#L-600 3/9/83

First Supplement to Memorandum 83-16

Subject: Study L-600 - Probate Law Reform Generally

Professor Halbach has provided the staff with some background material relating to probate reform. A portion of this material is attached. We will not consider the material as such at the meeting. However, we urge you to read the material for background prior to the meeting.

The material is relevant to the Commission's work in three respects:

(1) It is relevant to law reform generally and the need for and benefits of improvement of specific rules of law.

(2) It is relevant to the general approach to be taken in probate law reform.

(3) It is relevant to the concept of unadministered succession.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Part IV

PROCEDURAL REFORMS IN ESTATE PLANNING AND ADMINISTRATION

INTRODUCTION TO CHAPTERS 9-11

by
Edward C. Halbach, Jr.

Whatever the extent of succession (i. e., transferable wealth after taxes) allowed by society, and whatever the law requires with respect to taxes and allows with respect to testation, the members of society are naturally interested that the fulfillment of their duties and the exercise of their rights be made as simple, easy, expeditious and inexpensive as is reasonable and safe. Much of our difficulty arises, however, in deciding what is reasonable and safe—the degree of safeguards to be required and how much choice the individual should have with regard to the amount and cost of this security.

In the planning of one's estate and in the carrying out of that estate plan through the time of estate administration, the legal system has generally insisted upon a considerable amount of "insurance" against risk and has exacted a rather high premium for that insurance. Whether too much insurance is now required—too many safeguards imposed—is a matter about which there is legitimate difference of opinion. There are also differing views as to whether the system should be designed to permit a considerable degree of consumer free choice concerning the amount of "insurance" to be taken out.

The three essays in this Part are concerned with trends and possibilities for reform in the procedures by which individuals may have their estates planned and in the procedures by which these estates will later be administered. Professor Scoles reviews and comments upon recent developments in estate administration, that is, in what we call probate law and practice. Professor Fratcher, who has studied and written extensively on the English probate system, discusses that system and what he apparently sees as a promising opportunity for imitation, because of that country's quick, simple, low-cost procedures which apparently are quite satisfactory despite a lessening of what we think of as safeguards. My own paper, reprinted from another American Assembly volume, makes some more extreme proposals for lessening probate costs by not requiring estate administration and for lessening estate planning costs by modifying substantive law and by offering standardized options.

None of these essays examines the lawyers' monopoly that is protected through a society's definition of "practice of law", supported by a restriction that such practice be engaged in only by qualified lawyers. A society should see to it that such authorized monopolies are examined periodically. Are the rules that create these restrictions and the definition of practice of law working properly in our field, in the sense of providing adequate and reasonably priced estate planning and estate administration services? Should competition and free choice take greater hold here? Might the emphasis in this field be shifted more to regulating the fairness of representations, disclosure and advertising by a broader group of competitors? Or does this involve too many dangers against which consumers cannot realistically be expected to protect themselves?

Because particular attention has quite properly been focused upon the probate system in recent years, one should consider, as the essays in this Part are read, the extent to which that system should be based on required safeguards and the manner in which lawyers and judges should function within it. We should especially consider whether and to what extent courts should be involved in the probate process, and whether the individuals interested in the estates should have some choice in this matter.

For background, the reader should be aware of the basic functions served by probate and estate administration. These functions

include: determining whether a decedent died intestate or with a valid will; collection and ultimate distribution of assets; ascertainment and payment of debts; determining and paying taxes owed by the decedent or imposed upon the estate; determining and settling the new property rights of the decedent's successors, and identifying them if necessary; and providing management and care of the estate in the meantime.

In addition to the stake individual members of society have in seeing the process operate effectively and efficiently, a society as a whole has a stake in the system's costs. For example, there is general agreement, in the abstract at least, evidenced by statements ranging from those of the Chief Justice of the United States to pronouncements of the 1975 American Assembly on "Law and the American Future," that our serious problems of court congestion require a constant effort to remove from the judicial system matters that are not proper controversies requiring resolution in court. The bulk of probate activity fits that description.

