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Estate settlement through probate procedures satisfies no one. The public is hostile to the delay, expense, and lack of privacy that accompanies probate. Attorneys respond to public dissatisfaction by counseling probate avoidance. Legislatures facilitate some settlements by enacting simplified procedures for low-value estates. In large measure, the Uniform Probate Code (UPC) was a response to criticisms leveled at probate. Alternative settlement procedures are offered by the UPC, including informal testacy determinations and informal appointment procedures. These alternatives, however, remain imbedded in a judicial system, with its procedural rigidities.

The UPC informal settlement alternatives did not silence the criticism. The continued dissatisfaction with probate continues to breed devices to avoid probate and shortcut options for small estates. To address the ongoing hostility, this Article advocates the UPC adopt an optional, non-judicial registration system for estate settlement. Patterned after small-estate statutes, a registration system establishes the decedent's testate or intestate status by registering the will or an affidavit of heirship, identifies a personal representative when one is needed, and permits completion of settlement as rapidly as the unique circumstances of each estate permit.

A registration system is designed for the majority of estates, the ones that involve no controversy. Utilizing a registration system, the decedent's beneficiaries may collect assets, pay debts, and make distribution promptly, with reduced expense, and without the publicity that judicial proceedings entail. A registration system would be a continuation of the UPC's intent to offer estate settlement modes that are both acceptable to the public and responsive to the purposes of estate settlement.

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INTRODUCTION

The Uniform Probate Code¹ (UPC) simplified and streamlined the settlement of estates through the probate process.² The UPC offers a wide range of options—a virtual smorgasbord—for settling and administering a decedent’s estate.³ Some options are remarkably free of judicial involvement.⁴ With very limited exception, however, the options entangle beneficiaries in a series of requirements that are frequently unnecessary and unwanted. Increasingly, because of desires for simplicity, privacy, and efficiency, the public, the bar, and legislatures reject the courts as the venue for transmitting a decedent’s assets at her death. Thus, despite the improvements introduced by the UPC, probate is shunned.

To address the deficiencies of probate, this Article advocates adoption by the UPC of a non-judicial estate settlement option. To understand the need for such a mechanism, Section I briefly exam-

1. UNIF. PROBATE CODE (2011), 8 U.L.A. pts. I–II (1998). The UPC was approved in 1969 by the National Conference of Commissioners on Uniform State Laws (NCCUSL), now known as Uniform Law Commission. Article II, pertaining to Intestacy, Wills, and Donative Transfers was revised significantly in 1990 and 2008. *Id.* prefatory note (1990), 8 U.L.A. pt. I, at 75–76 (1998); *Id.* prefatory note (2011), 8 U.L.A. pt. I, at 33 (Supp. 2011). Only technical changes have been made to UPC Article III, the primary focus of this Article. The entire Code has been adopted in close to complete form in about twenty states but is “influential in virtually all.” UNIF. TRUST CODE prefatory note (2010), 7C U.L.A. 365 (2006); *see also* Roger W. Andersen, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 U. PUGET SOUND L. REV. 599, 599–600 (1984).

2. “Probate” in its narrow sense means to validate the decedent’s will. The Latin verb probare, “to prove,” is the antecedent to the present-day word. RAYMOND E. LAURITA, *LATIN ROOTS AND THEIR MODERN ENGLISH SPELLINGS* 248 (2000). As used here, however, probate refers to the administration of decedents’ estates through a judicial or quasi-judicial proceeding, and to the validation of the decedent’s will. For a general description of administration, *see* PAUL G. HASKELL, *PREFACE TO WILLS, TRUSTS AND ADMINISTRATION* 183–87 (2d ed. 1994). A study of probate administration in several states is described in Robert A. Stein & Ian G. Fierstein, *The Demography of Probate Administration*, 15 U. BALT. L. REV. 54, 57–104 (1985).

3. Settlement may be distinguished from administration. The former may occur without the latter. Administration is marked by the appointment of a personal representative who takes charge of collecting assets, paying debts, and distributing assets to beneficiaries. In general, the UPC alternatives are informal proceedings in Article III, Part 3; formal proceedings under Article III, Part 4; and supervised administration in Article III, Part 5. UNIF. PROBATE CODE §§ 3-301 to -322, 3-401 to -414, 3-501 to -505 (2011), 8 U.L.A. pt. II, at 55–75, 76–104, 105–10 (1998). Collection of assets by affidavit and a summary administration procedure for certain small estates are permitted by Article III, Part 12. *Id.* §§ 3-1201 to -1204, 8 U.L.A. pt. II, at 307–10 (1998). Although not highlighted, the UPC also contains a non-administration or do-nothing settlement option, which involves nothing beyond probating the will and determining heirs. *Id.* § 3-901, 8 U.L.A. pt. II, at 267 (1998) (“In the absence of administration, the heirs and devisees are entitled to the estate in accordance with the terms of a probated will or the laws of intestate succession.”).

4. The court registrar, intended to be a non-judicial person, handles informal proceedings. *Id.* § 3-105 cmt., 8 U.L.A. pt. II, at 37 (1998). Even the informal proceedings are called probate—in part, no doubt, because of the name of the UPC.

ines the discontent with traditional probate, legislative responses to this discontent, and the UPC's failure to resolve these issues. Section II proposes and describes a non-judicial option: a registration system. Section III explains how a registration system addresses the present dissatisfaction with probate, and Section IV demonstrates that the proposed system will attain the goals of estate settlement.

I. NEED FOR REFORM OF SETTLEMENT PROCEDURES

This section introduces the need for reform of probate by first reviewing, in Part A, the sources of the present hostility to probate. Part B examines the legislative responses to that enmity through adoption of so-called small estate proceedings. Part C reviews the UPC's imperfect efforts to address these issues.

A. Multifaceted Dissatisfaction

Will substitutes transfer more wealth at death than do probate procedures.⁵ This results, in part, from the popularity of life insurance, retirement plans and other contractual arrangements that pay proceeds directly to named beneficiaries. It also is due largely to widespread discontent with settling an estate through a judicial process—discontent that is fueled by the delay, expense, and lack of privacy that the public associates with probate.⁶ Actions of lawyers, academics, and legislatures evidence this dissatisfaction. Estate planners discourage use of probate administration, preferring a revocable trust as the primary vehicle for transmission of wealth.⁷ The practicing bar and academics assist in developing new

5. UNIF. PROBATE CODE art. II prefatory note (2011), 8 U.L.A. pt. I, at 75 (1998) (“[W]ill substitutes and other inter-vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission.”); see also Langbein, *infra* note 9, at 1108; Stein & Fierstein, *supra* note 2, at 104 (suggesting that significant wealth passes outside the probate process).

6. Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 542 (2000) (probate administration is characterized as “a process that can be time-consuming and costly, or even in some venues a modern form of grave-robbery”); Langbein, *infra* note 9, at 1116 (“The probate system has earned a lamentable reputation for expense, delay, clumsiness, makework, and worse.”); Karen J. Sneddon, *Beyond the Personal Representative: The Potential of Succession Without Administration*, 50 S. TEX. L. REV. 449, 460–61 (2009) (“[P]ublic perception of probate remains negative. Individuals’ concerns about administration can be categorized as follows: (1) cost, (2) delay, and (3) privacy.”).

7. John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 515 (1977) (“[S]implicity pushes estate planners . . . toward . . . use of the trust to avoid the frustrations of probate.”); Stephen P. Magowan, *Probate and Administration of Decedents’ Estates*, 804 TAX MGMT. (BNA), at A-9 (2000). A survey from 2006–2007 of Fellows of the American College of Trust and Estate Counsel (ACTEC) listed multiple shortcomings of the probate

will substitutes to avoid the probate process.⁸ Simultaneously, the general public vilifies probate.⁹

In response to this pervasive antagonism to probate, legislatures have adopted and expanded small estate proceedings. These responses are either summary procedures that aim to shorten and simplify the probate process, or affidavit collection approaches that bypass the court system or limit contact with it. The next section considers these legislative responses and their deficiencies.

B. Small Estate Proceedings: Limitations and Lessons

Although both summary procedures and affidavit collection devices are potential alternatives to traditional judicial administration of estates, they have limited utility. As the term “small estate proceedings” suggests, only estates of small or limited value are eligible for these procedures.¹⁰ Moreover, they may be available only to transfer personal property,¹¹ and sometimes are available only for intestate succession.¹²

process as the reason for the primacy of the revocable trust as the preferred vehicle to transmit property at death. Ira Mark Bloom, Summary of ACTEC Survey on Revocable Trusts 2–5 (unpublished manuscript) (on file with author).

