allowances of any nature payable from the ward's estate, for the investment of funds of the estate, or for the removal, suspension, or discharge of the guardian or final termination of the guardianship. The applicant for such notice must include in his written request his post office address or that of his attorney. Unless the court otherwise directs, upon filing the request, the person shall be entitled to notice of all such hearings or of such of them as he designates in his request.

MODEL PROBATE CODE

Sec. 210. Proof required for appointment of guardian.

Before appointing a guardian the court must be satisfied:

- (a) That the person for whom a guardian is prayed is either a minor or otherwise incompetent;
- (b) That a guardianship is desirable to protect the interests of the incompetent;
- (c) That the person to be appointed guardian is qualified and is the person most suitable to act as such under this Code.

REVISED LAWS OF HAWAII

Sec. 338-10. Notice, hearing and appointment of guardian of insane person. . . . If after a full hearing it appears to the judge that the person in question is insane, the judge shall appoint a guardian of his person or estate or both, . . .

Sec. 338-14. Notice, hearing, appointment. . . . If after a full hearing it appears to the judge that the person complained of comes within the description contained in section 338-13 (see below), he shall appoint a guardian of his person and estate, . . .

Sec. 338-13. Guardian of spendthrift, petition for.
When any person by excessive drinking, gaming, idleness or debauchery of any kind, so spends, wastes or lessens his estate, as to expose himself or his family to want or suffering, . . .

Sec. 211. Determination of incompetency. No guardian of the person or of the estate, or of both, of any person other than a minor, can be appointed until such person has been adjudicated to be incompetent upon sufficient competent evidence in a proceeding instituted for that purpose as provided by law.

Sec. 338-10. Notice, hearing and appointment of guardian of insane person. . . . If after a full hearing it appears to the judge that the person in question is insane, the judge shall appoint a guardian of his person or estate or both, . . .

Sec. 338-14. Notice, hearing, appointment /of guardian for spendthrift/. . . . If after a full hearing it appears to the judge that the person complained of comes within the description contained in section 338-13 [see below], he shall appoint a guardian of his person and estate, . . .

Sec. 338-13. Guardian of spendthrift, petition for. When any person by excessive drinking, gaming, idleness or debauchery of any kind, so spends, wastes or lessens his estate, as to expose himself or his family to want or suffering, . . .

COMMENT:

Under both the MPC and the RLH there are separate provisions for adjudication of incompetency and for commitment to institutions. The Code Committee states thereto at p. 201:

" . . . a person may well be committed to an institution because of minor mental derangements, and yet it may not be desirable either to put him under guardianship or to adjudicate him to be insane. Likewise, statutes should provide specifically for his release from such an institution; but those provisions should be distinct from general guardianship provisions, although they may be included in the same probate code."

In 28 Haw. 469 at p. 471 the Hawaii Supreme Court stated that it is not necessary to the appointment of a guardian of an alleged insane person that proceedings be had under the provisions committing such person to an institution. The court observed that the provisions of the commitment chapter applied to the restraint and detention of alleged insane persons whose liberty might be unsafe or dangerous to the community, that its provisions have no application to proceedings for the appointment of guardians for insane persons.

Sec. 212. Order appointing guardian. If on the hearing the court is satisfied that the requirements for the appointment of a guardian as set forth in this Code are proved, the court shall appoint one or two guardians of the person or of the estate or both; but not more than one guardian of the person shall be appointed unless they be husband and wife. The order shall specify the amount of the bond to be given.

Sec. 338-2. Nomination of guardian /for a minor/; appointment. If the minor is under the age of sixteen years, the judge may nominate and appoint his guardian, and if he is above the age of sixteen years, he may nominate his own guardian, who, if approved of by the judge, shall be appointed accordingly. . . . (emphasis supplied)

Sec. 338-3. Powers and duties. Every guardian appointed as aforesaid shall have the custody and tuition of the minor, and the care and management of his estate, . . . provided that the natural guardian of the minor, if competent, shall be entitled to the custody of the person of the minor, and to the care of his education.

Sec. 338-10. Notice, hearing and appointment of guardian of insane person. . . . If after a full hearing it appears to the judge that the person in question is insane, the judge shall appoint a guardian of his person or estate or both, . . .

Sec. 338-14. Notice, hearing, appointment /of guardian for spendthrift/. . . . If after a full hearing it appears to the judge that the person complained of comes within the description contained in section 338-13, he shall appoint a guardian of his person and estate, . . .

Sec. 213. Bond of guardian. If the guardianship be of the person only, the amount of the bond shall not exceed \$1,000, or the court may dispense with the bond altogether. At every accounting the court shall inquire into the sufficiency of the bond and of the sureties, and if either or both are found insufficient the guardian shall be ordered to file a new bond. If by the terms of a will the testator expresses the wish that no bond be required of the person whom he requests to be appointed guardian, that person may be relieved of giving a guardian's bond so far as it applies to property given by the will to the incompetent subject to the conditions specified in section 107(a) hereof. Sections 106 to 118 inclusive hereof with respect to the bonds of personal representatives shall be applicable to the bonds of guardians.

Sec. 338-4. Bond from guardians of ward's estate. Every such guardian /of a minor/ shall give a bond with surety or sureties, to the judge, in such sum as the judge shall order, with conditions as follows:

(a) To make a true inventory of all the real estate and all the goods, chattels, rights and credits of the ward, that come to his possession or knowledge, and to return the same into the probate court at such times as the judge shall order;

(b) To dispose of and manage all such estate and effects according to law, and for the best interests of the ward, and faithfully to discharge his trust in relation thereto;

(c) To render an account, on oath, of the property in his hands, including the proceeds of all real estate sold by him, and of the management and disposition of all the property, within one year after his appointment, and at such other times as may be required by law or as the court shall direct;

(d) At the expiration of his trust, to settle his accounts with the judge, or with the ward, or his legal representatives, and to pay over and deliver all the estate and effects remaining in his hands, or due from him on such settlement, to the persons who are lawfully entitled thereto.

If the trust extends solely to the guardianship of the person of the minor, the guardian shall not be required to give bond.

If the guardianship is of the estate of the minor, and the estate consists solely of bonds or deposits of funds, or both, the court may waive bond if the estate bonds and the passbook or other indicia of deposit are placed for safe-keeping in such a manner that none of the bonds or funds may be released without specific order of the court.

Sec. 338-7. Bond, unless exempted. Every testamentary guardian shall give a bond in like manner, and with like

RLH, continued.

condition, as is hereinbefore required of a guardian appointed by the judge; provided that when the testator in the will appointing the guardian has ordered or requested that no bond shall be given, the bond shall not be required, unless from a change in the situation or circumstances of the guardian, or for other sufficient cause, the judge thinks proper to require it.

Sec. 338-11. Powers and duties. . . . He [every guardian for an insane person/ shall give a bond to the judge appointing him, in like manner, and with the like condition, as is before prescribed with respect to the guardian of a minor, excepting that the provision relating to the education of the ward shall be omitted in the condition of the bond.

. . .

Sec. 338-16. Powers and duties, guardian of spendthrift; bond. . . . He [every guardian for a spendthrift/ shall give bond to the judge appointing him, in like manner and with the like condition, as is before directed with respect to the guardian of an insane person.

Sec. 338-20. Bond. Every such guardian [of a nonresident/ shall give bond to the judge appointing him, in like manner and with the like conditions, as is above provided with respect to other guardians; excepting that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardians, shall be confined to such estate and effects as come to his hands in the Territory, and that the provisions respecting the custody of the ward shall not be applicable unless the ward comes to reside within the Territory.

Sec. 338-32. New bond may be required and sureties discharged. The judge may require a new bond to be given by any guardian, and may discharge the existing sureties from future responsibility, whenever the judge may deem it proper so to do.

RLH, continued.

Sec. 338-49. Bond. Every guardian licensed to sell real property under this chapter shall, before the sale, give bond to the judge granting the license, with sufficient surety or sureties, with condition to sell the same in the manner prescribed by the judge, and to account for and dispose of the proceeds of the sale in the manner provided by law.

COMMENT:
MPC, p. 202:

"The bond is for the protection of the ward and his creditors, and also the ward's distributees if the guardian administers his deceased ward's estate under sec. 235. Under the last sentence the amount of the bond is determined in the same manner as the bond of a personal representative. . . . As to time limitations in actions upon the guardian's bond, see sec. 236 of this Code with which compare sec 119."

