THE PROPOSED PROBATE CODE FOR MISSOURI

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INTRODUCTION—Missouri's probate law, which is based on the old English law of decedents' estates, has not undergone a complete revision or codification since the general revision of statutes in 1825. Additions and amendments adopted piecemeal from time to time have been designed to meet specific situations or problems, but until recently no attempt has been made to tie all these amendments together as a part of a coherent and workable system of procedure. As a result, many conflicts, duplications and ambiguities exist in our statutes and many of the judicial expressions as to the meaning of what is in the law are equally conflicting and unsatisfactory. Some of the procedural steps do not even appear in the statutes but are required under judicial decisions in order to accomplish justice. Many probate judges have said that it is impossible to follow the existing law literally and accomplish justice and so they are forced to follow a rule of thumb. Of course, such a situation breeds injustice and constitutes a prolific source of litigation.

Since prior to the last decade there has been considerable agitation among probate lawyers for reform in probate practice. The Missouri Bar has recognized the need for legislative correction of the probate law and has created a number of committees which have done considerable work in attempting to clear up some of the defects in the existing law, but, almost without exception, they have come to a realization that nothing short of a complete recodification of the probate law will suffice. Consequently, a few years ago, a small committee of the Missouri Bar was established to work on a general revision but its work was not completed because its members were unable to give the time required for such an ambitious project and no funds were available for the employment of research assistance.

Against this background the General Assembly in 1953 established a Joint Probate Laws Revision Committee composed of five members of each House and directed the Committee on Legislative Research to provide such legal research and clerical assistance as the Joint Committee required. Mr. Edw. D. Summers, Revisor of Statutes, and Mr. John

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L. Porter, of the St. Louis Bar, were assigned to this work by the Committee on Legislative Research. An advisory group, composed of leading probate lawyers and judges of the state met with the Joint Committee and participated in its deliberations. Regular monthly meetings of the Joint Committee were held and, in addition thereto, separate subcommittee meetings and conferences by various members of the committee and advisory committee were held from time to time. The general method employed in the drafting of the Code was as follows: After tentative decisions on various subjects of probate law were indicated by the committee, the research staff undertook to draft the various parts of the Code and submit mimeographed copies of the drafts to the members of the committee and advisory committee. As a general practice subcommittees reviewed and passed on the drafts before they were considered by the full committee. The drafts were then presented to the full committee and after extensive consideration were placed in their final form.

The proposed Code, therefore, is not a radical departure from existing law but it is designed to clarify the law and to provide a more workable system of procedure for the probate court. No pretense is made that it is perfect or that it even meets the approval of any one student of probate law, because, like all legislative actions, many provisions in it are the result of compromise. At this writing the Code (House Bill No. 30) has passed the House of Representatives after a number of corrective amendments were adopted and it is highly probable that further amendments will be presented in the Senate. Practically all amendments so far suggested have been constructive and proposed for the purpose of improving the Code.

As Chairman of the Joint Committee, I want to express the sincere gratitude of the committee to the public spirited men who gave so generously of their time and talents in the formulation of this proposed Code. Moreover the spirit of helpfulness manifested by the many interested persons since the Code has been introduced in the legislature is a source of deep gratification to the committee. If it ultimately is passed I feel that it will constitute a substantial improvement in the means by which the probate court may serve the public and aid the legal profession in the administration of justice. —FLOYD R. GIBSON.**

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PROPOSED PROBATE CODE

Senate Bill No. 106 and House Bill No. 30, now pending in the Missouri Legislature, which were prepared by and introduced on the recommendation of the Joint Probate Laws Revision Committee\(^1\) of the 67th (1953) General Assembly of Missouri, proposes the adoption of a comprehensive code or revision and restatement of the laws relating to probate court procedure, wills, descent and distribution, dower and guardianship. The report of this committee from which these bills were taken gives brief notes of changes made in existing law following the sections containing the changes.

Because of space limitations this discussion obviously cannot exhaustively examine into the present law nor the proposed changes therein on the various subjects dealt with by such a comprehensive project. No more can be expected than a very brief summary of the major changes proposed by the pending legislation. With these limitations in view, the following suggestions may serve to acquaint the reader with the general scope of the changes undertaken by the proposed code.