8. The Uniform Real Property Transfer on Death Act is the most recent example. It makes no pretense of being anything other than a will substitute. A transfer on death deed is revocable, UNIF. REAL PROP. TRANSFER ON DEATH ACT § 6 (2009), 8B U.L.A. 129 (Supp. 2011), and is non-testamentary, *id.* § 7, 8B U.L.A. 130 (Supp. 2011). “[B]ecause the mode of transfer is declared to be nontestamentary, the [deed] is not a will and does not have to be executed in compliance with formalities for wills, nor does the instrument need to be probated.” *Id.* § 7 cmt., 8B U.L.A. 130 (Supp. 2011) (citing UNIF. PROBATE CODE § 6-101 cmt. (2011), 8 U.L.A. pt. II, at 431 (1998)). See Susan N. Gary, *Transfer-on-Death Deeds: The Nonprobate Revolution Continues*, 41 REAL PROP. PROB. & TR. J. 529, 532, 550 (2006).

9. JOEL C. DOBRIS, STEWART E. STERK & MELANIE B. LESLIE, *ESTATES AND TRUSTS, CASES AND MATERIALS* 46 (2d ed. 2003) (“Americans have developed—not without reason—a near obsession with avoiding probate.”); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1116 (1984) (“Since the mid-1960’s . . . there has been no denying the depth of public dissatisfaction with probate.”). The ACTEC Survey indicates that the public’s desire for privacy is a major factor behind the desire to avoid probate. BLOOM, *supra* note 7, at 8–9.

10. HALT, a self-styled legal reform organization, reports that every state has some version of a streamlined procedure for settling a decedent’s estate, but that in most states the ceiling on the value of assets that may use such a procedure is between \$10,000 and \$50,000. *Avoid Probate to Save Time and Money*, HALT, <http://www.halt.org/articles/5/835.php> (last visited June 1, 2011).

11. For example, Michigan limits use of its affidavit collection procedure to personal property not exceeding \$15,000 in value. MICH. COMP. LAWS ANN. § 700.3983 (West 2002) (\$21,000 in 2012, after adjustment for inflation as required by MICH. COMP. LAWS ANN. § 700.1210(1) (West 2002 & Supp. 2011)). Pennsylvania offers a small estate petition usable only for personal property up to \$25,000 in value. 20 PA. CONS. STAT. ANN. § 3102 (West 2005).

12. See, e.g., TEX. PROB. CODE ANN. § 137 (West 2003 & Supp. 2011), *repealed by* 2009 Tex. Acts, 81st Legis., ch. 680, § 10(a) (effective Jan. 1, 2014).

Affidavit procedures are collection devices. They authorize those entitled to receive the assets, under the decedent's will or under statutes of intestate succession, to collect the decedent's property directly from those holding the assets. In some states, the affidavit must be submitted to the court first, and must include a full inventory and valuation of assets.¹³ After court approval, the affidavit evidences the successors' entitlement to the decedent's assets, and may be used to collect them.¹⁴ In other instances, the successors' affidavit may be used to collect assets directly, without prior court approval.¹⁵ Under affidavit procedures, no personal representative is appointed,¹⁶ and the successors remain liable for the decedent's debts.¹⁷

Summary procedures, in contrast, shorten administration and involve limited contact with the court, but usually include the appointment of a personal representative.¹⁸ Notice to creditors and other traditional steps of administration may be necessary.¹⁹ Generally, the required procedural steps are an abbreviated version of a full-scale administration.

13. See, e.g., OR. REV. STAT. §§ 114.515, .525 (2009); TEX. PROB. CODE ANN. § 137. Arizona requires prior submission to the court of an affidavit to collect real estate, but not to collect personal property. ARIZ. REV. STAT. ANN. § 14-3971 (2005 & Supp. 2011).

14. See, e.g., CAL. PROB. CODE § 13154 (West 1991 & Supp. 2012); OR. REV. STAT. ANN. § 114.535; TEX. PROB. CODE ANN. §§ 137-38.

15. See, e.g., CAL. PROB. CODE §§ 13100-16; MICH. COMP. LAWS ANN. § 700.3983.

16. See, e.g., FL. STAT. ANN. §§ 735.201-2063 (West 2010); MICH. COMP. LAWS ANN. § 700.3983. Neither California nor Oregon require appointment of a personal representative, but the affidavit procedure may be used to collect assets even if a personal representative is appointed. See CAL. PROB. CODE § 13101(4) (allowing for use of the procedure when there is no administration or when there is administration, the procedure may be used with consent of the personal representative); OR. REV. STAT. ANN. §§ 114.515(1), 114.555 (an affidavit may seek appointment of a personal representative, but the appointment of a personal representative is not required).

17. See, e.g., CAL. PROB. CODE §§ 13109, 13156; FL. STAT. ANN. § 735.206(d)-(e); MICH. COMP. LAWS ANN. § 700.3984(2).

18. See, e.g., IOWA CODE ANN. § 635.1; NEV. REV. STAT. ANN. § 145 (LexisNexis 2009) (both requiring an initial petition to the court and appointment of a personal representative). Oregon requires the petition to list all heirs and devisees, inventory and value all assets, and detail expenses and claims, but a personal representative is optional. OR. REV. STAT. ANN. §§ 114.525, .545. Under the Uniform Probate Code, section 3-1203 permits a personal representative to close an estate in a summary manner when the net value of the assets is less than the sum of allowances, exemptions, and expenses of funeral, medical care for the last illness, and estate administration. UNIF. PROBATE CODE § 3-1203 (2011), 8 U.L.A. pt. II, at 307 (1998).

19. Iowa, for instance, requires filing an inventory, publication of notice to creditors, and a closing statement disclosing distribution of assets and the fees of the personal representative and his attorney. IOWA CODE ANN. §§ 635.2, .7-.8. Nevada requires notice to creditors and a final account that requests approval of distribution and discloses attorney fees. NEV. REV. STAT. ANN. §§ 145.060, .075. Florida, on the other hand, requires that all debts be paid before use of the summary procedure or that the petition state provisions made for payment of debts. FL. STAT. ANN. § 735.206(2). Notice by publication also is permitted to obtain a three-month limitations period. *Id.* § 735.2063.

The word “small” in small estate proceedings is elastic; the maximum value that can be probated under these alternatives varies widely. The UPC itself contains an affidavit procedure that undoubtedly was included to address demands for expeditious and efficient settlement of truly small estates.²⁰ Its valuation cap, however, is woefully out of date, as the UPC affidavit procedure can be used only if the total estate is less than \$5,000. In sharp contrast, Oregon provides an affidavit procedure for an estate with a total value up to \$275,000.²¹ Nevada offers summary administration for an estate worth less than \$200,000.²² California allows collection by affidavit of personal property worth up to \$150,000,²³ and offers a shortened procedure for settling an estate that contains both real and personal property with a combined value under \$150,000.²⁴ Hawaii’s alternative for estates below \$100,000 is a complete estate administration, but it functions under the authority of the clerk of the court rather than an appointed personal representative.²⁵

The procedures in Nevada and Hawaii, while available for estates somewhat larger than those defined as “small” in many states, are not abbreviated in any significant fashion. Each of those statutory alternatives require steps that are common in traditional administration, including a petition to initiate proceedings, a mandatory personal representative, notice to creditors, a final account, and a closing procedure.²⁶ Thus, some of the “small” estate proceedings are neither small nor simple. Others are summary in name, but fail to be brief in practice.

Small estate procedures are ubiquitous. Each state has some type of accelerated settlement.²⁷ Despite their variety, they exhibit common features. Generally, they shorten the settlement period,²⁸

20. UNIF. PROBATE CODE § 3-1201 (2011), 8 U.L.A. pt. II, at 307 (1998).

21. OR. REV. STAT. ANN. § 114.515.

22. NEV. REV. STAT. ANN. § 145.040.

23. CAL. PROB. CODE §§ 13100–13101 (West 1991 & Supp. 2012).

24. *Id.* §§ 13150–13151.

25. *See* HAW. REV. STAT. ANN. § 560:3-1205 (LexisNexis 2010) (providing that the clerk serves as the personal representative if one has not already been appointed).

26. *See id.* §§ 560:3-1206 to -1211; NEV. REV. STAT. ANN. §§ 145.060–.080.

27. *See, e.g., Avoid Probate to Save Time and Money*, HALT, <http://www.halt.org/articles/5/835.php> (last visited June 1, 2011) (claiming that “[e]very state has some streamlined system for distributing small estates through summary probate and out-of-court affidavit procedures”). Wisconsin itself has seven different small estate procedures. Mark T. Johnson, Comment, *A “Simple” Probate Should Not Be This Complicated: Principles and Proposals for Revising Wisconsin’s Statutes for Probate Summary Procedures*, 2008 WIS. L. REV. 575, 576–77 (2008).

28. Many affidavit procedures involve but a single step, *viz.* collection of the decedent’s assets from the one or those in possession. *See, e.g.,* ARIZ. REV. STAT. ANN. § 14.3971B (West 2005 & Supp. 2011); CAL. PROB. CODE § 13100; MICH. COMP. LAWS ANN. § 700.3983 (West 2002). Other affidavit procedures necessitate court approval prior to collection of assets. *See*

accelerate distribution of assets to the beneficiaries,²⁹ and place liability for the decedent's debts on the distributees.³⁰ When an inventory is required, it occurs at the opening step, and may be needed solely to show the estate is qualified to use the small estate mechanism.³¹ Accountings are not required unless demanded by a beneficiary, and there are no closing procedures to satisfy.³² Some of the procedures allow for settlement without the use of a personal representative.³³ Some also address concerns that use of the shortened process will be abused.³⁴ Overall, privacy for beneficiaries is increased, because an alternative procedure results in briefer encounters with the court.

