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P U B L I C   H E A R I N G

before

SENATE JUDICIARY COMMITTEE

on

UNIFORM PROBATE CODE BILLS

Held:
September 11, 1973
County Administration Building
Hackensack, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Senator Joseph C. Woodcock, Jr. (Chairman)

Senator John A. Lynch

ALSO:

Assemblyman Albert Burstein

* * * * *

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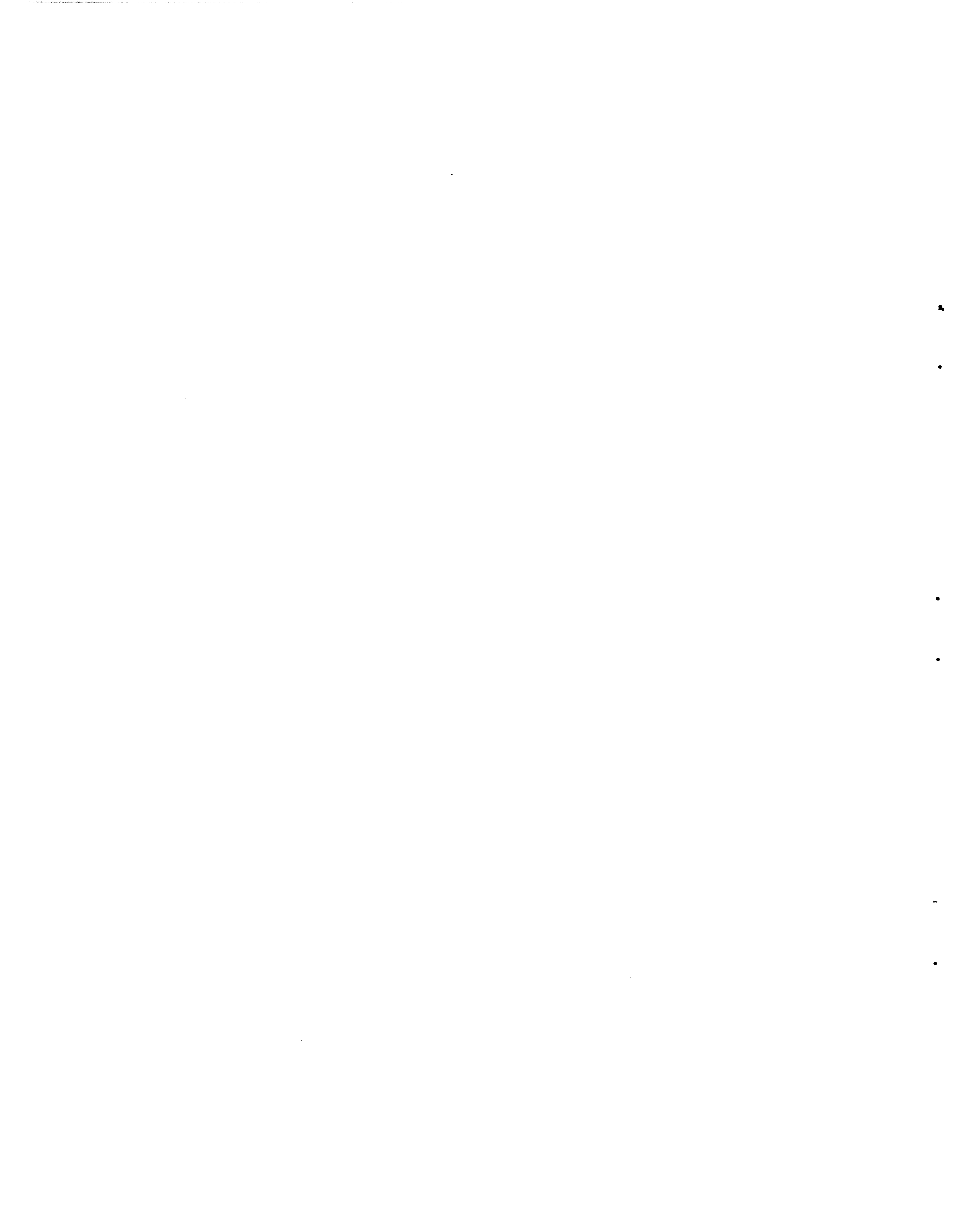

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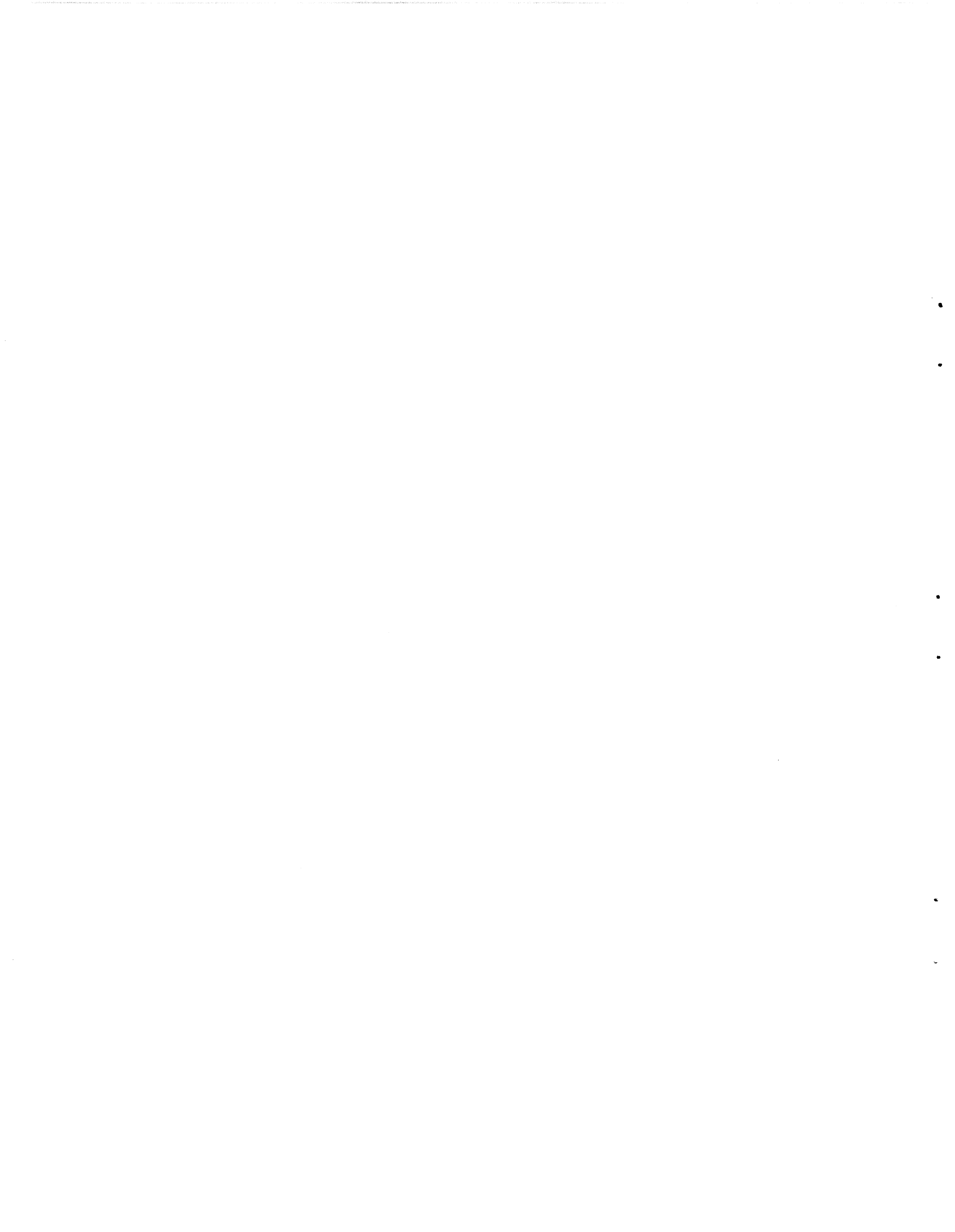

SENATOR JOSEPH C. WOODCOCK, JR. (Chairman): I see that we have passed the appointed hour for the public hearing. Before we begin, I would like to introduce the members of the Legislature who have joined with me at the committee table. On my left is Senator John Lynch from Middlesex County, a member of the Senate Judiciary Committee, and I am very happy that he took the time to come this long way to join with us in this hearing on some very important bills. We also have with us Assemblyman Albert Burstein from Bergen County, a member of the Assembly, who has introduced a number of bills in the Assembly that we will be discussing here today. I thank Assemblyman Burstein for taking time out to be here this morning.

This hearing is on a package of some 19 or 20 bills which make up the Uniform Probate Code. It has been suggested that the Probate Code or Law throughout the United States is in such a state that it needs some degree of uniformity and some degree of simplification.

The hearing this morning is for the purpose of clarification and for the purpose of explaining what those bills do, not only to the members of the Legislature who will be called upon to act either for or against the package, but so that the public and the members of the Bar of the State of New Jersey may be better informed as to the contents and effect of these bills.

To begin with, let me say that anyone who would like to testify before the Committee this morning and this afternoon, if they have not already notified the Committee of their intention to do so, may see Mrs. Donath at the end of the table so she may add their names to the list. We will attempt to take everyone in order. If you have any prepared remarks, I wish you would submit them to the Committee so that we may give them to our reporter. It will aid her and aid the Committee.

To begin with, I would like to call Senator Peter W. Thomas from Morris County, who is the principal sponsor of the package of bills known as the Uniform Probate Code.

SENATOR PETER W. THOMAS: Mr. Chairman, I want to thank you for calling this public hearing today to discuss and perhaps interrogate about the bills that have been introduced that would implement certain portions of the Uniform Probate Code.

The Uniform Probate Code contemplates the uniform revision of the law for all of the states covering the disposition of the property of a decedent and the administration of his estate. Many of the provisions of the Code are already in accord with our New Jersey Law. Others are not, however.

Much of the New Jersey probate and property law was adopted from the early English Common Law and, of course, that was founded on the concepts of a much different society than we have today. It was founded basically on an agricultural society. Our present economy requires that many people move frequently from place to place and some uniformity of the law throughout the nation really is required to avoid the continuous problems that arise as a result of the difference in the law from state to state which compel the execution of a will every time somebody moves his family. The consequences of this either result in testacy or intestacy of a person in instances in which he may not even be aware. And many times a person's intentions with regard to the disposition of his estate are completely frustrated just because he happens to change his residence.

The multiplicity and diversity of the various probate laws and the expense involved in the disposition of a decedent's peoperty have brought about in recent times the publication of many articles and pamphlets and even

the publishing of some books with regard to the disposition of property and giving advice as to ways which will enable a person to avoid probate altogether.

The Uniform Probate Code is designed to provide the changes in the law which have been found to be necessary in our present society and at the same time to remove much of the awkward encumbrances that have grown up in the administration of estates and to provide a financially safe, efficient and economical way to assure that a decedent's wishes will be carried out.

Now originally I introduced a package of five bills in 1972. The Judiciary Committee considered those bills. As a matter of fact, they had, as you know, Judge Clapp come in who had been one of those persons who had been most active in the development and the writing of the bills that had been introduced in the Senate. He lent his expertise to the Senate Judiciary Committee and ultimately those original five bills were released and placed in a position for a floor vote.