GENERAL PROVISIONS

At the outset it must be observed that the proposed code is designed to operate within the jurisdictional limits prescribed by constitution\(^2\) for the probate court. Section 3 of the code, which defines such jurisdiction, repeats the language of the constitutional provision and then adds that such jurisdiction includes "the construction of wills as an incident to the administration of estates," the determination of heirship and jurisdiction of the administration of testamentary trusts. The power to construe wills or to determine heirship is necessarily included in the power to make orders of distribution, a power which has long been exercised in this state\(^3\) by courts vested with probate jurisdiction. There

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1. This committee was composed of Senators Floyd R. Gibson, Independence, Chairman; John W. Noble, Kennett; George A. Spencer, Columbia; R. Jasper Smith, Springfield; Hartwell G. Crain, St. Louis County; Representatives L. A. Vonderschmidt, Mound City; Samuel E. Murphy, Kirkwood; Robert W. Copeland, Webster Groves; Martin Degenhardt, Yount; Warren E. Hearnes, East Prairie; and Robert C. Smith, Columbia. Its advisory committee was composed of Judges Leslie A. Welch, Jackson County; Walter F. Stahlhuth, St. Louis County; David R. Hensley, St. Louis County; A. J. Bolinger, Morgan County; Byrne E. Bigger, Marion County; William B. Waters, Clay County; Howard B. Lang, Sr., Boone County; Thomas J. Boland, St. Louis City; and Messrs. Adolph Thym, St. Louis; Rush R. Limbaugh, Cape Girardeau; and Hiram H. Lesar, Columbia.


is a question, of course, about the validity under the constitutional provision, supra, of that part of Section 3 which state that the probate court has jurisdiction over testamentary trusts,\(^4\) and for this reason no provisions for the exercise of such jurisdiction are included in the code. In other words, the only thing that the code does about testamentary trusts is to say that the probate court has jurisdiction of the administration thereof. Unless some implementing legislation is later adopted it is difficult to see how a test of this provision may ever be brought about.

The provisions in the present statute prescribing terms of court\(^5\) are replaced by one which requires the probate court to be open for the transaction of business at all reasonable hours.\(^6\) This change, of course, necessitated the amendment or repeal of many provisions which defined the powers of the judge or clerk in vacation\(^7\) and which fixed the time for various procedural steps in the court.

Section 8 of the proposed code gives the clerk power to hear, determine and make necessary orders in uncontested matters, subject to modification by the judge within thirty days. For cause, orders of the clerk as well as orders of the judge may be modified after thirty days under Section 16 which will be discussed infra. Section 8 is comparable to the present provision,\(^8\) which gives the clerk power to perform all acts in vacation which the judge may perform in vacation subject to confirmation or rejection by the court in term, although somewhat broader.

Written pleadings are required by general provisions\(^9\) which replace provisions dealing specifically with each type of proceeding.\(^10\) Such general provisions probably are more inclusive than the present law.

A comprehensive provision of the proposed code\(^11\) prescribes the method of giving notice of the various proceedings in the probate court.

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4. See In re Mortenson's Estate, 248 Ill. 530, 94 N.E. 120 (1911).
6. Section 8. All references herein to section numbers are to the Proposed Code unless otherwise indicated.
7. E.g. See Mo. Rev. Stats. §§ 461.030, 461.060, 461.120, 461.140 etc. (1949).
10. See II Lindbaugh, Missouri Practice With Forms, p. 115, § 763 (1939) (as to claims); Mo. Rev. Stat § 461.230 (as to applications for letters) §§ 463.160 to 463.180 (petitions for sale of real estate) and § 465.010 (as to settlements).
11. Section 11.
Service as in civil actions, service by publication, by registered mail and by ordinary mail are defined and provision for service on attorneys is made. In this connection it is interesting to note that all service, except that by personal service and on a person at his residence is to be made or directed by the clerk. Proof of service by sheriffs, private persons and by the clerk is provided for and another section prescribes the requisites of waiver of notice.