Chapter 11

PROBATE AND ESTATE PLANNING: REDUCING NEED AND COST THROUGH CHANGE IN THE LAW

by
Edward C. Halbach, Jr. *

Any realistic effort to meet even the basic legal service needs of all economic groups in this country at a reasonable cost will require more than imaginative public and private programs to finance the costs of services for low and middle income groups. Legal service programs, group plans and the like attack the problem from one side, but attention must also be devoted to methods of reducing the need and cost of legal services. A key element in solving problems that range from the workload of courts to the delivery of lawyer services must be a concerted, self-conscious effort by the legal profession itself, as well as by others, to find ways of eliminating some and simplifying other lawyer work. In short, startling as it may sound, the legal profession should strive to do away with some of its business.

LAW REFORM AND PROFESSIONAL PRODUCTIVITY

How many legal problems are complicated—or even created—by deficiencies or excesses in legal rules and processes? How many matters are drawn through our court systems, requiring the services of judges and lawyers, when they could be handled almost as well

* Professor of Law, University of California, Berkeley.

(or better) and at much lower cost in ways not involving judicial proceedings? How many commonplace transactions now go virtually unplanned or else require elaborate lawyer-advised planning and lawyer-drawn documents, when the legal structure could offer simpler, cheaper alternatives to be undertaken—individually but with minimal legal counseling—by those who need or can afford no more?

The legal profession possesses the special knowledge and insights essential to address these questions through law reform, and such an undertaking is in its long-range self-interest and consistent with its tradition of public service. Present conditions and attitudes, however, demand a greater than traditional concentration of effort. This effort should be reinforced by a sense of urgency and an awareness of the potential reform has for distributive justice. It should also be reinforced by governmental as well as foundation and professional support for research and experimentation.

The joint commitment of public and business interests to research and development in other areas provides an apt analogy for substantial efforts to better the legal system. Lawyers should recognize in their work the premise (even if unarticulated) upon which enlightened, successful business executives operate: that one should constantly strive to redesign the system in which one works to eliminate tasks when possible, to enable others to be shifted to lower-paid employees, and to routinize all but the vital judgment elements of still others. The process is both cost-saving and calculated to make the work of executives and subordinates at once more rewarding and more productive. To what extent, then, can features of the legal system be redesigned so that today's lawyer work can be discharged, in whole or in part, without lawyer time or with lesser commitment of lawyer time?

The "capital" underpinnings of the legal profession's productivity are not limited to the lawyer's own skills and knowledge. Obviously they also include office procedures and the skills of others in the law office. Awareness of these elements of productivity is evidenced by the profession's interest in continuing legal education, paraprofessionals, and the development of better forms, technology and office practices. But much more is involved ultimately in the efficiency, availability and adequacy of legal services. More attention

is urgently needed to the output and cost consequences of the rest of the system within which lawyers work—the legal system itself.

The opportunities are greater than one might initially suppose. The critical step is to recognize in all on-going law reform activities the importance of eliminating "unnecessary" types of work and making essential work easier in order to cut overall costs, in terms of both consumer prices and resource commitments. The unmet need for legal assistance promises enough work for lawyers, while reduced costs should attract these needs into the law office. The results hoped for are greater productivity and more rewarding work for lawyers and judges, and for society as a whole the opportunity of more nearly filling the real needs of all its members at a reasonable commitment of its resources.

REFORM NEEDS: GENERAL CATEGORIES

One can in a general way categorize certain important types of change that tend to reduce the need for and cost of legal services by simplifying the legal environment for lawyers and clients alike. More particularly, these are classes of changes that can facilitate either the rendering of legal services or the obtaining of results we now think of as involving legal services.

These categories are: (1) clarification or correction of specific legal rules not only to reduce and simplify litigation but also to facilitate the planning of private transactions; (2) ready-made or "canned" arrangements as alternatives to individually tailored transactions; and (3) drastic revision of processes and related rule systems as a means of reducing or simplifying the lawyer work required in those processes. The pages that follow treat these types of changes and their relation to the goals under discussion, illustrated by examples from the estates and trusts fields.