In addition to that, Judge Clapp spoke before both the Democratic and Republican Conferences to explain to their respective memberships the intricacies of the bills that had been introduced. Judge Clapp had published in the State Bar Association Journal an explanation of the original five bills that were introduced. In addition to that, the Bar Association's Real Property, Probate and Trust Law Section reviewed the bills and recommended endorsement of the bills to the trustees of the Bar Association and ultimately the trustees of the New Jersey State Bar Association did endorse the original package of five bills that were introduced.

When a move was made to advance the bills for a final hearing and vote, it was suggested that perhaps they would be the proper subject matter for the State Bar Association to consider at a special seminar to be given at the Association's annual meeting. Unfortunately, that did

not come about.

I then moved the five bills and two of them have already passed. Three have been laid over.

Following that, the rest of the package was introduced and it was suggested at the time that perhaps the best way to provide a forum for a full discussion of the bills because they are complex - a number of them are - some of them are housecleaning bills - but a number are quite complex and will result in substantial changes in the New Jersey Law - would be to hold a public hearing, that that would be the best vehicle to provide a means of determining just what these bills were all about. And that is why we are here today.

I think that I should call attention to the fact that these bills in their full form plus comments about them have been prepared in a very helpful and excellent pamphlet form which was prepared for today's meeting. I think particular attention and thanks should be given to Judge Clapp, the Honorable Harrison P. Durand, Bernard Hellring, Myron Kronish, Howard Kulp, Doane Twombly, Israel Spicer and others who gave a considerable amount of time and their very excellent expertise in not only getting this into a form that would be very readable and presentable but also in preparing the comments that follow each of the bills.

I think we should give thanks to George Bohlinger, Revisor of Statutes in the Department of Legislative Services, and also Bill Lanning, Chief Counsel of the Legislative Services agency, who has spent an enormous amount of time in the preparation and drafting of these bills, along with the members of the Bar Association, and also in the preparation of this pamphlet and in making arrangements for today's public hearing.

I think we should also give special thanks to some people who have come a considerable distance and who have great expertise and are here today to help us in

any way they can. Professor Wellman is here from the University of Michigan and he will be speaking. Harrison Durand is here and he will also be speaking and I understand Dean Diab, Associate Dean of Seton Hall Law School, will be here. He also has published a very valuable article in the Law Review of Seton Hall about the general subject of revision of the Probate Code.

I wish to thank all of those people and again you, Mr. Chairman and the members of the Committee, for providing this opportunity for a thorough discussion of what I think will be a very important and significant step the Legislature can take in revising and updating our Probate Laws and bringing them in line as much as we possibly can with the Uniform Probate Code.

I trust once this meeting has taken place and the questions have been asked and answered, hopefully then the Legislature will be in a position to proceed with the final consideration and, also hopefully, final passage of these bills. Thank you.

SENATOR WOODCOCK: Thank you very much, Senator Thomas. I certainly appreciate the time that you have taken in preparing the bills for presentation to the Senate. If your schedule will permit you to stay, we would be happy to have you do so. If not, sir, thank you for attending this morning.

I might also say that what we hope to do is, after we have had an opportunity for everyone to testify that wants to do so with respect to these bills, give the opportunity for people in the audience here today to ask questions with respect to provisions of a bill or the package of bills and hopefully we will be able to get some clarification and some answer to those questions. But we would like to have the testimony put on the record first and then we will proceed from there.

The next witness will be Professor Richard V. Wellman, University of Michigan Law School, who was the Chief Reporter of the Special Committee on the Uniform Probate Code.

Let me say on behalf of the Committee, Professor, that we welcome you to New Jersey and thank you for taking time out from your busy schedule to give us the benefit of your expertise in this very complex field.

R I C H A R D V. W E L L M A N: Thank you very much, Senator.

Members of the Committee and ladies and gentlemen, I am indeed delighted to be here. In my prepared remarks, I go into the history and purposes of the Uniform Probate Code because the package of bills that you are looking at today, 19 in all, at least 18 of these bills are directly derived from the Uniform Probate Code and it seems to me important that you be aware of the history, the purposes, the ongoing efforts across the country on behalf of the Code.

This has already been touched to some extent and I will not go into quite as much detail as might be possible.

The project that we are now into really began back in the mid '40's when the American Bar Association through the Real Property, Probate and Trust Law Section produced what was then called a Model Probate Code, never an officially-recommended uniform state law, never a product of the Uniform Law Commissioners, no more than a Bar Committee report, published, however, by the Michigan Law School, and useful because it was rested on an enormous volume of research, detailed examination of the probate statutes of all of the states, and involved close work by probate luminaries like Tom Atkinson, Lewis Simes and others who are well known to all law teachers and others in this field.

The Model Probate Code was published in about 1946.

It had an indirect influence on Probate Codes in Indiana, Missouri, Arkansas and a few other states. It really wasn't conceived as a code that should be enacted by all states. It was more a model. Here is how probate laws which frequently were scattered - there were lots of sections in state codes - should be gathered. Here is what they might include - that sort of thing.

It was about 1961, again in the Real Property, Probate and Trust Law Section of the American Bar Association, the project got started to update the Model Code and to make it suitable as a Uniform Code for enactment in all states.

At that point in time, the Bar teamed up with the Uniform Law Commissioners, the National Conference of Uniform Law Commissioners, and the project was formally launched in about 1962 or '63.

Eventually nine university law professors, including myself, were assembled as reporters. We worked from the years 1963 through 1969 under the continuing, close supervision and guidance of two committees, one from the Uniform Law Commissioners and another liaison and cooperating committee from the American Bar Association.

In all, the Code went through six full preliminary drafts before it was finally approved in the Uniform Law Conference in 1969. Thereafter, it was approved by the Real Property, Probate, Trust Law Section of the American Bar Association and accepted by the House of Delegates of the ABA. It was printed in 1970. In about 1970 and '71, a continuing supportive organization known as the Joint Editorial Board for the Uniform Probate Code was organized, again manned by persons from both the Uniform Law Conference and by persons from the American Bar Association. Their effort on behalf of the Code is continuing.

The educational efforts involved: free distribution of

literature about the Codes; National Institutes about the Codes - the third such will be held next month in Kansas City; the resources of persons who worked on the Code in commenting on drafts and helping local draftsmen see problems they may not have seen relating to suggested changes in the Code.

We started with the belief that this Code though it is suitable possibly as a Uniform Code will inevitably be changed to some degree in each state as it is enacted. We think, therefore, a very large part of our responsibility is to identify local changes that are compatible with the Uniform Probate Code and those that on the other hand should be at least pointed out as possibly being incompatible or as falling short of the goals of the Code.

We are quite serious in this endeavor and I think it needs to be pointed out that the real cause here is to reestablish public confidence in sole ownership of property until death and in the will as the primary instrument of estate planning.

Probate laws have accumulated a reputation for being unsatisfactory. They are unsatisfactory in regard to intestate laws because, if one leaves no will, his property inevitably by our state laws is distributed between, divided between, his spouse and his children and this really hasn't made much sense since the American family left the farm some generations ago. Everybody who drafts a will who is married, or virtually everybody, wants most of the estate or all of the estate in all but very large affairs to go to the spouse. And it isn't until the spouse is through with the property that the natural wish is for it to go on to the children.

Our intestacy laws around the country serve primarily to make people make wills. They do not adequately meet the charge of these laws and that is to provide a sensible estate plan for the little person or the person who through inadvertence does not make a will.

Unfortunately for those who make wills, our probate laws are in disarray. I have already heard commentaries to the effect that a will made in one state may not be good in another state and there is confusion, therefore, when people move from state to state, as so frequently they are doing in these times. Perhaps a will is technically good in another state but it can't be proved unless witnesses from the place where it was executed are brought at long distance and at good expense into the place of probate.

Even if a will is eligible to be probated in several states, one goes through different state views of the meaning of words in wills, different state approaches to the question of what property is exempt from creditors, different state approaches as to what the rights of a spouse may be against a will, and different postures, of course, in regard to administration.

This accumulation of complexity around the probate circle which has been so adequately brought to the public's attention in recent years by books, notably, "How to Avoid Probate," by Mr. Dacey, and others, has served principally to terrorize people about this area of private law. And as a result of this, they are moving massively, I would suggest, to avoid probate by one means or another - revocable trusts, joint tenancies. New games that people play with names on deeds and names on safety deposit boxes are growing apace in our observation all over the country.

It may be informative to point out that in California way back in 1964, careful statistics collected by the inheritance tax officials of that state showed that more than 60 per cent of all dollars moving at death in estates above $10,000 on the low side and under $400,000 on the high side - 90 per cent of all estates obviously -- more than 60 per cent of all dollars moving in those estates were back then moving to joint tenancies. People

don't understand joint tenancies. They don't understand that there may be a give-away involved or a loss of control, and they step into these things because of this myth that it will avoid probate. They don't understand what probate is, but they don't like it. They are clear about that.

We are finding an increasing amount of simply disarray in what ought to be an extremely orderly process of transmission of property if we are going to uphold family wealth and the succession thereto. Inheritance tax collection is becoming more complicated and troublesome because of this tendency to spread out away from probate and certainly the rights of creditors are in many areas in extremely dubious condition because of this growing tendency on the part of Americans to get away from it.

So the whole object here is to come up with a Probate Code that is suitable for adoption uniformly and then to work very strongly towards its uniform adoption because you cannot ignore lack of uniformity in this area of the law in these times, particularly here in this tightly-populated area in the East when you have state lines just a few miles away. We have got to provide the public with an alternative to the devices that so far have proved to be most popular in avoiding probate.

The success of the Uniform Probate Code to date is evidence that maybe we are on the right track. When the Code was approved in 1969, the predictions were that it would be ten years before it would be known whether anybody would pay any attention to this. Those predictions were way to conservative.

The Code was printed, as I said, in 1970. In 1971, Idaho enacted the Code as the first state to do so. Shortly thereafter, Alaska enacted the Code, the entire Code. These two states are the only places where today the entire Code is in operation. It has been in operation in

Idaho for more than a year. I have been involved with Idaho judges and experts and have concluded that the Code is working very well for so radical and new a set of proposals.

In 1972, more important states stepped into the circle of those with the Code. Arizona has enacted the Code, to become effective January 1, 1974. Colorado has enacted the Code, to become effective July 1, 1974. North Dakota has enacted the Code, to become effective in 1975. There is serious legislative study underway not only here in New Jersey but in a number of other states. These include: in New England, notably Maine and Vermont; in the South, one finds the very important State of Florida very well along toward enactment of this Code, probably next year. Tennessee is also into a serious legislative study of the Code. In the West, we find Montana, Wyoming, Hawaii, Oregon, all moving in a variety of ways, along with the State of Washington, toward full alignment with the Code. There are many other states that might be mentioned. It is certainly moving in the Midwest. This conference that will be held next month is at Kansas City because that is central to a circle of states in which the interest in the Code is very high indeed.

So this activity is rested on conviction among legislators that this Code has an answer to problems of complexity and of difficulty that have almost seemed beyond correction up to now. Happily the Code has been noticed by outside groups, outside the profession, serious consumer interest groups in the public, notably the American Association of Retired Persons, which has endorsed the Code and is working vigorously towards its enactment in several states. Senior Citizens, Inc. has also put its stamp of approval on it. And a variety of other interest groups, including committees that observed the formulation of the Code from the American

Bankers Association Trust Division, Internal Revenue Service, Veterans Administration, not all of whom accept all of the Code by any means, but are aware of it, have given general attention and approval to it.

So we think we are on the way and I am delighted to be here because of this clear indication of serious interest in the Code that has been evidenced in New Jersey.