Perhaps the most far reaching change in procedure proposed by the code consists in the treatment of estate proceedings as a single lawsuit. Under the present law, of course, the appointment of the representative is regarded as one proceeding as under the practice in the old English Ecclesiastical courts and to a large extent, at least, each subsequent step, such as the adjudication of a claim, the divesting of heirs of title of real estate, the accounting and the order of distribution, is also regarded as a separate proceeding which under the early English practice was tried in either a law court or a chancery court. Under the proposed code, the rationale of the Model Probate Code is adopted and the administration of any estate, including the probate of a will, is much like a bankruptcy proceeding or other action in which a receiver is appointed. Several provisions of the proposed code are necessary to give effect to this concept. Section 16 authorizes the probate court to vacate or modify any of its orders, so long as the estate is pending in the court and until the time for appeal from the final order of distribution has expired. Two necessary modifications of this rule are incorporated, namely, that no order which has been appealed may be set aside or modified and no modification or vacation is permitted which will affect rights acquired pursuant to the order. Section 19 also is designed to give effect to this concept in that it authorizes the court to stay any appeal in a decedent's estate until the order of final distribution if no person is prejudiced thereby. This provision may be utilized by the court to prevent a multiplicity of appeals from delaying the order of distribution.

12. Section 12.
16. Wolff v. Rager, 30 S.W.2d 1008 (Mo. 1930).
17. Prepared by the Model Probate Law Committee of the American Bar Association in cooperation with the Research Staff of Michigan Law School.
The time for appeal from orders of the probate court is fixed at thirty days after the order under Section 21, whereas at present appeals other than in sanity proceeding are required to be taken within the term.\textsuperscript{18}

Section 29 of the bill provides for the records which are required in the probate court. The only changes from the present law in this provision consist in requiring a uniform general system of indexing, and the elimination of the requirement that affidavits of publication and bills of sale of personal property be recorded. Provisions for the indexing of separate records are omitted. Present sections on the type of records to be kept are cited in the margin.\textsuperscript{19}

Sections 30 to 235 of the bill prescribe the procedure for the administration of the estates of decedents; sections 236 to 282 revise and reenact the laws relating to descent and distribution and wills while the remaining sections (283 to 355) deal with guardianship of minors and insane persons.

\textbf{Decedents Estates}

\textit{Probate and Grant of Letters}

The venue of administration proceedings is not substantially changed but the following minor changes from the present law\textsuperscript{20} are made in Section 30: (1) Consideration of the place where a nonresident decedent who has no property in this state died is not necessary; and (2) a provision is inserted to stay proceedings in other counties until decision of the venue question is made in the county in which the proceedings are first commenced.

Section 31 says an administration proceeding is a single proceeding in rem and thus gives effect to the concept of the Model Probate Code discussed \textit{supra}.\textsuperscript{21} It is, of course, entirely new and marks a distinct departure from the present law\textsuperscript{22} in that the only jurisdictional notice in administration is expressly declared to be the initial notice of letters.

\begin{flushleft}
\textsuperscript{21} See Section 16.
\textsuperscript{22} See Wolff v. Rager, 326 Mo. 222, 30 S.W.2d 1005 (1930).
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Another innovation is the provision in Section 36 which permits any interested person (i.e. an heir, devisee, spouse or creditor) to obtain mailed notice of all hearings held on settlements, claims or other matters in connection with the administration of the estate on a single request.

The notice of letters required by Section 37 differs from the present law\textsuperscript{23} in the following particulars: (1) The clerk of the court, rather than the executor or administrator, is required to give the notice; (2) service by mail on all heirs and devisees whose addresses are known is required in addition to notice by publication; (3) the notice is required to state that claims will be barred if not filed in court within nine months after the date of the first publication of notice, rather than the present law which establishes the bar on claims not exhibited to the representative within one year after the date of letters if the notice is published within ten days after letters, otherwise within one year after the first publication of notice; and (4) the notice is required to give the business address of the administrator and the name and address of his attorney, if any.