MPC secs. 106 to 118 and the comments thereto governing bonds of personal representatives are pertinent to a-comparison of the Hawaii and Model Probate Code provisions relating to bonds of guardians. This is because Hawaii's statutes on guardianship bonds reflect common law regarding personal representatives' bonds except in the following particular:

The last paragraph of sec. 338-4, RLH 1955 provides that where guardianship of the estate of minors are involved and where the estate consists "solely of bonds or deposits of funds, or both", the bond might be waived.

MODEL PROBATE CODE

Sec. 214. When letters to be issued. When a duly appointed guardian has given such bond as may be required and the bond has been approved by the court, letters under the seal of the court shall be issued to him.

MODEL PROBATE CODE

Sec. 215. Temporary guardian. If the court finds that the welfare of an incompetent requires the immediate appointment of a guardian of his person or of his estate, or of both, it may, with or without notice, appoint a temporary guardian for the incompetent for a specified period not to exceed sixty days, and remove or discharge him or terminate the trust. The appointment may be to perform duties respecting specific property or to perform particular acts, as stated in the order of appointment. The temporary guardian shall make such reports as the court shall direct, and shall account to the court upon termination of his authority. In other respects the provisions of this Code concerning guardians shall apply to temporary guardians and an appeal may be taken from the order of appointment of a temporary guardian.

COMMENT:

HPC, p. 203:

"It will be noted that under sec. 20(b) no appeal is allowed from the order appointing a special administrator, while an appeal is specifically permitted by the terms of sec. 215 from the order appointing a temporary guardian. The reasons for preventing an improper person from acting as the temporary guardian of the person and estate are more cogent than in the decedent's estate situation where the delay caused by appeals overrides the considerations as to whether the special administrator selected was a proper one. In this regard sec. 20(b) does not apply to temporary guardianships under sec. 198 and by their terms secs. 20(c) and 20(d) do not apply in any way to guardianships. So far as may be, other provisions of sec. 20 apply to appeals in all guardianship matters under sec. 198.

". . . A number of states have no provision for special or temporary guardians. Doubtless this is due to the fact that the guardian ad litem often serves the purpose of a temporary guardian. . . . See sec. 105 of the Model Probate Code as to special administrators. While there is doubtless less need for a temporary guardian than for a special administrator, there are some occasions where there should be a temporary guardian."

However, guardians ad litem are appointed only to prosecute or defend for an infant in any suit to which he may be a party.

Hawaii does not have a temporary guardian statute.

2010 REVISIONS

REVISED LAWS OF HAWAII

Sec. 338-8. Guardian ad litem; next friend; appointment. Nothing contained in this chapter shall impair or affect the power of any court or judge to appoint a guardian to defend the interests of any minor impleaded in such court or before such judge, or interested in any suit or matter there pending, or their power to appoint or allow any person as next friend for a minor, to commence, prosecute or defend any suit in his behalf;

. . .

MODEL PROBATE CODE

Sec. 216. When guardian may be removed. When a minor ward has attained the age of fourteen years, the guardian of his person may be removed on petition of the ward to have another person appointed guardian if it is for the best interests of the ward that such other person be appointed. A guardian may also be removed on the same grounds and in the same manner as is provided in section 98 hereof for the removal of a personal representative.

HAWAII REPORTS

An infant under guardianship upon reaching the age of sixteen years is not thereby empowered to have her guardian removed and the one of her selection appointed, 31 Haw. 547. Not removable except for cause specified by statute, 39 Haw. 39.

REVISED LAWS OF HAWAII

Sec. 338-34. Resignation, removal and death. Where any guardian appointed either by a testator or by any of the judges hereinbefore mentioned, becomes insane or otherwise incapable of discharging his trust, or unsuitable therefor, or where it appears to any of such judges that it would be for the best interests of the minor to remove the guardian of its person, any of the judges, after notice to such guardian and to all others interested, may remove him, and every guardian may upon his request be allowed to resign his trust, when it appears to the judge proper to allow the same. . . .

MODEL PROBATE CODE

Sec. 217. Appointment of successor guardian. When a guardian dies, is removed by order of the court, or resigns and such resignation is accepted by the court, the court may appoint another guardian in his place in the same manner and subject to the same requirements as are herein provided for an original appointment of a guardian.

REVISED LAWS OF HAWAII

Sec. 338-34. Resignation, removal and death. . . . Upon every such resignation or removal, and also upon the death of the guardian, the judge may appoint another in his stead.

COMMENT:

MPC, p. 204:

"Sections 216 and 217 correspond to secs. 98 and 99. Section 216 adds the additional provisions as to the minor ~~fourteen~~ years of age who wants a different guardian."

MODEL PROBATE CODE

Sec. 218. Inventory and appraisement. When a guardian of the estate has been appointed, an inventory and appraisement of the ward's estate shall be made in the same manner and subject to the same requirements as are provided in section 120 hereof for the inventory and appraisement of a decedent's estate.

REVISED LAWS OF HAWAII

Sec. 338-4. Bond from guardians of ward's estate. Every such guardian shall give a bond . . . with conditions as follows:

(a) To make a true inventory of all the real estate and all the goods, chattels, rights and credits of the ward, that come to his possession or knowledge, and to return the same into the probate court at such times as the judge shall order; . . .

Sec. 338-29. Appraisement, disposition of personalty. Upon the taking of any inventory required by this chapter, the estate and effects comprised therein shall, if the judge deem it necessary, be appraised by from one to three suitable persons, to be appointed and sworn by the judge.

Sec. 219. General duties of guardian.

(a) Guardian of the person. It is the duty of the guardian of the person to care for and maintain the ward and, if he is a minor, to see that he is properly trained and educated and that he has the opportunity to learn a trade, occupation or profession. The guardian of the person may be required to report the condition of his ward to the court, at regular intervals or otherwise as the court may direct.

(b) Guardian of the estate. It is the duty of the guardian of the estate to protect and preserve it, to invest it prudently, to apply it as provided in this Code, to account for it faithfully, to perform all other duties required by him by law, and, at the termination of the guardianship, to deliver the assets of the ward to the persons entitled thereto. Except as otherwise provided in Part IV hereof, the law of trusts shall apply as far as may be in determining the duties of a guardian of the estate.

Sec. 220. Powers of guardian of the person; custody. The guardian of the person shall be entitled to the custody of the ward, but shall not have power to bind the ward or his property.

COMMENT:

MPC, p. 205

". . . As to the last sentence of subsection (b), see Introductory Comment to Part IV. Contrasting with the trustee, however, the guardian does not have title to the ward's property. See Sec. 221 and comment thereto.

Sec. 338-3. Powers and duties. Every guardian appointed as aforesaid shall have the custody and tuition of the minor, and the care and management of his estate, and shall continue in office until the minor arrives at the age of twenty years, or until the guardian is discharged according to law; provided that the natural guardian of the minor, if competent, shall be entitled to the custody of the person of the minor, and to the care of his education.

Sec. 338-11. Powers and duties. Every guardian so appointed for an insane person shall have the care and custody of the person of the ward, and management of all his estate, until the guardian is legally discharged. . . .

Sec. 338-16. Powers and duties, guardian of spendthrift; bond. Every guardian, so appointed for a spendthrift, shall have the care and custody of the person of the ward, and the management of all his estate, until the guardian is legally discharged. . . .

Sec. 338-19. Powers and duties. Every guardian appointed according to the provision section 338-18 (Guardians of nonresidents) shall have the same powers and duties, with respect to any estate of the ward, that is found within the Territory, and also with respect to the person of the ward, if he comes to reside therein, as are prescribed with respect to any other guardian appointed under this chapter.

COMMENT: continued:

"Under subsection (a), the guardian of the person must see that the child is maintained from the guardian's personal funds if necessary. If the guardian of the person is the parent, or stands in loco parentis, the ward's estate cannot be used for maintenance except as directed by the court under sec. 224 (b). If the guardian of the person is neither the parent, nor a person standing in loco parentis the ward's property may be used for his maintenance under sec. 224(a); see also sec. 223.