The eighteen bills that you are considering today will not bring all of the advantages of the Code to New Jersey, but clearly they constitute what I would call an excellent start in that direction.

In this package are proposed new rules for persons who leave no wills. These are right in line with the Uniform Probate Code's purpose to make it unnecessary for people of small estates and of ordinary circumstances to make wills unless they have preferences among certain members of their family that they want to implement or choices vis-a-vis who will administer the estate that are important to them.

These proposals regarding intestate succession are directly derived from the Code and are certainly, in our estimatation, desirable. However, since in your state matters of court procedure fall over under the control of court rules rather than legislation, as I understand it, your intestacy bill - that's Number 903 in this package, I believe - omits reference to some points that are an important part of the picture in intestacy around the country. These include the question of who will be appointed, who has priority to be appointed to administer an intestate estate, whether bond must be posted when there is no will. So wills may still be necessary in New Jersey under this statute to control these points.

Also your bill 2274 dealing with the power of executors and administrators over assets of the estate

sort of leans against persons who don't leave wills and who die leaving land that has to be sold in their estate. Because, as I read your bill, the power of sale that is given statutorily to all personal representatives is there restricted to a power over personal property and hence there would be no change of your present law regarding the relationship between an executor or an administrator when there is no will over land, making land sale proceedings possibly still required when there has to be a sale. The Uniform Code would say there is no vital difference between land and personal property and that the law's estate plan that is in testate succession ought to include that every administrator has full power of sale as a fiduciary over all aspects of the estate, including land. I am not sure why the New Jersey bill is limited as it is. I assume there is good reason.

Now these comments are not meant as criticisms of your bills, but only to point out that they don't go as far as they might toward tracking some of the premises of the Uniform Code.

On the particularly desirable side, I have already mentioned the new provisions in here on intestate succession. The bill dealing with the meaning of words in the wills, lapse, ademption and similar technical problems, is directly derived from the Uniform Probate Code and I have nothing but good things to say about it.

The provision in here for self-proving wills, arranging a will so that on its face and on the certificate appended to it, it may be admitted to probate without pulling in the attesting witnesses as special supporters of the thing, is from the Code and it an excellent idea.

The provisions in your bills permitting a fiduciary from another state where the decedent was domiciled to come in, collect property of the decedent in New Jersey, possibly file a copy of his domiciliary letters and get

the same power over the assets that he would get if appointed in New Jersey, is from the Uniform Probate Code and is a vital part of any scheme to permit a single administration of a decedent's estate when the decedent owned assets in several states.

Your bill also includes direct derivatives from the Uniform Probate Code that we think are particularly interesting and important in the area of conservatorship and guardianship. I find your entire package here, a rewrite to be true, with some changes of organization and of language, but an excellent job.

The bill dealing with joint and survivor bank accounts is a very important contribution, I think, to the needs of people in today's time. We are out possibly on the one hand to tell people they don't need to rely on joint tenancies in order to have a satisfactory relationship over their estate at death. On the other, they are using joint accounts and they are using them for a variety of purposes. The Code and your bill contain new provisions that are designed to strengthen the use of bank accounts as modes for transfer, at least, of account balances at death without probate and without undue difficulty.

At the same time, this package includes careful protection for creditors. I think we find in this proposal from the Uniform Probate Code a balance between the needs, on the one hand, of persons for quick and efficient transfer devices like they are accustomed to use and, on the other, fairness for creditors and others interested.

I find I am really unable to comment about your Bill Number 905 dealing with disinheritance of a surviving spouse because I just don't understand the proposal as it appears to have emerged from the committee. But I will be happy to answer questions about it or about other aspects of this.

I might conclude simply by observing that the package of proposals that you are looking at today is certainly well worth support. I assume that there will be redrafting accomplished just in the natural course of pursuing determined interest in this package and that will be useful. But the package, if it is enacted, certainly should give New Jersey immediate relief from a very large number of ancient probate law problems and it may well hasten the day when your state can move to a more complete acceptance of the Uniform Probate Code.

I will be very happy to take questions now, sir, or whenever it is convenient. Thank you very much. (See p.88.)

SENATOR WOODCOCK: Thank you, Professor. I think it might be more convenient if we have them at the end because I am sure that some of the people who will be testifying this morning will raise those questions. Perhaps we can handle it that way.

Is J. Pennington Straus here? I understand that Mr. Straus has some very pressing business in Philadelphia and is unable to attend. I am sorry that he is not here this morning.

Is Harrison F. Durand here?

MR. DURAND: I am here.

SENATOR WOODCOCK: Mr. Durand is a member of the New Jersey Ad Hoc Committee on the Probate Code.

H A R R I S O N F. D U R A N D: I have to fill an unusually large pair of shoes today because Judge Clapp was unable to be here and was to have made the remarks that I will try to make on his behalf.

I have been familiar with this Code for more years than I would like to say and I have also worked with Judge Clapp on the bills that are now before the Legislature.

I would like to say that New Jersey in its procedural aspects, the rules, has in its entire history embraced many of the principles of the Code, those principles being

that a fiduciary who is appointed should be permitted to go pretty much his own way without a great deal of court supervision in the administration of an estate and should only be required to come into court when there was some substantial problem to be solved.

In that respect, New Jersey law is unlike the law of many of our states in this country, notably a bloc of states in the midwest and the far west where the court supervises by procedural orders almost all of the acts of a fiduciary. So in that respect, we do have a great deal of the Code in New Jersey.

In another aspect of it, as you examine these bills you will find that some of the bills state in statutory form what has been recognized for the most part as a part of the common law. We think it wholesome that the bills be stated in statutory form so that it is a little easier to identify the problem than it would be to research it through the cases and come up with the answers that are embraced in some of these Code provisions.

In other provisions of the Code which get into the bills that are before you now, there is the matter of reform. And when you consider probate reform in this country, you go back to feudal times and then colonial times and our probate laws have more or less been built piecemeal in New Jersey as well as in other states.

When the Code first came out, I had occasion to examine the reform that was being made in New York contemporaneous with that of the Code, and I found that there had not been any comprehensive reform in New York since 1828. Now imagine the changes in our society since that time. It is before the Gold Rush, the Pony Express, the railroad, the motor car and the airplane, the public utility industry, and our whole mode of life has been changed.

So when we talk about reform in New Jersey, bear in mind that over more than a century changes have been

developed and for one reason or another we have not in our probate laws kept abreast of the economic changes that had so gradually occurred.

In the selection of the bills for submission in New Jersey, Judge Clapp made a list and, independently of him, I made a list and we sat down together and went over our lists and then we organized the Ad Hoc Committee. I think to a large degree we agreed as to the sections of the Code that might be suitable for legislation in New Jersey.

In doing this, we first excluded all of the procedural matters. That was a little difficult because in some instances, as Professor Wellman has mentioned, words that dealt with procedure in the Code were mixed up with words that dealt with substance. But we did the best we could.

Then when we got to the substantive sections, we examined each section of the Code and we compared that section with our New Jersey law and considered whether or not the Code section was as desirable, more desirable or less desirable than what we have. And, for the most part, the Code sections were selected with change in language to make the bills adaptable in New Jersey.

The first group of bills that seems to me to be significant in representing changes in New Jersey law are those bills that deal with the rights of the spouse and of children. Among other things, the bills abolish the right of dower and curtesy. In feudal times, for land owners anyway, a dower was a very neat and effective way of providing for a surviving wife. There was always a dower cottage or a dower house on the property and the wife could go and live there for the rest of her life and that gave her a degree of protection. I don't believe that the peasants in feudal times were protected at all, but the idea that all people were entitled to protection of the laws evolved in subsequent centuries. So now we look to methods to protect both the surviving spouse, usually the wife, and children, and these bills are

intended to do just that.

For example, as Professor Wellman has mentioned, the pattern of intestate distribution has been changed principally by a marked increase in the share of the surviving spouse to $50,000. Why should it be $50,000? Well, the studies that have been made indicate that almost everybody in those circumstances with an estate of $50,000 or less would, if his attention had been called to it and he had made a will, have left everything to his surviving spouse and rely on the spouse to take care of the children. So if a person doesn't make a will - in this area we are dealing with more than 90 percent of the estates - it would go to the surviving spouse. If a person had any other intentions, he could express those intentions by making a will and that seems to us to be a wholesome change in our law.

Then we have bills that deal with the marriage after the execution of a will and the frequently inadvertent situation in which the deceased does not make a new will and the new wife is unprovided for. We think that the new wife should have rights in a situation like that and in the converse situation where there is a divorce or an annulment of marriage, the rights of the wife under a will should be removed. And the Code so provides.

If you start with the premise that dower and curtesy are ineffective means of providing for a surviving spouse and that spouses should be provided for in some way, what is the most effective way in a common law state of giving that protection? We get into Bill - I believe it is 899 - which gives the spouse a right to elect to take one-third of the estate, which is designated as the augmented estate, if the aggregate of the provisions under the will and funds that she may have received by gift or otherwise turns out to be less than the one-third. The bill is similar to the revised New York legislation

on the right of election. It is similar, I understand, to the Pennsylvania legislation. It involves the most advanced thinking on this subject. The augmented estate is designed to do two things. One is to prevent an old meany from defeating the right of election by inter vivos transfers during life and the other is to prevent the wife who might be unduly grasping from getting the benefit of what she received from her husband during his lifetime or is transferred to her and then claiming a third on top of it. So the Right of Election Bill strikes a good balance in assuring the wife of approximately one-third of the estate, including transferred property.

SENATOR WOODCOCK: Mr. Durand, if I may just interrupt, since we are discussing the bills, I believe we have copies of the suggested Probate Code here in the corner. I know that some of the lawyers in the audience may want to follow along, as may others. So if you want to pick up a copy while we are discussing it, it might be of some help.

I am sorry to have interrupted you, sir.

MR. DURAND: That is quite all right.

I had finished with that subject anyway so it was a good time to interrupt.

I am not going to devote right now very much time to another group of bills that I referred to as dealing with administrative matters. Some of these bills simply incorporate the common law into statute and to that extent they are wholesome because it is easy to pick up the statute and find out what the law is. It is easier than to research it, as I mentioned before.

One of the bills contains several marked changes in our law and that deals with the execution of wills, the formalities. The age limit is reduced to 18. That seems wholesome in view of the other changes in our

statutes and the fact that soldiers are drafted at age 18. The formalities for the execution of wills are modified in a way that is considered to be sufficient to assure that the will is genuine and yet to do away with super technicalities that sometimes prevented the probate of testamentary documents. For example, you could acknowledge to a will before one witness in one room and go to another room and acknowledge it before another witness. Changes of that type tend, particularly in the opinion of the reporters, to prevent the failure of testamentary plans, and this is pretty well substantiated by their research in that area.

Another change is that the Code proposes that a will should be valid if executed in accordance with the laws of New Jersey, if executed in accordance with the laws of the place where it was executed, say, in New York, or if executed in accordance with the laws of the domicile state of the person who made the will, say, Connecticut or Florida. In any case, that will ought to be entitled to probate in New Jersey. That has been the law of New York for a number of years. In what has been referred to as our mobile society, it will prevent the failure of a will which has been executed in some other state and not re-executed in New Jersey. I personally feel that it is a very worthwhile provision in the statute and I know that Judge Clapp feels likewise.

There is another bill that I think is worthy of mention and that deals with contracts to make wills and the litigation that arises in our courts from time to time dealing with oral contracts to make wills. Bill 1104 provides that there must be some expression of the contract in the will or by some separate document in writing in order that the contract can be approved. That seems to us to be a wholesome provision. I know that it has been the law of New York since 1930 and has saved a lot of litigation.