Improving specific legal rules

One would hope that most of our existing rules of substantive law are at least arguably sound and that we could not too often obtain a ready consensus or demonstrate to the satisfaction of most observers that the present law is objectionable. Sometimes, however, it *is* obvious or *can* be demonstrated that specific legal rules are not operating effectively—that they need to be and can be improved, either by clarification of uncertainties or by correction of rules that

are clear but undesirable (usually as a result of being outdated). Rules of either type invite troublesome, often needless litigation over their application. They also tend to require special care in counseling and drafting, resulting in documents of a length, complexity and cost that would otherwise be unnecessary.

Improved rules should lead to better outcomes in individual disputes and in individual transactions, or at least ease the process of reaching such results. This, of course, is independently important. For present purposes, however, the search for and then the correction or clarification of troublesome, specific rules of substantive law can lessen the frequency and difficulty of occasions for which the services of lawyers are needed. Although each rule is individually of relatively minor significance in these broader terms, in the aggregate such clean-up campaigns can be of substantial importance both in simplifying the planning of private transactions and in removing unnecessary cases from our courts, with the latter resulting in a saving to the public as well as to litigants.

A list of litigation-producing and transaction-complicating rules can readily be compiled from the field of probate and trust law, and especially from the most fertile corner of that field: rules of construction applicable to wills and trusts. A representative list of outdated or inappropriate rules would include some which still exist in a minority of states and others which continue to thrive in the vast majority. These rules are "unsound" in that: (a) they frequently invite a wrong result where the right result would have been easy but for the rule; (b) upon examination they would bring a quite solid consensus of opposition from lawyers and informed laymen alike; (c) they are often applied with apology by the courts which must administer them, and they bear that hallmark of unsound rules of construction (i. e., that stamp of judicial disapproval) which declares that "the rule yields to the faintest indication of contrary intention"; and (d) they produce that relatively objective indicator of a bad rule of construction, a lengthy wake of litigation which yields no consistent pattern of results and offers no adequate basis for predicting the outcome of potential disputes.

One such rule is the old English doctrine, still thriving in many of our states, that a bequest to the "issue" of a designated person is presumed to pass *per capita* rather than *per stirpes*. That is, under

a gift "to the issue of X" the property passes in equal shares to each and every one of X's descendants, so that each living grandchild takes the same share as any other child or grandchild, despite the fact that his parent (a child) is living and claims a share, regardless of the number of grandchildren in each family line, and despite the fact that the local intestacy laws prescribing the disposition of estates of those who die without a will would have prescribed some form of *per stirpes* or representational distribution among the issue in the event of an intestacy. New York's experience with the *per capita* rule offers a particularly revealing and relevant study. That rule produced a flood of cases, with the rule rebutted about as often as it was applied but always at the financial and personal costs of family litigation, often extending through one or two levels of appeal. When, however, the proper rule—i. e., one in which the law's presumption and common sense (probabilities of intention and other relevant policies) coincide—was adopted by legislation in 1920, litigation on this point virtually ceased.

A more widespread example of such a troublesome rule of construction is the general presumption that (omitting refinements) a reference in a will or trust to someone's "children" or "issue" or the like does not include that person's adoptive children or their descendants. This presumption of intention exists in the vast majority of our states today, despite *intestate* succession rules and sociological studies to the contrary and even though we can readily handle the side problems of a contrary rule.

The results of these and other such rules are a great deal of wasteful litigation, as well as unfortunate results. Another consequence is the cost and complexity of attempting to draft private instruments adequately covering all the various points for which the law ought to imply a series of more probable, intent-fulfilling answers so that simple documents would suffice for routine dispositions.

Ready-made in lieu of individually tailored arrangements

Significant savings of lawyer time and client expense can be achieved and wider distribution of essential legal services encouraged, if we can develop standardized or partially standardized arrangements which private individuals can, if they wish, by a simple act of selection, utilize for transactions that now must either be individually tailored or go virtually unplanned. That is, the terms of

potentially complicated, planned transactions, or major portions thereof, can be "pre-packaged" in a series of statutory or other options rather than necessarily requiring the planning and drafting of elaborate, wholly individualized documents. Also, legislation imposing standardization on terms of certain routine transactions can make them safer, easier and more fair to all parties, while reducing the risk of costly disputes.

