

July 1981

Probate Law in Montana—Changes by the 1981 Legislature

Robert S. Marcott
University of Montana School of Law

Follow this and additional works at: <http://scholarship.law.umt.edu/mlr>

 Part of the [Law Commons](#)

Recommended Citation

Robert S. Marcott, *Probate Law in Montana—Changes by the 1981 Legislature*, 42 Mont. L. Rev. (1981).
Available at: <http://scholarship.law.umt.edu/mlr/vol42/iss2/5>

This Comment is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized administrator of The Scholarly Forum @ Montana Law.

COMMENT

PROBATE LAW IN MONTANA—CHANGES BY THE 1981 LEGISLATURE

I. Introduction	315
II. Foreign Personal Representatives and Ancillary Administration	316
A. Introduction	316
B. Powers of the Domiciliary Personal Representative	317
C. Priority of Appointment of the Domiciliary Personal Representative	319
D. Resident Creditors	320
E. Distribution of the Estate	321
F. Jurisdiction Over the Foreign Personal Representative	322
G. Conclusion	322
III. Renunciation	323
IV. Intestate Succession	324
V. Self-Proved Will Clause	325
VI. Bona Fide Purchasers and the Augmented Estate	326
VII. Estate Closing Requirements	327
VIII. Conclusion	327

I. INTRODUCTION

The 1981 Montana legislature enacted numerous changes to the state's probate laws. Most of the amendments codified language of the Uniform Probate Code (U.P.C.) that was either not adopted in the original enactment in Montana or was subsequently modified by the U.P.C.'s Joint Editorial Board.¹ This article canvasses the changes of most importance to the practicing attorney in Montana. Particular attention is given to amendments to the statutes covering the perplexing field of ancillary administration.

1. The U.P.C. Joint Editorial Board was created to revise the U.P.C. after its promulgation in 1969. The Board is composed of ten members, half from the National Conference of Commissioners on Uniform State Laws, and half from The Real Property, Probate and Trust Law Section of the American Bar Association.

II. FOREIGN PERSONAL REPRESENTATIVES AND ANCILLARY ADMINISTRATION

A. Introduction

One change of Montana's probate laws made by the 1981 legislature was more accurate adoption of Article IV of the U.P.C. provisions on foreign personal representatives and ancillary administration. While the legislature basically enacted Article IV of the U.P.C. in 1975, they altered some of the U.P.C. language, and added statutes designed to protect the Montana inheritance tax on estate assets located in this state but subject to probate in the state where decedent was domiciled. The U.P.C. revision committee of the Tax and Probate Section of the Montana Bar Association subsequently concluded that the Montana statutes were unclear and recommended adoption of the U.P.C. language. The 1981 legislature concurred and amended most of the Montana statutes to conform to Article IV of the U.P.C. The statutes not amended² were designed to protect the state's inheritance tax, but, as will be demonstrated, these laws create inconsistency.

Pre-U.P.C. law usually required two separate and complete administration procedures for an estate with assets located in more than one state. Double administration was inevitably costly and complex. The aim of Article IV of the U.P.C. is to encourage a simpler, more unified administration.³ This was essentially accomplished by two techniques. First, the U.P.C. gives substantial powers to the personal representative (PR) appointed in the state of decedent's domicile.⁴ The powers of this domiciliary PR extend to any state which has enacted the U.P.C., regardless of whether the state of domicile has adopted it. Hence, a domiciliary PR appointed in Illinois, a non-U.P.C. state, can exercise the U.P.C. powers in Montana.⁵ The second technique used by the U.P.C. drafters to achieve a unified administration of a multi-state estate was to

2. MONTANA CODE ANNOTATED [hereinafter cited as MCA] §§ 72-4-303, -304 and -305 (1981). Unless otherwise noted, the citations in this article are to the statutes amended by the 1981 legislature as they will appear in the 1981 codification.

3. Vestal, *Detailed Discussion of Article IV*, 1 UNIFORM PROBATE CODE PRACTICE MANUAL 432 (R. Wellman ed. 1977) [hereinafter cited as Vestal].