I would like to say something about the bill or bills dealing with incapacitated persons, that is, minors and mental incompetents. It is here designated as Senate 2329. We have at least been able to get by in actual practice with not too much formality in the administration of the affairs of people who cannot act for themselves, but it is a growing problem in our country, particularly because there are so many elderly people, and ways just have to be found to handle the affairs of people who cannot act for themselves expeditiously and economically.

This bill which Senator Clapp adapted from the Code is for that purpose. It sets forth the law as it is and it sets forth guidelines that make it possible for persons in the family or, if necesarry, for a guardian that is formally appointed, to handle the affairs in the interest of incompetents and to do it without much judicial supervision. It provides, among other things, a new concept in the law, a facility of payment provision, by which a fiduciary or insurance company or a bank owing money payable to an infant not exceeding $5,000 can make the payments to the guardian or to the parent or deposit the money in a bank to the account of the minor without any formal proceedings whatsoever. The recipient, of course, is accountable for what he does with the money and may make expenditures for the support and maintenance of the minor but cannot, of course, appropriate the money to his own use and will be accountable when the minor attains majority. That is an important provision of the new law.

Another important provision is to enumerate and set forth a number of things that can be done particularly for mental incompetents or incapacitated persons with the aid of the court. Many of these matters probably can be spelled out by a very careful examination of the law, the principles of equity in New Jersey. There

are not too many cases in New Jersey, but there are in other states. So the aggregate of these provisions that the court can supervise by court order authorizing estate plans, authorizing gifts, and provision for the family of an incapacitated person - those can be in a vague and general way found in the cases. The act sets these things forth in a more specific way so that it is easier to understand the very broad powers that the Chancery Division will have over the affairs of incompetents.

Finally, the legislation on multiple-party accounts is legislation that Mr. Spicer and Judge Clapp were very much interested in and devoted a great deal of time to its drafting and its consideration. The reason in New Jersey was that the legislators thought that they had this problem solved a number of years ago when legislation was enacted, but the Supreme Court had different thoughts and in a recent decision upset the calculations of the old law. The new law on multiple-party accounts does define the rights of the parties and I believe, and I know that Mr. Spicer and Judge Clapp believe, that it would solve that troublesome problem that we have had to deal with from time to time.

I think those are the principal changes that perhaps should be discussed now. There are others, but I don't want to go on and impose on the time of others. So I will conclude my remarks with what I have said. Thank you.

SENATOR WOODCOCK: Thank you very much, Mr. Durand. Is Dean Robert A. Diab here?

R O B E R T A. D I A B: Members of the Committee, ladies and gentlemen, I am very pleased to be able to have this opportunity to make some remarks at this public hearing.

I have from the very outset been an enthusiastic supporter of the Uniform Probate Code. In fact, shortly

after it was launched, I wrote an article, as has been pointed out, in which I analyzed certain parts of the Code and compared them with the present New Jersey legislation and, of course, the common law because there are many parts of the Code that seek to change not only specific aspects of our legislation but also to codify much of the common law.

I am also a member of the Executive Committee of the National Advisory Council of Law School Professors who meet periodically to discuss strategy for adoption of the Uniform Probate Code because we did realize that there would be a certain amount of resistance to adopting this Code. I think there is general appreciation that this segment of the Bar is somewhat conservative and traditional and perhaps there might be more resistance to change than in other areas of the law. I recall one professor from Louisiana saying that he was quite convinced from his experience that the only way to really get this thing going would be to start a massive propaganda effort at the law school level.

With that in mind, we did in fact - and I think perhaps Seton Hall might have been the first school to do so - offer this past summer a seminar on the Uniform Probate Code. I found it very enlightening to have about thirty students who offered all sorts of views and suggestions. We made a detailed study of some aspects of the Uniform Code and came up with some interesting suggestions.

I think that some of the more advanced aspects of this Code - and I don't want to get into the procedural aspects because I am sure that the practicing members of our profession here have and will discuss that aspect very thoroughly -- I want to confine my remarks to some of the substantive reforms and to offer some possible suggestions where I don't entirely agree with

what has been proposed. In fact, there is one particular aspect of the Code that I am not in agreement with and I would like to bring that up. We have it here proposed for adoption and that is the one part of the Code that I am not fully in agreement with.

Substantively then, some of the really more important reforms that will come about if the proposed aspects of the Code are adopted will be the rights of the surviving spouse. Mr. Durand has already pointed out that dower is old hat. It serves as nothing more than an encumbrance on property. It had some value in an agricultural economy. In our present-day form of economy where personal property is the main form of wealth in the form of securities, it has no further use.

Certainly if we are to agree with the premise that there ought to be some legislative technique for affording protection to a surviving spouse, then there is no question that this concept of a statutory elective share is a good one whereby a spouse is given the right to elect to take a certain share of the decedent's estate, not just his probate estate but what the Code has called the augmented estate, bringing in, in other words, several will substitutes, transactions which were effected during the property owner's lifetime but where he retained so substantially the economic benefits that they move or shift from him at his death. These are will substitutes. And there is no question that before that part of the New York legislation was amended in 1966, which had the most profound influence, by the way, on this part of the Code, the right that was given to surviving spouses was very often a very hollow right. There was one famous case in New York called, "Matter of Halpin," where a property owner put most of his property in a totten trust in a savings bank about three days before he died, in favor of his grandniece, by the way, and in

a mocking gesture, he made a will leaving his entire estate to his beloved wife, which turned out to be a grand total of $3,000. She contended that she ought to be able to include the assets of that totten trust in the estate for purposes of electing to take her statutory elective share under the then New York legislation. The Appellate Division in a very far-reaching decision back in 1952 agreed with her and said that this inter vivos transaction, the totten trust, will be recognized as valid but it should be set aside to the extent of permitting the spouse to elect to take her share because otherwise frauds could easily be perpetrated against the spouse and this right would then be a hollow right. The Court of Appeals unfortunately reversed that decision and said a totten trust is either all good or all bad - it can't be half good and half bad. They reversed and held that it was a valid transaction and that the surviving spouse had no right whatever to reach those assets in order to exercise her statutory elective share.

That is one example of what this concept of the augmented estate really means. It will afford a surviving spouse more protection.

I am, myself, a believer in the civil law system whereby children are in fact given a certain right of inheritance which then is a further limitation on a testator's freedom of testation because in a sense, just as dower was, so is this statutory elective share really a restriction on a testator's freedom. He cannot dispose of his property at death in any way he wishes. Here is a fixed right in the form of a fraction of his augmented estate given to a surviving spouse. And if we were to adopt what the civil law countries, including Louisiana, have, then even children would be so protected by means of what is known as the legitime in the civil law countries.

Perhaps a statistical study could be made on this,

but I feel sometimes that children are disinherited by way of reprisals because they didn't marry the person of the parents' choice and what have you. It seems to me a very civilized thing to have that sort of protection for children. But be that as it may, I think this is a far-reaching step, at least as far as we have gone now, namely, to afford further protection to the surviving spouse.

I don't think it has been pointed out by anyone, but I am not sure why the Committee on page 1 of your blue book made a change in the law of intestate succession which really is an about turn or an about face from giving a surviving spouse in this state little or nothing in comparison to a child. I think you all appreciate the position at present is that when a person dies intestate survived by, let's say, a wife and one child, that child in effect comes in for twice the share that a surviving spouse gets, twice the share, because the surviving spouse gets one-third of the personalty, the children or one child, the remaining two-thirds, and the child gets the entire real property, subject only to her dower estate, her right of dower, which is a life estate in one-half of real property only. I might point out that there is an error in one of these comments along the way - I think on page 5 - which indicates that this dower right is a one-third life interest. It was one-third at common law. Under our statutes now in New Jersey it is a one-half interest. I mention this not to be critical of anyone but perhaps it should be pointed out.

Why then from giving our surviving spouse little or nothing in comparison to the child do we suddenly then give her everything when there are no issue but a decedent is survived by a parent?

On page 1, Senate Number 903, the bill we are talking

about, Section 2 begins, "The intestate share of the surviving spouse is: (a.) if there is no surviving issue, the entire intestate estate." Now I would hope that the Legislature would conform that - and I don't know if this was an accidental omission or a deliberate one - but I would hope that the Legislature would conform that part of the legislation to the Uniform Probate Code. The Uniform Probate Code in fact says in Section 2-102, counterpart section, "The intestate's share of the surviving spouse is: (a) if there is no surviving issue or parent of the deceased, then the entire intestate estate."

You see the way this present proposal stands, we would be one of the few states, I think perhaps the only state now, where if a decedent is survived by a spouse and parents but no issue, no children, that the wife gets the entire estate. That is the present stance of our law. It is a sort of all-or-nothing-at-all thing when she gets little or nothing at present if a decedent is survived by issue, yet when he is not survived by issue, she gets it all.

Again, as has been pointed out in the comments to the Probate Code - and it is worth reading this Uniform Probate Code because the comments really are excellent - the whole concept of our laws of intestate succession should reflect as much as possible the probable desires of a testator and his wishes if he had thought on the matter because many people die intestate simply because it never occurred to them to make a will. Some people are superstitious. They think if you make a will that death is imminent. This applies to very old people too. It is sort of a danger sign and they will not make a will.

The point then is that the legislation ought not to be arbitrary, as I think our present legislation is,

but the Legislature ought to enact the kind of legislation that would probably reflect the wishes of a testator.

Again, if a statistical survey were to be made - and I have done it myself over the years in my classes and the great preponderance of the students have felt that if it were left to them, if they died survived by a spouse and a parent or parents, they would not want the entire estate to go to the surviving spouse. So I think by the insertion of the word "or parent of the decedent", then if there are surviving issue, all of whom are issue of the surviving spouse, etc., -- then, of course, we have a scheme where the wife or the spouse does get the first $50,000, plus one-half of the balance, which would then go in that order to the children or, if there are no children, then to the parents; or if there are no parents, then to the brothers and sisters. Here again there is an interesting change. We do give a preference under our present law - not a preference really - but we equate parents with brothers and sisters.

The Uniform Probate Code does give a preference if there are no issue and that one-half of the balance does give a preference to parents over collaterals such as brothers and sisters. Enough said on that.

Another part of the proposed Code that I would -- well, it is not that I would disagree with, but I would hope that this omission would be corrected, and that is in Bill Number 902 on page 8. We come now to the formalities for the making of a will.

Now, thank heavens, we have gotten away from some of these excessive formalities because you know we tend quite often to make a fetish of formalities. The whole policy of the Uniform Probate Code is to liberalize some of these excessive requirements. Again, as Mr. Durand pointed out, many of these requirements are liberalized and the statute as it does exist is in line with the provisions of the Code, the statute of wills, in other

words. But why not a provision for a holographic will; that is to say, a will that is entirely in the handwriting of the testator?

It seems to me that if we look at the underlying rationale for the statute of wills, it is, of course, obviously to prevent fraud, fraudulent claims, forgery and what have you. There is very little danger really and it is an ample cushion against fraud when you do have an instrument that is entirely in the handwriting of the testator.

As of the present time, there are 23 states that do recognize this form of will, the significance of it being, by the way, which I am sure you may all be aware of, that when the instrument is entirely in the testator's handwriting, then the other formalities are dispensed with, much like our present sections relating to wills for members of the Armed Forces. They are given the privilege of executing a will with as little formality as possible, the big formality being, of course, the presence of witnesses. That I believe ought to be a provision in line with liberalizing, as the proposed sections do, some of the stringent requirements and formalities.