The objective of the "canned" or ready-made options is not to eliminate the carefully personalized work lawyers now perform for those of their clients who can afford it. The goal is to offer individuals, if they prefer, some less personalized, less costly alternatives. These can be lawyer-advised choices among a series of statutory or institutionally offered options, or even choices among options that are subject to individualized modification. Thus, although traditional legal services would remain available, the hope is that adequate lawyer services can and will become realistically available to more individuals. The lower-cost but still lawyer-advised options would be used not only by some who now pay the higher cost of elaborate services but also by many who leave their affairs unplanned because they will not or cannot pay for the services required for planned transactions.

"Canned" Trusts. Lawyer services in creating trusts by wills and other instruments offer a nice illustration. Of course, individuals can leave their estates entirely unplanned and die intestate. On the other hand, minimal planning can be done through will substitutes (e. g., joint tenancy) or simple wills, leaving property outright to the beneficiaries, regardless of age or capacity. These forms of minimal planning are often done with no legal advice, at the cost of adverse results—and even litigation far more costly than proper planning. The property owner who recognizes these deficiencies may have a lawyer prepare an elaborate estate plan involving fairly complicated trusts which are costly either to the client or to the lawyer or both.

The problem is that no reasonably satisfactory, inexpensive alternative exists between the ideal but costly plan and the unplanned or negligibly planned estate. This is unfortunate for that broad range of individuals with small and moderate-sized estates. These categories include many who think of themselves as almost poor but who have insurance and employee benefits to consider in the event of death.

To understand the needs of these individuals, let us consider some purposes for which trusts are used in modest estates. Insurance proceeds and other property left outright to a surviving spouse might better be left in trust. This might be done to provide professional or at least moderately skilled management rather than turning the funds over to a widow or widower whose managerial abilities are dubious because of inexperience or old age. In other cases a trust may be appropriate because of a client's concern over how the property will be used or where it will end up if the spouse remarries. Even more common are wills containing trusts for the management and use of property being left to minors, covering the possibility (although fairly remote) of both parents' death. Insurance and other properties need to be managed and applied for the benefit of the orphaned children. Despite the frequent, usually fallacious argument that the amount of property involved does not justify a trust, some fiduciary management—either a guardianship or a trust—is required because minor beneficiaries cannot legally manage property. For a variety of reasons, the trust will almost certainly be preferable; a professional trustee is not required, for the same individual can be used who would otherwise serve as guardian. Often more important than management is the allocation of benefits among various minor beneficiaries. Dividing $100,000 of life insurance equally between two children at their parents' deaths, for example, may initially seem appropriate, but when we consider their different ages and needs (medical, dental, etc.) we find that at maturity one's fund is very different from the other's. The result is not the equality parents could arrange by establishing properly planned trusts, with equal division after all children come of age. Furthermore, in many states today children receive guardianship funds as legal adults at age 18, whereas parents will often wish through trusts to defer this event. Other considerations as well may encourage the use of trusts in very ordinary wills of people of modest means.

To meet these recurrent needs in ways which at least approximate the wishes of many property owners, the law could offer statutory trust options which, with modest help from a lawyer, a client could select through a simple will. These standardized trusts can be made subject to modification by express provision of the will, but to the extent the standardized provisions are retained they would incorporate

cost-saving, uniform interpretations and applications. This certainty and simplicity—and the reduction of other risks of error—cannot be obtained even through privately planned "incorporation by reference" of another document.

The statutory options would follow various archetypes of trusts in frequent use. These would include trusts for a surviving spouse or other life beneficiary and at least two categories of trusts for minors. One of the latter would be a single "family trust" providing for several minor children, with termination and equal division when the youngest reaches a stated age. The other would be an option providing a separate trust for each minor child; this would simply be an extension of the present, well-established and widely-used "canned" trust (which we call a custodianship) now provided by gifts to minors acts in all states.

These gifts to minors acts are a limited form of the type of legislation here proposed. They were developed, however, in response to tax-planning objectives of well-to-do clients engaging in relatively modest transactions and have the great deficiencies (a) of not being available in most states to the many who *at death* have a similar need for a ready-made substitute for guardianships and (b) of not fitting the "family trust" needs of most families in the event the parents die leaving several minor children.

