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STREAMLINING PROBATE—A PROPOSAL TO EXPAND SUMMARY SETTLEMENT

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I. INTRODUCTION

The legal profession has come under increasing attack in recent years in connection with the procedures, delays and costs involved in probate.¹ This criticism is especially applicable to small estates where undue delay and cost have imposed a special hardship.² The purpose of this article is to examine the summary settlement procedure for dealing with small estates in Wisconsin, consider alternatives to summary settlement, review a sampling of the average size of estates and consider whether there is a more effective way to handle relatively small estates.

II. DEVELOPMENT OF SUMMARY SETTLEMENT

Wisconsin has authorized summary disposition of small estates since 1925.³ Initially, summary settlement permitted immediate transfer of property where the estate, exclusive of exempt homestead, did not exceed selections and allowances of the widow and minor children and expenses of funeral and last illness.⁴ The original law provided for a special administrator to settle and wind up an estate. In addition, the procedure could be invoked at anytime after appointment of a regular administrator or executor if statutory requirements were satisfied. Finally the law allowed transfer of real estate to a mortgage holder if foreclosure was imminent and there was a possibility of a deficiency judgment.

Over the years summary settlement was gradually expanded and modified.⁵ In 1933, expenses of administration were added to the list

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¹ DACEY, HOW TO AVOID PROBATE, 5-9 (1965); Bloom, *The Mess In Our Probate Courts*, READERS DIGEST, 102 (Oct. 1966). See also, 26 Milwaukee Labor Press No. 2 (Aug. 10, 1967); 26 Milwaukee Labor Press No. 3 (Aug. 17, 1967); 26 Milwaukee Labor Press No. 10 (Oct. 5, 1967); 25 Milwaukee Labor Press No. 51 (July 20, 1967); 25 Milwaukee Labor Press No. 52 (July 27, 1967); 25 Milwaukee Labor Press No. 53 (Aug. 3, 1967).

² Ward & Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393.

³ WIS. LAWS ch. 230 (1925), creating WIS. STATS. §311.075 (1965). See also, WIS. LAWS ch. 454, §14 (1925); Fox, *Summary Settlement of Small Estates*, 1948 WIS. L. REV. 453. Other states having similar laws: ILL. STATS. ANN. ch. 3, §269 (Smith-Hurd Supp. 1965); IND. STATS. ANN. §7-203 (Supp. 1967); KAN. GEN. STATS. ANN. §59-1507 (1967); MINN. STATS. §525.51 (1967); TEXAS PROBATE CODE ANN. §§139-143 (1956).

⁴ WIS. LAWS ch. 230 (1925).

⁵ WIS. LAWS ch. 190, §6 (1933); WIS. LAWS, ch. 509, §1 (1945); WIS. LAWS, ch. 551 (1953); WIS. LAWS ch. 661 (1953); WIS. LAWS ch. 197, §1 (1957); WIS. LAWS, ch. 203 (1963).

of liabilities considered in determining whether summary procedure was applicable.⁶ Subsequently in 1953, priority for distribution was established.⁷ Where assets were insufficient to cover all claims, they were to be paid in the following order: expenses of administration; funeral; and last illness. This amendment also indicated that summary settlement could be used even if there were no surviving widow or minor children. However, this amendment was repealed several months after passage.⁸

The present law was enacted in 1957.⁹ It dispenses with an executor or administrator where assets in an estate do not exceed administration expenses, funeral and last illness expenses, selections and allowances of widows and minor children¹⁰ and claims of county institutions.¹¹ The county court is authorized to distribute such property to persons entitled to receive it. And as in the earlier laws, a general probate or administration may be terminated at anytime that an estate becomes eligible for summary disposition.¹²

The probate court may hear a summary settlement matter with or without notice.¹³ If real estate is involved, heirship may be determined on notice.¹⁴ The rights of the tax department are preserved and it may examine the property involved at any time.¹⁵ The court may order monies or personal property owed or belonging to the decedent and other property owned by the decedent paid to the persons entitled to them.¹⁶

The petition for summary settlement may be denied if the rights of any interested party may be jeopardized.¹⁷ Interested parties include, among others, creditors and taxing authorities. Persons making payments, delivery, transfer or issuance in accordance with court orders are released to the same extent as if they had done the same to a legally qualified executor or administrator.¹⁸ And finally, the court may require a bond if it deems it necessary for any reason.¹⁹

The present law provides for complete protection of creditors, the state, survivors of the decedent, and the public. The probate court is authorized to take all steps necessary to insure such protection while accommodating the immediate needs of the decedent's family. The principal drawback of summary settlement is that it is applicable to only

⁶ WIS. LAWS, ch. 190, §6 (1933).