4. In disputes over which state was the state of domicile of a decedent, a final order of a court of another state which is based on a finding of domicile is controlling. MCA § 72-3-312 (1981). If courts in two states have simultaneous domicile disputes pending, the U.P.C. requires Montana to stay any proceeding and honor the finding of the other state unless the Montana proceeding was commenced first. MCA § 72-3-114 (1981).

5. The converse, however, is not true: A PR appointed in a U.P.C. state does not have U.P.C. powers in a state which has not enacted the U.P.C. See L. AVERILL, JR., UNIFORM PROBATE CODE § 25.01 (1978).

grant the domiciliary PR priority of appointment over all other persons, except those nominated in the will, in the selection of a local PR. Estate administration was thus streamlined by having one person serve as both the domiciliary and the local PR.

After discussing these two techniques, this part of the article examines the role of resident creditors in ancillary administration, distribution of estate assets, and Montana's jurisdiction over the foreign PR.

B. Powers of the Domiciliary Personal Representative

The first technique used to unify estate administration in two states is to grant two powers to the domiciliary PR acting in this state. The first power, defined in MCA § 72-4-306 (1981), permits the domiciliary PR, sixty days after a non-resident decedent's death, to collect two types of personal property: that owned by the decedent but in the possession of persons in this state, and money owed the decedent by debtors residing in this state.⁶ This authority is exercised by the appointed domiciliary PR by presenting the debtor or person in possession of the decedent's asset with proof of the appointment in the foreign state and with an affidavit stating, in addition to the date of death, that no administration or petition for one is pending in this state, and that the domiciliary PR has the right to receive the asset.⁷ The debtor is not forced to pay the domiciliary PR; the debtor can refuse and thus force the domiciliary PR to use other methods to secure payment.⁸

Persons who do pay or deliver property to the domiciliary PR may receive the same protection from liability afforded one who deals with a local PR.⁹ Exactly when that protection applies, although clearly stated in the U.P.C.,¹⁰ is uncertain in the Montana statute. This problem is due to an inconsistency between two of the Montana laws. The U.P.C. is consistent: both payment or delivery and the release from liability are based on the proof of authority and the affidavit.¹¹ The Montana laws provide, however, on the one hand, that payment of the debt or delivery of the asset to the domiciliary PR is sanctioned when the debtor or holder of de-

6. The assets subject to this statute are personal property, or "instrument[s] evidencing a debt, obligation, stock or chose in action belonging to the estate of the non-resident decedent . . ." MCA § 72-4-306 (1981). Securities are excluded.

7. MCA § 72-4-306 (1981).

8. Vestal, *supra* note 3, at 434.

9. MCA § 72-4-307 (1981). For the protections given a person who deals with a local PR, see MCA §§ 72-3-606 and -618 (1981).

10. U.P.C. § 4-202.

11. Compare U.P.C. § 4-201 with U.P.C. § 4-202.

cedent's property is presented with the proof of authority and affidavit. On the other hand, however, the statute granting the protection to one who does pay the debt or deliver the property requires payment or delivery to be made on the basis of a certificate of the clerk of court and a certificate of the Montana Department of Revenue.¹² This inconsistency may lead an unwary debtor of the decedent to make payment to the domiciliary PR on the basis of the proof of authority and affidavit, only to find out later that there was no release from liability because the domiciliary PR never presented the debtor with the certificates of the clerk of court and Department of Revenue.

The clerk of court's certificate is the equivalent of the proof of authority and the affidavit which the domiciliary PR must present to collect an asset of the estate.¹³ Consequently, presenting the person who has the asset or owes the debt with the proof of authority and affidavit may satisfy one of the two requirements for release from liability.¹⁴ But the second requirement of showing the person the certificate of the Department of Revenue will not be met.¹⁵ The person paying the debt or handing over the asset, therefore, will not receive the statutory protection by delivering the asset on the basis of the proof of authority and the affidavit. Thus, an attorney for a debtor or one holding decedent's personal property should require the domiciliary PR to present both certificates along with the proof of authority and the affidavit. Alternatively, the debtor can refuse to pay the debt or the holder of the property can refuse to deliver. Such refusal will force the domiciliary PR to exercise the second power authorized by the statutes.

