DEFENSIVE REMEDIES UNDER NEBRASKA PROBATE CODE

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INTRODUCTION

Perhaps the major problem practitioners face is how to approach the Nebraska Probate Code. The Code must be considered a different, even a new, concept. If we start at the top and ignore our traditional concepts and habitual reactions, we can place the Code in context. We can generally understand it, accept it and perhaps even endorse it. We should look at this as a new and different approach to probate seeking to meet the needs and the demands of the public.

Work began on the model probate code in the 1940's. Some may recall that Professor Lewis M. Simes presented an institute on the model probate code at the Nebraska State Bar meeting in 1950. The article is published as Simes, The Model Probate Code—A Comparison of Nebraska Probate Law and the Model Probate Code, 30 Neb. L. Rev. 208 (1950). See also Kuhns, The Proposed Model Probate Code, 35 Neb. L. Rev. 290 (1955). Although the Bar has been working on probate revision for a long time, much of the impetus for adoption of the Nebraska Probate Code has come from the outside. If we realize these facts and approach the Code with such understanding, I believe we will have fewer problems in accepting the Nebraska Probate Code.

It is interesting to note that in our present practice aside from collecting, inventorying and appraising assets, accounting and tax matters, we have as much paper work in a $20,000 estate as we do in a $200,000 estate. It is on small estates, ones under $50,000 or $60,000 that the Nebraska Probate Code should have its most significant impact. It will aid the lawyer by eliminating much of the “make work.”

Greater professional involvement reaches many of the comments about ethics raised by practitioners. We have to consider the propriety of our advice to the widow, the surviving children, and the personal representative. Conflicts of interests may exist among some or all of them. Ethical considerations will present themselves at each step of the procedure.

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DEFENSIVE REMEDIES

The defensive remedies present an area for endorsement. Judge Robert C. McGowan touched on the precision of the procedure in his article and covered much of the subject, such as notices, fundamentals of formal and informal testacy, definitions and specifics of the Code. Professor Richard V. Wellman noted in his article the "in and out" aspect of the Code, which is one of its most desirable features. Attorneys will no longer have to trot over to the courthouse to have the judge or the associate judge "sign here" for every paper or act. We go to court only when we have a problem. We operate efficiently and effectively when there is no problem. To give you a summary of some considerations, I will give you examples of defensive remedies. Some of them are devices which you can use in practice prior to the effective date of the Code.

If you are drafting a will and have some question as to competency or even the trustworthiness of the personal representative proposed for the will, you can provide that the will be subject to supervised administration according to section 30-2440. The will can restrict applicability of the powers authorized under section 30-2476. A bond can be required setting an adequate amount under section 30-2446. The common clause inserted in wills exonerating questions raised by conflict of interest may be omitted so that the statutory conflict of interest clause will prevail under section 30-2474.

These suggestions might be contrary to our concepts of estate planning when we seek broad powers and flexibility. The Probate Code makes these protective devices available, however, where desired.

The question has been raised about a personal representative of doubtful qualifications. Once the Code is effective, upon death, you can apply all of these remedies:

(1) Anyone interested in the estate, including a creditor, can file a request for information under section 30-2413. Until that person is no longer interested in the estate, he is entitled to any information.

(2) You can petition for formal testacy under section 30-2425. The term "testacy" in this event not only relates to probate of a will, but relates to administering an intestate estate.

(3) You can petition for supervised administration; if the court determines that there is cause for supervision, it can enter an order requiring supervision. See section 30-2440.
(4) If the court determines to limit the authority of the personal representative, the limitations are to be stated on the letters of appointment, by section 30-2442. Anyone dealing with the personal representative is alerted to the fact that there are restrictions on authority. For example, if a limitation is endorsed on the letters, the personal representative could not sell stocks, cash certificates of deposit or otherwise deal with specific property without court order. The personal representative can not sell land without the authorization of the court after proper notice. This is a Nebraska modification of the Code in section 30-2476(23).

(5) Anyone having an interest in the estate in excess of $1,000, even though not a devisee or an heir (which would include a creditor), can request a bond, even though the will may exonerate a bond. See section 30-2448.

(6) An important factor is that by statute the personal representative, by accepting appointment, submits himself to the jurisdiction of the court in all proceedings relating to the estate. See section 30-2445. If someone is aggrieved, he can immediately file a petition for an adjudication in the court, and the personal representative must respond.

(7) Also, the surety on the bond by execution and filing of the bond, submits to the jurisdiction of the court. If there is more than one surety they are jointly and severally liable. See section 30-2449.

(8) The Code expressly authorizes a petition for a restraining order restricting the personal representative from disposing of a certain asset, making distribution in kind or in cash, or from performing other specific acts of administration. See section 30-2450.

(9) An interested person can petition to remove the personal representative. See section 30-2454.

(10) Anyone interested in the estate can petition for settlement after one year or after the claims filing date, whichever is later, under section 30-24,115. This is a corollary of our existing statute, section 30-1409, which provides "the personal representative shall account for the administration of the estate within one year after his appointment". The Nebraska Probate Code Manual noted that that provision is generally ignored. We all know there are good reasons for keeping an estate open for more than one year—federal estate tax audit, questions of determination of inheritance tax, contested claims, installment payments of federal estate tax over a period of nine years—where you don't
want to make a distribution which may trigger the entire tax.