Put succinctly, the affidavit collection approaches and summary procedures generally shorten common probate administration. They do so by eliminating the usual process for determining and paying debts, and by omitting steps, such as submission of an inventory and an accounting. Overall, the required activities and the actual settlement period are curtailed, which lowers the expense of settlement. Given that the public repeatedly identifies delay and expense as objections to traditional probate, these alternative settlement procedures and their widespread adoption offer lessons for reducing delay and expense that may be made part of a more comprehensive reform of the estate settlement process.

supra text accompanying notes 13–17. When summary procedures are used, the administration is an abbreviated version of a regular probate administration. *See supra* text accompanying notes 18–19.

29. Under a regular administration, beneficiaries generally do not receive distributions until claims are barred. *See* UNIF. PROBATE CODE § 3-807(b) (2011), 8 U.L.A. pt. II, at 257 (1998) (making the personal representative personally liable for earlier distributions). Significant portions of the assets will be retained until closing occurs, as a guard against disputes before settlement is complete. Direct collection of assets or a quicker settlement process accelerates the distribution to beneficiaries.

30. *See supra* note 17.

31. *See supra* note 13.

32. As affidavit procedures are simply collection mechanisms, there is no administration to close. Summary procedures may allow the personal representative to signal the end of administration by filing a sworn statement. *See, e.g.*, IOWA CODE ANN. § 635.8 (West 2003 & Supp. 2011). In other instances, a final account and hearing may be necessary. *See, e.g.*, NEV. REV. STAT. ANN. §§ 145.075, .080 (LexisNexis 2009).

33. Affidavit procedures do not use a personal representative. *See supra* note 16. Summary administration, as in Iowa and Nevada, features a personal representative. *See supra* note 18.

34. Sections 13110 and 13205(b) of the California Probate Code prescribe treble damages for fraud. *See* CAL. PROB. CODE §§ 13110, 13205(b) (West 1991 & Supp. 2012). Florida requires the wrongdoer to pay reasonable attorney fees incurred in corrective action. *See* FL. STAT. ANN. § 735.206(4)(g) (West 2010).

C. Flexible Settlement Under the Uniform Probate Code

UPC Article III provides alternative settlement procedures, which vary in formality and degree of contact with the court. The least structured settlement approach, consisting of informal procedures,³⁵ is intended to provide prompt settlement of estates that involve no controversy. The analysis of informal procedures in this section indicates, however, that barriers to an expeditious settlement still remain.

Informal procedures consist of two distinct steps: informal probate of the decedent's will³⁶ and informal appointment of a personal representative.³⁷ Neither step is a judicial proceeding.³⁸ Instead, each necessitates a response from the registrar, essentially the clerk of the court. When the will of an apparently testate decedent is offered for informal probate, this is nothing more than an *ex parte* request for informal validation of the will.³⁹ The applicant for informal probate may request informal appointment of a person with apparent priority to serve if a personal representative also

35. The flexible system of administration of decedents' estates, which the General Comment to UPC Article III describes as "the heart of the Uniform Probate Code," also includes formal procedures, supervised administration, and an option to employ neither of those techniques. *See* UNIF. PROBATE CODE art. III general cmt. (2011), 8 ULA pt. II, at 26–27 (1998). Informal procedures are those described in UPC sections 3-301 through 3-322; formal procedures are described in UPC sections 3-401 through 3-414; and supervised administration provisions are those in sections 3-501 through 3-505. *Id.* §§ 3-301 to -322, 3-401 to -414, 3-501 to -505 (2011), 8 U.L.A. pt. II, at 29–75, 76–104, 105–10 (1998), 8 U.L.A. pt. II, at 13–16, 17–25, 26–29 (Supp. 2011). The option to do nothing relies on UPC section 3-101, which states property of a decedent descends directly to the decedent's heirs or to his or her devisees subject to exemptions, allowances, and rights of creditors and the surviving spouse, if any. *Id.* § 3-101, 8 U.L.A. pt. II, at 29 (1998). The General Comment to Article III clearly states that neither probate nor appointment of a personal representative is compelled by the Code. *Id.* art. III general cmt., 8 U.L.A. pt. II, at 27 (1998). The provisions of a will, however, are not effective without probate of the will. *Id.* § 3-102, 8 U.L.A. pt. II, at 33–34 (1998).

36. For a description of informal probate, see *id.* §§ 3-301 to -306, 8 U.L.A. pt. II, at 55–61 (1998), 8 U.L.A. pt. II, at 13–14 (Supp. 2011).

37. For a description of informal appointment of a personal representative, see *id.* §§ 3-301, -308 to -311, 8 U.L.A. pt. II, at 55–56, 63–65 (1998), 8 U.L.A. pt. II, at 15–16 (Supp. 2011).

38. Section 3-105 of the Uniform Probate Code clearly delineates between applications to the Registrar under informal proceedings and petitions to the court to invoke judicial authority. *See id.* § 3-105, 8 U.L.A. pt. II, at 37 (1998). The comment to section 3-105 indicates that a non-judicial officer will act on informal applications. *Id.* § 3-105 cmt., 8 U.L.A. pt. II, at 37–38 (1998).

39. The submission of the will for informal probate is termed an application, and it is made to the registrar. *See id.* § 3-301, 8 U.L.A. pt. II, at 55–56 (1998). That section also states the requirements for an application for probate, none of which is notice to the other interested parties. No notice of the application is required other than to an incumbent personal representative and to any person who previously has filed a demand for notice. *See id.* § 3-306, 8 U.L.A. pt. II, at 61 (1998).

is desired.⁴⁰ The registrar may both probate the will and appoint a personal representative informally, without prior notice to interested parties.⁴¹ In some estates, only the first step, probate of the will, is necessary.⁴² Probate without administration is sufficient when the decedent's successors believe that the informally probated will is an adequate muniment of title to the decedent's assets.

The second, often concurrent, step is informal appointment of a personal representative. This initiates administration of an estate.⁴³ The appointment arms the personal representative with authority to collect and value assets, determine and pay or settle claims and taxes, and allocate and distribute assets to the proper beneficiaries.⁴⁴ Although the personal representative possesses plenary authority to settle the estate "expeditiously,"⁴⁵ and to "do so without adjudication, order, or direction of the Court,"⁴⁶ the UPC obligates the personal representative to prepare and transmit an inventory of the decedent's assets,⁴⁷ and encourages the personal representative to return to the court to utilize one of the alternative closing procedures.⁴⁸ These steps are required even though the personal representative may be the sole beneficiary. Giving notice to the decedent's creditors may or may not be within the discretion of the personal representative.⁴⁹ If notice is given, a short, four-month

40. See *id.* § 3-307, 8 U.L.A. pt. II, at 62 (1998).

41. See *id.* §§ 3-306, -307, -310, 8 U.L.A. pt. II, at 61, 62, 65 (1998).

42. Not only are the procedures for informal probate and informal appointment stated separately, see *id.* §§ 3-301 to -306, 3-307 to -311, 8 U.L.A. pt. II, at 55-61, 62-65 (1998), but the General Comment to Article III indicates that probate of a will without appointment of a personal representative is an essential characteristic of the Uniform Probate Code. See *id.* art. III general cmt., 8 U.L.A. pt. II, at 26-27 (1998).

43. See *id.* § 3-103, 8 U.L.A. pt. II, at 35 (1998).

44. Appointment is an essential precondition to acquiring the authority given to the personal representative. See *id.*, 8 U.L.A. pt. II, at 35 (1998). The extensive powers of a personal representative are stated in section 3-715 of the UPC. See *id.* § 3-715, 8 U.L.A. pt. II, at 169-71 (1998).

45. *Id.* § 3-704, 8 U.L.A. pt. II, at 148 (1998).

46. *Id.* 8 U.L.A. pt. II, at 149 (1998).

47. See *id.* § 3-706, 8 U.L.A. pt. II, at 152 (1998).

48. Alternative closing procedures are stated in UPC sections 3-1001 (formal closing culminating in an "order of complete settlement"), 3-1002 (closing without a conclusive determination of testacy status), and 3-1003 (closing by sworn statement). *Id.* §§ 3-1001 to -1003, 8 U.L.A. pt. II, at 288, 294-95 (1998). The comment to section 3-1003 suggests the personal representative may decline to use a closing procedure. See *id.* § 3-1003 cmt., 8 U.L.A. pt. II, at 295-96 (1998). In practice, however, courts invariably insist that some step be taken to signify conclusion of administration. See LAWRENCE W. WAGGONER, GREGORY S. ALEXANDER, MARY LOUISE FELLOWS & THOMAS P. GALLANIS, FAMILY PROPERTY LAW, CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 20-2 (4th ed. 2006) ("[P]ersonal representatives cannot shortcut mandatory closing procedures. If they do, they are subject to possible sanction by the probate court.").