No change is made in the requirement that wills be probated in common form in the probate court\textsuperscript{24} but wills must be presented for probate within nine months (instead of one year as in Missouri Revised Statutes, Section 468.470) after the first publication of notice of letters on the estate,\textsuperscript{25} and for the first time a limitation of five years on the probate of a will is fixed in cases where no letters are granted on the estate.\textsuperscript{26}

Our present will contest statute\textsuperscript{27} has been amended in the following particulars: (1) Contests are required to be filed within nine months after probate or rejection of a will instead of one year; (2) where several wills are involved the question of which one is the last will is to be litigated in the same contest; (3) notice of the contest is required to be given to the probate court; and (4) the extension of the time for contest by minors and insane persons until one year after removal of their disability is removed and the probate court is given power to appoint a guardian for any such person for the purpose of instituting a contest\textsuperscript{28} within the nine-month period.

\textsuperscript{23} Mo. Rev. Stat. § 461.440 (1949).
\textsuperscript{24} Section 41, 43, 46.
\textsuperscript{25} Section 42.
\textsuperscript{26} Section 49.
\textsuperscript{28} Section 52.
Dispensing With Administration

Sections 54 to 56 authorize the dispensing with administration in cases where an estate is of less value than $1,500. If the estate is personal property a defeasible title thereto and possession can be obtained by the distributees either after giving a forthcoming bond to insure return of the property or after waiting four months for creditors either to request letters or refusal of letters. Title to real estate of a value of less than $1,500 may be transferred to distributees under Section 56 in about four months after the death of the owner under a procedure which requires publication of notice and the recording of an affidavit reciting facts entitling the distributees to the property.

The only change in the present refusal of letters section is a provision which extends it to authorize the transfer of title to real estate of a value of less than $1,500 to the spouse or minor children in accordance with Section 56 supra.29

Section 58 gives the court power to order an appraisement of the estate in any case where proceedings are instituted for the dispensing with administration.

Executors And Administrators

The present provision30 as to the compensation of executors or administrators is replaced by Section 73 which fixes a graduated schedule based on the size of the estate. The schedule based on value of personal property and proceeds of sales of real estate is as follows:

- **First** $5,000 5%
- $5,000 to 25,000 4%
- 25,000 to 100,000 3%
- $100,000 to $400,000 2 1/2%
- 400,000 to 1,000,000 2 3/4%
- Over 1,000,000 1 3/4%

A Senate Committee amendment would increase the fees on estates of over $100,000 by one-fourth of one percent.

Where real estate is managed, the court may allow additional fees not in excess of the following percentages of the actual value of the real estate:

- **First** $20,000 4%
- $20,000 to 80,000 1 1/2%
- 80,000 to 200,000 1%
- Over 200,000 1/2%

29. Section 57.
A Senate Committee amendment would remove this schedule and leave the matter to the court.

Compensation of joint or successor administrators cannot exceed twice the amount specified in these schedules or 5%, whichever is less.

Attorneys for estates are entitled to the same fees as the administrator or executor and either or both may receive additional compensation for extraordinary services.

The provisions as to the bond of an executor or administrator are changed in the following particulars:

(1) The amount of the bond may be fixed at the actual value of the personal estate where a corporate surety bond is given rather than in double such value in all cases and no number of sureties is specifically required.\(^{31}\)

(2) Personal sureties are required to file affidavits as to their qualifications.\(^{32}\)

(3) The representative is required to establish the sufficiency of his bond before extension of time for his final settlement may be granted and before any subsequent annual settlement is approved\(^{33}\) instead of the present provision which requires the court to examine into the sufficiency of the bond annually.\(^{34}\) Also the adequacy of the bond is required to be checked by the clerk upon the filing of an inventory, a settlement and on sale of real estate.\(^{35}\)

Section 88 requires an accounting up to the date of a new bond where a new bond is given and also makes possible the limitation of the liability of sureties on the new bond to transactions occurring after the new bond is given which, of course, is contrary to the present law.\(^{36}\)

Actions on a bond must be brought within two years after the discharge of the representative\(^{37}\) rather than within seven years after surrender, revocation of letters or death\(^{38}\) or within ten years after breach in other cases.\(^{39}\)