The second power afforded the domiciliary PR is designed, like the power to collect estate assets, to unify and simplify estate administration. MCA § 72-4-301 (1981) permits the domiciliary PR, through a simple filing procedure, to acquire all the powers of a locally appointed PR over the assets located in Montana and to sue and be sued in this state.¹⁶ The power is acquired by filing

12. Compare MCA § 72-4-306 (1981) with MCA § 72-4-307 (1981).

13. Compare MCA § 72-4-303 (1981) with MCA § 72-4-306 (1981). The former provides that the certificate of the clerk of court will issue when three documents are filed with the clerk of court in the county where the property is located or the debtor resides. These three documents are authenticated copies of appointment and of any official bond given, an inventory and appraisal of the property pursuant to MCA § 72-3-607 (1981), and an affidavit stating both decedent's date of death and that no local administration or petition for one is pending. See text accompanying notes 7 and 8 *supra*.

14. MCA § 72-4-307 (1981).

15. *Id.* The certificate of the Department of Revenue is given when the state inheritance tax is paid or satisfactory bond is posted. MCA § 72-4-304 (1981).

16. The powers conferred are those provided for in Article III of the U.P.C. for an

authenticated copies of the appointment and of any bond given in the county where the non-resident decedent's assets are located or the debtor of the decedent resides.¹⁷ Once this power is obtained, the domiciliary PR can sue recalcitrant debtors or do whatever else is authorized by the statutes to settle and distribute the estate.¹⁸

Both powers discussed above—the authority to collect estate assets and to use the power of a local PR—are terminated when a local administration or a petition for one is pending.¹⁹ The local court may, however, allow the domiciliary PR limited powers to preserve a decedent's assets when the full power has been discontinued.²⁰ The statutes also protect individuals dealing with the domiciliary PR whose powers have been terminated, if they did not have actual notice of a petition for local administration.²¹ Finally, to assure continuity of administration, the newly-appointed local PR is subject to all duties and obligations created by the domiciliary PR.²² For instance, a contract made by the domiciliary PR to sell land for estate administration purposes is binding on the successor PR.

C. *Priority of Appointment of the Domiciliary Personal Representative*

The filing of a petition for local administration, as indicated, terminates the two powers of the domiciliary PR. When this occurs, the second technique formulated by the U.P.C. drafters to reduce the complexity of ancillary administration is activated. This method is expressed in provisions adopted by the 1975 legislature which were not altered by the 1981 legislature.

MCA § 72-3-506 (1981) all but guarantees that, when an ancillary administration is begun, the domiciliary PR will also be the person chosen as the local PR. This selection is accomplished by providing that the priority of the domiciliary PR supersedes the priority of others in appointment of a local PR to administer a decedent's local assets.²³ Only one person has more priority than the domiciliary PR: a person nominated in the will to be the local

unsupervised administration. U.P.C., art. IV, General Comment.

17. MCA § 72-4-301 (1981).

18. See generally MCA §§ 72-3-610 and -613 (1981).

19. MCA § 72-4-302(1) (1981).

20. *Id.*

21. MCA § 72-4-302(2) (1981).

22. *Id.*

23. Generally, priority of appointment is listed at MCA § 72-3-502 (1981). The priority of the domiciliary PR is conferred in MCA § 72-3-506 (1981).

PR.²⁴ MCA § 72-3-225(1) (1981) bolsters the preference for appointment of the domiciliary PR by delaying appointment of a local PR to administer assets of a non-resident decedent for thirty days unless the domiciliary PR is the applicant.²⁵ In those instances where a local PR is appointed before a domiciliary PR, MCA § 72-3-526(3) (1981) allows the domiciliary PR to have the local PR removed from appointment, unless the will provides for separate PRs.

D. Resident Creditors

Resident creditors, defined as creditors of a non-resident decedent who live or do business in Montana, are affected by the new statutes.²⁶ Of direct concern to them are the time period within which claims against the estate must be filed, and their right to blunt the domiciliary PR's power to collect assets of the estate.