49. See UNIF. PROBATE CODE § 3-801 (2011), 8 U.L.A. pt. II, at 208 (1998). As originally adopted the UPC required the personal representative to publish notice to creditors. See *id.*

statute of limitations applies to creditors claims. Otherwise, a one-year limitations period applies.⁵⁰

A personal representative utilizing the simplest closing procedure merely files a sworn statement to indicate that the settlement process is complete.⁵¹ Unfortunately, the verifications required by the sworn statement contain time constraints and impose additional mandates for the personal representative to observe. The personal representative must confirm that the claims period has expired.⁵² Although the claims period may be as short as four months, the closing statement itself may not be filed earlier than six months after appointment of a personal representative,⁵³ imposing a minimum half-year delay until closing of the estate can occur even if notice is given to creditors. If notice is not given, at least a 12 month wait is required.⁵⁴

The personal representative must represent in the sworn statement that she has furnished a “full account[ing]” to distributees.⁵⁵ Preparation and dissemination of a financial report containing the significant details of the settlement process adds time and expense. Further, the mandate for a full accounting applies even though all parties may be satisfied with the knowledge they already possess.

Informal probate and informal appointment of a personal representative expedite estate settlement. Although use of a personal representative is optional, it is relatively easy to obtain a personal representative through informal appointment. Once a personal representative is installed in office, however, the UPC imposes requirements of a full and complete administration. This extends the settlement period, and dictates actions that the affected parties often view as unnecessary and unwanted.

D. Need for Additional Settlement Option

Although many states have increased the valuation caps on their usage, summary procedures and affidavit collection measures are incapable of addressing the fundamental problems of probate. Availability of small estate proceedings depends on the nature of

§ 3-801 cmt., 8 U.L.A. pt. II, at 209 (1998). States were given the option by the 1989 amendments to the Code whether to mandate or only permit notice to creditors. *See id.*

50. *See id.* §§ 3-801, -803, 8 U.L.A. pt. II, at 208 (1998), 8 U.L.A. pt. II, at 64–65 (Supp. 2011).

51. *See id.* § 3-1003(a), 8 U.L.A. pt. II, at 294–95 (1998).

52. *See id.* § 3-1003(a)(1), 8 U.L.A. pt. II, at 294 (1998).

53. *See id.* § 3-1003(a), 8 U.L.A. pt. II, at 294–95 (1998).

54. *See id.* §§ 3-1003(a), 3-803, 8 U.L.A. pt. II, at 294, 215 (1998).

55. *See id.* § 3-1003(a)(3), 8 U.L.A. pt. II, at 295 (1998).

the decedent's assets and their value.⁵⁶ Occasionally, availability depends on whether the decedent died testate or intestate.⁵⁷ At the planning stage, an owner of wealth and her estate planner do not know whether the owner's assets at death will fall within the restrictions on the use of small estate proceedings. This uncertainty means summary procedures and affidavit collection devices are not reliable planning tools. They become helpful only when the facts at death fortuitously permit their use.

Where the UPC has been adopted, its informal proceedings are very popular.⁵⁸ Nevertheless, informal proceedings have not restored probate administration to a favored status for transmitting property at death. This is due, in large measure, to the UPC's answer to a central question posed by Professor Richard V. Wellman, the first Reporter for the UPC. Prof. Wellman suggested that discussion about probate reform should focus on three major questions: (1) whether a court is the proper forum to handle routine applications and appointments; (2) whether routine probate and appointment decisions are correctly viewed as adjudication; and (3) whether responsibility for complete administration of estates should be assumed by a state agency.⁵⁹ The UPC, in adopting informal procedures, answered "no" to the first two questions—routine probate and appointment events need not be addressed by a court, and they are not adjudications.⁶⁰ But, in mandating that certain administrative steps be taken by an appointed personal representative, the UPC kept administration within the ambit of a state agency. The consequences of that answer are evidenced by the discontent that fuels probate avoidance, the preference for will substitutes, and the expansion of small estate procedures.⁶¹

A new settlement option is needed to address the shortcomings of UPC informal proceedings and the limitations on availability of small estate devices. To have utility and attract usage, a new settlement mode must accomplish a number of goals. It must identify a

56. See *supra* notes 10–11, 20–25 and accompanying text.

57. See *supra* note 12 and accompanying text.

58. See, e.g., 2010 MICH. SUP. CT. ANN. REP. 49 (indicating that in Michigan, where the UPC has been adopted, of 23,215 new trusts and estates filings in 2010, 67 percent were unsupervised (informal) administration and 26 percent were small estate (under \$20,000) proceedings).

59. Richard V. Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 459 (1969).

60. See, e.g., UNIF. PROBATE CODE art. III general cmt. (2011), 8 U.L.A. pt. II, at 27 (1998); *id.* § 3-107 cmt., 8 U.L.A. pt. II, at 40 (1998) ("This section and others in Article III describe a system of administration of decedents' estates which gives interested persons control of whether matters relating to estates will become occasions for judicial orders.").

61. See discussion *supra* Section I.A-B.

valid will or confirm the decedent died intestate, document passage of title to the distributees, protect those who purchase assets from distributees, and facilitate collection and payment of the decedent's debts. Equally important, an alternative procedure must address the public's concern for privacy, shorten the time required for estate settlement, and minimize the expense of estate settlement.

These goals and objectives can be achieved through adopting a wholly non-judicial settlement approach, which this Article terms a registration system of estate settlement.⁶² The following section outlines this system, and illustrates the philosophical compatibility of a registration system with the UPC, and the ease of incorporating a registration system into the UPC.

II. REGISTRATION: A NON-JUDICIAL SETTLEMENT SYSTEM

The registration system that the author visualizes is unlike the judicial administration that characterizes traditional probate. Indeed, it is not called probate, to sidestep the unsavory reputation of the traditional process.

This section outlines the primary features of a registration system, noting that each feature of the registration system is consistent with the design of UPC informal procedures. The review begins with the identification and verification of the document governing transmission of the decedent's assets.

A. Registering the Decedent's Will

Under this proposed registration system, if a decedent leaves a will, any interested person may submit the will for registration, i.e., for recording. Registration occurs in a designated location, here called the Office of Estate Settlement. In many cases, this will be the same office that houses the probate court. The clerk or, under UPC terminology, the registrar, handles the registration.

The will qualifies for registration if it appears to satisfy the applicable execution formalities.⁶³ In response to the act of registration,

62. The author has previously described a registration system that is similar to the one described here, without advocating its inclusion in the Uniform Probate Code. Cf. John H. Martin, *Reconfiguring Estate Settlement*, 94 MINN. L. REV. 42, 77-101 (2009).

63. For a statement of the execution requirements for a will, see UNIF. PROBATE CODE § 2-502 (2011), 8 U.L.A. pt. 1, at 103 (Supp. 2011). Section 2-503 offers an avenue for validating a writing that fails to satisfy section 2-502, but that avenue requires judicial action. See

the registrar issues a confirmation of registration. The confirmation of registration evidences to third parties that the will is presumptively valid and operative according to its provisions.

These steps mimic the approach that is described in the general comment to UPC Article III, and is employed successfully under UPC informal probate.⁶⁴ As under the UPC, the person who offers the will for registration is required to submit, in affidavit form, a list of heirs and devisees; and to agree to provide those persons with notice of the registration.⁶⁵ This ensures that all those who have an economic interest are aware of the registration. To prevent potential wrongdoing, improper actions such as concealment, fraud, or noncompliance with the notice requirement precipitate significant penalties.⁶⁶

To address privacy concerns of interested parties, access to the registrar's file, upon request by an interested person, is limited to the devisees and heirs listed on the application for registration. The option to limit public access is unique to the registration system, unlike the requirement to notify interested parties, and the provision of penalties for wrongdoing. The UPC does not provide expressly for restricted public access.⁶⁷

B. Registering an Affidavit of Heirship

If the decedent dies intestate, any interested person may submit an affidavit of heirship, together with a commitment to give notice

id. § 2-503, 8 U.L.A. pt. I, at 108 (Supp. 2011). The registrar who considers a will for UPC informal probate is required to determine whether the formalities of section 2-502 appear to be satisfied. *See id.* § 3-303(c), 8 U.L.A. pt. II, at 14 (Supp. 2011).

64. See section 3-302 of the UPC for the registrar's written statement of probate and sections 3-301 and 3-303 for other requirements to obtain the statement of probate. *Id.* § 3-302, 8 U.L.A. pt. II, at 58; *id.* §§ 3-301 to -303, 8 U.L.A. pt. II, at 55-58 (1998), 8 U.L.A. pt. II, at 13-14 (Supp. 2011).

65. Notice to interested persons after informal probate of a will is required by section 3-306 of the UPC. *Id.* § 3-306, 8 U.L.A. pt. II, at 61 (1998).