\(^{31}\) Section 74.
\(^{32}\) Section 80.
\(^{33}\) Section 84.
\(^{35}\) Section 86.
\(^{36}\) State to use of Enyart v. Doud, 216 Mo. App. 480, 269 S.W. 923, 925 (1925).
\(^{37}\) Section 91.
\(^{39}\) Nelson v. Barnett, 123 Mo. 564, 27 S.W. 520 (1894).
Our present statutes relating to partnership estates40 have probably been superseded by the Uniform Partnership Law41 which was adopted in 1949.42 This code contains Sections 340 to 343 of Chapter 3 of the Illinois Revised Statutes as Sections 93 to 96, and they are probably in harmony with the Uniform Partnership Law. In effect these provisions require the surviving partner to file an inventory of the partnership assets in the probate court where the deceased partner's estate is being administered or, if none, in the county of decedent's residence, and to account to the executor or administrator of the deceased partner. For cause the court may order the surviving partner to account to the court or to give bond and on his failure to file the inventory or comply with orders of the court he may be committed or a receiver may be appointed to wind up the partnership affairs.

Inventory, Collection and Management of the Estate

Section 97 as to the inventory is taken from Section 120 of the Model Probate Code but it includes provisions similar to those found in existing statutes.43 Two instead of three appraisers are required and Section 100 removes the limits on their compensation.

The code provides that title to personalty as well as realty vests in the heirs or devisees.44 Possession of personalty is taken by the executor or administrator and possession of realty may be taken on order of the court when necessary to pay claims or for its preservation.45

Another change gives the representative the right to sue to set aside a fraudulent conveyance made by his decedent which, of course, is contrary to existing law.46

The provisions relating to encumbered assets of an estate have been spelled out and an attempt has been made to remove some of the con-

42. See Davis v. Hutchinson, 36 F.2d 309 (9th Cir. 1929).
44. Section 105.
45. Section 106.
46. Section 107; Compare Biondo v. Biondo, 179 S.W.2d 734 (Mo. 1944); Stierlin v. Teschemacher, 333 Mo. 1208, 64 S.W.2d 647 (1933).
fusion that now exists in the law.\textsuperscript{47} The creditor, of course, is entitled to satisfaction out of the secured assets and to the payment of any deficiency out of the estate under section 147, but where his rights are not prejudiced, the court may order redemption of property owned by the estate (1) when for the best interests of the estate; (2) where the will indicates testator intended that property should be exonerated out of the estate; or (3) where the court finds from the mortgage agreement or circumstances surrounding it that decedent intended to redeem the property from his estate.\textsuperscript{48} A difference is made between encumbrances incurred before and after the execution of a will under Section 274. The devisee takes the property subject to the encumbrance if it was on the property when the will was made unless the will provides for its payment; but a devisee is entitled to have the property exonerated if the encumbrance was created after the will unless it appears testator intended otherwise. Also, provision is made for redeeming out of the estate property which does not become a part of the estate under the following circumstances: (1) Where the property is owned by the entireties; (2) where the property is owned by a third person and pledged by the decedent; and (3) where decedent’s life insurance policy is pledged. Redemption of property in any of such cases is not permitted if the mortgage was incurred for the purchase or improvement of the property, if deceased did not receive substantial consideration from the transaction out of which the encumbrance arose or if the circumstances surrounding the mortgage agreement indicate decedent’s intention that the encumbered property should be exhausted before payment of the debt out of his estate. A remedy is also provided for the third person in any of these cases.\textsuperscript{49}

Specific authority for the continuance of the business of the decedent under orders of the court is given in Section 117 rather than our present provisions which merely authorize expenditures to protect the estate from loss.\textsuperscript{50}

A new provision is designed to permit the court to determine title to personal property which is in the possession of the executor or administrator and which is claimed by another.\textsuperscript{51}

\begin{footnotesize}
47. See §§ 113, 114, 121, 147, 162 and 274.
48. Section 113.
49. Section 114.
51. Section 133.
\end{footnotesize}
Allowances to Spouse and Minor Children

Under the code the spouse or unmarried minor children are allowed as their absolute property (1) the household furniture (Insofar as such furniture is of a value of not more than $2,000 it is not subject to the debts of decedent);52 (2) an allowance for maintenance for one year;63 and (3) a homestead allowance of one half of the estate up to $7,500 in value.54 The first two of these allowances are similar to those under our present law55 while the third is designed to replace the present estates of dower and homestead. The homestead allowance is primarily an exemption from debts because it is chargeable against the share of the spouse or heir who receives it. The homestead allowance is waived if not claimed within ten days after the expiration of the time for filing of claims against the estate.