Although only individually tailored arrangements can fully and precisely meet the desires of clients, lawyers today often do less than this anyway due to considerations of time or cost. In other instances clients accept the essentially unplanned solutions provided by the law, such as guardianship, while in still others they pay unnecessarily for tailoring they would not want if intermediate options were available. As a practical matter, statutory trust options could be expected to bring many clients to lawyers for simple, inexpensive but adequate services, when the same client now avoids lawyers, doing such planning as is done by himself or simply by following the advice of real estate and insurance agents, and possibly his bank, in various aspects of his affairs. Under legislation of the type suggested, clients should rarely be tempted to use wills invoking the statutory trust options without legal advice, if indeed they would even know that such options exist. In any event, the risk of such ill-advised or unadvised estate plans could hardly be expected to

match the degree to which dispositions of the major assets of modest-sized estates are in effect "planned" piecemeal today, based on the advice or actions of stockbrokers and realtors (e. g., the use of joint tenancy) and of life insurance agents (e. g., the selection of settlement options) without benefit of an overall plan advised by independent, qualified legal counsel.

Evidence of the practicality and attractiveness of "canned" trusts can be found in the experience and popularity of the custodianship under gifts to minors acts as a vehicle for giving during the life. There is also evidence of the practicality of ready-made trusts for the lifetime of a surviving spouse in the experience of England, where such statutory trust arrangements have operated successfully for some time even in intestate situations.

Analogous Situations. Other comparable opportunities for simplifying and reducing the cost of legal services in estate planning can be imagined. In fact, on a somewhat limited scale, a number of such developments have already taken place. Existing examples well known to trust lawyers are the widespread adoption of principal-and-income legislation and the occasional enactment of trustees' powers legislation.

The examples just mentioned are like some developments and some proposals involving uniform codes setting out the standardized terms of transactions in commercial, real estate and other fields intended to avoid costly litigation and make individualized transactions unnecessary. More of such legislation standardizing and clarifying common transactions should be developed for situations which ought to be made routine, simple and safe.

Analogous developments have also apparently proved successful in other countries. Illustrative is the East European experience with optional arrangements of this type for recurrent commercial transactions, which one East European lawyer aptly referred to as "vending machine" contracts. In this context the idea is essentially to offer a variety of alternative, ready-made arrangements among which customers could elect in entering into transactions which sellers would otherwise offer only on a take-it-or-leave-it basis, except for large transactions which the parties can afford to negotiate individually.

Obviously, the schemes described above are not unique. What is crucial, however, is that we set out on a concerted effort to offer simplification through standardization of the forms of transactions or of some of their provisions, on an optional basis or on a uniform transaction basis, wherever this approach will prove useful. We have particularly neglected the development of easily usable, entirely ready-made alternatives fitting between the individually tailored transaction and that which is unplanned or merely results from a take-it-or-leave-it legal or contractual situation.

Basic revision of processes and rule systems

A number of possibilities exist for fundamental modification or totally new concepts of traditional processes or their related substantive rule systems, or both, to eliminate lawyer work or at least simplify what is now extensive, costly activity by lawyers and judges. This involves (1) devising different methods of handling situations of potential dispute or other matters where a complex of issues or actions now generally must be processed through the machinery of our court systems, and (2) doing so in a way that minimizes time commitment of expensive judges and lawyers, or enables their work to be handled by paraprofessionals or even wholly or partially by the interested parties by themselves—or, more likely, some combination of these.

Well-known current examples of this general type of reform are "no-fault" insurance and divorce. Actually, these no-fault concepts are quite different from one another, and they also relate quite differently to the general objectives of the type of reform discussed here. Whatever the merits of the particular proposals currently in controversy or in use in either of these areas of legal activity, they represent diverse examples of the general types of reforms which ought to be explored carefully in many areas of law. The potential gain from such developments, where they are sound, can be expected in the long run to justify the dislocations, inconveniences, uncertainties and other short-term costs resulting from experimentation. This is so even though, obviously, all experiments cannot be successful.