66. Penalties under a registration system may include treble damages, such as provided in California for wrongdoing committed in use of small estate proceedings; or payment of actual, reasonable attorney fees, a remedy available to victims of improper use of Florida small estate procedures. *See supra* note 34. The UPC provides remedies for fraud in Section 1-106. UNIF. PROBATE CODE § 1-106 (2011), 8 U.L.A. pt. II, at 28 (1998).

67. Interestingly, the distinction in the UPC between non-judicial informal proceedings and the adjudicatory nature of formal proceedings offers an argument that only the formal, judicial proceedings are open to public view. *Cf. id.* § 3-105 cmt. (2011), 8 U.L.A. pt. II, at 37-38 (1998). *See infra* text accompanying notes 106-108. The former involves only actions taken by a clerk, not a judge, making the policy reasons for open court proceedings inapplicable.

to all of the heirs and, if desired, a request that access to the registrar's file be limited to those identified persons.⁶⁸

An *ex parte* registration of an affidavit of heirship departs from requirements stated in the UPC.⁶⁹ For an intestate decedent, the UPC requires a formal judicial determination of heirs even if informal proceedings are used thereafter to administer the intestate estate. While the UPC does require a judicial order to determine heirs, entry of an order may be based on the pleadings or on affidavit testimony.⁷⁰ Consequently, there is no required hearing on a request for a determination of heirs under the UPC.⁷¹ *Ex parte* registration of an affidavit of heirship thus only departs modestly from the UPC.

C. Uncertainty and Disputes

There will be infrequent occasions when an interested party wishes to challenge the validity of a registered will or an affidavit of heirship.⁷² In those instances, the contestant may pursue the matter in judicial proceedings in the same manner as afforded to contests of informally probated wills under the UPC.⁷³ If there has been no formal challenge to the will or affidavit, but the registrar is uncertain whether execution formalities have been observed or whether the will otherwise is eligible for registration, the registrar has authority to deny registration. This is consistent with the registrar's authority to deny informal probate under the UPC and to force parties to use formal, judicial proceedings.⁷⁴ Judicial involvement

68. Thus, initiation of settlement procedures under a registration system is parallel for both testate and intestate proceedings as filing an affidavit begins the process for each. *See supra* Section II.A.

69. A determination the decedent died intestate and an identification of his or her heirs are made under section 3-402(b) of the UPC. 8 pt. II U.L.A. 79 (1998). That section is a part of UPC formal procedures. It calls for "a judicial finding and order." *Id.* § 3-402, 8 pt. II U.L.A. 79 (1998); *see also id.* § 3-401, 8 U.L.A. pt. II, at 76 (1998) ("A formal testacy proceeding is litigation to determine whether a decedent left a valid will.").

70. *Id.* § 3-405, 8 pt. II U.L.A. 84 (1998).

71. *See id.* § 3-405, 8 U.L.A. pt. II, at 84 (1998).

72. Contested wills as a percentage of wills offered for probate over a nine year period (1976–84) in Davidson County (Nashville), Tennessee were 66 of 7,638, or 0.864 percent. Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 613–15 (1987) ("[T]he key point is that the likelihood of any will being contested is extremely attenuated . . .").

73. Formal, judicial proceedings under UPC section 3-401 must be used to challenge the validity of an informally probated will or one offered for informal probate. *See* UNIF. PROBATE CODE, § 3-401 (2011), 8 U.L.A. pt. II, at 76 (1998).

74. If the registrar is unsure whether a will satisfies the requirements for informal probate, the application may be declined. *See id.* § 3-305, 8 U.L.A. pt. II, at 60–61 (1998).

also will be fully accessible under a registration system, as under the UPC, when the proponent of a will resorts to the harmless error concept to establish the validity of the will.⁷⁵ A court proceeding is necessary to find that a writing is intended to be a will even though it does not satisfy the requisite statutory formalities.⁷⁶

In some situations, contested or uncontested, all of the affected parties will agree to depart from the decedent's will or from the statutory succession scheme. In these cases, the registration system permits a private agreement to alter shares, just as the UPC sanctions private agreements.⁷⁷ When registered, the private agreement itself might operate as a muniment of title.⁷⁸

D. Finality

Occasionally, the settlement process can end with the registration of the will or affidavit of heirship. In those instances, the registered will or affidavit may serve as an adequate muniment of title, just as an informally probated will may under the UPC.⁷⁹ Both systems recognize that there is no need to perform any task other than validating the proper document when there are no assets to collect, distributions to make, or uncertain claims. In many situations, however, the complexity of the settlement, multiplicity of assets, or large number of beneficiaries will necessitate designation of a personal representative.

Whether or not a personal representative is needed, a registered will or affidavit must attain finality within a reasonable time period. Finality means the provisions of the registered document become conclusive after a finite period. That period needs to be sufficiently long in order to permit a person with an economic interest to discover errors or grounds for contest. The period also should not extend beyond the point when a party having an interest can be

75. Section 2-503 allows a document to be treated as a will if it is evident that the decedent intended it to serve as a will. *See id.* § 2-503, 8 U.L.A. pt. I, at 108 (Supp. 2011).

76. Eligibility under section 2-503 to probate a writing intended to be a will must be established by clear and convincing evidence, a burden addressed in a judicial proceeding. *See id.* § 2-503, 8 U.L.A. pt. I, at 108 (Supp. 2011).

77. Private agreements are recognized under section 3-912 of the UPC. *See id.* § 3-912, 8 U.L.A. pt. II, at 279 (1998).

78. If administrative steps are necessary to implement the private agreement, a personal representative could assume office to perform the necessary tasks.

79. Once a will is admitted to probate, either formally or informally, title to the property disposed of by the will devolves to the beneficiaries under the will. *See id.* §§ 3-101, -102, 8 U.L.A. pt. II, at 29, 33-34 (1998).

expected to make inquiry to discover and protect his rights. Finally, it should be short enough to encourage use of the registration procedure.⁸⁰

Until the period leading to finality expires, those who purchase assets from beneficiaries under registered wills or pursuant to an affidavit of heirship receive full protection against claims of others. The UPC has a similar provision.⁸¹ It grants protection to purchasers who take from beneficiaries under informally probated wills. Unfortunately, the protection provided by the UPC is limited to those who purchase from distributees.⁸² As distributees are necessarily persons who have received property from a personal representative,⁸³ the UPC forces appointment of a personal representative to obtain early marketability of property.

E. Role of a Personal Representative

Using a personal representative is strictly optional under a registration system. As with UPC informal procedures, separating administration from confirmation of testate or intestate status clearly indicates that devolution of title to the decedent's assets neither entails nor requires administering the assets.

A personal representative is very useful in many instances. That person can collect and marshal assets, pay liabilities, satisfy exemptions and allowances, and allocate assets among and distribute them to the proper recipients. Multiple beneficiaries may find these tasks difficult to perform; they lack the authority to perform the task,⁸⁴ and decision-making becomes complicated when the group is large. A registration system recognizes the potential need to appoint a personal representative to perform estate settlement.

Appointing a personal representative does not mandate performance of all the steps of a traditional probate administration. Instead, the registration system recognizes that there is no need to unfurl the panoply of the administrative apparatus in every situation. The personal representative under a registration system is

80. The three-year period provided in section 3-108 of the UPC for finality of an informally probated will may be the appropriate interval leading to finality. *Id.* § 3-108, 8 U.L.A. pt. II, at 42 (1998).

81. *See id.* § 3-910, 8 U.L.A. pt. II, at 277 (1998).

82. *See id.*, 8 U.L.A. pt. II, at 277 (1998).

83. *See id.* § 1-201(10), 8 U.L.A. pt. I, at 17-18 (Supp. 2011).

84. Only an appointed personal representative possesses statutory authority to perform settlement tasks. *Cf. id.* § 3-103, 8 U.L.A. pt. II, at 35 (1998); *see also id.* §§ 3-701 to -711, 8 U.L.A. pt. II, at 136-70 (1998).

required to perform only those tasks that are necessary under the circumstances or desired by the interested parties.

Not all tasks are necessary to achieve a proper settlement of the decedent's affairs. When one or two assets or very few beneficiaries are involved in the settlement, an inventory and valuation of all assets may be surplusage.⁸⁵ If all known liabilities are paid and the successors are willing to take the risk that an unknown creditor may appear, notice to creditors and an extended claims period are unnecessary.⁸⁶ Requiring a full accounting or a closing procedure may duplicate information that is already known or readily available to the beneficiaries.⁸⁷ Recognizing that circumstances differ, a registration system permits a published notice to creditors. It allows but does not mandate preparation and submission to interested parties of an inventory or an accounting. Each of those steps will be used when helpful but may be eliminated when unnecessary or unwanted. A registration system avoids superfluous work and steps.