Where there is an estate administration in the state of the decedent's domicile, that state's nonclaim statute governs. Nonclaim statutes set a time limit for presenting claims against the estate, which, if not met, act as a permanent bar to the claim. All claims barred in the state of domicile before the first publication of notice in Montana are also barred here.²⁷ Thus, while the domiciliary PR must begin the notice to creditors in the ancillary jurisdiction at the time of appointment,²⁸ it is possible the date the ancillary administration is begun will be after creditors' claims have been barred. For example, a person domiciled in Idaho and owning property in Montana dies. Because Idaho has enacted the U.P.C.,²⁹ all creditor claims there must be asserted within four months of the first publication of notice or be forever barred.³⁰ If the Idaho PR opens an ancillary administration in Montana one week after creditor claims have been barred in Idaho, all claims thereafter filed in Montana or Idaho are barred.

Resident creditors are in an onerous position: if the domiciliary PR does not begin ancillary administration until the time limit of the nonclaim statute expires in the state of domicile, and the Montana creditor does not open an administration here because

24. MCA § 72-3-506 (1981).

25. For example, if adopted in the decedent's state of domicile, the U.P.C. permits informal appointment there five days after decedent's death. U.P.C. § 3-302.

26. MCA § 72-4-101(3) (1981).

27. MCA § 72-3-803(1)(a) (1981). Tort claims and claims for taxes are excepted.

28. MCA § 72-3-801 (1981).

29. IDAHO CODE §§ 15-1-101 to 15-7-307 (1979).

30. U.P.C. § 3-803(a)(1).

the creditor is not aware of decedent's death, then the resident creditor cannot assert the claim. For protection, a creditor with knowledge of the death of a non-resident decedent should initiate ancillary administration in Montana, if one has not been commenced soon after the death.³¹ The opening of an administration here before the nonclaim statute of limitations has run at domicile extends the deadline for claims by Montana residents to the period of our nonclaim statute.³² Or, the resident creditor may simply use the administration in the state of domicile to enforce the claim.

As discussed above, the domiciliary PR has the power to collect the assets of the estate.³³ MCA § 72-4-308 (1981) permits a resident creditor of the non-resident decedent to notify a debtor or holder of property of the decedent to withhold payment or delivery to the domiciliary PR. This action will stop payment or delivery.³⁴ The right should be exercised by a creditor who wishes to prevent the local assets from being taken to the state of domicile.

E. *Distribution of the Estate*

Distribution of the ancillary estate is regulated chiefly by two statutes enacted by the 1975 Montana legislature.³⁵ A key provision makes all estate assets administered in this state "subject to all claims, allowances, and charges existing or established against the personal representative wherever appointed."³⁶ Another section states that family exemptions and allowances provided for by the law of the state of domicile must be satisfied before local claims.³⁷ Claims allowed locally and in the domicile state should be satisfied next; if the claims are greater than the assets, then each claimant receives an equal proportion of his or her claim.³⁸ If the assets exceed the claims, then local assets are used to satisfy local claims, and the remainder is given to the domiciliary PR.³⁹ The statutes also require a local PR to transfer all local estate assets to the domiciliary PR with three exceptions: one, if the will identifies devisees according to Montana law; two, if a domiciliary PR does

31. Vestal, *supra* note 3, at 440. MCA § 72-3-502(7) (1981) allows creditors to initiate an administration.

32. The period of our nonclaim statute is four months. MCA § 72-8-803(1) (1981). See also Vestal, *supra* note 3, at 440.

33. MCA § 72-4-306 (1981).

34. U.P.C., art. IV, General Comment; Vestal, *supra* note 3, at 434.

35. MCA §§ 72-3-821 and -822 (1981).

36. MCA § 72-3-821(1) (1981).

37. MCA § 72-3-821(2) (1981).

38. *Id.*

39. MCA § 72-3-821(3) (1981).

not exist or cannot reasonably be ascertained; and, three, if the court's closing order provides otherwise.⁴⁰