Claims

The nonclaim statute56 fixes the time for filing of claims at nine months after the first publication of notice of letters rather than at one year under the present law.57 Also it requires all suits in other courts to be filed or revived and notice thereof filed in the probate court within that time. Contingent claims (other than those based on real estate warranties) as well as all others are required to be filed within the nonclaim period and are barred unless filed. Specific provisions for dealing with such claims appear in Sections 148 and 149. A general bar on all claims is fixed at five years after the death of decedent if administration is not commenced within that time as compared to the ten year limit prescribed by Missouri Revised Statutes, Section 463.430. Another change in this section requires only that claims be filed in the court (rather than exhibited to the representative and filed in court) within the nonclaim period. Service of notice of the claim is required by Section 151 but such service has nothing to do with the nonclaim period.

Claims of less than $100 (rather than $50)58 may be paid before

52. Section 134.
53. Section 135.
54. Section 138.
56. Sections 139 to 142.
allowance\textsuperscript{59} but their classification\textsuperscript{60} and validity are subject to later review by the court.

Jury trials on claims of more than $100 are authorized on request, but the court may transfer the case for jury trial in the circuit court when the court believes the case will be appealed.\textsuperscript{61}

Sales, Mortgages, Exchanges and Leases of Property

The grounds for sales, mortgages and leases of real or personal property are listed in Section 169 and are expanded to apply to any of such transactions. Real as well as personal property may be sold, mortgaged or leased to pay administration expenses and when for the best interests of the estate and this is a change from the present law.\textsuperscript{62}

Section 172 authorizes the restraint of the sale of property where heirs give bond to pay debts. Compare Missouri Revised Statutes, Sections 463.050 to 463.070.

Section 175 prohibits collateral attacks on sales if the court has jurisdiction of the estate.

Section 179 provides for notice of the application for the order of sale of real estate to be given by mail to all heirs and devisees. The present law\textsuperscript{63} requires notice publication in every case, but since due process requires only that the heirs and devisees be notified,\textsuperscript{64} the publication of notice is here dispensed with.

Public sales of real estate may be made at the court house door or elsewhere in the county when ordered by the court under Sections 183 and 184 and brokerage fees may be allowed under section 190.

The provision for exchange of real or personal property\textsuperscript{65} derives from section 171 of the Model Probate Code and is new to the Missouri law.

Settlements and Distribution

A semi-annual settlement is required and final settlement must be made not later than the first court day after the expiration of a year after
the grant of letters. If the final settlement is continued annual settlements are required and, of course, final settlements are required on resignation or revocation of letters. The court may order settlements at other times as well.66

The procedure on final settlements under the proposed code in the House Bill is changed from the present law so that the settlement is to be filed at the time required by law, the notice then being given and hearing on the settlement is set for a date at least twenty days later.67 Under the present law, of course, notice of settlement is given and, in theory, at least, the settlement is filed and approved on the same day.68 Also at present exceptions to the settlement after it is made are required whereas the code contemplates that objections will be heard prior to the court's action on the settlement. However, Senate Committee amendments provide for notice by the executor or administrator, stating the day on which final settlement will be filed. Objection's may be filed within ten days after the settlement is filed and the settlement may be approved after expiration of the ten days.

A petition for an order of final distribution is required at the time of filing the final settlement.70 The decree or order of final distribution,71 being the final judgment in the estate, is required to be in much greater detail than that required under the present law.72 It is expressly provided that the decree "is 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".