F. Identifying a Personal Representative

If the interested parties want a personal representative, a registration system identifies and appoints one in much the same manner as under UPC informal proceedings. When a personal representative is named in a testate decedent's will, that person may take office by filing an acceptance with the registrar and, in response, receiving a certificate of incumbency. This procedure is similar to an *ex parte* appointment under the UPC.⁸⁸ If the decedent's will fails to nominate an able and willing candidate, or if the

85. The UPC always requires the personal representative to prepare an inventory and value the estate assets. *See id.* § 3-706, 8 U.L.A. pt. II, at 152 (1998). The inventory may be filed with the court and must be mailed to interested persons who request it. *See id.*

86. Enactment of the UPC may require publication of notice to creditors or it may make publication optional. *See id.* § 3-801 cmt., 8 U.L.A. pt. II, at 209 (1998). If made, publication begins a four-month limitations period. *See id.* § 3-801(a), 8 U.L.A. pt. II, at 208 (1998). If notice is given by mail, the limitations period is the later of four months after publication if notice was also given by publication, or 60 days after mailing of notice. *See id.* § 3-801(b), 8 U.L.A. pt. II, at 208 (1998). If no notice is given to creditors, claims are barred after one year. *See id.* § 3-803(a)(1), 8 U.L.A. pt. II, at 64–65 (Supp. 2011).

87. *See supra* text accompanying notes 51–55 for a description of UPC closing procedures, including the associated prolonged waiting period and duplicative accounting and inventory requirements.

88. The UPC requires an application to the registrar by an interested person. *See* UNIF. PROBATE CODE §§ 3-307 to -311, 8 U.L.A. pt. II, at 62–65 (1998). Notice must be given to anyone who has requested it and to anyone with prior or equal right to serve as personal representative. *See id.* § 3-310, 8 U.L.A. pt. II, at 65 (1998). The registrar makes an actual appointment if the registrar determines there is no impediment to that action. The appointee must then file an acceptance. *See id.* § 3-601, 8 U.L.A. pt. II, at 111 (1998).

decedent died intestate, the registrar, upon request, designates the person possessing statutory priority as personal representative and issues her a certificate of incumbency. If two or more have equal priority,⁸⁹ the interested parties may designate by agreement who serves. If the applicants with equal priority are unable to agree, a judicial resolution of their dispute is readily available.

G. Personal Representative Authority and Duties

The office of personal representative under a registration system resembles that position under the UPC but differs in important ways. As under the UPC, the personal representative acquires control over, but not title to, the decedent's assets.⁹⁰ The personal representative must give notice to heirs and beneficiaries that settlement proceedings are underway if notice was not previously provided at the time of registration.⁹¹ The personal representative must supply an inventory or an accounting or both of those documents when requested by an interested party.⁹² When needed or desired to provide clear evidence of the distributee's title, the personal representative may assign or convey assets in distribution.⁹³ If real estate is transferred, the deeds can be recorded easily without exposing the decedent's will to public examination.

Although the registration system does not mandate a closing mechanism, the personal representative may invoke, or an interested party may precipitate, an informal or a formal closing procedure.⁹⁴ The personal representative and an interested party have access to the court for *ad hoc* attention to the particular issue,

89. When no person is nominated in a will, the UPC order of priority is surviving spouse (if a devisee), other devisees, surviving spouse (if no will or not a devisee), other heirs. *See id.* § 3-203(a), 8 U.L.A. pt. II, at 49 (1998). Thus, whenever there is no surviving spouse or the surviving spouse declines to serve, there is a high probability that several persons have equal priority to serve as personal representative.

90. *See id.* § 3-711, 8 U.L.A. pt. II, at 158 (1998; *id.* § 3-701 cmt., 8 U.L.A. pt. II, at 158 (1998).

91. Similar notice is required under section 3-705 of the UPC. *See id.* § 3-705, 8 U.L.A. pt. II, at 150-51 (1998).

92. An inventory must be supplied under the UPC to any interested person who requests it. *See id.* § 3-706, 8 U.L.A. pt. II, at 152 (1998). On the other hand, an accounting is required under each of the UPC closing procedures, even if not requested. *Cf. id.* §§ 3-1001(a), -1002, -1003(a)(3), 8 U.L.A. pt. II, at 288, 294-95 (1998) (providing for an accounting in all closing procedures).

93. The UPC requires the personal representative to execute a transfer document when distribution is made in kind. *See id.* § 3-907, 8 U.L.A. pt. II, at 274 (1998).

94. Although the UPC indicates that use of the sworn statement (or, by implication, any other closing procedure) is optional, *see id.* § 3-1003 cmt., 8 U.L.A. pt. II, at 294-95 (1998), courts typically require use of some closing mechanism. *See supra* note 48.

should a dispute or a question arise at any point in the course of settlement.⁹⁵

The authority of the personal representative ceases at the expiration of a fixed period that is noted on his certificate of incumbency.⁹⁶ As a result, the registrar need not be concerned with closing registered estates, just as the court does not consider whether all matters have been addressed in the context of summary procedures or collection affidavits. Of course, if an interested person believes a matter has been neglected or a harm inflicted, a simple petition to the court will precipitate judicial attention and response.

H. Creditor Claims

Most decedents leave solvent estates, and their successors readily pay all debts.⁹⁷ Moreover, creditors in general do not rely on probate claims procedures but protect themselves through other devices.⁹⁸ Few claims, other than routine billings, are filed in most estates. Unfortunately, a set time period during which claims can be filed under traditional administration causes an automatic delay in distribution. This is especially true under the UPC because closing an administration by a sworn statement requires affirmation that the claims period has expired.⁹⁹

Notifying creditors is entirely optional under a registration system, but it is an attractive option when certainty as to liabilities is

95. This is similar to the “in and out” relationship to the court described in the General Comment to UPC Article III. *See* UNIF. PROBATE CODE art. III general cmt. (2011), 8 U.L.A. pt. II, at 27 (1998). Under that relationship any interested person or the personal representative may make independent applications to the court for judicial resolution of any issue that arises during the settlement process. *See id.*, 8 U.L.A. pt. II, at 27 (1998). That contact with the court does not, however, subject the estate to oversight by the court in other steps of the settlement. *See id.*, 8 U.L.A. pt. II, at 27 (1998). This concept has been codified in at least one state. *See* MICH. COMP. LAWS ANN. § 700.3415 (West 2002).

96. If additional time is needed to complete settlement, the personal representative may request a renewal of his certificate of incumbency.

97. *See* Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 REAL PROP. PROB. & TR. J. 819, 826 (2007); Langbein, *supra* note 9, at 1120–21.

98. *See* Richard W. Effland, *Rights of Creditors in Nonprobate Assets*, 48 MO. L. REV. 431, 431–32 (1983) (enumerating some of the alternative devices employed by creditors); Stein & Fierstein, *supra* note 2, at 106.

99. Because a sworn statement to close administration cannot be filed before six months after appointment of a personal representative, six months is the shortest period of administration possible even when notice to creditors is published promptly. *See supra* text accompanying notes 51–55. If notice is not given, the wait before closing is one year. *See* UNIF. PROBATE CODE § 3-803(a)(1) (2011), 8 U.L.A. pt. II, at 64 (Supp. 2011).

desired before distribution of assets. Nevertheless, the registration system permits and facilitates an early distribution of assets and closing of the settlement phase. If distribution is made before the expiration of the limitations period, or if distributees collect and possess assets without appointing a personal representative, those who receive the assets remain liable for claims until the relevant limitations period runs.¹⁰⁰ There is no need to delay distribution until expiration of the time during which a creditor may appear.

Granting flexibility in addressing claims simplifies estate settlement; it does not facilitate or promote creditor avoidance. Thus, the limitations period that the jurisdiction applies when notice is not given to creditors should allow the creditor time to determine whether the debtor is still alive and, if not, whether an estate is involved. The diligent creditor is protected during the limitations period because the registrar's office maintains a list, available to the public, of all decedents for whom a registration file exists together with the name and address of the personal representative, if any, or of the one who registered a will or filed an affidavit of heirship.¹⁰¹ Additionally, upon a showing that the creditor lacks sufficient information to pursue collection, the creditor has standing to obtain appointment of a personal representative if no one has assumed that office.¹⁰²

III. ADDRESSING OBJECTIONS TO TRADITIONAL PROBATE ADMINISTRATION

Part I identified the primary objections to traditional probate: delay in settlement, lack of appropriate privacy, and unacceptable expense in transmitting a decedent's assets to her survivors. The previous section introduced the registration system as an alternative to both traditional probate and UPC informal procedures. The following discussion describes the success of a registration system in satisfactorily addressing the persistent problems of delay, lack of privacy, and expense.

100. The UPC provides that after distribution is made or if there is no estate administration, the decedent's successors take subject to claims of creditors. *See id.* §§ 3-104, -901, -1004, -1006, 8 U.L.A. pt. II, at 36, 267, 297, 299 (1998).

101. The one who registered the will or affidavit also should be required to furnish the creditor with the names and addresses of those who received assets that remain subject to claims of creditors.

102. The creditor also should be given the right to request a judicial proceeding to determine and allocate liability for the claim among the distributees.

A. Delay

Traditional probate causes delay by imposing set time periods for performance of certain tasks and requiring actions that have marginal utility for many estates. Informal administration under the UPC breeds delay by requiring the personal representative to await expiration of the applicable claims period, to prepare an accounting, and to utilize a closing procedure.