⁷ WIS. LAWS, ch. 551 (1953).

⁸ WIS. LAWS, ch. 661 (1953).

⁹ WIS. LAWS, ch. 197, §1 (1957). See also, WISCONSIN PROBATE LAW §2.02 HAERILE, PROBATE PRACTICE IN WISCONSIN, 1964.

¹⁰ WIS. STATS. §311.05(1)(a) (1965).

¹¹ WIS. LAWS ch. 203 (1963).

¹² WIS. STATS. §311.05(1)(b) (1965).

¹³ WIS. STATS. §311.05(2)(b) (1965).

¹⁴ WIS. STATS. §311.05(2)(c) (1965).

¹⁵ WIS. STATS. §311.05(2)(d) (1965).

¹⁶ WIS. STATS. §311.05(3) (1965).

¹⁷ WIS. STATS. §311.05(4) (1965).

¹⁸ WIS. STATS. §311.05(5) (1965).

¹⁹ WIS. STATS. §311.05(6) (1965).

those estates that meet the qualifying limitations. Accordingly, if the assets of an estate exceed the statutory liabilities, a family is required to conduct a full-blown probate.

The proposed Wisconsin probate code would soften the present strict requirements by allowing use of summary settlement for any estate where the assets, apart from expenses, claims and allowances, did not exceed \$5,000 and the decedent was survived by a widow or minor children.²⁰ The proposal would retain present requirements in all other instances. Accordingly, summary settlement would continue to have very limited application for other survivors.

III. ALTERNATIVES TO SUMMARY SETTLEMENT

There are two important alternatives to summary settlement for small estates which have developed outside of Wisconsin. These are simplified probate procedures and the so-called affidavit collection process. In both instances, these procedures shorten and simplify probate for the typical small estate.²¹

A. Simplified Probate.

The idea of simplified probate was advanced by the National Conference of Commissioners on Uniform State Laws in the Model Small Estates Act.²² Although some reform for small estates was included in the Model Probate Code, it was apparently thought that additional flexibility was required.²³ Under the Model Small Estates Act, if a net estate, after deduction of claims and encumbrances, does not exceed \$10,000, the court may authorize a simplified procedure. While this act authorizes customary procedure, it shortens the period for claims of creditors and dispenses with certain published notices. In addition, the personal representative is given certain plenary powers to avoid the need for frequent applications to court for authority to dispose of property.²⁴ Accordingly, although creditors are protected, much procedure designed for contests is eliminated. More importantly, the decedent's family is relieved of the necessity of extended costly procedure.

B. Collection by Affidavit.

Affidavit collection is a procedure by which survivors of a decedent, by preparing, filing and delivering an affidavit setting forth certain essen-

²⁰ Proposed Wisconsin Probate Code, §867.01.

²¹ Oswald, *The Legal Efficacy of Attempted Methods of Avoiding Probate*, 5 WASH. L. REV. 1 (1930); Basye, *Dispensing With Administration*, 44 MICH. L. REV. 329 (1945); SIMES & BASYE, PROBLEMS IN PROBATE LAW (1946); Wren, *Small Estates*, 104 TRUSTS AND ESTATES 1038 (1965); Basye, *Streamlining Administration Under the New Texas Probate Code*, 35 TEX. L. REV. 165 (1956); WINKLER, PROBATE AND ADMINISTRATION OF SMALL ESTATES (1965); Note, *Settlement of Small Estates—A Proposal for Iowa*, 52 IOWA L. REV. 531 (1966); *Proposal for a Small Estates Act*, 1 REAL PROPERTY, PROBATE & TRUSTS JOURNAL 504 (1966).

²² MODEL SMALL ESTATES ACT, §11.

²³ Commissioner's Prefatory Note, MODEL SMALL ESTATES ACT.

²⁴ *Id.* at §11.

leaving less than a certain amount of property, may collect such property taxes.²⁵ Customarily, thirty days must elapse after death before this procedure may be invoked, there cannot be any petition pending or granted for the appointment of a personal representative and the value of the estate, exclusive of homestead and exempt property, cannot exceed a certain amount, usually \$1,000.

A typical affidavit statute requires the affiant to indicate: that no petition is pending for the appointment of a personal representative; that the amount of the property meets the statutory requirement; that the property is to be distributed to certain named persons; and that the inventory stated is complete. The original affidavit is filed with the clerk of court and certified copies are given to persons having custody of or owing property to the estate. The person turning over property is released from liability and the recipients may be required to account for such property.