F. *Jurisdiction Over the Foreign Personal Representative*

The former statutes dealing with jurisdiction over foreign personal representatives are not, for the most part, changed by the recent enactment. Montana gains jurisdiction over the foreign domiciliary PR in four circumstances. First, any PR who accepts appointment in this state submits to personal jurisdiction in all estate proceedings begun by interested persons.⁴¹ Secondly, personal jurisdiction is acquired where a foreign PR, in order to receive the powers of a local PR,⁴² files in the local court authenticated copies of the appointment and of any official bond given.⁴³ Thirdly, jurisdiction is obtained when money or property are received pursuant to the power to collect estate assets,⁴⁴ but is limited to the value of the assets collected.⁴⁵ And, fourthly, the foreign PR concedes jurisdiction to Montana by performing acts here as a PR which are sufficient to give the state personal jurisdiction.⁴⁶ The above methods of obtaining jurisdiction should meet the constitutional requirement of sufficient minimum contact between the foreign PR and the state.⁴⁷ The statutes also cover the situation where, for example, a non-resident dies in an automobile accident in this state because of his or her own tortious conduct; MCA § 72-4-202 (1981) subjects a foreign PR to the same jurisdiction in this state to which the decedent was liable. Methods of service of process on the foreign PR are also delineated.⁴⁸

G. *Conclusion*

The purpose of the drafters of the U.P.C. was to simplify ancillary administration and to unify the administrations in the state of domicile and the foreign jurisdiction. The means chosen were to coordinate the administrations and invest certain powers in the

40. MCA §§ 72-3-822(1)(a), (b) and (c) (1981).

41. MCA § 72-3-511 (1981).

42. MCA § 72-4-301 (1981).

43. MCA § 72-4-201(1)(a) (1981).

44. MCA § 72-4-201(1)(b) (1981).

45. MCA § 72-4-201(2) (1981).

46. MCA § 74-4-201(1)(c) (1981).

47. Vestal, *supra* note 3, at 442-43. See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. Washington*, 316 U.S. 310 (1945). These cases require sufficient minimum contacts with a state, as well as fairness to the litigant, before a state can assert jurisdiction over a non-resident.

48. MCA § 72-4-203 (1981).

domiciliary PR. Montana's recent statutory enactments will not substantially change ancillary administration here; our laws before the 1981 legislature's action were already, in large measure, drawn from the U.P.C. The hope of those who urged adoption of U.P.C. language where it had not already been codified was to reduce confusion and uncertainty in ancillary administration.

III. RENUNCIATION

Montana law on renunciation of a devised or inherited interest was modified in three notable ways to conform to basic changes in the U.P.C. Affected are the time limit in which renunciation must be made, whether a representative of an incapacitated or protected person may renounce, and whether an interest renounced by a spouse should be charged against the elective share.

The time limit within which a renunciation had to be made under the previous U.P.C.⁴⁹ and Montana sections⁵⁰ was six months after the death of a decedent. One purpose of the six-month limit was to conform the provision to Internal Revenue Code regulations which, at one time, negated federal gift taxes on property renounced within "a reasonable time" after knowledge of the devise or inheritance.⁵¹ Courts generally construed a renunciation made within six months to have been within a reasonable time.⁵² In 1976 a nine-month time limit was substituted for a six-month period in the Internal Revenue Code.⁵³ Since federal law now uses the nine-month time limit, a potential problem existed with Montana's six-month period. For example, a renunciation made seven months after a decedent's death would qualify within the federal time period, but the renunciation would not meet the state requirement. Therefore, because federal law requires a renunciation to be "irrevocable and unqualified,"⁵⁴ the failure to meet the Montana time limit might have led to a holding that the renunciation was not "irrevocable and unqualified."⁵⁵ In that instance, federal gift taxes would apply. Hence, the U.P.C. Joint Editorial Board adopted a period of nine months from death within which the renunciation must be made. The 1981 Montana legisla-

49. U.P.C. § 2-801(b)(1) (1975 version).

50. MCA § 72-2-101(2)(a) (1981).

51. Treas. Reg. § 25.2511-1(c) (1958).

52. *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973).

53. I.R.C. § 2518(b)(2). Now the transfer must generally be made within nine months after the interest is created in order to avoid a gift tax.

54. I.R.C. § 2518(b).

55. *Id.*

ture agreed.