The registration system demands none of these steps. Each is optional and can be used or bypassed according to the needs of the estate or the desires of the participants. Accordingly, settlement can proceed with as much dispatch as circumstances permit.

A registration system is admittedly more elaborate and less instantaneous than obtaining assets under will substitutes such as joint tenancies, life insurance, or POD/TOD beneficiary designations. Each of those devices, however, transmits only a single asset. A registration system, in contrast, provides a comprehensive settlement mechanism that encompasses identification of beneficiaries, articulation of liability for debts, and allocation and distribution of all property to proper beneficiaries without regard to the asset mix or the total estate value. Registration is every bit as direct and expeditious as settlement under a funded revocable trust, but it avoids the expense of preparing a trust and eliminates the burden of lifetime funding.¹⁰³ Registration represents a uniquely comprehensive, delay-free, and nearly self-executing settlement mechanism.

B. Privacy

A registration system provides the privacy that estate beneficiaries desire. The individual registering a will or affidavit of heirship may request that the file be accessible only to those who are identified as heirs and beneficiaries. This request blocks the general public from accessing the decedent's will or learning the details of the decedent's assets and their values. Despite this restricted access, creditors have the right to know that a file exists for a specific decedent debtor. Creditors also have the right to know the identity of any personal representative or person who registered the will or affidavit of heirship.

103. Use of a revocable trust as a will substitute is not inexpensive. See Steven Seidenberg, *Plotting Against Probate: Efforts by Estate Planners, Courts and Legislatures to Minimize Probate Haven't Killed It Yet*, 94 A.B.A. J. 57, 58 (2008) (indicating the attorney fee for drafting a revocable trust may average \$1,500).

Where land titles are concerned, limiting access to the decedent's registration file may seem problematic. But probate court records are not the primary location for documenting land titles.¹⁰⁴ Instead, the designated public record office, such as the office of the register or recorder of deeds, reflects the chain of title. That office is fully accessible by the public. If the heirs or distributees under a registration system intend to rely on the registered will or affidavit of heirship to establish their title to real estate, they may need to record that document in the jurisdiction's land records. If they prefer not to record the will or affidavit (undoubtedly for reasons of privacy), they may install a personal representative who may confirm their title by a conveyance of the real estate in a recordable deed.¹⁰⁵

The public, admittedly, has a genuine interest in transparent court proceedings.¹⁰⁶ When there is a contested matter, it "is of fundamental importance that justice not only be done, but should . . . be seen to be done."¹⁰⁷ Limiting access to the registration file does not close judicial proceedings from public view. There are simply no judicial proceedings. Registration does not take place within a court; no findings are made nor orders entered. The public's interest in a decedent's assets and her dispositive provisions is voyeuristic. Satisfaction of that curiosity is not essential or even helpful to the functioning of a democratic society.¹⁰⁸

C. Expense

Major expenses of estate settlement include court costs, fiduciary fees, and legal fees. Legal fees accumulate according to time spent preparing, serving, and filing documents that address or comply with required stages of the settlement process, and time

104. Cf. POWELL ON REAL PROPERTY § 92.03[2](a) (Michael Allen Wolf ed., LexisNexis Matthew Bender 2000) (explaining that title insurance companies look many places other than probate court records when determining title to real property).

105. This is exactly the procedure used to provide documentation of the distributee's succession to real estate under UPC informal administration. See UNIF. PROBATE CODE §§ 3-907, -908 (2011), 8 U.L.A. pt. II, at 274-75 (1998).

106. Professor Foster asserts, "Wills are public record because of the 'public's interest in openness and accessibility' of court proceedings and records." Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 561 (2008) (citing *In re Reisman*, CONN. L. TRIB., Jan. 22, 1996, at 78).

107. *R. v. Sussex Judges*, ex parte *McCarthy*, [1924] 1 KB 256 at 259 (Eng.).

108. For recent discussions of cases involving the public's right to access all court records and proceedings, see Foster, *supra* note 106, at 561-67; see also Frank S. Ganz, *Privacy in Probate Court: Why Connecticut Should Seal the Record*, 22 QUINNIPIAC PROB. L.J. 136, 136-42 (2009).

spent in court at mandatory, but uncontested, hearings.¹⁰⁹ A registration system permits successors to eliminate steps that are unneeded or unwanted. This reduces expenditure of both time and money.

Not all expense is monetary. A high emotional toll results from navigating the court system to secure assets left by a family member. Seemingly arbitrary requirements for hearings, publications, inventories, appraisals, and accountings offend beneficiaries; the lack of privacy feels invasive. Negative reactions by the public, lawyers, and legislators result in increased development and use of probate avoidance devices.¹¹⁰ This monetary and emotional toll as well as probate avoidance can be mitigated by the simpler, less invasive, and more expedient registration system.

A registration system does not attempt to save money by ousting attorneys from estate settlement. It is, instead, an attempt to engage lawyers in the tasks they are trained to perform: to analyze the client's needs and objectives and to provide counsel to attain the client's goals, while considering the risks and expense. A lawyer will be needed when a registration system is an available option. The attorney will identify the settlement approach most suited to the facts of the particular estate and guide the participants through the selected alternative.¹¹¹ The lawyer will be paid for that advice and assistance, not for shuffling papers to satisfy unnecessary, unwanted, and irritating requirements.

IV. ATTAINING THE GOALS OF ESTATE SETTLEMENT

Prior sections have catalogued the ills of probate, introduced a registration system, and described the manner in which a registration system addresses the delay, expense, and lack of privacy that exist under current forms of probate administration. This section argues that a registration system will promote protection of the decedent's donative intent. It then describes the protection afforded to participants in the settlement process. The section concludes by

109. A study of attorney involvement in estate administration discovered that communication with the personal representative and beneficiaries consumes the greatest or second greatest portion of attorney time. Robert A. Stein & Ian G. Fierstein, *The Role of the Attorney in Estate Administration*, 68 MINN. L. REV. 1107, 1193 (1984).

110. See *supra* notes 5–9 and accompanying text.

111. Stein & Fierstein found that even when survivors have freedom to proceed in estate settlement without an attorney, the overwhelming majority elects to be represented by an attorney. Stein & Fierstein, *supra* note 109, at 1145. They conclude "attorneys . . . will likely remain necessary in the estate administration process whatever the course of future probate 'reforms.'" *Id.* at 1147.

recounting the ease with which a registration system performs the primary functions of estate settlement.

A. Protection of Donative Intent

Implementing the decedent's donative intent is a primary goal of estate settlement.¹¹² When all parties agree that the decedent's will is valid or that the decedent died without a will, donative intent is not an issue. It is revealed by the will or by statutory proxy. Instances of complete agreement are most suitable for use of a registration system.

On the other hand, when there are questions concerning the testamentary intent of a specific decedent, the court is the appropriate forum for adducing that intent. Judicial proceedings are also the proper locus for addressing other disputes or uncertainties in estate settlement.

Protecting the decedent's donative intent is a centuries-old concern.¹¹³ That concern justifies will execution formalities.¹¹⁴ Today, the concern is an argument for encouraging use of a single will rather than a multiplicity of will substitutes.

Whether commonly used will substitutes provide adequate protection is questionable. The general assumption with nonprobate devices such as a transfer on death real estate deed, a joint tenancy bank account, or a beneficiary designation under a life insurance policy is that executing a deed or a standard preprinted form pre-

112. There is tension in the law of succession between upholding intent and ratifying societal norms. The UPC reflects this tension. The harmless error concept of section 2-503 seeks to avoid frustration of the decedent's intent while protective devices such as exemptions and allowances in sections 2-402 to -404 and the spousal elective share of an augmented estate in sections 2-202 to -209 limit testator's intent that may stray from society's notions of familial obligations. See Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WISC. L. REV. 340, 340 (1966); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 268-69, 279 (1996).

113. The Statute of Wills (1540) required a writing for a devise of land; the Statute of Frauds (1677) added requirements of the testator's signature, attestation, and subscription by three witnesses. The Wills Act (1837) reduced the number of witnesses to two and unified the formalities for disposition of both personal and real property. The formalities required by these English statutes were adopted in various combinations by American states. See JESSE DUKEMINIER, JAMES LINDGREN & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 225-26 (8th ed. 2009).

114. Discussion of the importance and function of will execution formalities is ubiquitous in the legal literature. See, e.g., Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155 (1989); Friedman, *supra* note 112, at 366-78; Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541 (1990); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033 (1994).

vents abuse and safeguards intent.¹¹⁵ Considering each execution of a will substitute may yield independently the conclusion that the action fulfills the maker's intent at that specific time.