"Of course, under subsection (a) and sec. 220 when a guardian of the person of a minor is appointed, other than the parent, the parent's right of custody ceases. However, the guardian of the estate, as such, has no rights or duties relative to the custody of the ward. See sec. 221.

MODEL PROBATE CODE

Sec. 221. Title and possession of estate. The guardian of the estate shall take possession of all of the ward's real and personal property, and of rents, income, issues and profits therefrom, whether accruing before or after his appointment, and of the proceeds arising from the sale, mortgage, lease or exchange thereof. Subject to such possession, the title to all such estate, and to the increment and proceeds thereof, shall be in the ward and not in the guardian.

COMMENT:

MPC, pp. 205-6:

" . . . The second sentence states the common-law rule as to title. . . . See Introductory Comment to Part IV. Cf. secs. 84, 124 of this Code. As to actions, see sec. 228."

MODEL PROBATE CODE

Sec. 222. Continuation of business. In all cases where the court deems it advantageous to continue the business of a ward, such business may be continued by the guardian of the estate on order of the court and according to the rules specified in section 131 hereof for the continuation of the business of a decedent by a personal representative when no testamentary provisions are involved.

COMMENT:

25 American Jurisprudence, pp. 52-53

" . . . Cases may sometimes occur where a ward inherits an interest in a business and it is necessary temporarily to continue the business in order that it may be sold as a going and successful enterprise; but even in such a case the guardian must apply for and obtain an order of court authorizing him to continue the business, and such an order will only be granted in case of evident necessity and under the most careful limitations. Sometimes, the continuance of a business may also be authorized by the terms of the will under which the ward received the property or by statute. But it has been held that a court of probate does not acquire power to permit a guardian to carry on a trade or business in behalf of his ward from a statute providing that guardians may manage their wards' estates under the direction of such court, and lease their lands and loan their money, and do all other acts which the court may deem for the benefit of their wards.

MODEL PROBATE CODE

REVISED LAWS OF HAWAII

Sec. 224. Application of income and principal for benefit of ward.

(a) Income and principal; order of court. So far as is necessary for the purpose except as provided in subsection (b) hereof, the income of the ward's estate shall be first applied to his care, maintenance and education. On order of the court, any surplus of the income may be applied to the care, maintenance and education of the dependents of the ward. If the income is not sufficient to care for, maintain and educate the ward and his dependents, the court may order the expenditure of such portion of the principal as it deems necessary from time to time for such purposes.

(b) When parents able to care for ward. If the ward is a minor, and his parents or those standing in loco parentis are able to care for, maintain and educate him, neither the income nor the principal shall be expended for any purpose except as ordered by the court.

Sec. 338-25. Manage estate, support ward and family, etc. The guardian shall . . . apply the income and profits thereof, so far as may be necessary for the comfortable and suitable maintenance and support of the ward and his family. If the income and profits are insufficient for that purpose, the guardian may sell the real estate, upon obtaining a license therefor as provided by law, and shall apply the proceeds of the sale, so far as may be necessary, for the maintenance and support of the ward and his family.

Sec. 338-3. Powers and duties. . . . provided that the natural guardian of the minor, if competent, shall be entitled to the custody of the person of the minor, and to the care of his education.

Sec. 338-38. Sale of real estate for ward's maintenance. When the income of the estate of any person under guardianship, whether as a minor, insane person or spendthrift, is insufficient to maintain the ward and his family, his guardian may sell his real estate for that purpose, upon obtaining a license therefor, and proceeding therein in the manner hereafter in this chapter provided.

Sec. 338-40. Application of proceeds from sale for maintenance. If the estate is sold for the maintenance of the ward and his family, as provided in section 338-25, the guardian shall apply the proceeds of the sale to that purpose, as far as necessary, and shall put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital is wanted for the maintenance of the ward and his family, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward.

HAWAII REPORTS

Guardian may spend reasonable amount out of income for the support of the ward, and with the approval of the court may expend the capital, 17 Haw. 517.

Sec. 224, continued.

COMMENT:

MPC, p. 207:

"... In cases coming under subsection (b) the compensation and necessary expenses of the guardian will of course be ordered by the court. See sec. 232 hereof."

MODEL PROBATE CODE

Sec. 225. Investments. The guardian of the estate shall invest the property of the ward in accordance with the rules applicable to investments of trust estates by trustees, except that:

- (a) No investment shall be made without prior order of the court in any property other than unconditional interest-bearing obligations of this state or of the United States and in obligations the interest and principal of which are unconditionally guaranteed by the United States;
- (b) In all cases the guardian must report in writing his purchase or sale of any trust investment on the date thereof;
- (c) If it is for the best interests of the ward that his specific property be used by the ward rather than sold and the proceeds invested, the court may so order.

REVISED LAWS OF HAWAII

Sec. 338-26. Guardianship estates, leases, investments, etc. Any circuit judge sitting at chambers in probate and having jurisdiction over a guardianship, on petition of the guardian and after such notice to those interested as shall be ordered by the judge, may, if it appears to be for the benefit of the ward authorize and direct the guardian . . . to invest moneys of the ward in the purchase of real or personal property, or the constructing, improving or repairing of buildings or other improvements on the land belonging to the ward or in such other manner as the judge shall deem to be most for the benefit of the ward.

. . . .

Sec. 340-6. Investments. Every guardian . . . unless it is otherwise ordered by the court, which order may be made on an ex parte hearing, shall invest the funds of the guardianship . . . only in the investments authorized in the cases of trust companies acting as guardians or trustees under the provisions of section 179-14, and with respect to all investments and the security for the same every such guardian . . . shall have and be subject to the same rights, powers, privileges, duties, obligations and responsibilities as would apply to trust companies acting as guardians or trustees as to similar investments and the security for the same under section 179-14. Nothing in this section shall be deemed to authorize any guardian . . . to issue participation certificates or notes. Any investment made by any such guardian . . . under order by the court made on an ex parte hearing or otherwise may be held during the life of . . . guardianship or lesser period unless . . . the terms of the order of the court or of any subsequent order of the court specifically provide otherwise.

Sec. 225, continued.

COMMENT:

MPC, P. 208:

"Practically all states have permissive or restrictive provisions regarding trust investments and, in a majority of states, the lists go into considerable detail. . . . Dependent on the judicial interpretation of the language of the statute, the list may be exclusive, or the trustee may be authorized to invest in other securities if he uses ordinary skill and prudence. . . . [Hawaii has such a statute in RLH 1955, sec. 179-14 which is permissive]. The above sec. 225 of this Code would apply the law of trust investments in the particular state, whether common law, statutory or both, to investments by guardians, subject, however, to the three exceptions expressed in sec. 225. See Uniform Veterans' Guardianship Act (sec. 250 of this Code). In accord with this general principle, some states have statutes in which the rule as to trustees applies equally to guardians.. [This is so in Hawaii]"

MODEL PROBATE CODE

Sec. 226. Purchase of home. The court may authorize the purchase of real property in which the guardian has no interest, but such purchase can be made only for a home for the ward, or to protect the home of the ward or his interests, or, if he is not a minor, as a home for his dependent family. Such purchase of real property shall not be made except upon order of the court after notice in accordance with section 14 hereof.

REVISED LAWS OF HAWAII

Sec. 338-26. Guardianship estates, leases, investments, etc. Any circuit judge sitting at chambers in probate and having jurisdiction over a guardianship, on petition of the guardian and after such notice to those interested as shall be ordered by the judge, may, if it appears to be for the benefit of the ward authorize and direct the guardian . . . to invest moneys of the ward in the purchase of real or personal property, or the constructing, improving or repairing of buildings or other improvements on the land belonging to the ward or in such manner as the judge shall deem to be most for the benefit of the ward. . . .

COMMENT:

From MFC, p. 208:

" . . . Compare, also, the Uniform Veterans' Guardianship Act (sec. 252 of this Code)."

MODEL PROBATE CODE

Sec. 227. Claims.

(a) Duty of guardian to pay. A guardian of the estate is under a duty to pay from the estate all just claims against the estate of his ward, whether they constitute liabilities of the ward which arose prior to the guardianship or liabilities properly incurred by the guardian for the benefit of the ward or his estate and whether arising in contract or in tort or otherwise, upon allowance of the claim by the court or upon approval of the court in a settlement of the guardian's accounts. The duty of the guardian to pay from the estate shall not preclude his personal liability for his own contracts and acts made and performed on behalf of the estate as it exists according to the common law. If it appears that the estate is likely to be exhausted before all existing claims are paid, preference shall be given to prior claims for the care, maintenance and education of the ward and of his dependents and existing claims for expenses of administration over other claims.