There is one area, however, in which I must disagree, with all due respect to Professor Wellman -- And I do want to say at this stage, by the way, that in my article I did rely very heavily and have made extensive reference to the writings of Professor Wellman and I wish personally at this point to acknowledge that to him. But I must disagree, with all due respect, with regard to that one section, again in the same bill, #902, with regard to the execution of a will, and that is the whole area of interested witnesses.

I think that perhaps this warrants a little bit of background. With regard to the qualification of

witnesses, the statute of fraud's requirement - this is way back in the common law, the statute of frauds from which the various statutes of wills are derived -- the requirement that the witnesses be credible, that the will has to be witnessed by two or three or whatever credible witnesses, was construed to mean that the will was void if a necessary witness was incompetent to testify where, for example, he had a pecuniary interest in establishing the will. In other words, a devisee or a legatee or even a spouse could not be witnesses without rendering the will invalid. They were interested witnesses.

Of course, that situation without any doubt calls for a remedy. It worked many hardships. So as early as 1752, in fact, the situation was remedied by an English statute and later by the Wills Act of 1837, etc., which specifically provided that a will would not be void if attested by an interested witness, but at the same time that legislation forfeited the gift left to the legatee or devisee who witnessed the will.

Now as many as 43 or 44 states, including New Jersey, presently have statutes substantially similar to the English statute, but there are variations, interesting variations, and New Jersey perhaps is a little backward amongst all these states - alone, in the company of Oregon and Alaska, if that is any comfort. Now under most of these statutes of various states, but not included in New Jersey, the interest of the devisees or legatees will not be avoided if there are otherwise enough competent witnesses. But you see, we have an absolute bar. In 3A:3-6 and 3A:3-7, there is an absolute bar to an interested witness taking any gift at all.

If it is a supernumerary witness, a surplus witness, why shouldn't he? See, if you look at the rationale of the legislation, he is not likely to want to falsify

his testimony.

Now again - and this is an important thing - under most of the statutes, but again not in New Jersey, provision is made for the situation where the witness is one who would have taken had the testator died intestate. Now the most usual type permits him to receive what he would have taken in the absence of the will. In other words, it voids the excess over the intestate's share.

By way of example, supposing a son in a home-drawn will -- and the rationale of the Uniform Probate Code is indicated to be that the purpose of the change, as the comments of the Code say, is not to foster the use of interested witnesses. In fact, it expresses a hope, or rather the expectation, that attorneys will continue to use disinterested witnesses. But the Code takes the rationale to be not to penalize the rare and innocent use of a member of the testator's family on a home-drawn will.

By way of example of what I was saying a moment ago, supposing a son in one of these home-drawn wills is a witness to the will. He wouldn't be barred outright as he would under our present legislation because the rationale again is, what incentive would there be for him to falsify his testimony and say the will is really good just because he is a beneficiary under it? He would take an intestate share in any event. Suppose that his intestate share was $10,000 and the gift under the will left to him was $13,000. Most statutes in practically every jurisdiction void only the excess. In other words, $3,000 is voided, not the entire $13,000 gift under the will. So at least he is entitled and would receive his intestate share, which would be $10,000.

In most cases, refuting what the Code states, the comment in the Code, such a person, in other words, a

member of the testator's family, would be one who would take on intestacy under the prevailing statute, and interestingly enough the Model Probate Code and the first tentative draft of the revision of the Uniform Probate Code actually did have the same kind of legislation that preponderates in a greater number of states. So I don't see any great need - and I am sorry to throw this fly in the ointment, as it were - to adopt that particular part of the Code which is Section 5 on page 10.

The other thing that really does puzzle me on page 10 is why we in New Jersey - and there is really no adequate explanation in the comments in this pamphlet - decided to part company with the Code with regard to the revival of a will. That is, for your reference, at the bottom of page 10, Section 9, of the same bill, Senate Number 902.

The Uniform Probate Code, in fact, - it is in Section 2-509 - is in line as it happens with New Jersey's present law and New Jersey is in line with the view of the majority of jurisdictions in this county. In fact, other jurisdictions like New York have come along to the view we have espoused by case law - come along to that view by legislation.

It is basically this: This concept of revival - in order to just explain what this is about, that very short sentence there, Paragraph 9 -- the doctrine of revival is simply this: Supposing that a will is executed and then it is revoked later by a subsequent instrument. That is a method for the revocation of a will. The next stage would be that that revoking will - will number two, let's call it - is itself revoked by physical destruction. The question is: Is will number one automatically revived? There were two views really. There was a view that was espoused by the common law courts which said that there was an automatic revival, the rationale

being that all wills are ambulatory, that is to say, they take effect at death, including therefore will number two, the revoking will, whose revocatory effect, if any, would be at death. It also is ambulatory since that will has disappeared from the scene, physical destruction. It is revoked by physical destruction. It is no longer around; therefore, will number one should have an automatic revival.

If you think on the intentions or the wishes or probable intent of the average testator, it would probably come as a surprise to him to know that. It would come as a shock if he were told just because he used two different methods of revocation, one by subsequent instrument and the other by physical act -- it would come as a shock to him to be told, if he could be after he is dead, that will number one is automatically revived. Perhaps that is the rationale over here. But why not retain the present view that New Jersey does by case law, and which is the majority view, and that is the view - it was most of the common law courts' view and the view espoused by the ecclesiastical courts -- that view is that there was no automatic revival, but rather the first will, will number one, would be revived if in fact it was his intention. And his intention, as the Code indicates in Section 2-509, could be determined by declarations, testator's contemporary or subsequent declarations, that he intended the first will to take effect as executed.

Let me just give a simple example of how this might work. Suppose a person executes his will and leaves it all to his wife in this state of exuberance and marital bliss, etc., and later there is a parting of the ways; he takes off and takes up with somebody else, a mistress, let's say. I am sorry if this sounds a bit chauvinistic. It is only by way of example of what I

am getting at. In this second relationship, he now executes a new will and leaves it all to his mistress. Then again, because he is so chameleon-like, he has another parting of the ways with his mistress. And as he leaves, he rips up this will and flings it at her and says, "Good-bye. Here is the will." There is our situation basically.

He is then reunited, reconciled, with his wife and meanwhile he is carrying will number one with him. He has never destroyed it. Let's say he has left it at his home or wherever. He has made statements, pronouncements, or what have you, to his friends that he is now reconciled with his wife. He is glad he never physically destroyed it because he only revoked it by a subsequent instrument which itself has now been destroyed.

Why under those circumstances should he not be able to revive will number one? Is it necessary to go back and re-execute a will? Especially since we have not yet come around to accepting holographic wills, must he now visit an attorney and re-execute the will? It doesn't make much sense.

I have said enough and those are the main things I wanted to draw to the attention of the members of the Committee and the legislators. I hope perhaps something is done.

As to the rest of the bills, I am very pleased and I hope eventually that major portions of the Uniform Probate Code will be enacted in our State of New Jersey. Thank you very much.

SENATOR WOODCOCK: That you very much, Dean.

I think at this point we will take a break for the reporter's benefit.

(Short Recess)

SENATOR WOODCOCK: If we all take our seats, we can begin.

Before we take our next witness, I would like to put in the record communications that we have received.

The first one is from the County Officers' Association of New Jersey, dated September 7, 1973, addressed to the New Jersey Senate Judicial Committee, State House, Trenton, New Jersey, re: Senate Bill 716. (Reading)

"Gentlemen:

"The New Jersey Division of the Surrogates' Division of the New Jersey County Officers' Association wish to be recorded as opposed to the passage of Senate Bill 716 concerning the deposit of wills.

"Study of the proposal pose the following objections:

"1. The Surrogates' Courts are not equipped physically or personnel wise to provide the service.

"2. Few, if any, of the Surrogate Courts can provide safety equipment sufficient to adequately protect a will from fire, vandalism or theft.

"3. Acceptance of the responsibility for storing a will would open the door to a variety of liability and negligence suits against the Surrogate, his staff and the County.

"4. The task of notifying an executor of a stored will could become an endless chore. Who is to authorize cessation of the search and when - Who is to compensate the County for the expenditures necessary? The bill imposes the delivery of the will to the executor, which in the larger Counties would mean extra personnel and transportation.

"5. Even though the Surrogates Courts had the space, personnel and equipment to provide the service, the cost as compared to renting a safe deposit box or entrusting the will to the Attorney who drew it makes the proposal completely unwarranted.

"We respectfully request defeat of Senate Bill 716.

"Very truly yours,
Gil Job, Chairman
Surrogates' Division"

We will put that in the record.

I also have received a communication from the Board of Consultors - Real Property, Probate and Trust Law Section, addressed to Martin L. Haines, Esq., President, New Jersey State Bar Association, 172 West State Street, Trenton, New Jersey (reading)

"Gentlemen:

"The Board of Consultors of the Real Property, Probate and Trust Law Section of the New Jersey State Bar Association, at a meeting held on February 22, 1973, adopted a motion recommending to the Board of Trustees that the following bills be approved and their adoption be supported:

"Senate Bill 899 - Right of election by surviving spouse.

"Senate Bill 902 - Requirements for execution of a will and revival of will.

"Senate Bill 903 - Distribution of intestate estates.

"Senate Bill 904 - Time period for presumption of death.

"Senate Bill 905 - Omission of surviving spouse.

"These bills have been drawn from provisions of the Uniform Probate Code and represent significant advances in the probate law. A synopsis of these bills appears in the November, 1972 issue of the New Jersey State Bar Journal in the article authorized by Judge Alfred C. Clapp.

"Representatives from the Board of Consultors will be available to present the content and merits of this proposed legislation to the Trustees at such time as you may wish to consider our recommendation.

"Yours very truly,
Robert E. Gaynor
Chairman, Real Property, Probate
and Trust Law Section"

I would incorporate that in the record.

We will now proceed with the hearing. Our next witness will be Gill C. Job, Surrogate of Bergen County.

G I L L C. J O B: Thank you, Mr. Chairman. Welcome to Bergen County.

Mr. Chairman, as you know, our presence here today on behalf of the Surrogates is primarily concerned with those things which affect the operation of our office.

We realize, and I know that you gentlemen do, that the Surrogate's Court in New Jersey is probably unique throughout the country. We are what the statutes love to refer to as a court of limited jurisdiction, and, believe me, we are.

We personally feel as far as the Surrogates are concerned that there are many things that we can do and are capable of doing in the conduct of the administration of our office which actually would relieve this so-called overload in the County Courts, to which, as you know, under the statutes we now must refer all disputed matters. In many instances we, of course, have to prepare the case practically, send it up to a Presiding Judge who is appointed to handle these things, and then take the time of the court. In most instances, it is our Court Clerk or the Surrogate, himself, who is advising these Judges as to the procedures and so forth concerned with these matters.

I just give you this as background to indicate why we today are not in a position and do not intend to usurp the prerogatives of the Legislature as far as going into the specific details of this package of bills.

We realize that much time has been spent by many brilliant minds down through the years, dating back, as we heard this morning, to 1940, and that this is the best thinking, combined thinking, of many brilliant minds that have worked on this. So I am going to confine my remarks simply to the effect that some of these bills will have on the work of the Surrogate's Court, the mechanical work, so to speak, because 90 per cent of our work is administrative rather than judicial.