C. Comparison of Simplified Probate and Affidavit Collection With Summary Settlement.

In essence, summary settlement is a compromise between the relative formality of simplified probate and the lack of judicial intervention under affidavit collection. It would appear that summary settlement works a better balancing of the rights of the various persons involved in probate. While summary settlement meets the immediate needs of the family for simplicity, low cost and dispatch, it imposes a judicial proceeding to protect creditors, the state and other interested persons. Moreover, summary procedure is clearly more desirable than simplified probate from the standpoint of time and cost. Indeed, summary settlement would appear to have a time advantage over affidavit procedures because there is no waiting period.

In all of these procedures, the same essential data is placed on file. While it might be argued there is reason to adopt affidavit procedures to maximize simplification, there is much to be said for at least one formal court hearing as is provided under summary settlement. This proceeding gives interested persons an opportunity to be heard and to examine the documents before the court. It also allows a formal determination of inheritance tax. And perhaps most important, it allows the judicial system to examine the request for transfer, minimizing any possible detriment to creditors and other interested parties.

IV. PROPOSAL TO EXPAND SUMMARY SETTLEMENT

Summary settlement is an effective procedure for small estates and should be expanded to encompass a broader area. This expansion can

²⁵ See CAL. PROBATE CODE §630 (1967); IND. STATS. ANN. §§7-201-202 (Supp. 1967); ILL. STATS. ANN. ch. 3, §324 (Smith-Hurd Supp. 1965); MO. REV. STATS. §473.097 (Supp. 1967); NEV. REV. STATS. §146.080 (1963); TEXAS PROBATE CODE §§137, 138 (Supp. 1956); LA. CIVIL PRO. CODE ANN., Art. 3421 (1964).

be accomplished without working a hardship on any class of interested persons and conveying positive benefits to those most in need of lower cost and shorter waiting periods. There is no need to impose complicated probate procedures designed for large estates and bitter contests on relatively small estates. There is also no need to accord creditors a special remedy not bargained for. This is especially significant when the corresponding risk of loss on their part is remote or nonexistent. Interestingly, under present probate procedures, a creditor can assert his claim against all property of a decedent even though during the lifetime of a decedent much property is exempt from any such claims. In summary, full probate procedure for small estates imposes an unfair hardship on a decedent's family without offsetting benefits to any class of persons.

Specifically, it is suggested that summary settlement be expanded to include all estates involving a surviving spouse or minor children or resident adult children which, exclusive of expenses, claims, allowances and homestead, do not exceed \$60,000. This amount is reasonable for a number of reasons. First, it is in tandem with the minimum amount taxable under the Federal Estate Tax. This tax often involves extended procedures and delays. Accordingly, an estate of this size might be tied up for a period of time regardless of streamlined state procedures. And second, prosperity and inflation have increased the value of property and correspondingly the dollar size of estates. Thus today there are many estates ranging to \$60,000, whereas this number was much smaller in the past. This means that more people are faced with cumbersome probate procedures. An amount lower than \$60,000 cannot be justified in view of this increasing prosperity and inflation.

It is submitted that an expanded summary settlement procedure would be fair and equitable to all interested persons and society. First, a surviving family would obtain the property of a decedent within a reasonable length of time and with minimum costs. Second, creditors would continue to receive the protection of court proceedings. In this connection, a court may require notice or a bond in appropriate cases and deny summary settlement in cases of serious question. In the great majority of cases there are either no claims or very few claims. Moreover, there are relatively few contest claims. Third, the state would be protected insofar as inheritance taxes are concerned as no matter is finalized until taxes are paid. And the public would receive the protection of formal court proceedings. All relevant data is disclosed and made a matter of public record.

Finally, there is the question of testate estates. In this connection, there is no need to change present requirements except to consolidate all procedures into a single hearing. This would save time and yet provide for distribution in accordance with the wishes of the testator. Moreover, it is suggested that a testator be given the right to elect in his will

to subject his estate to a full-blown probate. Such election would foreclose summary settlement.

