



# *South Dakota Legislative Research Council*

## *Issue Memorandum 94-22*

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### **PROBATE REVISION IN SOUTH DAKOTA**

#### ***Introduction***

The 1994 Legislature's adoption of SB 69, with the support of the South Dakota Bar Association, seems to represent the culmination of a long legislative debate over whether or not South Dakota should join the ranks of those states that have implemented the Uniform Probate Code (UPC). Although SB 69 constitutes only the first phase of a more comprehensive ratification process, passage of complementary legislation in the 1995 Legislature would complete South Dakota's admission to the UPC camp by the July 1, 1995, target date established in SB 69. However, during the 1970s, proponents and opponents of the UPC fought many turbulent legislative battles.

#### ***Background***

Probate may be defined as the process by which ownership of a decedent's property is legally transferred to the decedent's heirs. In preliterate societies, succession was determined by kinship, and leadership of the family or clan was often indistinguishable from property rights. With the rise of the classical civilizations of Greece and Rome, property ownership assumed a new sophistication, and written instructions from the decedent in the form of wills and testaments permitted the decedent to disburse his estate with greater attention to detail. But, with the collapse of Rome and the advent of the Dark Ages, the inheritance of landed property reverted to a kinship system which we refer to as feudalism. Because the ownership of land in a feudal

society entailed many rights and duties to king, overlord, vassals, clergy, and peasants, which were necessary adjuncts to land ownership, elaborate ceremonies called "enfeoffment" were evolved so that everyone in the feudal relationship from sovereign to illiterate serf understood who the lord was and what his relationship was to them.

The probate procedures of the early English civil law grew directly out of these medieval enfeoffment rites. The emphasis on form, ritual, and public notice were important characteristics of an eighteenth century aristocratic milieu in which land was scarce and not easily attainable. In America, however, land was cheap and plentiful, and sentiment grew quickly against anything viewed as a restraint on the buying and selling of property. The commercial classes petitioned state legislatures to simplify probate proceedings; lawyers usually resisted changes in the legal systems that they were familiar with and administered. To further complicate matters, different probate systems evolved in various states. By the twentieth century, probate in America had become difficult, expensive, time-consuming, and legalistic; and the public was demanding reform.

#### ***The Uniform Probate Code***

The promulgation of the UPC in 1969 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association was the watershed event in modern probate reform. Like the Uniform Commercial Code (UCC) and the Uniform

Consumer Credit Code (UCCC), the UPC was one of the flagships of the Uniform State Laws Commission's campaign to convince the states to adopt identical or very similar laws to regulate the most important interstate legal and commercial activities. Although the UCC was quickly adopted nationwide, the UPC, after considerable initial success, has experienced difficulty gaining acceptance, especially in the East and the South. At present, fifteen states have substantially adopted the bulk of the UPC:

Alaska	1973
Arizona	1974
Colorado	1974
Florida	1975
Hawaii	1976
Idaho	1972
Maine	1981
Michigan	1979
Minnesota	1975
Montana	1975
Nebraska	1977
New Mexico	1976
North Dakota	1975
South Carolina	1987
Utah	1977

The UPC has been quite popular in the Midwest and, of South Dakota's neighbors, only Iowa and Wyoming have failed to adopt it. Many other states have incorporated some ideas or procedures from the UPC into their own probate laws.

The UPC itself has undergone continual review and revision since 1969 and currently consists of seven major parts. Article III, on the probate of wills and the administration of estates, is the heart of the UPC and contains many of its most important innovations. This article, along with Article IV on foreign personal representatives and ancillary administration, has been adopted in South Dakota. Other significant portions, which South Dakota has not yet adopted, are Article II on intestacy, wills and donations and Article V on guardianships. Many of the major aspects of Article V were

considered, however, when South Dakota comprehensively revised its guardianship statutes in SB 123, which was enacted in 1993.