All of these provisions are spelled out in the Code. The Code contains similar provisions relative to guardianship of a minor and of an incapacitated person, a conservator and a registered trust. We have no existing statutory guides for any of these provisions. Similar rules may be applied by court order in some areas. The Code spells out these procedures and limitations.

Filing of a petition for adjudication on any of these questions may not automatically trigger the desired result. For example, the court is not required to order settlements after one year. The Code provides the authorization. Whether or not the relief is granted depends upon the evidence. The Code does not change the fundamental concept.

An answer to all of these questions, of course, is to encourage appointment of a qualified personal representative in the will. Is it desirable to appoint the eldest son, spouse, or someone else? Of course, under our present law we have no assurance that the personal representative will avoid maladministration.

One of the most salutary benefits of the Probate Code is the emphasis upon information. The request or demand for information is an example. Under section 30-2466 the personal representative has to give notice to the heirs and devisees within 30 days of his appointment. He has to provide copies of the inventory and any supplemental inventory correcting or adding to the previous inventory (sections 30-2467 and 30-2468). The trustee on reasonable request has to supply information (section 30-2814). The guardian on request has to supply information; the court can order these things (sections 30-2613 and 30-2628).

Actually, providing information is only good practice. Every practitioner should provide the beneficiaries of a will with a copy of the will. Every practitioner should provide beneficiaries a copy of the order admitting the will, if any, to probate and appointing the personal representative. We should supply copies of the inventory and appraisal. We should inform beneficiaries as to what the claim procedure is, what claims are filed, whether or not there are enough assets to pay them, and whether or not any of them are contested. Perhaps we need not provide a beneficiary a copy of the federal estate tax return unless the beneficiary needs the information for income tax purposes. We should, however, send beneficiaries a summary of the estate tax computation and possible problems on any audit of the return. We should alert beneficiaries
to questions of valuation, of includibility or non-includibility of assets and the method of answering these questions.

This is good practice which the Code has now codified. Again, the Code provides the vehicle to bring us to a position of professional action.

A testacy proceeding stays any action upon informal probate under section 30-2425. If you are worried about the informal probate, file a petition for formal testacy. This is a defensive remedy.

The pendency of a proceeding for supervised administration stays action upon the informal application then pending or thereafter filed until the question of supervised administration is determined (section 30-2441).

The Nebraska Legislature in 1975 amended section 30-2446 to specifically state when a bond would be required. A bond is required from a personal representative unless the will expressly waives it; all heirs in intestacy or all devisees in a will not containing a waiver of bond can file a written waiver of bond. It is interesting that the guardian or conservator may waive bond for the ward or the protected person, unless that person is also the personal representative. No bond is required if the personal representative is a federal or state bank or trust company authorized to engage in trust business. A court may require a bond upon a petition expressly requesting it, even though the petitioner previously has filed a waiver of bond. If you are concerned about how things are going, you can request a bond. If previously it was suggested to the court that there was a possibility of a summary proceeding and the facts do not support the monetary test, bond would be required unless otherwise waived.

The court can require a bond of a conservator under section 30-2640. A Nebraska amendment to the Probate Code provides that the court may require a guardian of either a minor or of an incapacitated person to furnish bond. See sections 30-2613(4) and 30-2627(c).

As I have mentioned, the acceptance of the appointment submits the personal representative to the jurisdiction of the court on all matters relating to the estate.

Another provision of great interest to lawyers, and protection to beneficiaries and creditors, is the standard of care for a personal representative provided in section 30-2464. This section incorporates the standards of care for the trustee from section 20-2813. The standard is of a prudent man dealing with the property of another,
with this caveat: a trustee with special skills or named upon representation of special skills must use those skills.

I have never favored lawyers acting as personal representatives. I have done it a few times, and every time I have experienced problems as a result. I wonder if this caveat of the standard is a warning to lawyers. Does the fact that you are a lawyer dealing with probate administration imply to the testator or to the petitioner that you have some special skills and therefore have to exercise them? I do not believe I will willingly serve as a personal representative after the Code takes effect.

The statute requires the personal representative to settle and distribute the estate expeditiously according to section 30-2464.

The Code contains specific provisions for recovery in the event of fraud under section 30-2206 and for improper exercise of duties under section 30-2473.

The Code expressly prohibits by the personal representative, spouse, agent or attorney, corporation or trust in which the representative has substantial beneficial interest or transactions affected by a substantial conflict of interest. This problem is avoidable by any interested person in the absence of consent after fair disclosure unless the will or contract of the decedent expressly authorizes the transaction or the court approves the transaction after notice to interested persons. See section 30-2474.

**CONCLUSION**

The statute codifies a broad variety of tools. The Nebraska Probate Code is replete with them. Under the Code, we have a total arsenal of tools we can use to protect our clients and their interests in handling estates, and yet simplify the routine and minimize the paper work.