V. PUBLIC POLICY

There are numerous reasons for simplifying probate. These range from reducing cost to lessening the burden imposed on the courts. The main factors as indicated in this article appear to be as follows:

- A. There is no present legal justification for extended probate proceedings in the great majority of relatively small estates.
- B. The cost of probate can be reduced for those who can least afford it.
- C. A decedent's family can obtain limited assets within a shorter period of time.
- D. No damage will be inflicted upon creditors inasmuch as the courts will continue to control the ultimate disposition of property as well as the character of the proceeding, i.e., summary settlement or full-blown probate.
- E. There is no chance of loss of inheritance taxes as no transfer of property can be made unless tax obligations are met.
- F. The courts will continue to control the ultimate disposition of property in all cases.
- G. Simplification will allow the courts to handle more estates expeditiously and devote efforts to more difficult problems.
- H. The introduction of simplified methods for smaller estates will lessen or eliminate discriminatory treatment in the disposition of property. Thus persons with only life insurance or pension plans will no longer receive special treatment (i.e., no probate) over those persons with relatively small estates containing conventional assets.
- I. The public desire for simplified probate will be met.

VI. SIGNIFICANCE OF PROPOSAL

There is much to be said for implementing simplified procedures for probate. It is also important to have some idea as to the impact of any such simplification. Accordingly, an extensive study was undertaken of recently closed estates to get some idea as to how many estates might benefit from expanded summary settlement.

In this regard, it has been suggested from many quarters that the average estate is relatively small. To test this theory, an examination was made of approximately one-half of the taxable estates closed in Milwaukee County during 1966. This examination consisted of a review of all of the tax orders entered by Public Administrator Patrick T. Sheedy. He is one of two Public Administrators in Milwaukee County. A tabulation was made of the net amount of estates. Net amount for this purpose meant the gross estate less all debts, expenses of last illness

and funeral and costs of administration. This net amount also excluded life insurance up to \$10,000, inasmuch as this amount is exempt from Wisconsin inheritance tax. All other assets were included. A total of 1,050 estates were reviewed. The results are indicated in the table below:

<i>Net Amount</i>	<i>Number of Estates</i>	<i>Percentage</i>
0-\$10,000	235 (143) ²⁶	22.5%
\$10,000-\$20,000	291 (238)	27.8
\$20,000-\$30,000	187 (133)	17.9
\$30,000-\$50,000	143 (100)	13.7
\$50,000-\$75,000	69 (49)	6.7
\$75,000-\$100,000	44 (34)	4.3
\$100,000-\$150,000	46 (28)	4.5
\$150,000-\$250,000	21 (14)	2.1
\$250,000-\$500,000	11 (8)	1.1
\$500,000 +	3 (3)	.3
	1,050	100.00%

It is self evident from the above table that most estates examined were relatively small. More than one-half of all estates were less than \$20,000 and more than three-quarters of all estates were less than \$50,000. It is noteworthy that in seventy-one percent of all of the foregoing estates the decedent was survived by a spouse and/or children.

Although joint tenancies are not affected by the proposal for expanding summary settlement, a study of about one-half of all joint tenancies terminated in Milwaukee County during 1966 indicated that the net taxable amounts in that area were even smaller than estates. About two-thirds of all joint tenancies were less than \$20,000 and almost ninety-nine percent were below \$50,000.

The data collected for this study tends to confirm the findings reported in the Ward and Beuscher article written in 1950. They found that only about 40% of all decedents had any estate pass through probate and of those requiring probate, more than one-half were below \$5,000. It would appear that if these figures were adjusted for prosperity and inflation, they would be close to the data contained in the above table.

More importantly, the foregoing table indicates that the burden of delay, extended procedure and cost falls far more often on families of limited means than anyone else. It is hard to justify a system that imposes this burden on grounds of public policy, protection of creditors, tradition, or anything else.

The proposal to expand summary settlement to \$60,000 would sim-

²⁶ This figure represents the number of estates in this category in which the decedent was survived by either a spouse and/or children.

plify the transfer of property in approximately 80% of all probates. This percentage would probably gradually drop over the years assuming rising values due to continued prosperity and inflation.

The impact of expanded summary settlement on the courts would appear to be salutary. There would be fewer hearings in each matter and more expeditious handling of estates. The general public would benefit not only in the streamlined handling of probate, but also in the ability of the court system to handle more matters and deal more completely with contests.

VII. CONCLUSION

It appears that there is an increasing public desire and need for simplified probate. Wisconsin has an existing procedure—summary settlement—which can be easily expanded to accommodate this objective. Summary settlement would continue to offer maximum flexibility. There is very little to support a continuation of present procedures for the great majority of estates. This is especially true in view of their small size and the lack of controversy. Accordingly, an expanded summary settlement procedure would convey major benefits to a large number of families while not endangering the rights of any other class of persons. Accordingly, there is much to be gained by changing the law and little or nothing to be lost.