(b) Claims may be presented. Any person having a claim against the estate of a ward, or against the guardian of his estate as such, may file it with the court for determination at any time before it is barred by the statute of limitations, and, upon proof thereof, procure an order for its allowance and payment from the estate. Any action against the guardian of the estate as such shall be deemed a claim duly filed.

(c) When decedents' estate law applicable. The provisions of sections 137, 144 and 146 hereof as to claims against decedents' estates shall be applicable to claims against estates under guardianship, but other provisions regarding claims against decedents' estates shall not apply to estates under guardianship.

REVISED LAWS OF HAWAII

Sec. 338-24. Guardian to pay and collect debts, appear in suits, etc. Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, shall pay all just debts due from the ward, out of his personal estate, if sufficient, and if not, out of his real estate, upon obtaining a license for the sale thereof, as hereinafter provided.

Sec. 227, continued.

COMMENT:

MPC, pp. 209-10:

"Under this section a guardian may pay a claim without allowance but he does so at his peril. If he has doubt as to whether the court will allow the claim he should withhold payment until the creditor procures allowance of the claim or until the guardian's next accounting. See sec. 233(a) hereof. The allowance of a claim is binding upon all persons except that, as between guardian and ward, the latter is permitted to question these as well as other items of the account at any time within two years after the guardian's discharge. See sec. 233(b).

". . . . In general, creditors of the estate under guardianship stand in the same position as creditors of a living person who is not under guardianship. However, . . . they cannot reach the estate by levy, attachment or garnishment and they should sue the guardian as such. See sec. 228 hereof. In accord with the law in some states [not Hawaii], in case of insolvency of a ward of unsound mind the law recognizes a preference for claims even for future maintenance and support of the ward and his family, as against other general creditors. . . . No precedent is found for imposing liability upon the guardian in bankruptcy proceedings on account of following such direction as is laid down in the last sentence of subsection (a)."

MODEL PROBATE CODE

Soc. 228. Actions.

(a) Guardian to sue and be sued. When there is a guardian of the estate, all actions between the ward or the guardian and third persons in which it is sought to charge or benefit the estate of the ward shall be prosecuted by or against the guardian of the estate as such. He shall represent the interests of the ward in the action and all process shall be served on him.

(b) Joinder, amendment and substitution.

When the guardian of the estate is under personal liability for his own contracts and acts made and performed on behalf of the estate he may be sued both as guardian and in his personal capacity in the same action. Misnomer or the bringing of the action by or against the ward shall not be ground for dismissal of the action and leave to amend or substitute shall be freely granted. If an action was commenced by or against the incompetent before the appointment of a guardian of his estate, such guardian when appointed may be substituted as a party for the incompetent. If the appointment of the guardian of the estate is terminated, his successor may be substituted; if the ward dies, his personal representative may be substituted; if the ward becomes competent, he may be substituted.

(c) Garnishment, attachment and execution. When there is a guardian of the estate, the property and rights of action of the ward shall not be subject to garnishment or attachment, and execution shall not issue to obtain satisfaction of any judgment against the ward or the guardian of his estate as such.

REVISED LAWS OF HAWAII

Sec. 338-24. Guardian to pay and collect debts, appear in suits, etc. . . . He shall also settle the accounts of the ward, and demand, sue for, and receive all debts due to him . . . He shall appear for and represent his ward in all legal suits and proceedings, unless another person is appointed for that purpose, as guardian or next friend.

COMMENT:

MPC, pp. 211-2:

". . .

Subsection (a) applies regardless of whether the action arises out of transactions involving the ward directly or transactions by the guardian. However, under sec. 227 a guardian may be sued personally as to the later, and a creditor may sue the guardian in both capacities in a single action under subsection (b) above.

"If there is no guardian of the estate the usual rule is that actions for the incompetent are brought in the infant's name by next friend and actions against him are managed by a guardian ad litem selected by the court in which the action is commenced. These persons are in no sense guardians of the estate and are not entitled to receive the proceeds of the judgment. Their authority terminates when the judgment becomes final. . . . The Code does not disturb the local practice in this regard.

"The authorities are divided as to whether garnishment, attachment or execution may be employed in an action against an estate under guardianship. Most of the decisions deny the right on the basis that the estate is in custodia legis. . . . Creditors' rights are adequately protected by action on the guardian's bond or probate court order for allowance and payment of claims. See secs. 213, 227(b). Cf. sec. 145. When the guardian incurs personal liability as the result of his own transactions relative to the ward's estate and judgment is obtained against him in his personal capacity, the creditor may obtain execution from the personal assets of the guardian. See sec. 227 and comment."

Sec. 229. Compromise.

(a) By guardian. Whenever it is proposed to compromise or settle any claim by or against the ward or the guardian as such, whether arising as a result of personal injury or otherwise, and whether arising before or after appointment of a guardian, the court on petition of the guardian of the estate, if satisfied that such compromise or settlement will be for the best interests of the ward, may enter an order authorizing the settlement or compromise to be made.

(b) By parent. Whenever a minor has a disputed claim, whether arising as a result of personal injury or otherwise, and no guardian of his estate has been appointed, his father, or if his father is dead or the parents of the minor are living separate or apart and his mother then has the care and custody of the minor, then his mother shall have the right to compromise or settle such claim, but before the compromise or settlement is valid, it must be approved by the court upon the filing of a petition. If the court approves the compromise or settlement, it may direct that the money be paid over in accordance with the provisions of section 237 hereof, or may require that a guardian of the estate be appointed and that the money be delivered to such guardian.

Sec. 338-24. Guardian to pay and collect debts, appear in suits, etc. . . . He shall also settle the accounts of the ward, and demand, sue for, and receive all debts due to him; or may, with the approval of any of the judges hereinbefore specified, compound for the same, and give a discharge to the debtor, upon receiving a fair and just dividend of his estate and effects. . . .

COMMENT:

MPC, p. 213:

" . . . In this section 'court' refers to the court having probate jurisdiction regardless of whether or not litigation on the claim is pending in another court. When litigation is pending in another court there are provisions in some states that small claims of a minor for whose estate no guardian has been appointed may be compromised and paid over for the minor's benefit by order of the court in which the litigation is pending. . . . Such provisions seem desirable but they belong in the code of civil procedure rather than in a probate code. See sec. 237 and comment."

Sec. 230. Sales, mortgages, leases and exchanges.

(a) When permitted. The real or personal property of the ward, or any part thereof, may be sold, mortgaged, leased or exchanged by the guardian of the estate upon such terms as the court may order for the purpose of paying the ward's debts, providing for his care, maintenance and education and the care, maintenance and education of his dependents, investing the proceeds or in any other case where it is for the best interests of the ward.

(b) Guardian forbidden to purchase. No guardian shall purchase property of the ward, unless sold at public sale with the approval of the court, and then only if the guardian is a spouse, parent, child, brother or sister of the ward and is a cotenant with the ward in the property.

(c) What decedents' estate law applicable. In other respects, the provisions of sections 154, 156 to 167 inclusive, 170 and 171 hereof, relative to decedents' estates apply to sales, mortgages, leases and exchanges of property of the ward.

Sec. 338-26. Guardianship estates, leases, investments, etc. Any circuit judge sitting at chambers in probate and having jurisdiction over a guardianship, on petition of the guardian and after such notice to those interested as shall be ordered by the judge, may, if it appears to be for the benefit of the ward authorize and direct the guardian to lease or extend the terms of the leases of the real property for such periods as may be deemed advantageous to the ward; . . . Any lease or extension of lease made under any such authority or direction shall continue in force for the period so authorized notwithstanding the guardianship shall have terminated; provided, that in the case of the guardianship of a minor over the age of sixteen years, no lease to run beyond the age of majority of such minor shall be made without his consent.

Sec. 338-29. Appraisement, disposition of personality. . . . Every guardian shall account for and dispose of the personal estate of the ward as directed by the judge.