The second significant change in the Montana law of renunciation was to permit, as the current U.P.C. does,⁵⁶ "the representative of an incapacitated or protected person" to renounce an interest passing to the ward.⁵⁷ Under state law the court has the power to renounce for an incapacitated person⁵⁸ and, possibly, for a minor.⁵⁹ Prior law, however, did not expressly grant the conservator or guardian that power.⁶⁰ The new provision does grant that power. Allowing the guardian or conservator to renounce for a protected or incapacitated person follows the general rule.⁶¹ Note that Montana still allows, and the 1977 U.P.C. does not allow, a personal representative to renounce an interest given a decedent.⁶²

A third amendment to renunciation statutes concerns the effect of a spouse's renunciation on the elective share of the augmented estate. The new section alters Montana law so that now property "which would have passed to the spouse but [was] renounced" is applied against the spouse's elective share.⁶³ For example, a decedent devised a life estate to the surviving spouse and that spouse renounced the life estate in order to acquire a fee simple interest through the elective share proceeding. The rationale of the U.P.C. drafters is that, in this instance, the value of renounced property should be applied against the elective share because the decedent had provided for the spouse in the will. Renounced property, therefore, is charged against the elective share as though the property were accepted. The effect of this revision is to protect a decedent's will to the extent it gives property to the surviving spouse.

IV. INTESTATE SUCCESSION

Two adjustments of intestate succession statutes made by the 1981 legislature harmonize our law with the U.P.C. One change concerns who may inherit when the decedent dies intestate; the other affects inheritance by adopted children.

The U.P.C. has consistently limited inheritance to grandparents and those descended from them where there were no surviving

56. U.P.C. § 2-801(a).

57. MCA § 72-2-101(1) (1981).

58. MCA § 72-5-421(3)(h) (1981).

59. MCA § 72-5-421(2) (1981).

60. MCA § 72-5-231, -321 and -428 (1981).

61. U.P.C. § 2-801(a), Comment. See 21 A.L.R.3d 320 (1968).

62. Compare MCA § 72-2-101(1) (1981) with U.P.C. § 2-801(a).

63. MCA § 72-2-706(1) (1981).

issue, parent or issue of a parent.⁶⁴ The rationale for the line of succession limitation was to avoid challenges to a will by remote relatives and to eliminate difficulties of proof of heirship.⁶⁵ Montana, however, in enacting the U.P.C. in 1975, chose not to cut off intestate succession at any point but instead allowed, as did prior state law,⁶⁶ the collaterals who can inherit to extend indefinitely.⁶⁷ The new provisions, like the U.P.C., restrict intestate heirs to grandparents or lineal descendants of grandparents.⁶⁸

The second change in our intestate succession law eliminates the possibility of double inheritance that existed in Montana before the amendment. Prior state law allowed adopted children to receive intestate shares from both natural and adoptive parents.⁶⁹ The U.P.C.⁷⁰ and new Montana law⁷¹ give an adopted person the intestate share of only the adoptive parents, thereby cutting off inheritance from the natural parents. Another section of the U.P.C.,⁷² also codified by the 1981 legislature,⁷³ expressly eliminates the chance of double inheritance in any other circumstances. That provision covers the situation where, for example, grandparents adopt the child of their deceased son. Upon death of the grandparents, the adopted child would be entitled to receive two intestate shares: one as the adopted child of the grandparents, and one by representation as a natural descendant of the grandparents. Under the new law the adopted child would receive only the larger of the two shares.⁷⁴

V. SELF-PROVED WILL CLAUSE

Another significant change made by the 1981 legislature is the addition of a new self-proved will clause.⁷⁵ Execution of the original self-proved will clause,⁷⁶ which was not affected by the amendment, eliminates proof of signature requirements at time of probate.⁷⁷ This form requires the testator and witnesses to sign both

64. U.P.C. § 2-103(4) (1969, 1974 and 1977 versions).

65. U.P.C., art. II, part 1, General Comment.

66. REVISED CODES OF MONTANA (1947) § 91-403(1).

67. MCA § 72-2-203(5) (1981).

68. MCA § 72-2-203(4) (1981).

69. MCA §§ 72-2-203(1) and -213(1) (1981).

70. U.P.C. § 2-109.

71. MCA § 72-2-213(1) (1981).

72. U.P.C. § 2-114.

73. Senate Bill 38, § 4, 47th Mont. Legislature (1981).

74. *Id.*

75. MCA § 72-2-304(2) (1981).

76. MCA § 72-2-304(1) (1981).

77. MCA § 72-3-309(2) (1981).

the will and the self-proved clause. The new form, however, allows one signature of each party to constitute both execution of the will and execution of the self-proved will clause. Note that the amendment would not have changed the result in *Estate of Sample*,⁷⁸ where the first form was used. In that case the Montana Supreme Court held invalid a will which was signed only by the testator, even though both the testator and the witnesses had signed the self-proved will affidavit. Had the new self-proved will affidavit been permitted by the statute at that time and, in fact, used, the will would likely have been held valid. The practitioner must, therefore, exercise care in the use of the forms; each form has a different purpose and requirements.