Section 218 spells out the law as to the abatement of devises or legacies under the will. There is no comparable single provision in the present law although Sections 465.310 and 465.400 do require the residuary estate to be exhausted prior to the taking of property specifically granted for the payment of debts, etc. The order in which property is to be applied for such purposes under this section is as follows: (1) Pro-

66. Section 193.
67. Sections 206 to 210.
70. Section 206.
71. Section 217.
property not disposed of by will; (2) residuary estate; (3) property disposed of by the will but not specifically devised or devised to the residuary devisee; and (4) property specifically devised or demonstrative legacies. Compare Missouri cases cited in the margin.73

Another new provision provides for an order of discharge and prescribes that such order bars actions against the representatives two years after its date.74

Section 231 provides for a determination of heirship by the probate court where no administration is had within five years after the death of the decedent. As noted supra, administration is barred after five years and this provision is designed to enable heirs to place on record their names and interests in the property of decedent. The decree in such case is to be recorded when real estate is involved.

Descent and Distribution

The most important change in the rules of descent proposed by the code is the provision for the inheritance of one half of the net estate by the surviving spouse.75 This provision, of course, replaces the estate of dower76 and the right of election to take in lieu of dower.77 The share of the surviving spouse is taken from the "net estate", that is after all claims are paid.78 The other rules of descent of the present law79 are unchanged except that inheritance is precluded by relatives more remote than grandparents, uncles and aunts and their descendants. A Senate Committee Amendment would exclude only collaterals beyond the ninth degree according to the civil law.

The law relating to advancements is rewritten80 and it differs primarily in that it states that a gratuitous inter vivos transfer is presumed to be an absolute gift and not an advancement. Also the rule is given that the value of an advancement is to be fixed as of the time of the transfer or at the time of the receipt thereof by the advancee.

73. O'Day v. O'Day, 193 Mo. 62, 91 S.W. 921, 929 (1906); Nowach v. Berger, 133 Mo. 24, 34 S.W. 489 (1896); Brant v. Brant, 40 Mo. 266 (1887).
74. Section 228.
75. Section 236; See also § 246 abolishing dower.
77. Mo. Rev. Stat. §§ 469.080 to 469.130.
78. See Section 2, Subsection 24.
80. Section 244; Compare Mo. Rev. Stat. §§ 468.110 to 468.120; See also 18 Mo. Law Rev. 249 (1953).
Where a spouse elects to take against the will he receives only one third of the net estate if there are lineal descendants of decedent; otherwise the spouse may receive one half thereof. 81 Notice of the right to elect is required to be given by the clerk 82 and such right is barred if not made within ten days after the expiration of the time for filing of claims or if litigation is pending which will affect the value of the estate, within ten days after determination of the litigation. 83 Provision for waiver of the right of election by contract is made in Section 258.

The rule as to pretermitted children is changed. Under the present law 84 children inherit if not mentioned in the will. The code provides that children born or adopted after the last will is made inherit if not mentioned unless it appears from the will the omission was intentional or where testator had children known to him and devised all his estate to his spouse. 85 Also where it appears testator erroneously believes one of his children is dead and fails to provide for him, such child may inherit unless it appears that testator would have disinherit the child if he knew the child was alive.

WILLS

Under Section 261 any person over eighteen years may devise his real and personal property by will. The present law is that persons over twenty one may will all kinds of property and males over eighteen may bequeath their personal estate. 86

The present provision for oral wills of soldiers and sailors 87 is omitted but the provisions for nuncupative wills 88 are expanded to include such wills of property of a value of $500 instead of $200.

Section 271 which provides for revocation of a devise to the spouse on divorce is a copy of Section 53 of the Model Code and it changes the law in Missouri. See Robertson v. Jones, 89 which holds that divorce does not revoke a devise to a spouse even though a property settlement is also

81. Section 252.
82. Section 253.
83. Section 254.
85. Section 260.
89. 345 Mo. 828, 136 S.W.2d 278 (1940).
made. Also Section 468.250, which provides for revocation on marriage and birth of issue, is omitted and precluded by the last sentence of section 271; but the child is adequately provided for in the pretermitted child section (Section 260).