Sec. 338-38. Sale of real estate for ward's maintenance. When the income of the estate of any person under guardianship, whether as a minor, insane person or spendthrift, is insufficient to maintain the ward and his family, his guardian may sell his real estate for that purpose, upon obtaining a license therefor, and proceeding therein in the manner hereafter in this chapter provided.

Sec. 338-39. Sale of real estate for investment. When it appears, upon the representation of any guardian, that it would be for the benefit of his ward that his real estate, or any part thereof, should be sold, and the proceeds thereof be put on interest, or invested in some productive stock, his guardian may sell the same accordingly, upon obtaining a license therefor, and proceeding therein as hereinafter provided.

Sec. 338-43. License to sell, granted by circuit judge. The license in either of the cases aforesaid may be granted by any circuit judge of the circuit in which any of the estate

to be sold lies, or by the circuit judge having jurisdiction over the appointment of such guardian.

Sec. 338-44. Petition for license. In order to obtain a license, the guardian shall present to the judge a petition, setting forth the condition of the estate, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale. If after full examination, on the oath of the petitioner, or otherwise, it appears to the judge, either that it is necessary, or that it would be for the benefit of the ward that the real property or any part of it should be sold, the judge may grant a license therefor, specifying therein whether the sale is to be made for the maintenance of the ward and his family, or in order that the proceeds may be put out and invested as aforesaid, and whether the sale shall be public or private.

Sec. 338-45. When private sale or exchange authorized. Upon the issuing of a license for a private sale or exchange the judge may determine whether the guardian shall be required to comply with the provisions of section 338-49. Any private sale or exchange made pursuant to the provisions of this section shall be as valid as if the ward had been competent to make and had made the sale or exchange in person, notwithstanding any other provision of this chapter. (am. L. 1957, C. 19, s. 2)

Sec. 338-46. Notice. No license [to sell] shall be granted until notice by public advertisement or otherwise, as the judge shall order, shall have been given to the next of kin of the ward, and to all persons interested in the estate, to appear and show cause why the same should not be granted.

Sec. 338-47. License in force one year. No license to sell granted in pursuance of this chapter shall be in force for more than one year after the time of granting the same.

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Sec. 338-48. Costs on objection to license. If any person appears and objects to the granting of any license, prayed for under the provisions of this chapter, and if it appears to the judge that either the petition, or the objection thereto, is unreasonable, he may in his discretion award costs for the party prevailing in the case.

Sec. 338-50. Notice of sale. In the event of a public sale, the guardian shall also give public notice of the time and place of sale by causing notifications thereof to be posted up in the most public places on the island where the property to be sold is, and if it is on the island of Oahu he shall also cause a notice of the sale to be published in such newspaper as the judge shall order, at least fourteen days previous to the day of sale. Upon his return he shall obtain from the judge an order of confirmation of the sale before making conveyance thereof.

Sec. 338-56. Sale, when valid. In case of an action relating to any property sold by a guardian, under the provisions of this chapter, in which the ward, or any person claiming under him, contests the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings, provided, it appears:

(a) That the guardian was licensed to make the sale by a judge of competent jurisdiction.

(b) That he gave a bond, which was approved by the judge, in case any bond were required by the judge upon granting the license.

(c) That he gave notice of the time and place of sale, as provided herein, in cases where notice is required.

(d) That the property was sold by public auction in accordance with such notice, or at private sale in accordance with the order of the judge having jurisdiction of the matter, and is held by one who purchased it in good faith.

Sec. 338-58. Sale, when valid as against adverse claimants. If the validity of any sale made by a guardian under the provisions of this chapter is drawn in question by any person claiming adversely to the title of the ward, or claiming under any title that is not derived from or through the ward, the sale shall not be held void on account of any irregularity in the proceedings; provided it appears that the guardian was licensed to make the sale by a judge of competent jurisdiction, and that he did accordingly execute and acknowledge, in legal form, a deed for the conveyance of the property.

COMMENT:

MPC, p. 214:

"... cf. sec. 155 of this Code."

MODEL PROBATE CODE

Sec. 231. Sale of ward's property not an ademption. In case of the guardian's sale or other transfer of any real or personal property specifically devised by the ward, who was competent at the time when he made the will but was incompetent at the time of the sale or transfer and never regained competency, so that the devised property is not contained in the estate at the time of the ward's death, the devisee may at his option take the value of the property at the time of the ward's death with the incidents of a general devise, or the proceeds thereof with the incidents of a specific devise.

COMMENT:

MPC, p. 214:

" . . . The Kentucky statute purports to give the value of any adeemed devise to the devisee if he is an heir of the testator. The Model Probate Code does not deal with this more general proposition but proceeds upon the theory that the remedy for the usual ademption situation lies in greater liberality by the courts in holding that devises are general or demonstrative rather than specific. . . . When the testator becomes incompetent, however, it seems unfair that acts of his guardian should work an ademption when the incompetent has no opportunity to remedy the situation by making a fresh will. The option given to the devisee in the above situation will prevent him from being totally disappointed in most cases where there are assets payable to devisees. If he chooses to take the value of the property the devise will abate as a general devise; if he can trace the proceeds and chooses to do so the devise will abate as a specific devise. As to abatement generally, see sec. 184."

Sec. 232. Compensation of guardian and attorney. A guardian shall be allowed such compensation for his services as guardian, as the court shall deem just and reasonable. Additional compensation may be allowed for his necessary services as attorney and for other necessary services not required of a guardian. He may also be allowed compensation for necessary expenses in the administration of his trust, including reasonable attorney's fees if the employment of an attorney for the particular purpose is necessary. In all cases, compensation of the guardian and his expenses including attorney's fees shall be fixed by the court and may be allowed at any annual or final accounting; but at any time during the administration of the estate, the guardian or his attorney may apply to the court for an allowance upon the compensation or necessary expenses of the guardian and for attorney's fees for services already performed. If the court finds that the guardian has failed to discharge his duties as such in any respect, it may deny him any compensation whatsoever or may reduce the compensation which would otherwise be allowed.

COMMENT

MPC, p. 215:

"If it were desired to limit the guardian's ordinary compensation to a definite percentage of the income of the estate, the provisions of the Uniform Veterans' Guardianship Act (sec. 249 of this Code) are suggestive. The limitations there provided might be enacted by rule of court. Compare sec. 103 as to compensation of the personal representative and his attorney. No attempt has been made in sec. 232 to permit a testator to limit the compensation of a guardian. The situations in a decedent's estate and an incompetent's estate are not analogous in this regard. It would seem to be against public policy in all cases to permit a testator to restrict a guardian's fees, as the selection of the guardian should be determined by the best interests of the living ward and in order to secure a proper guardian the court should not be limited by any fixed amount in the allowance of reasonable compensation to the guardian. The same considerations seem to indicate the desirability of not fixing any definite statutory limitation as to amount of the guardian's compensation."

Sec. 338-30. Expenses and compensation. Every guardian shall be allowed the amount of all his reasonable expenses incurred in the execution of his trust, and except as otherwise provided, he shall also have such compensation for his services as the judge by whom his accounts are settled shall consider to be just and reasonable.

Sec. 233. Accounting. (a) Guardian to account. Unless otherwise directed by the court, every guardian of the estate shall file with the court annually within thirty days after the anniversary date of his appointment, and also within thirty days after termination of his appointment, a written verified account of his administration. Notice of hearing of every accounting shall be given to the same persons and in the same manner as is required by section 207 hereof for notice of the petition for the appointment of a guardian. The account shall show with respect to each item for which credit is claimed whether or not the amount has been paid, and in either event the court may allow any item or disallow it in whole or in part except to the extent that it has been approved in advance.

(b) Effect of settlement. When notice has been given as provided in subsection (a), the settlement by the court of any account, subject to the right of appeal and to the power of the court to vacate its final orders, is binding upon all persons except the ward, or, if he shall die after the settlement, his personal representative. The ward, or, if he shall die after the settlement, his personal representative, may question any item of any settlement within two years after the date of the discharge of the guardian but not afterward.