VI. BONA FIDE PURCHASERS AND THE AUGMENTED ESTATE

The augmented estate concept is intended to ensure that a surviving spouse, in a proceeding for an elective share, will receive a fair proportion of the estate.⁷⁹ The protection of the surviving spouse is accomplished by including certain transfers of property made by the decedent in the augmented estate.⁸⁰ The 1981 legislature adopted clarifying language which had been added to the U.P.C. in 1975.⁸¹ The new language is designed to prevent inclusion in the augmented estate of a transfer to a bona fide purchaser. The need for the clarification arose in Colorado where real estate experts felt the old language required inclusion in the augmented estate of real property transferred by the decedent before death where the document transferring title was not signed by the spouse.⁸² In Montana, some title companies also require the spouse's signature. Accordingly, language added to the U.P.C., and now adopted in Montana, averts the addition to the augmented estate of "the value of property transferred to anyone other than a bona fide purchaser by the decedent."⁸³ Another section defines a bona fide purchaser as one who buys in good faith without knowledge of any adverse claim, and provides that "[a]ny recorded instrument is prima facie evidence" of a transfer to a bona fide purchaser.⁸⁴ Thus, the burden of proof is placed on the person who claims that the value of the transferred property should be in-

78. 175 Mont. 93, 572 P.2d 1232 (1977).

79. U.P.C., art. I, part 2, General Comment.

80. MCA § 72-2-205 (1981).

81. U.P.C. § 2-801.

82. U.P.C. § 2-202, Comment.

83. MCA § 72-2-705(1) (1981).

84. MCA § 72-2-705(4) (1981).

cluded in the augmented estate because the surviving spouse did not sign the document conveying title.

VII. ESTATE CLOSING REQUIREMENTS

Montana law states two conditions, in addition to the U.P.C. requirements adopted in this state, that must be met before an estate can be closed.⁸⁵ Both of these conditions were amended by the 1981 legislature. The first Montana requisite to estate closing provides that the personal representative must deliver an accounting of receipts, expenditures, and claims against the estate to all interested persons.⁸⁶ The exception to the accounting has been greatly expanded in the new provision. Formerly, an accounting was unnecessary only where the personal representative was the sole beneficiary of the estate.⁸⁷ Now, if the personal representative is the "sole *residual* beneficiary,"⁸⁸ no accounting need be delivered to interested persons.

Also affected by the new legislation is a second Montana precondition to estate closing. A new provision removes an inconsistency between the statute requiring payment of inheritance taxes before an estate could be closed,⁸⁹ and a statute allowing the Department of Revenue to grant an extension of time for payment of the tax.⁹⁰ Now the statute which used to require payment allows for the extension of time for payment.⁹¹

VIII. CONCLUSION

The changes made by the 1981 legislature to probate law in Montana reflect, for the most part, an attempt to harmonize state law with the U.P.C. The amendments both mirror changes in the U.P.C. itself and adopt U.P.C. language that was not enacted when Montana first legislated the U.P.C. in 1975. Close adherence to the U.P.C. language has two advantages: it lessens the chance statutes

85. MCA §§ 72-3-1005 and -1006 (1981).

86. MCA § 72-3-1005(1) (1981). Interested persons are defined at MCA § 72-1-103(21) (1981).

87. MCA § 72-3-1005(3) (1981).

88. *Id.* (emphasis added).

89. MCA § 72-3-1006(1) (1981). Note that the state inheritance tax for lineal descendants has been repealed. 1981 MONT. LAWS, ch. 202.

90. MCA § 72-16-438 (1981).

91. MCA § 72-3-1006(1)(b) (1981).

will conflict, and it makes both case law in U.P.C. states and secondary materials on the U.P.C. relevant and valuable sources of information for the Montana attorney.

Robert S. Marcott