One - and you just read the letter - thank you very much, Mr. Chairman, you saved me the reference to it - but we are very concerned, of course, about Senate 716 because we are just simply not equipped and we see no suitable purpose to be served by the enactment of that bill into law. We are not equipped to handle these wills. It would present a terrific burden on the courts and also an expense.

If I may speak personally for a moment, as far as a county like Bergen is concerned with 70 scattered municipalities, if it became the function of the Surrogate to notify the executor in each case and to personally deliver the will to him, that would be almost impossible.

As far as the alternative measure that is proposed to give it to the County Court, to the Probate Division, I would only be giving it to myself because I serve in another capacity, and that is as clerk of the County Court, Probate Division. They do not have the means of holding these records. I hold these records for them. So we strenuously object to that particular bill.

Another thing - and probably some of you may think that I am getting into the realm of the area which I don't want to violate, and that is the prerogative of the Legislature in setting these things up - I would

like to concur in previous remarks that have been made here pertaining to Senate 902, and specifically the provision which permits an interested witness to take.

Here again the Surrogates' Association feels that that would present a burden to us in the sense that there would be invariably increased litigation as far as our courts are concerned. I think that is a bad feature of that particular bill and that more thought and deliberation should be given to it.

I agree completely with Professor Diab's remarks in that respect.

As far as the provisions in some of the other bills are concerned, I want to be brief but I also want to indicate to this Committee that it was impossible because of the tardiness of the pamphlet and the letters setting up this particular hearing to convene - and, of course, I should say fairly because of vacation schedules - to convene a meeting of the Surrogates' Association. Notices did go out. We do have several of the Surrogates here. I have indicated to them that, despite my capacity as Chairman of the organization, in view of the fact that we did not have this meeting that it is perfectly all right with me, and I am sure it will be with the Committee, if they have remarks that they wish to add to the hearing, to request to be heard also.

With that in mind and with the matters that I have brought to your attention, Mr. Chairman, and also reserving the right, of course, to attend your legislative sessions in Trenton and offer any additional objections to proposals that might come up affecting the operation of our office, I just wish to submit what I have already said.

SENATOR WOODCOCK: Thank you, Mr. Job. We are happy that you made the long trip up from the second

floor.

The next witness will be the Honorable Samuel S. Saiber, 11 Commerce Street, Newark, New Jersey

S A M U E L S. S A I B E R: Mr. Chairman and members of the Committee: May I first say to you on behalf of Judge Clapp with whom I was yesterday that he regrets the fact that he cannot personally be here with you. He is engaged in a trial that couldn't be changed. He has authorized me to talk about one bill and announce his view, which I shall do in a few moments. He very much wanted to be here, but it just couldn't happen.

I might say, Mr. Chairman and gentlemen of the Committee, that I am fully aware of the fact that men like Professor Wellman and Harrison Durand and many others have worked long and hard on these series of bills that we have before us. In my view, I think by and large as a model set of bills that a very fine function has been performed.

I want to call the Committee's attention to the fact that there appeared in the New Jersey Law Journal, edition of August 23rd, an article in which it was made known that there was a substantial amount of opposition to the Probate Code and at a vote taken in one of the Bar Associations- a State Bar Association - a referendum vote showed that 906 disapproved to 307 approving.

I think that there very well can be differences of opinion in this entire area.

Mr. Durand made known the fact that the New York law had not been changed nor reformed in substantial part since 1828. This is not the fact in the State of New Jersey. In New Jersey some twenty years ago there was, in fact, a very careful and a very thorough reform of our legislation in this entire area. Judge Clapp

was then in the Senate and he introduced the bills and I had the privilege of handling them in the Assembly. I fully know the time and effort and energy that went into it. And the proof of the pudding is that throughout all these years our law has been a good law. It has worked out well.

As the Surrogates and their representatives in this office will testify, there is, in fact, very, very little litigation of any kind substantially affecting our probate law. I venture to say if we took even 500 probates and administrations, we probably wouldn't find one amongst all of those 500 that were litigated. I think that is a pretty good test.

I made an analysis of these nineteen bills and I want to say because there are many others waiting to speak to the Committee today that I only want to address myself to three in principle.

I have no problem with the so-called housekeeping bills. I think they are good. I think they serve a good purpose and I think all legislation can be updated as time goes on in light of events, such as the rationalizing, the revitalizing, of joint accounts, etc. However, I want to agree with the last speaker, Surrogate Gill Job, who testified about the deposit of wills. Judge Clapp has authorized me to say to this Committee that he opposes this bill vigorously. I, too, want to oppose it. I have some knowledge of these matters. It can only lead to great abuse and problems, not only expense alone.

People move away. People change their wills and they wouldn't let the Surrogate know. They wouldn't bring their second and third will in. They sometimes want to come in and delineate something and change it from Aunt Martha to Mary Jane and change the amount or what not. They move to California. They are very mobile.

I think that this bill is a bad bill. I think

it would cause nothing but confusion, expense, and be very disruptive of our probate procedure, and I oppose it very strongly.

My main objection is something that I have had occasion to debate with many of my colleagues at the Probate Bar for some time. As I understand it, we are one of seven or eight states in the Union today where a man or a woman can dispose of their estate in any way that they want to. They need not necessarily leave any bequest or devise to their spouse. Certainly it cannot be argued that it is proper and right and moral for two spouses living together with one another to provide for each other in the event of the death of one of them. Nobody can argue that question.

Then we read a comment attached to Bill 899 and I would like to take a moment to read it for you. It is found on page 26. "Under existing New Jersey law, a testator may deplete his entire estate during his lifetime by gift or otherwise, so that at the time of his death his assets or estate have been either completely or considerably depreciated. The effect is to disinherit the surviving spouse to the extent of such depreciation. This can result in complete disinheritance. The object of the provisions of the Code proposed to be adopted by this Bill is to overcome these deficiencies in the existing law."

Well, I submit, ladies and gentlemen, that a man or a woman should have complete right of disposition of their estate under our system of government, that they should not be inhibited in any way. In this sophisticated life of ours with the kind of things we see on the scene today, with all due respect to the professors that are here - I love them and they are great and they do marvelous research - but we who draw the wills today and have to contend with providing for children who are under the influence of drugs or

are in communes where you cannot give them money directly, where you must devise custom-tailored manners of providing for them, this matter of arbitrariness and compulsion to provide under all circumstances, I submit is wrong.

Let me give you a couple of examples. We take a man and woman who are married and the woman has inherited a great deal of money. Perhaps they are married a week or two and the wife dies. Why should that husband, after a week or two of marriage, inherit a substantial part of that woman's estate merely by virtue of the fact that he married her? Perhaps he connived to marry her. Perhaps he hypnotized her. I don't know what happened. Why should that man who may be separated for 20 years from a woman under very justifiable circumstances whose wife doesn't want to leave him a dime have to do so? Why should he arbitrarily be entitled to have an elective share of an augmented estate upon her death?

I submit that under our system of government, which is a capitalistic system, that people still join in marriage because they love each other and they will provide for each other, and most men, I submit, will do it beyond the call of duty if their wives deserve it and are good wives. They need not be commanded by law to do it. But I also suggest that there may be very, very good reasons why one spouse decides, even as a matter of tax planning, if you will, as a matter of tax law -- I draw wills frequently for clients and I suggest to one of the spouses to skip the estate of the other. I don't want that estate to go to one spouse and then come down to the children.

Something was said earlier today that children should be provided for, that they have a right to inherit. I agree that they have a right to inherit

under normal circumstances. But there are circumstances, as I stated a little while ago, where there are children for whom the worse thing in the world that can happen at an early age, particularly today in New Jersey at the age of 18, is to arbitrarily under the laws of intestacy inherit large sums of money when it might not be the right thing to do.

So much for 899, about which I could say a good deal more. My thesis there is simply this, that I still cannot be convinced that under all circumstances and in all events that a spouse must be entitled to inherit a portion of an estate, arbitrarily one-third of a so-called augmented estate.

I think, yes, there are rights in a spouse. And I think that the Uniform Probate Code is a good model code. But I think we in New Jersey must think about this very, very carefully before we adopt it. If we ever adopt it, we should adopt it with a great deal many more safeguards than this bill provides to us.

There are reasons in estate planning, in taxes and many other phases that I can see that require that you give this attention.

I respectfully suggest to this Committee and through this Committee to the Legislature that with respect to this very important bill, it be more carefully looked at and investigated.

I also want to express total agreement with what has been said before with respect to the matter of interested witnesses. What worries me about some of these bills is the fear that they will promote a great deal of litigation. I think it is dangerous. I think Professor Diab had some good suggestions in that regard that would be protective of all of the aspects involved, but I think to merely permit interested

witnesses, except under very special circumstances, to act as such and to qualify would be bad.

I also have some problems with respect to the very important matter of incorporation by reference. I make a will and I say I give my estate to my wife and children as is explained in a letter that I wrote under date of April 14, 1942. I think it is a very dangerous thing. That letter may disappear. That letter may be hidden in a spot and I may not remember where I put it. That letter may have been superceded by five other letters. You can imagine a thousand different contingencies. And I have great concern intellectually as to this matter of incorporating by reference.

What we frequently do-- a man or woman may have a coin collection, a gun collection, a stamp collection or what not, and he may want to divide parts of it amongst members of his family - very properly so. Attorneys have traditionally suggested that he write a letter and put it in a sealed envelope to be opened at his death, suggesting to his family how he wants certain assets divided amongst his estate rather than doing it in 25 pages of the will. I can see that that has merit. But I perceive that there is grave danger, grave danger, in this general method of incorporating by reference provisions of dispositions in a will.

Finally, the matter of the intestate devolvement. I have a problem with that. I don't know what is exactly right. But I am far from certain that just simply changing our present system of one-third of personal property and two-thirds to the children -- while that might not be the best way - it hasn't been the worse way. I don't know that just simply saying to a wife, you get the first $50,000 and we'll split

the rest of it after that amongst you and the children is necessarily the best way. We are in an inflationary era. We are in an age when people are attaining greater and greater age thresholds.

Many of these things have to be approached very, very carefully, and just saying that the first $50,000 - and I don't know why it isn't $30,000 or $75,000 - as Mr. Durand said, it is just an arbitrary figure - I don't think is the best answer. The fact that other states may have gone along with this doesn't mean that our State of New Jersey can't do better or can't have a better formula. And this is a very, very important aspect of our probate law. Many people here who are far more knowledgeable than I am who sit in the Surrogate's Office where I had a short stay will tell you that so many of the estates land in this category. To arbitrarily simply say, $50,000 - then half and half - is not in my view the very best thing to do.

Therefore, I would respectfully recommend to the Legislature that this bill also, irrespective of what has happened in any other state, be given further attention and consideration and very careful review.

These are some of the views I wanted to present to the Committee without taking too much of your time. Thank you very much.

SENATOR WOODCOCK: Thank you.

Is Donald J. Hollywood, Trust Officer, Colonial First National Bank of Red Bank, here?

DOUGLAS J. HOLLYWOOD: Thank you, Mr. Chairman.

I am Douglas J. Hollywood, Trust Officer of Colonial First National Bank, Red Bank, and Chairman of the Probate Subcommittee of the New Jersey Bankers Association Trust Division. I am pleased to appear

before this Committee, and appreciate this opportunity to present a statement on behalf of the 99 members of the Trust Division of the New Jersey Bankers Association. I am accompanied by the Chairman of our New Jersey Bankers Association Trust Division, Mr. David T. Pyne, who is Vice President and Senior Trust Officer of American National Bank and Trust Company of New Jersey, in Morristown; and the Chairman of the Trust Legislation Committee, Mr. Gilbert C. Turner, who is the Senior Vice President and Trust Officer of the Garden State National Bank, in Hackensack.