Section 58 of the Model Probate Code, which provides for renunciation of succession by an heir or devisee subject to rights of creditors and taxing authorities, is incorporated as Section 279. A devisee under a will may now renounce a legacy or devise, within a reasonable time, irrespective of objections by his creditors,90 but an heir at law may not renounce or refuse to accept an inheritance so as to prejudice the rights of his creditors.91 This section places both heirs and devisees in the same position.

Another new provision in the code provides for the deposit and keeping of a will by a testator in the probate court.92 Provisions for sealing the will and opening it on the death of testator are included.

GUARDIANSHIP

The provisions on guardianship in the code are primarily a consolidation of the present laws on guardianship of minors and guardianship of insane persons.93 The Uniform Veterans' Guardianship law (Missouri Revised Statutes Chapter 459) is unaffected by the code except insofar as it depends on the regular guardianship law94 for procedural provisions.

The code defines an incompetent as one who is incapable of managing his own affairs by reason of various types of insanity, senility, drunkenness, drug addiction or other incapacity95 and then provides for the appointment and supervision of guardians of incompetents. The present law requires a finding that an individual is "an idiot, lunatic or person of unsound mind and incapable of managing his affairs" or the like,96 before a guardian is appointed.

Section 289 which provides for change of venue in cases of guardians of minors is new and replaces Section 457.130, which requires such change

90. Sanders v. Jones, 347 Mo. 255, 147 S.W.2d 424 (1940).
92. Section 280.
94. Section 286.
95. Section 283.
only on the demand of a minor who has attained fourteen years of age. The arbitrary right to remove a guardian of a minor over fourteen years is replaced by Section 304 making removal dependent on the best interests of the ward. Also the grounds for removal of executors and administrators from Section 457.640 are made applicable to all guardians.

Section 312 of the code expressly provides for the continuation of the business of a ward, when for his advantage, and the various kinds of securities in which a guardian may invest are specifically set forth in Section 319.

The time for filing claims against an incompetent's estate is reduced from one year to nine months under Section 323, and the probate court is given jurisdiction of all claims against estates of wards whether arising before or after the guardianship under Section 322. At present it is probable that the probate court has no jurisdiction of claims arising after the guardian is appointed.

Section 333 contains a new provision prohibiting executions against property in the hands of a guardian and requiring that judgments against the ward or his estate be enforced in the same manner as against decedents' estates. Compare Missouri Revised Statutes Section 458.430.

Another new provision requires verification of securities held by the guardian at the time of settlement. It is similar to subsection 2 of Section 459.100 of the Uniform Veterans' Guardianship Law.

The court is given power to terminate the guardianship when the estate is exhausted or when it is no longer necessary under section 338.

Section 345 provides that on the death of a ward who leaves no will and is not indebted, the funeral expenses, inheritance and estate taxes for which his estate is liable, claims on obligations incurred by the guardian and authorized by the court and administration expenses may be paid by the guardian out of the estate on order of the court and that the estate may then be ordered distributed to the heirs and distributees without administration. This is somewhat of an expansion of the present Section 457.460, Missouri Revised Statutes, which applies to estates of minor wards only.

98. See In re Moore's Guardianship, 148 S.W.2d 116 (Mo. App. 1941).
99. Section 336.
Our present law provides that the court may order payments of amounts not in excess of $500 by executors, administrators, special commissioners or sheriffs which are due minors to the natural guardians of such minors or other persons designated by the court for the minors. Section 347 of the code authorizes the court to make appropriate orders to dispense with guardianship in all cases where the estate of the minor or incompetent does not exceed $500. The order may require the deposit of the money or the delivery of property to a designated person or the payment to a parent.

CONCLUSION

The proposed code is based primarily on existing Missouri law. Many of its provisions are lifted verbatim from present statutes while others are simply restatements thereof. The changes here enumerated and summarized are those which the writer feels accomplish the most significant departures from existing law. There are, of course, other changes from the present law which may become important in specific cases, but they are not of such wide general interest as to justify lengthening this discussion.

The proposed code represents the first attempt to redraft our probate law on an overall basis since the 1825 General Statute Revision. It is felt by the sponsors of this code that it will reduce litigation, expedite and render less costly administration proceedings and promote certainty in the law.