What is needed, essentially, is revision of sets of substantive legal rules and the processes of their application in such a way that major matters (such as automobile accidents, marriage dissolutions and

wealth transmission at death) can be handled without unnecessary litigation or other unnecessary intervention of the judicial system. Chief Justice Burger and others have already pointed out the importance of such reforms in the substantive law as a means of coping with the enormous problems of judicial administration and the workload of the courts. Except under small claims concepts (themselves deserving of fuller consideration in this respect), almost anytime the judicial system is involved in a situation—wherever a judge and the court personnel and machinery are involved—so too are at least a couple of lawyers and their supporting help, all of whose time in court is but a fraction of the legal-service time involved.

DECEDENTS' ESTATES: AN OPPORTUNITY FOR BASIC REFORM

The Uniform Probate Code of the National Conference of Commissioners on Uniform State Laws, proposed in 1969, represents one major effort to attack the complexities, bureaucracy and other costs of the so-called probate system or, more precisely, the system for administration of decedents' estates. That Code offers numerous examples of specific rule improvements. It also sets out a concept of unsupervised estate administration (analogous to procedures that have been successful in several American states); this is a rather significant but modest example of basic reform of the type just suggested. The UPC's concept of unsupervised administration is in some respects more problematic than more fundamental change would be.

The concept of unadministered succession

A more promising experiment than the UPC should be undertaken, however, not simply to remove routine aspects of estate administration from the judicial system ("unsupervised administration") but to do away with estate administration altogether for most estates, utilizing courts only as necessary for their usual role of dispute resolution.

Such simplified systems for the transmission of wealth at death without administration (or simply unadministered succession) exist in varying forms outside the Anglo-American world. Even England, from which our estate administration systems were largely derived,

has now simplified its system to involve far less administration than ours. English lawyers and lawyers operating under the Civil Law systems of other countries are appalled by the idea of American-type procedures to protect beneficiaries and other interests. In fact, from the viewpoint of lawyers and judges involved in the succession processes, their roles—although reduced—are seen as thoroughly dignified, rewarding and worthwhile. These roles, in contrast to those generally imposed by American probate systems, are more nearly confined to matters for which lawyer-skills are genuinely needed.

A system of succession essentially without administration goes considerably beyond the UPC's scheme of unsupervised administration. The primary difference is as follows: The UPC preserves the traditional basic steps of decedents' estate administration but seeks to minimize the involvement of probate courts and judicial-type processes; unadministered succession not only simplifies estate administration but, for most cases, eliminates it. The ensuing paragraphs describe such a system as it might exist in this country, drawing by analogy on relatively pure systems of some Civil Law countries (and also a bit on the system of Louisiana, because of its Civil Law ancestry) but attempting to fit it into and describe it in terms of the legal and other circumstances of our states.

Unadministered succession in practice

The basic idea of unadministered succession is that the testate or intestate successors figuratively step into the shoes of the decedent at his or her death. To avoid complexities in explanation—but noting that these complexities can be, and in other countries have been, quite satisfactorily dealt with—let us assume the very common case of a person's death leaving the estate entirely to a surviving spouse, with the exception of a few legacies to other relatives, friends or charities.

The first step is to prove the will. (This is the strict meaning of "probate," but the term is more casually used also to refer to the whole estate administration process.) Traditional American attitudes may lead us to require that a simple proceeding to establish the will be initiated in court, giving notice of the time and place of a possible hearing. At that time the will can be contested; if not it is summarily admitted to probate. (Even the step of routinely

probating wills has been eliminated in many Civil Law systems by relying on less formal, nonjudicial steps and some combination of the passage of time and bona fide purchaser rules to provide security of ownership and title.) Thereafter, the probated will establishes the spouse's right to the decedent's property, much as deeds do in lifetime transfers.

As a result of this simple step, the spouse becomes recognized as owner of what had been assets of the decedent. The spouse then acquires personal liability for all of the decedent's debts, and also for payment of legacies (e. g., "$10,000 each to John Doe and Mary Roe"), which are treated much like debts and therefore become personal obligations of the spouse on accepting the benefits of the will. Thus, the spouse "stands in the shoes of the decedent" as present owner of estate assets and as the debtor to whom the decedent's creditors or legatees look for the payment of their claims.