We are here today to state the general support of our Trust Division for 18 of the bills in the probate area which are the subject of today's hearing, and to indicate that we have a position of no action on one of the bills because present New Jersey procedure seems adequate.

Three committees within the New Jersey Bankers Association Trust Division have given detailed study to the 19 bills, both in the form they were introduced in the Legislature and in the very helpful pamphlet which was prepared by the Legislative Services Agency of the New Jersey Division of Law Revision.

In this presentation we plan to follow the same sequence of bills as listed in the Division of Law Revision pamphlet rather than follow the numerical sequence of the bills themselves, in hopes that our comments will be easier to follow. I should add that many of the bills where we merely in my prepared statement, which you have copies of, recite the subject matter of the bill and evidence our support I shall eliminate from my reading, as they will be part of the record. In other words, I will try to speak only on those bills which we feel are significant and important and the others you can read about in this report.

Our Trust Division supports the enactment of

Senate No. 903 concerning the disposition of intestate estates and abolishing dower and curtesy.

The Trust Division supports Senate No. 2275, which we believe will tend to reduce litigation and construction proceedings by providing a firm set of rules to be used in construing wills.

The Trust Division also supports Senate No. 902, which will facilitate the execution and probate of wills.

In this area I would like to digress from my written statement and speak briefly on the area of interested parties acting as witnesses of wills. In our deliberations and considerations we spent quite a bit of time discussing this particular area. One of the major factors which we took under advisement and consideration in arriving at our position of support is the fact that certain of the members of one or more of these various committees which have looked into this have had experience in other states of the Union where interested parties are permitted to inherit under the terms of the will. From their experience, this has produced little or no excessive amount of litigation involving the probate of wills. They have found it was just a statutory procedure that was very easy to live with and made it very advantageous to the people of small means who in trying to do the right thing, through ignorance or otherwise, signed their name to a will as a witness.

Under Senate No. 899, the surviving spouse of a decedent who dies testate is given the right to an elective share of that decedent's estate. This bill represents a significant change in New Jersey law, which presently permits a decedent to effectively disinherit his spouse. We feel that this bill is an improvement over present New Jersey law in this

regard and accordingly the Trust Division supports this bill.

The Trust Division feels that Senate No. 2274, which deals with the powers and duties of personal representatives, the effect of homicide upon the distribution of estates and the establishment of times and procedures for establishing certain interests in testate and intestate estates is good legislation and, therefore, supports the enactment of this bill.

We strongly support the enactment of Senate No. 2145, known as the "Prudent Investment Law." The statement on the bill, in our opinion, lists compelling reasons for the prompt enactment of this legislation.

This bill would vest in those administering trust estates the power to invest the assets of such estates in any kind of investments in which persons of prudence and reasonable discretion would invest their own funds, having regard to the probable income as well as the probable safety of their own capital.

The concept of prudent investment was first developed in the United States in 1830 by the Massachusetts Supreme Court, and is presently the law in 32 states, including New Jersey's close neighboring states of New York, Pennsylvania and Delaware. In addition, at least 5 other states have adopted the prudent investment rule by judicial decision, and 5 more, including New Jersey, have modified prudent investment rules.

The bill is consistent with the modern concept and guideline for fiduciary investment and embodies provisions uniformly used for many years in wills and trust instruments and we urge its prompt enactment.

Our Trust Division also urges the enactment of Senate No. 2146, a companion bill to S-2145, whose purpose is to authorize banks acting in fiduciary capacities to make the same kind of investments in their common trust funds which fiduciaries will be authorized to make if the bill designated as the Prudent Investment

Law is enacted.

While S-2146 is not on the list for consideration at today's hearing, we do want to incorporate it by reference as it is a companion bill to Senate 2145 which is included in the 19-bill package.

Senate No. 2327, concerning powers of and jurisdiction over foreign fiduciaries is supported by the Trust Division since one primary purpose of this bill is to simplify estate procedures involving more than one state.

The Trust Division supports the enactment of Senate No. 2326. We feel that this bill represents a significant improvement over present New Jersey law regarding the distribution of estates. We are also very much in favor of the provisions of this bill regarding the law of abatement.

The Trust Division supports the enactment of Senate No. 2318, dealing with multiple party deposit accounts in certain financial institutions. However, our support also includes a recommendation that the Commissioner of Banking be granted regulatory power concerning deposit contracts. For example, we feel that the Commissioner could be empowered to issue a regulation specifying that each financial institution's deposit contract shall include a question asking whether, on the death of one of the parties, the ownership of the account shall pass to the surviving parties. This is in light of the Sadofski Case recently handed down by our Supreme Court and we feel that such a recommendation would go far in the area of removing any ambiguities or questions regarding intention of a depositor at the time the deposit account was opened.

The Trust Division has taken a "no action" position on Senate No. 2273, which deals with the power of attorney for service of process on fiduciaries of estates. We feel that present law and practice in New Jersey is sufficiently adequate in this area.

In conclusion, I would merely again like to say that we appreciate this opportunity to present the recommendations

of the New Jersey Bankers Association Trust Division on these important legislative matters. Thank you.

(Complete statement submitted by Mr. Hollywood can be found beginning on page 96.)

SENATOR WOODCOCK: Thank you very much, Mr. Hollywood.

Mrs. Sylvia Sammartino, Chairman, New Jersey State Commission on Women.

MRS. SAMMARTINO: I am sorry. I was scheduled for 1:30 and I don't have the statement with me at the moment. May I speak later?

SENATOR WOODCOCK: We will be, I believe, out of session at 1:30 and probably not resume until 2:00, at which time we can hear you.

MRS. SAMMARTINO: Fine. Thank you.

SENATOR WOODCOCK: Is Dr. John T. Rice present?

J O H N T. R I C E: Mr. Chairman and distinguished members of this Committee: My name, as you just said, is Dr. John Rice. I am a retired lawyer and a member of the American Association of Retired Persons. I appear before you today as the Chairman of the New Jersey Joint State Legislative Committee of the AARP and its sister organization, the National Retired Teachers Association, representing their combined membership in New Jersey of over 270,000 members.

On the national level these two Associations represent over five and one-half million elderly and retired persons. In their behalf, the Associations are actively supporting the concept of probate reform and, more specifically, the Uniform Probate Code, before the legislative bodies of the several states through the Joint State Legislative Committees such as that which I represent in my appearance before you today.

For years these Associations have received ever-increasing complaints about obsolete inheritance laws and irrelevant and expensive procedures that have been

with us for decades; so long, in fact, that we tend to discount the frustrations and problems they generate. In many cases the reaction has been extreme, many individuals choosing to give away half of all they own in setting up joint ownerships solely to avoid the archaic and costly probate machinery. This reaction is understandable but hardly an adequate solution.

As a result the Associations determined that the laws must be changed to bring the probate process into conformity with the needs and wishes of the average American who wishes to insure the orderly distribution of his or her estate, but for whom extensive estate planning is simply not feasible. It is the considered opinion of these Associations that the comprehensive model state law known as the Uniform Probate Code is an intelligent and workable reform; and, as such, we have endorsed and supported it in our published legislative goals since 1971.

I want to take this opportunity to thank Professor Wellman for his laudatory comments about our Association's interest and activities regarding this matter.

Without getting into any extensive detail or comparison with present New Jersey law, which has already been presented to you by preceding more qualified speakers, I would like to take a few minutes to highlight those provisions of the Uniform Probate Code which we feel are of primary importance to the elderly.

We believe that the passage of the relevant provisions of the Uniform Probate Code will enable persons of ordinary means to pass on their property at death with fewer delays, less cost and, most importantly, with the assurance that their wishes will be carried out. The Probate Code accomplishes this result by simplifying the making and probating of a will. Just as importantly, the Code relieves most persons in ordinary circumstances of the necessity to make wills by providing a modern intestate succession plan that

reflects the intentions of most people. Studies have shown that most persons of modest means want their estate to pass entirely to the surviving spouse. Whereas most statutory estate plans still divide a decedent's property between the spouse and other relatives, often including collateral relatives. Under present statutes, people are forced to make wills simply to avoid the undesirable effects of the law.

Present statutes also contain other provisions which tend to force people to make wills: Wills are commonly used to name family members to administer estates; the Uniform Probate Code sets up the order of priority for administration beginning with the surviving spouse. Today, wills are used to avoid common disaster problems; under the UPC a spouse must survive the decedent by five full days. Today, old legal formalities throw considerable doubt on the validity of a will made in one state when the testator later takes up residence in another state. Under the UPC it would no longer be necessary to make a new will when a person took up residence in another state where the Code had been enacted, for it recognizes the validity of "foreign" wills.

For those who prefer to control their estates by their own will, the Code also offers some significant improvements. Under it, a simple signed statement is valid as a will, and even if witnesses are used for additional safety, the Code permits the will to be probated without calling the witnesses to court after the death. In short, the will would have a presumption of validity unless challenged by any interested party, at which time a court proceeding would be convened to determine its validity.

The Code also slices away a lot of red tape and reduces the procedural requirements relating to inheritance. By offering procedures for informal probate and administration - that is, without court supervision - the Code reduces the need for a lawyer in every estate and the need to wait months or even years for an inheritance. I know

that that won't please some of the lawyers in the audience, but from the viewpoint of elderly people who are living on very limited budgets, it is a very important matter. The simplicity and speed of Code procedures work to shorten delays and lower the expense of settling small, trouble-free estates.

The Code provides modern, sensible law relating to guardianships, conservatorships and other means for handling the affairs of persons who are incapacitated by illness, advanced age or other disability. The Code provides for powers of attorney that remain good in spite of incompetency, so that persons who expect difficulties in managing for themselves can arrange for others to act for them.

Finally, the Code unifies administration of estates consisting of land or savings located in two or more states. The mobility of Americans makes this reform essential. In short, the Uniform Probate Code assumes that most people are trustworthy and honest, and makes the law work in their favor. But at the same time, it fully protects those who need safeguards against foul play.

Thank you very much for your kind attention. And on behalf of over 270,000 elderly New Jerseyans, we urge that you recommend to the full legislature the enactment of the relevant provisions of the Uniform Probate Code as embodied in the bills which are the subjects of this hearing.

SENATOR WOODCOCK: Thank you very much, Dr. Rice.

Is Rosemary Higgins Cass here?

MRS. CASS: Yes, sir. Mrs. Sammartino and I wish to make our presentations jointly. We are ready, sir.

SENATOR WOODCOCK: Fine. Go right ahead.

S Y L V I A   S A M M A R T I N O: I am Sylvia Sammartino of Rutherford, and I speak today on behalf of the New Jersey State Commission on Women, of which I am the chairman. The Commission on Women was created by an

act of the New Jersey Legislature in 1969. Eleven members, appointed by the Governor with the advice and consent of the Senate, serve on the Commission without compensation. By legislative mandate the Commission is charged with the obligation to carry on a continuous study of the changing needs and problems of women in New Jersey. The Commission is deeply concerned with the many inequities against women that still exist in many areas of our economic, education, social, judicial, and political life in New Jersey. These inequities can only be eradicated by adherence to the principle of equal rights for men and women. New Jersey is one of the very few remaining states that permits husbands to disinherit their wives, an idea long since discarded by the great majority of the states in the United States.