(c) When decedents' estate law applicable. The provisions of sections 172, 174 to 178 inclusive, 180 and 181 hereof as to accounting in decedents' estates shall apply to guardianship estates,

Sec. 338-4. Bond from guardians of ward's estate. Every such guardian shall give a bond . . . with conditions as follows:

(c) To render an account, on oath, of the property in his hands, including the proceeds of all real estate sold by him, and of the management and disposition of all the property, within one year after his appointment, and at such other times as may be required by law or as the court shall direct;

(d) At the expiration of his trust, to settle his accounts with the judge, or with the ward, or his legal representatives, and to pay over and deliver all the estate and effects remaining in his hands, or due from him on such settlement, to the persons who are lawfully entitled thereto.

Sec. 340-4. Annual account; trustees and guardians to file. Every guardian . . . acting under appointment of any court or under any appointment requiring the approval of any court, shall . . . file annually with the court having jurisdiction thereof an account showing in detail all his receipts and disbursements, together with a full and detailed inventory of all property in his possession or under his control; provided that the court in cases in which it deems it advisable in the interests of the beneficiaries may permit the accounts to be filed biennially or triennially instead of annually or, if they are filed annually, may permit them to accumulate to be passed upon biennially or triennially; and provided further that the court on its own examination or that of its clerk, shall, without reference to a master, pass upon the accounts in cases in which the annual income does not exceed \$1,000, except in the case of a final account when the court may refer the same to a master, irrespective of the amount of the annual income, if for any reason it is deemed proper or necessary. If any such guardian . . . fails to file

Sec. 233, continued.

Sec. 340-4, R.L.H., continued.

his account as herein required, the clerk of the court in which such guardian . . . is required to file such account, shall notify him promptly of such failure, and, if the guardian . . . fails to file his account within thirty days after such notification, he shall be cited to appear before the court and be required to show cause why he should not be punished for contempt of court as provided by chapter 269 and he shall be subject to all of the penalties in such chapter provided. The court may also, in its discretion, remove any such guardian . . .

Sec. 338-31. Accounts of joint guardians. When an account is rendered by two or more joint guardians, the judge may, in his discretion, allow the same, upon the oath of any one of them.

Sec. 338-55. Limitations of actions for recovering lands sold. No action for the recovery of any property, sold by a guardian under the provisions of this chapter, shall be maintained by the ward, or by any person claiming under him, unless it is commenced within five years next after the termination of the guardianship. No entry shall be made, unless by judgment of law, upon any lands sold as foresaid, with a view to avoid the sale, after the expiration of the five years; exception only that persons out of the Territory, and minors and others under any legal disability to sue at the time when the right of action or of entry first accrues may commence their action or make their entry at any time within five years after the removal of the disability, or after their return to the Territory.

Sec. 233, continued.

COMMENT:

MPC, pp. 216-217:

"Of particular importance under subsection (c) is the provision of sec. 175 that the court may provide for inspection of the balance of assets on hand. This device is more important in guardianship estates than in decedents' estates since the former normally continue over a longer period. See in this connection the provision of the Uniform Veterans' Guardianship Act (sec. 247 of this Code) which requires inspection at each accounting.

". . . In the above section the position is taken that while notice to other interested persons is required in the case of annual accountings so as to bind them, the approval is not binding on the ward until he becomes sui juris. . . . Indeed, not even the settlement of the final account is binding on the ward until two years after the guardian's discharge."

MODEL PROBATE CODE

Sec. 234. Termination of guardianship.

(a) Termination without court order. A guardianship is terminated

- (1) If the guardianship was solely because of ward's minority, by the ward attaining his majority;
- (2) If the guardianship of the person was solely because of the ward's minority, by the marriage of the ward;
- (3) By an adjudication of competency of the ward;
- (4) By the death of the ward.

(b) Termination on court order. A guardianship may be terminated by court order after such notice as the court may require

- (1) If the guardianship is of the estate and the estate is exhausted;
- (2) If the guardianship is no longer necessary for any other reason.

(c) Effect of termination. When a guardianship terminates otherwise than by the death of the ward, the powers of the guardian cease, except that a guardian of the estate may make disbursements for claims that are or may be allowed by the court, for liabilities already properly incurred for the estate or for the ward, and for expenses of administration. When a guardianship terminates by death of the ward, the guardian of the estate may proceed under section 235 hereof but the rights of all creditors against the ward's estate shall be determined by the law of decedents' estates.

REVISED LAWS OF HAWAII

Sec. 338-3. Powers and duties. Every guardian [of a minor] . . . shall continue in office until the minor arrives at the age of twenty years, or until the guardian is discharged according to law; . . .

HAWAII REPORTS

Minor, marriage, operates as a discharge of her guardian, 13 Haw. 575; but disability of minority continues until she attains age of 18 years (now 20), 20 Haw. 596.

REVISED LAWS OF HAWAII

Sec. 338-35. By marriage of female ward; termination, re insane or spendthrift ward. The marriage of any female who is under guardianship as a minor, shall operate as a legal discharge to her guardian so far as the guardianship of the person of the minor is concerned. The guardian of any insane person, or spendthrift, may be discharged by any judge, when it appears to him, on the application of the ward, or otherwise, that the guardianship is no longer necessary.

HAWAII REPORTS

Spendthrift. Marriage of female ward under guardianship as spendthrift does not of itself terminate such guardianship, guardian may be discharged when no longer necessary, 12 Haw. 22. Necessity for guardianship is presumed to continue until contrary is shown, 14 Haw. 413.

Sec. 338-34. Resignation, removal and death. Where any guardian appointed either by a testator or by any of the judges hereinbefore mentioned, becomes insane or otherwise incapable of discharging his trust, or unsuitable therefor, or where it appears to any of such judges that it would be for the best interests of the minor to remove the guardian of its person, any of the judges, after notice to such guardian and to all others interested, may remove him, and every guardian may upon his request be allowed to resign his trust, when it appears to the judge proper to allow the same. Upon every such resignation or removal, and also upon the death of the guardian, the judge may appoint another in his stead.

COMMENT:

One difference between MPC, sec. 234, and its Hawaii counterparts is that the marriage of a male minor also terminates the guardianship of his person under the MPC. (See MPC, sec. 200, supra.)

See MPC, secs. 216 and 217, on Code provisions dealing with removal of guardians for cause and their resignation, respectively.

MODEL PROBATE CODE

Sec. 235. Administration of deceased ward's estate.

Upon the death of a ward intestate the guardian of his estate has power under the letters issued to him and subject to the direction of the court to administer the estate as the estate of the deceased ward without further letters unless within thirty days after death of the ward a petition is filed for letters of administration or for letters testamentary and the petition is granted. Notice to creditors and other persons interested in the estate shall be published and may be combined with the notice of the guardian's final account. This notice shall be published in accordance with section 14(b)(2) hereof, and all claims which are not filed within sixty days after first publication shall be barred against the estate. Upon the hearing, the account may be allowed and the balance distributed to the persons entitled thereto, after the payment of such claims as may be allowed. Liability on the guardian's bond shall continue and shall apply to the complete administration of the estate of the deceased ward. If letters of administration or letters testamentary are granted upon petition filed within thirty days after the death of the ward, the administrator or executor shall supersede the guardian in the administration of the estate and the provisions of Part III of this Code shall apply to all proceedings in the administration, including the publication of notice to creditors and other interested persons and the barring of creditors' claims.

COMMENT:

From MPC, pp. 218-19:

" . . . Upon death of a ward the rights of his creditors are determined according to the law of decedents' estates. See the last sentence of sec. 234(c) hereof. The shortening of the nonclaim period under sec. 235 is justified inasmuch as the guardian's personal liability remains for obligations incurred by him, and in normal cases other debts of the ward would probably have been already satisfied. It should not be necessary under this section that there be a separate hearing or notice of hearing on the final account of the guardian as to the post-mortem affairs of the ward. This section contemplates that ordinarily all matters will be closed upon a single hearing, winding up both the guardianship and also the estate of the deceased ward as a decedent's estate. As to the application of the provisions of Part III in proceedings under sec. 235, see sec. 198 and second paragraph of comment thereto."

MODEL PROBATE CODE

Sec. 236. Discharge of guardian. When a guardian of the estate shall file with the court proper receipts or other evidence satisfactory to the court, showing that he has delivered to the persons entitled thereto all the property for which he is accountable as guardian, the court shall enter an order of discharge. The discharge so obtained shall operate as a release from the duties of his office which have not theretofore terminated, and shall operate as a bar to any suit against the guardian and his sureties unless such suit be commenced within two years from the date of the discharge.