A simplified version of the estate proceedings we now know would be available if the surviving spouse wished protection against the possibility that the decedent's debts exceeded the assets. The familiar notice to creditors, followed by the filing or barring of claims, could take place. Unless administration were thus instituted as an insolvency proceeding, the mere establishment of the will enables the spouse to transfer assets inherited from the decedent. Because of the spouse's personal liability, it would not be necessary first to determine and pay debts, as required by present probate law and the liens it imposes. Thus, the spouse is free to sell the property just as the decedent could have done before death, subject only to mortgages, fraudulent conveyance rules and the like.

The decedent's beneficiaries would have the personal obligation to file tax returns and pay succession duties, much as they now file their own income-tax returns. The government's protections to assure payment of taxes would require adaptation by taking on characteristics of the income-tax system. Both practically and conceptually, death taxation under such a succession system is simpler in the form of an "inheritance" or "accessions" tax than in an "estate tax" form. The inheritance tax is typically relied on in Civil Law countries (and also in most of our state tax codes), but if the estate tax is preserved in our federal system it could be coped with satisfac-

torily, as is now done by residents of Louisiana with its essentially Civil Law system.

As the case shifts from succession by a spouse to succession by some other adult beneficiary, the situation does not change. As one introduces, however, the situation of multiple successors (e. g., "the residue of my estate equally to my son and daughter"), essentially the same principles prevail but with tenancy-in-common ownership of the assets which had belonged to the decedent. The successors also assume joint liability for the decedent's obligations, with right of contribution between them.

A number of modifications in accompanying legal rules are necessary or desirable in order to accommodate the characteristics of such a succession system and to enable allied rules or activities to work. An essential adjustment appeared in the preceding discussion: the present system of encumbering title to the decedent's assets (by imposing a lien on them) until all creditors are paid should be replaced by a rule making the successor or successors personally liable for debts and allowing a successor to pass title without liens for the decedent's unsecured liabilities. The foregoing discussion also suggests one of the helpful modifications—changing the federal death tax system from one of estate to accessions taxation.

Successors to estate property and other potential clients would continue to need legal advice concerning some aspects of transition in ownership, their new business affairs and sometimes their new tax problems. The lawyer's role under systems of unadministered succession, however, becomes one of counseling and assisting with serious problems. It is largely freed of the makework and artificial legal problems typical of our present systems. Even some of the concerns over possible fiduciary misconduct that have been created by the Uniform Probate Code's proposal for unsupervised administration are diminished by the more fundamental reform discussed here. Thus, while the Uniform Code leaves us with estate administration under either its judicially supervised or its unsupervised alternatives, succession without administration really involves no intervention of an executor or administrator. Therefore, the beneficiary acquires the property immediately and directly, without even being exposed to the risks of fiduciary wrongdoing that arise in the context of any estate administration, whether supervised or un-

supervised. As a result, an unadministered succession system should enable us generally to avoid the need—and thus the costs—of both fiduciary work and fiduciary supervision in any form by making the fiduciary unnecessary.

Certainly the experience in much of the Civil Law world suggests that this is in fact a desirable and workable approach (even though an occasional Civil Law system's "notaire" has regressed into something as bad as our system). Furthermore, our own present systems, even without the benefit of a conscious design to facilitate such arrangements, offer examples of the feasibility of devices for unadministered succession: revocable living trusts; joint tenancy ownership; direct payment of life insurance proceeds to designated beneficiaries; and other will-substitute and probate-avoidance devices. Another example is the traditionally limited but recently expanded provision by which a California decedent's share of community property can pass outright, without administration, to a surviving spouse.

If a state's legal system were consciously designed to encourage and facilitate probate avoidance, the devices mentioned above could operate more smoothly and economically, while a complete, properly worked-out system directly authorizing unadministered succession could have enormously advantageous effects. The beneficiaries of estates would be saved delay and cost; the overworked judicial system would be spared an immense burden of unessential responsibilities; and attorneys would be spared dull, socially unproductive work while retaining roles worthy of professional time and talent, even if at the expense of losing a good deal of legal business. Much of the business created by antiquated or excessively paternalistic probate systems is felt by many lawyers to be unworthy of their time anyway, and is in fact being pushed off onto paraprofessionals, much as probate courts are finding ways to have their burdens picked up by non-judges.