***Initial Passage and Repeal in South Dakota***

Subsequent to its promulgation in 1969, the UPC received wide and generally quite favorable support from the media and among several important interest groups. In South Dakota, the lobbies representing the elderly and the agricultural community, among others, were active in promoting state passage. The Legislature was at first reluctant to consider the legislation because of its complexity and newness. In 1973, Representative Merle Pommer, long-time chair of the Agriculture Committee, primed HB 525 mandating a summer study of the UPC, which passed without opposition. An interim study committee under the chairmanship of Senator Homer Kandaras, although charged with "proposing legislation incorporating concepts from the UPC," was so impressed by the new code, which, like the UCC, appeared to be sweeping the country, that they chose instead to recommend adoption of the UPC in its entirety. The resultant bill, SB 28 of 1974, passed the Legislature relatively easily but with a delayed effective date of July 1, 1975.

No sooner had SB 28 passed than second thoughts began to be raised. Although several legislator-lawyers were strong advocates of the UPC, most of the rank and file legal practitioners were skeptical, and the State Bar Association called for postponement and more study. In 1975, Representative Lyle Mensch introduced HB 784, which set the effective date back six months to January 1, 1976.

As that date approached, resistance to the

UPC on the part of the Bar and the courts hardened. During the 1976 Legislative Session, Representative George S. Mickelson introduced a package of six bills, which had been studied and drafted by the Bar. Most of these bills represented piecemeal reforms to the old previous probate statutes by providing for limited court supervision of estate administration (HB 707), simplified inventory procedure (HB 708), self-proving wills (HB 709), simplified sale of assets (HB 710), and simplified procedures for conveying trust and guardianship assets (HB 711). Ordinarily, these five bills might have been considered uncontroversial, but the sixth of the series, HB 712, provided for outright repeal of the UPC. Supporters of the UPC quickly rallied in opposition to the Mickelson package, and the battle lines were sharply drawn. All six bills, including the repealer, subsequently passed; and, while each passed with a comfortable majority, the debate was bitter and the opponents charged the proponents with a breach of good faith. In that soured atmosphere, support for the UPC lay dormant for a decade.

### *Reenactment*

When renewed interest in the UPC began to surface in South Dakota in the early 1990s, it was the Bar Association that initially called for a reexamination. Although certain lobby groups never completely abandoned the UPC during the 1980s, they never attempted a major legislative campaign. As the UPC began to be taught in the law schools of the state and country, lawyers learned to recognize and acknowledge the merits of the UPC and the idiosyncrasies of the present

state system. Finally, committees of the South Dakota Bar Association, headed by David English of the University of South Dakota Law School and Charles Riter of the Rapid City firm of Bangs, McCullen, recommended that the UPC be reintroduced in South Dakota. Legislative sponsorship was solicited, and SB 69 was introduced in the 1994 Legislative Session. Carrying an effective date of July 1, 1995, SB 69, which passed with little opposition, enacts only Articles III and IV, the old core probate and administrative reforms. Since passage, the Bar has been sponsoring continuing legal education sessions to familiarize all practitioners with the UPC probate procedures. The Bar also intends to introduce legislation in 1995 to enact most of Articles I and II on jurisdiction, intestacy, and wills, as well as cleanup legislation to repeal the old probate statutes. There are no plans to adopt Article V on guardianship at this time because of the comprehensive revision of the guardianship statutes that were enacted in 1993. If this Phase II is successful, South Dakota will become the sixteenth full Uniform Probate Code state on July 1, 1995.

### *Conclusion*

Considering the bitter and divisive debate on the UPC in the South Dakota Legislature of the 1970s, the degree of harmony and acceptance surrounding its passage in 1994 is somewhat surprising. Most of the UPC states adopted the Code in the 1970s, and South Carolina was the last state to do so in 1986. Nevertheless, in South Dakota, at least, the UPC's time seems to have arrived.

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**This issue memorandum was written by Reuben D. Bezpaletz, Chief of Research Analysis and Legal Services for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the**

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