REVISED LAWS OF HAWAII

Sec. 338-4. Bond from guardians of ward's estate. Every such guardian shall give a bond . . . with conditions as follows:

(d) At the expiration of his trust, to settle his accounts with the judge, or with the ward, or his legal representatives, and to pay over and deliver all the estate and effects remaining in his hands, or due from him on such settlement, to the persons who are lawfully entitled thereto.

COMMENT:

From MPC, p. 219:

"This section is designed to correspond to sec. 193 on discharge of personal representative.

"As in case of personal representatives the discharge of the fiduciary terminates his powers and duties as to future acts. It does not, however, relieve him or his sureties from liability for past acts."

MODEL PROBATE CODE

Sec. 237. Dispensing with guardianship.

(a) Estate of minor of a value not exceeding five hundred dollars. When the whole estate of a minor does not exceed the value of \$500, the court may, in its discretion, without the appointment of a guardian or the giving of bond, authorize:

- (1) The deposit thereof in a depository authorized to receive fiduciary funds, payable to the guardian of the estate when appointed or to the minor upon his attaining the age of majority; or,
- (2) If the assets do not consist of money, the delivery thereof to a suitable person designated by the court, deliverable to the guardian of the estate when appointed or to the minor upon his attaining the age of majority; or,
- (3) The payment or delivery thereof to the parent of the minor, or to the person having the care or custody of the minor or to the minor himself.

The person receiving such money or other assets shall hold and dispose of the same in such manner as the court shall direct.

(b) Estate of adult incompetent of a value not exceeding five hundred dollars. When the whole estate of a person over the age of twenty-one who has been adjudicated incompetent does not exceed the value of \$500, the court may, in its discretion, without the appointment of a guardian or the giving of bond, authorize the deposit thereof in a depository authorized to receive fiduciary funds in the name of a suitable person designated by the court, or if the assets do not consist of money, authorize the delivery thereof to a suitable person designated by the court. The person receiving such money or other assets shall hold and dispose of the same in such manner as the court shall direct.

(c) Deposit of funds subject to order of court. If the estate of an incompetent consists in money in an amount

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REVISED LAWS OF HAWAII

Sec. 338-5. Small estates; clerk of court to act when. Whenever so requested by a parent, relative or next friend of a minor or insane person whose estate is of a value of less than \$1,500, the court may appoint the clerk of the court of that circuit as guardian of such minor or insane person, who shall serve in such capacity, with the full powers of and under like obligations as other guardians appointed under this chapter, except that he shall not be required to give any bond; nor shall he be entitled to any commission or compensation except for expenses necessarily and actually incurred, nor shall he or the minor or insane person or the estate of such minor or insane person be liable for any court costs arising out of such guardianship, except the actual cost of any advertising found necessary; provided, further, that the right of such clerk to act as such guardian shall not be affected by reason of any increase of the estate to an amount in excess of \$1,500 as the result of any accumulations of income accruing from the original principal of the estate or by the increase in value of the principal; provided, further, that if the estate reaches in value the sum of \$3,000 a guardian shall then be appointed under the preceding sections of this chapter.

Sec. 237, MPC, continued.

greater than \$500, and it is for the best interests of the incompetent that no guardian of the estate be appointed, and that such estate be deposited in a depository authorized to receive fiduciary funds, the court may, on reasonable notice to all persons who would be entitled to receive notice of a hearing on a petition to appoint a guardian, so order. The person receiving such money shall hold and dispose of the same in such manner as the court shall direct.

COMMENT:

From MPC, p. 220:

" . . . If an incompetent's claim is pending in a court of ordinary trial jurisdiction, the legislation described in the comment to sec. 229 provides another means of dispensing with guardianship."

MODEL PROBATE CODE

PART IV. GUARDIANSHIP-B. UNIFORM VETERANS' GUARDIANSHIP ACT

Model Probate Code Secs. 238 through 254 covers Uniform Veterans' Guardianship Act which has been enacted in Hawaii. (See Revised Laws of Hawaii 1955, Sec. 339-1 through 339-17.)

MODEL PROBATE CODE

Sec. 255. Commitment to Veterans Administration or other agency of United States Government.

(a) Whenever, in any proceeding under the laws of this state for the commitment of a person alleged to be of unsound mind or otherwise in need of confinement in a hospital or other institution for his proper care, it is determined after such adjudication of the status of such person as may be required by law that commitment to a hospital for mental disease or other institution is necessary for safekeeping or treatment and it appears that such person is eligible for care or treatment by the Veterans Administration or other agency of the United States Government, the court, upon receipt of a certificate from the Veterans Administration or such other agency showing that facilities are available and that such person is eligible for care or treatment therein, may commit such person to said Veterans Administration or other agency. The person whose commitment is sought shall be personally served with notice of the pending commitment proceeding in the manner as provided by the law of this state; and nothing in this Act shall affect his right to appear and be heard in the proceedings. Upon commitment, such person, when admitted to any facility operated by any such agency within or without this state shall be subject to the rules and regulations of the Veterans Administration or other agency. The Chief Officer of any facility of the Veterans Administration or institution operated by any other agency of the United States to which the person is so committed shall with respect to such person be vested with the same powers as superintendents of state hospitals for mental diseases within this state with respect to retention of custody, transfer, parole or discharge. Jurisdiction is retained in the committing or other appropriate court of this state at any time to inquire into the mental condition of the person so committed, and to determine the necessity for continuance of his restraint, and all commitments pursuant to this Act are so conditioned.

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Sec. 255, MPC, continued.

(b) The judgment or order of commitment by a court of competent jurisdiction of another state or of the District of Columbia, committing a person to the Veterans Administration, or other agency of the United States Government for care or treatment shall have the same force and effect as to the committed person while in this state as in the jurisdiction in which is situated the court entering the judgment or making the order; (and the courts of the committing state, or of the District of Columbia, shall be deemed to have retained jurisdiction of the person so committed for the purpose of inquiring into the mental condition of such person, and of determining the necessity for continuance of his restraint; as is provided in subsection (a) of this section with respect to persons committed by the courts of this state. Consent is hereby given to the application of the law of the committing state or District in respect to the authority of the chief officer of any facility of the Veterans Administration, or of any institution operated in this state by any other agency of the United States to retain custody, or transfer, parole or discharge the committed person.)

(c) Upon receipt of a certificate of the Veterans Administration or such other agency of the United States that facilities are available for the care or treatment of any person heretofore committed to any hospital for the insane or other institution for the care or treatment of persons similarly afflicted and that such person is eligible for care or treatment, the superintendent of the institution may cause the transfer of such person to the Veterans Administration or other agency of the United States for care or treatment. Upon effecting any such transfer, the committing court or proper officer thereof shall be notified thereof by the transferring agency. No person shall be transferred to the Veterans Administration or other agency of the United States if he be confined pursuant to conviction of any felony or misdemeanor or if he has been acquitted of the charge solely on the ground of insanity, unless prior to transfer the court or other authority originally committing such person shall enter an order for such transfer after appropriate motion and hearing.

Any person transferred as provided in this section shall be deemed to be committed to the Veterans Administration or other agency of the United States pursuant to the original commitment.

MODEL PROBATE CODE
PART V. ANCILLARY ADMINISTRATION
UNIFORM POWERS OF FOREIGN REPRESENTATIVES ACT

Sec. 256. Definitions. As used in (this Act:)
sections 255 to 260:

- (a) "Representative" means an executor, administrator, testamentary trustee, guardian or other fiduciary of the estate of a decedent or a ward, duly appointed by a court and qualified. It includes any corporation so appointed, regardless of whether the corporation is eligible to act under the law of this state. This Act does not change the powers or duties of a testamentary trustee under the non-statutory law or under the terms of a trust.
- (b) "Foreign representative" means any representative who has been appointed by the court of another jurisdiction in which the decedent was domiciled at the time of his death, or in which the ward is domiciled, and who has not been appointed by a court of this state.
- (c) "Local representative" means any representative appointed as ancillary representative by a court of this state who has not been appointed by the domiciliary court.
- (d) "Local and foreign representative" means any representative appointed by both the domiciliary court and by a court of this state.

Sec. 257. Powers of foreign representatives in general.
When there is no administration or application therefor pending in this state, a foreign representative may exercise all powers which would exist in favor of a local representative, and may maintain actions and proceedings in this state subject to the conditions imposed upon non-resident suitors generally.