In reality, the maker's intent is not so clear under will substitutes because people are free to—and do—execute numerous transfer documents over many years, often with varying motives.¹¹⁶ Intent changes and memories dim regarding papers signed in the past. Consequently, a large collection of single asset will substitutes may not articulate the decedent's overall plan or accurately reflect the desired distribution of multiple assets.¹¹⁷

In contrast to the uncertainty resulting from numerous single asset transfer devices, a will reflects a unitary plan that encompasses all of a testator's assets and directs distribution of those assets at death. There is a high probability that the will reflects the testator's true intentions. A registration system encourages use of a will because it satisfies the public's demand for private, expeditious, and less expensive settlement. By encouraging use of a will as a comprehensive dispositive document, a registration system reduces the risks and dangers present in a multitude of will substitutes.

B. Protection for Participants in Estate Settlement

Protecting the economic interests of those with a direct stake in the transfer of the decedent's wealth is another important goal of estate settlement. A registration system is designed for beneficiaries who do not dispute the validity of the will or the identification of

115. Langbein, *supra* note 9, at 1130–32, describes an “alternative formality” test for possibly setting the boundaries of the nonprobate transfer system. This test would ask whether “the mode of nonprobate transfer is sufficiently formal to meet the burden of proof on the question of intent to transfer.” *Id.* at 1132. He suggests that commonly used standard business forms easily meet this requirement. *See id.*

116. Ambiguous intent is, for instance, suggested by the addition of another name to a bank account making it joint with right of survivorship. Changing title may reflect an intent that the other party own the account at the depositor's death, or it may only indicate a desire that the other party be able to access the account for the original depositor's benefit during his or her lifetime.

117. Many commentators have noted the risks presented by use of multiple will substitutes signed at isolated points in time. *See* Gary, *supra* note 8, at 557 (“Unfortunately, property owners [who have executed TOD deeds] may forget to make changes or may procrastinate and die with out-of-date documents.”); John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 875 (1972); William M. McGovern, Jr., *The Payable on Death Account and Other Will Substitutes*, 67 NW. U. L. REV. 7, 12 (1972); *cf.* Olin L. Browder, *Giving or Leaving—What is a Will?*, 75 MICH. L. REV. 845, 849 (1977) (noting that some will substitutes may pose just as great a risk of imposition as formal wills).

the decedent's heirs, and who agree on the goals of the settlement process. There is scant need to protect those who are parties to such agreements, because they do not request, and seldom need, court oversight or supervision.¹¹⁸

Parties who are potential beneficiaries but who are unaware of an estate settlement need protection. They need to know that a settlement is in progress in order to safeguard their interests. Both a registration system and UPC *ex parte* informal procedures require notice to all interested parties.¹¹⁹ If fraud occurs, these systems offer appropriate remedies.¹²⁰ Additionally, a penalty of either double or treble damages, or the burden of paying attorney fees for corrective action, provides redress for ignoring or subverting the rights of interested parties.¹²¹

A registration procedure, like the UPC, rests on the notion that self-interest is the great motivator.¹²² Both reject the belief that an estate settlement system should be a large, bureaucratic apparatus that views all participants in the settlement process with suspicion and, accordingly, monitors them for malevolent actions. Instead, both subscribe to the belief that the proper role of an estate settlement system is to facilitate transactions when all participants agree, and to provide ready access for dispute resolution when disagreements arise and remedial orders when wrongdoing is detected.¹²³

118. See WAGGONER, ET AL., *supra* note 48, at 20-2 ("Most estates pass without controversy to a sole surviving heir or a small group of adults who are eager to expedite estate settlement and to release the fiduciary.").

119. The personal representative who assumes office in a registration system is required to give notice to all others who have an interest. See *supra* text accompanying 91. If no personal representative is anticipated, the one registering the will or affidavit of heirship must give notice. See *supra* text accompanying note 68. Similar obligations are imposed in sections 3-705 and 3-306 of the UPC. UNIF. PROBATE CODE §§ 3-705, 3-306 (2011), 8 U.L.A. pt. II, at 150-51, 61 (1998).

120. Remedies for fraud are described in UPC section 1-106. See *id.* § 1-106, 8 U.L.A. pt. I, at 28 (1998). A registration system would include similar remedies.

121. Both the California and Florida statutes contain penalties for wrongful assertions in small estate proceedings. See *supra* note 34.

122. See UNIF. PROBATE CODE § 3-107 cmt. (2011), 8 U.L.A. pt. II, at 40-41 (1998); Richard V. Wellman, *Recent Developments in the Struggle for Probate Reform*, 79 MICH. L. REV. 501, 508; Wellman, *supra* note 59, at 498.

123. See UNIF. PROBATE CODE art. III general cmt., 8 U.L.A. pt. II, at 28 (1998); Wellman, *supra* note 122, at 509.

C. Performing the Functions of Estate Settlement

Estate settlement involves three primary tasks: to marshal assets, pay liabilities, and distribute the net estate to successors.¹²⁴ A registration system facilitates and expedites the accomplishment of each of them.¹²⁵

The first task of estate settlement is to identify, collect, and value the decedent's assets. In a simple estate, there may be only a home and a bank account. Registration of the will or an affidavit of heirship may be sufficient to identify the successors and enable them to collect or take title to their assets.¹²⁶ A registration system works equally well when there are multiple assets. In those instances, a personal representative can assume the fiduciary role. The representative's certificate of incumbency evidences full authority to locate, collect, control (as necessary), and value the assets.¹²⁷

Paying debts, taxes, and expenses is the second task of settlement. Generally, paying the decedent's debts is neither difficult nor contentious. The creditors are easily identified. The beneficiaries agree that the liabilities exist; they want the debts paid promptly in order to distribute the net assets without delay. In cases of uncertainty about the existence of claims, publication of a notice to creditors is appropriate, and a shorter limitations period will function as a reward. Notice to creditors by publication is unlikely when additional liabilities are both unknown and remote. Any neglected or unknown creditor, however, has access to registration filings to discover whether a debtor has died and a registration has been made. The information available to the creditor includes the identity of the individual who registered the will or affidavit and the personal representative, if any. If contact by the creditor fails to precipitate payment, the creditor has access to the judiciary for enforcement proceedings against the personal representative or the distributees. If there is no personal representative, the creditor has standing to obtain one when necessary to collect the debt.¹²⁸

124. EUGENE F. SCOLES, EDWARD C. HALBACH, JR., PATRICIA GILCHRIST ROBERTS & MARTIN D. BEGLEITER, *PROBLEMS AND MATERIALS ON DECEDENTS ESTATES AND TRUSTS* 666 (7th ed. 2006).

125. *Id.*

126. Title descends to the heirs or devisees at the decedent's death. The affidavit of heirship or the will simply identifies the new owners. This is wholly consistent with sections 3-101 and 3-102 of the UPC. *See* UNIF. PROBATE CODE §§ 3-101 to -102, 3-301 to -302 (2011), 8 U.L.A. pt. II, at 29-34, 55-58 (1998).

127. *See supra* text accompanying notes 90-96.

128. For further discussion regarding identification and satisfaction of decedent's debts, see *supra* text accompanying notes 101-106.

Distribution of assets to heirs or devisees is the final stage of the estate settlement trilogy. The will or affidavit of heirship itself may be sufficient to evidence title. When it is, the person who initiates the registration may record the document in the appropriate office or designate the document for public access if that access becomes necessary. If recording or accessing the will or affidavit is necessary but undesirable, a personal representative can accept the fiduciary role and assign or convey title by separate transfer documents. Recordation of those instruments then will evidence title in the recipients.¹²⁹ When the estate consists of multiple assets or there are numerous beneficiaries, a personal representative can be used to allocate assets and effect distribution.

CONCLUSION

The accelerating use of will substitutes and the expansion of so-called small estate proceedings signal unhappiness with traditional probate administration. The inadequacy of small estate proceedings, coupled with the public's desire for expeditious settlement, privacy, and reduced expense, strongly suggests addition to the UPC of a non-judicial registration system for estate settlement.

A registration system is designed for the typical estate: the estate whose successors have no disagreements and who want prompt collection of assets, payment of debts, and distribution of the net assets. A registration system is usable for both real and personal property, without restriction as to the total value of the decedent's estate.

Under a registration system, a will or affidavit of heirship, when registered, confirms the dispositive provisions that govern distribution of the decedent's assets and identifies the proper successors. If the beneficiaries need assistance to collect and distribute assets, determine and pay creditors, or address other settlement issues, the one with priority under the decedent's will or applicable statute may file an acceptance of office to assume the role of personal representative and proceed with the needed settlement tasks. Importantly, the personal representative needs to perform only those tasks that are necessary or desired. When those steps are completed, settlement may end without a closing procedure unless a party

129. This procedure for documenting title in the heirs or devisees is employed under sections 3-907 and 3-908 of the UPC. UNIF. PROBATE CODE §§ 3-907 to -908, 8 U.L.A. pt. II, at 274-75 (1998).

with a beneficial interest or the personal representative requests otherwise.

A registration system provides a direct, expeditious process for the vast majority of estates, which lack disputes and uncertainties. The system provides protection for participants in the settlement process. By improving the acceptability of transmitting assets under a will rather than under a multitude of nonprobate substitutes, a registration system also promises clearly articulated testamentary intentions.