SOME CONCLUDING OBSERVATIONS

The first of the three types of reform—improving specific rules—is thoroughly traditional and relatively easy. The problem is as much one of inertia as it is one of ideas.

Changes of the other types will require a good deal more imagination, and also just about as much unselfish dedication as enlightened self-interest, especially from lawyers and others who make their livelihood in the legal system and therefore bear the heavy, short-run burdens of experimentation, re-learning and adaptation. Major changes always produce new problems analogous to those worked out in the old system over a long time through practice, trial and error and even litigation. The better designed the new scheme, of course, the less there will be of these costs.

The center of most fundamental reform will have to be our legislatures. Because it is mostly private or "lawyer's" law that must be revised in pursuit of the objectives discussed in this article, obstacles will necessarily arise out of the limitations of legislative interest, competence and workload. Understandably, and for the most part properly, legislatures are preoccupied by issues that appear politically significant. Especially when other types of issues involve fundamental changes, it is inevitable that legislatures lacking personal or detailed knowledge and interest will have difficulty acting in the absence of a consensus within the concerned professions and other relevant interests. This is more a fact of life than a criticism.

With regard to some changes, particularly of the more specific, less fundamental type, our courts can play a prominent role. But here too there are obstacles. A recognition of the important values underlying a practice of adhering to precedent—i. e., judicial restraint—is as essential as a recognition of the necessity that viable systems adapt to change and refuse to be bound by prior mistakes. Nevertheless, in lawyers' law areas which are peculiarly the province of courts in a common law system (at least when legislatures are not able to carry much of this responsibility), our courts have too rarely earned the criticism that they have been so willing to incur through judicial activism in areas of broad social and political concern. This problem, however, may have at least as much to do with the character of advocacy as with the philosophy of judges.

In this latter respect and in matters relating to potential legislation, the legal profession must through its bar association committees and individual members, especially its scholars, assume a vital role. The

legal profession's resistance to change is usually a natural result of a well-motivated desire to avoid mistakes and injury to the public from both perceived (real or imaginary) and unforeseen risks. After all, the role of lawyers is more one of *keeping* people out of trouble than *getting* them out. They are conditioned to look for and avoid risks. In addition, lawyers, like academicians and everyone else, are victims of innate conservatism when it comes to modifying their own affairs. Even more importantly, lawyers are victims of time pressures and short-run concerns, and have paid too little conscious attention in law reform work to the aggregate impact particular processes and rules have on the need for and cost-availability of legal services.

Greater awareness will deal with this latter problem, and also with the general problems of inertia. Beyond that are important problems of time and other resources. Legislatures, bar associations, foundations and the public as a whole must recognize the necessity of marshalling intellectual resources to improve the legal environment. Some thought might be given to requiring "legal service impact statements" in connection with any type of legislation that may create legal complexity and greater legal service needs. Then, long-term studies, and even some experimentation, must be funded and endured. Some patchwork repair can be done even on the volunteer time of over-extended professionals, but a concerted attack on deficient rules and a greater vision in working out proposals for fundamental reform will require busy legislatures to delegate responsibility. This means underwriting, and giving some respect to, the work of commissions, task forces and expert individual researchers.

In some areas this will require careful consideration of federal legislation because of the inhibiting force of disparate state laws when truly fundamental law change is involved. Contrary to the usual assumption that our federal system provides numerous laboratories for experimentation and law change, our separate jurisdictions make it uninviting for one state to get too far out of step with its neighbors, because of transactions and affairs which cross state lines.

Despite the various difficulties and restraints in law reform activity, such efforts must be made continually by lawyers and others interested in the legal system. At least this is so if it is right that the key

to solving problems of judicial workload and legal-service delivery is to be found in improving and simplifying the law and its processes. Not only the productivity of lawyers and the cost to clients, but also the supply and effective demand for legal services—and thus the quality of justice—depend on the simplicity of our laws. By eliminating the unnecessary legal services and reducing the effort and cost associated with those that are essential, a given supply of lawyers and legal service expenditures can do more to satisfy the real needs of the society, and more people can have the services they need.