Secs. 256-260, MPC, continued.

Sec. 258. Proof of authority in court proceedings; bond. Upon commencing any action or proceeding in any court of this state, the foreign representative shall file with the court authenticated copies of his appointment, and of his official bond if he has given a bond. If the court believes that the security furnished by him in the domiciliary administration is insufficient to cover the proceeds of the action or proceeding, it may at any time order the action or proceeding stayed until sufficient security is furnished in the domiciliary administration.

Sec. 259. Proceedings to bar creditors' claims. Upon application by a foreign representative to the probate court of the county in which property of the decedent or of the ward is located, the court shall cause notice of the appointment of the foreign representative to be published once in each of three consecutive weeks in some newspaper of general circulation in the county. The claims of all creditors of the decedent or of the ward, unless filed with the court within after date of the first publication are barred as a lien upon all property of the decedent or of the ward in this state, to the extent that claims are barred by a local administration. If before the expiration of such period any claims have been filed and remain unpaid after reasonable notice thereof to the foreign representative, ancillary administration may be had.

Sec. 260. Effect of local proceedings. The powers granted by this Act shall be exercised only when there is no administration or application therefor pending in this state, except to the extent that the court granting local letters may order otherwise, but no person who, before receiving actual notice of local administration or application therefor, has changed his position by relying on the powers granted by this Act shall be prejudiced by reason of the application for, or grant of, local administration. The local representative or the local and foreign representative shall be subject to all burdens which have accrued by virtue of the exercise of the powers, or otherwise, under this Act and may be substituted for the foreign representative in any action or proceeding in this state.

REVISED LAWS OF HAWAII

PROBATE: JURISDICTION AND PROCEDURE

Sec. 317-7. Wills of persons dying while in war service. No document offered for probate as a will or codicil shall be denied probate for lack of proof of the signatures of the attesting witnesses, if the signature of the testator is proved and it appears by affidavit or otherwise to the satisfaction of the judge presiding in probate that the testator died while engaged in war service and that all persons who signed as attesting witnesses are engaged in war service.

A person shall be deemed to be engaged in war service in any of the following cases:

- (a) If he is a member of the armed forces of the United States or of any of its allies;
- (b) If he is in service on any ship of United States registry;

- (c) If he is engaged outside of the Territory and of the continental limits of the United States, in any work in connection with a governmental agency of the United States or in connection with the American Red Cross Society or any other body with similar objectives;

- (d) If he is interned or otherwise held in custody by any nation with which the United States is at war.

REVISED LAWS OF HAWAII

PERSONAL ESTATES OF HANSEN'S DISEASE SUFFERERS

Sec. 317-41. Claims presented in sixty days. All such claims not presented or filed with the board within sixty days after the date of publication or posting of notice shall be forever barred; provided, the board may, in its discretion, waive the requirement of presenting or filing claim as to any person whom it has determined upon investigation to be an heir of decedent.

Sec. 317-42. Claims paid pro rata. If the claims against such deceased persons exceed in amount such moneys, the board shall convert such other personal property into cash or so much thereof as may be necessary, and pay such claims; or if there still are insufficient funds for such purposes, then the board shall divide the same pro rata among the creditors of the deceased person.

Any money or other personal property remaining, if any, shall be distributed by the board to the aforesaid heirs of decedent who have filed claims therefor or whose failure to so file claims has been waived as hereinabove provided, in such proportions as are provided by the laws relating to the distribution of estates of intestates, and the board may convert such other personal property into cash, or so much thereof as may be necessary to effect such distribution.

When any such heir is a minor or is under other legal disability, and no guardian or special guardian of his estate has been appointed, and the value of the money and other personal property to be distributed to him does not exceed the sum of \$250, the board may pay or turn over such money or other personal property to his natural guardian, or to some suitable person with whom he resides, for his use and benefit, and be thereby relieved, acquitted and discharged from any and further liability therefor.

Sec. 317-43. Balance deposited in treasury. The balance of any such personal property or moneys, remaining

Sec. 317-43, RLH, continued.

after the payment of all claims made within the time hereby limited and all claims where filing has been waived as hereinabove provided, shall become a government realization, and the board shall convert such personal property, if any, into cash and deposit the whole in the treasury of the Territory.

Sec. 317-44. Estates of personalty under five hundred dollars. Notwithstanding the foregoing provisions of this part, upon the death of any person who is a patient of any Hansen's disease hospital, leaving only personal property located in its entirety within the institution in which the patient was hospitalized, the value of which does not exceed \$500 in amount, the director, division of Hansen's disease, in the absence of any other executor or administrator, shall collect or otherwise reduce to possession all such personal property, and, if necessary, reduce the same to cash, shall give notice to creditors within the county of residence of the deceased patient by posting at the entrance to the district court of such county, a notification to present their claims within fifteen days of the giving of the notice, shall pay such claims as are established to his satisfaction or, if the assets are insufficient, prorate the amount among the creditors, and if, after the expiration of such period and the distribution of assets to creditors who have filed established claims, there is personal property remaining, the director shall deliver such property to such person or persons as have been designated to him in writing by the decedent, or, in the event no such person or persons have been designated, shall distribute the same to the heirs in accordance with the statutes of descent of the Territory, and, if no heirs appear, the director shall convert all such personal property into cash and forthwith deposit the same in the territorial treasury.

The director shall report monthly to the president of the board of health all of his activities hereunder and shall include in such report the names of any persons who, during the month covered by the report, have filed with him the written designation provided hereunder, without disclosing in the report the persons named as beneficiaries.

REVISED LAWS OF HAWAII

GUARDIANS AND WARDS

Sec. 338-15. Lis pendens; spendthrift's contracts, when void. After the order of notice has been issued, the complainants may cause a copy of the complaint, with the order of notice, to be filed in the bureau of conveyances. If a guardian is appointed upon such application, all contracts, excepting for necessities, and all gifts, sales or transfers of real or personal property, made by the spendthrift after the filing of the complaint in the bureau of conveyances, and before the termination of the guardianship, shall be null and void.

REVISED LAWS OF HAWAII

GUARDIANS AND WARDS

Sec. 338-21. Conservator for absentee, when. Whenever a person, serving in or with the armed forces of the United States, or serving as a merchant seaman, or outside the limits of the continental United States and the Territory by permission, assignment or direction of any department or official of the United States in connection with any activity pertaining to or connected with the prosecution of any war in which the United States is then engaged, has been reported or listed as missing, or missing in action, or interned in a neutral country, or beleaguered, besieged or captured by an enemy (which person is hereinafter referred to as an absentee), has an interest in any form of property in this Territory or is a legal resident of this Territory and has not provided an adequate power of attorney authorizing another to act in his behalf in regard to such property or interest, then the circuit judge at chambers of the circuit of such absentee's legal domicile or of the circuit where such property is situated, upon sworn petition alleging the foregoing facts and showing the necessity for providing care of the property of such absentee made by any person who would have an interest in the property of the absentee were such absentee deceased, after publication of notice of such petition in the manner required by section 317-12, and upon good cause being shown, may, after finding the facts to be as aforesaid, appoint a conservator to take charge of the absentee's estate, under the supervision of and subject to the further orders of the judge.

Sec. 338-22. Qualification, powers of conservator. The circuit judge at chambers shall have full discretionary authority to appoint any suitable person as such conservator and may require such conservator to post an adequate surety bond and to make such reports as the judge may deem necessary. The conservator shall have the same powers and duties as a guardian appointed under the provisions of this chapter and shall be considered as an officer or arm of the court.

RLH, continued.

Sec. 338-23. Termination. At any time upon sworn petition of the person adjudged an absentee, or of an attorney-in-fact acting under an adequate power of attorney granted by the absentee, the circuit judge at chambers shall, upon proof being made of the existence of such person and that he is no longer an absentee, or of the existence of such power of attorney, direct the termination of the conservatorship and the transfer of all property held thereunder to the absentee or to the designated attorney-in-fact. Likewise, if, at any time subsequent to the appointment of a conservator, it appears that the absentee has died and an executor or administrator has been appointed for his estate, the circuit judge at chambers shall direct the termination of the conservatorship and the transfer of all property of the deceased absentee held thereunder to such executor or administrator.