One of these serious areas of inequities is in the inheritance law. New Jersey is one of the few states where literally, if there is no real property, a wife can be completely disinherited. Most common law states impose some restrictions on the right of one spouse to disinherit the other. Community property states, of course, give an absolute 50 per cent to the spouse.

The majority of wives in this country still are not employed outside of their own homes. Their basic function is that of homemaker, a non-remunerative occupation, yet one which, if it were necessary to pay for all the tasks a typical wife and mother performs, would cost the average husband and father many thousands of dollars a year.

While modern society has dictated, and justly so, that the typical husband will be paid for his work outside the home, it has not yet found an answer to the question of how to justly compensate the equally important job done by the wife and mother in the home. Because of this, women are frequently at great disadvantage in this money-oriented society as well as dependent upon their husband's largesse

for whatever money they have. In a well-functioning marriage, this is not a serious problem, but it can become the source of much friction in any but the stablest situations. If the wife has not been previously employed she may, sometimes at a late age in life, when employable skills are rusty or even non-existent, be compelled to seek employment because what the husband has left is not adequate to support her and/or children left behind.

The sadder situation, however, is the gross inequity resulting not infrequently when, as presently permitted in New Jersey, a husband upon death, for whatever reason, cuts his wife off either wholly or partially through his will or by life-time gifts. Only the meagrest protection is afforded the wife by her dower interest in any real estate which the man may own in his own name. Any lawyer could tell you how many times property is put in a corporate name to avoid this right.

Our state has always upheld and promoted the welfare of the family. We believe that it is long past time for the state to give recognition to the important role of the woman in the family and to insure that her equality of partnership in the marriage is given legal protection by these much needed changes in the inheritance laws.

On behalf then of the State Commission on Women, and speaking for the women of this state who have become and grow daily more conscious of their rights as citizens, making an inestimable contribution to the welfare of the community, I urge your passage of Senate Bills 899, 903, and 905, as they are built upon the principles of equality of men and women and they will eradicate the inequities now existing in our state laws of inheritance.

Mrs. Cass, a member of our Legislative Committee, as well as Chairman of the New Jersey State Bar Association Committee on the Rights of Women, will address herself to the technical aspects of the pending legislation with

which comments our Commission on Women is in total agreement.

Thank you, Mr. Chairman.

SENATOR WOODCOCK: Thank you.

Rosemary Higgins Cass is our next witness.

R O S E M A R Y H I G G I N S C A S S: Thank you, Mr. Chairman.

I am very happy for the opportunity to speak today on behalf of our New Jersey State Bar Association Committee on the Rights of Women and also as a member of the Legislative Committee of the New Jersey State Commission on the Status of Women.

It is also personally gratifying to me, as an attorney who has specialized in the field of wills, estates and probates for many years, as I have long been deeply concerned about the inequities of our present inheritance laws.

I would like to note that while our committee studied the bills proposed from the vantage point of the rights of women, nevertheless these bills, while benefitting more women, will yet benefit men in numerous situations: More and more women are today employed and have assets of their own. There are wills drawn by women cutting off their husbands from any portion of their assets. The proposed statutes would abolish dower and curtesy, which are really anachronistic in this modern day and have been the causes of spouses refusing to sign deeds. I remember one lady who refused to sign a deed for real estate until her husband got her a new bathroom.

Speaking more seriously, however, New Jersey is one of the most antiquated in the probate field of any state in this country.

Nearly all of our common law states impose some restrictions on the rights of a spouse to disinherit the other.

Traditionally this has pointed to some capital sum related to the size of the holdings of the decedent, rather than the need of the surviving spouse.

Both of our neighboring states, Pennsylvania and New York, the latter for many years, have had far more equitable laws regarding the distribution of property, both by testate and intestate succession.

Additionally, the retention of the concept of dower and curtesy, as I mentioned, is truly anachronistic today and impedes the free alienability of real estate at a time in history when it is highly undesirable. Yet, of course, because of the fact that it has been the only protection that a spouse has had in New Jersey up to the present, unless the other bills pending would be adopted, it would not be wise to abolish dower and curtesy.

The changes proposed by Bills 899, 903 and 905 would be consistent with the change in law promulgated by N.J.A. 2A:34-23, which provided for equitable distribution upon the dissolution of a marriage.

It was my privilege to serve on the Commission which proposed the changes to the divorce law. And, indeed, our Commission considered some type of distribution on dissolution of marriage, but because of the inheritance laws, we felt that we couldn't go so far as to recommend any kind of division of assets between the parties on dissolution.

We were happy, however, that the New Jersey Legislature moved ahead and incorporated the concept of equitable distribution in the changed statute. Now, however, if we are not to prevent an anomalous situation where it is better to divorce your spouse before he dies if he is going to cut you off anyway, then I think it is imperative that our Legislature make the inheritance laws be consistent with the laws which now provide for the equitable distribution on dissolution of marriage, and that these laws provide, at the least, for a statutory share of the decedent's

assets and indeed for a more equitable share, as is proposed in an intestate's estate to the wife or to the surviving husband.

Coming to the specific bills themselves, I know you have heard detailed analyses of these by persons who are far more knowledgeable than I. We would simply like to make one or two comments, one regarding Senate Bill 899.

Here we find one major inequity which from my reading of the commentary of the proposed Uniform Code appears not to have any solid reasoning behind it and that is the exclusion of life insurance and pension benefits from the augmented estate of the decedent while they are included in the amount calculated to have been received by the surviving spouse.

Today the major part of most medium-sized estates is composed of life insurance and pension benefits and the net effect of the statute as it is proposed in some instances - in many instances - may be again to disinherit the wife of substantial assets.

Let me give a brief illustration of a $400,000 estate, $200,000 of which is in life insurance and $200,000 of which is in probate assets. If the wife receives the life insurance, then no part of the probate estate would go to her if her husband elected to cut her off. She would, of course, still be receiving $200,000 of his total estate.

On the other hand, if that $200,000 of life insurance were to pass, say, to children or to his girl friend, it would not be included in his estate for purposes of determining how much her share would be. But she would simply get one-third in probate assets, which would be $66,000, and $66,000 out of a total estate of $400,000 is only one-sixth.

For this reason, we think that the net effect of this statute should be reviewed and possibly some change

made either to eliminate from the surviving spouse's share life insurance as well as pension benefits or else to include it in the augmented estate. But to do otherwise appears to create a real inequity for the surviving spouse, whichever one it may be.

Finally, in regard to proposed Bill 902, I am speaking here as well now on behalf of the International Law Section of the State Bar Association, because for many years we have been endeavoring to see that the probate of foreign wills is facilitated in the State of New Jersey. Therefore, the passage of Bills 902 and 2277 would bring our state into accord with other states in this country and really facilitate what is a modern necessity, the ease of making wills in one jurisdiction and being assured that when one moves to another state, as one out of every five families does every year, that the will doesn't immediately have to be changed because the new state has entirely different requirements than the first state.

More and more states are adopting a provision essentially like that which is included in the proposed Bill 902 and we believe that this would definitely be an advantage to our state and bring it into the forefront of the states in this country, as would the adoption of these other bills which our Committee would like to suggest are right, are progressive, and would once more assure that New Jersey, which has always been called the state where equity is done, is indeed doing equity to all of its citizens.

Thank you, Mr. Chairman.

SENATOR WOODCOCK: Thank you.

Is Mahlon L. Fast present?

M A H L O N L. F A S T: Thank you.

Before I start, I might say that perhaps I am in error, but it seems to me that Mrs. Cass' remarks about

the insurance and benefits are covered by Bill 899, paragraph 2(b), which I believe adds insurance to the augmented estate.

I would like to express my opposition to Senate No. 899 relating to a surviving spouse's right to an elective share. This opposition should not be confused as opposition to Senate No. 903 or No. 905. Indeed, I believe there is a significant difference. No. 903 is concerned with the situation of intestacy and is therefore unlike No. 899 which deals with wills and No. 905. And No. 905 is unlike No. 899 because No. 905 is concerned with a situation which a testator may "cure", that is by expressing his will after marriage. However, I oppose No. 899 because it denies an individual the right to make, publish and declare his will. I use "his" to designate singular. Of course, it applies likewise to "her" will. There is a statement in the comment to No. 899 that there is a provision "for the purpose of preserving as far as possible the testamentary plan of decedent".

I submit that 899 in its entirety destroys the testamentary plan of the decedent.

I do agree with the comment to No. 903 that "... most married persons.... almost always leave all of a modest estate, or at least half of a larger estate, to the surviving spouse when a will is executed." However, I believe that a testator should be given the freedom to express his will. I consider this a matter of substance whereas to my thinking the other provisions now under study are basically procedural inasmuch as a testator may provide to the contrary of all other provisions that you are considering. This is the only one where a testator is denied his own freedom.

No. 899 denies a testator the freedom to express his own will. The Legislature would be substituting its will for any married testator. In effect, a testator's will would not be his will if he wanted to disinherit a

spouse. The bill may be subtitled, perhaps, "Legislative defeat of Testamentary Intention" or "Prohibiting the right to disinherit certain relations."

Now I realize that disinheritance of a spouse is, or may be, considered a drastic step. However, the previously quoted comment gives the reality that this is so seldom done. What seems to have been lost sight of is that there is usually a substantial, significant reason for any testator to take this "drastic" step. If such situation does exist, i.e., a substantial, significant reason to disinherit a spouse, why shouldn't the testator have the freedom to disinherit a spouse? In fact, the comment does not state why the right to disinherit is a "deficiency" in the existing law. I would like to stress that the word "deficiency" was the commentator's word rather than my word for disinheritance.

I suppose the answer is socio-economic. It involves a balancing of interests. However, in our society, I consider the right to make a will is just that, that is, a right, a freedom. I submit that this freedom should be undeniable.

I want to emphasize that my thesis does not apply to a consenting spouse or intestacy or the will of an incompetent, including one who may have overlooked his spouse. I do believe that the right to disinherit a spouse should be absolute. However, I can conceive of a reasonable condition for disinheritance. I would submit that it would be proper to require a statement in a will that a surviving spouse was not being overlooked.

That was my prepared comment. But if I may, I would like to take a few moments to address myself to some of the comments that have been made earlier.

The Dean who spoke earlier and Mr. Durand made reference - and I may be quoting both of them - to the fact if you begin or accept the premise that dower and

curtesy are insufficient for the protection of the surviving spouse, then provisions must be made therefor. I cannot accept that premise as a universal factor.

I am quite, shall I say, flattered that I happen to be speaking for the same thing as Sam Saiber whom I consider an authority in the field. I had no idea that he was going to take the same position, that is, opposition to No. 899. Mr. Saiber did address himself to tax planning where a surviving spouse may agree to a waiver and that is provided for in the bill. However, the bill provides for the waiver during the lifetime of the testator. I have spent a good deal of my practicing years specializing, with all due regard to the American Bar Association which does not permit the acceptance of a specialization of taxation, estate taxation -- I have spent a good many years emphasizing estate planning and estate taxation.

I have seen many circumstances where the intention and the plans of parties during their mutual lifetimes have been set awry by a surviving spouse as survivor, both man and woman. They come to new realizations. They realize that they are alone and that they do not have, shall I say, help and guidance by a spouse.

It is my experience that a surviving spouse will give serious thought to her waiver as a surviving spouse. I am afraid that litigation may arise by a post mortem attack by a surviving spouse of a waiver given during joint lifetimes. And I can see a very strong legal point for an attack on a waiver by a surviving spouse that he or she was not given all of the relevant facts at the time that the waiver was made, and I am afraid that this may induce litigation.

There also appears to me to be an inconsistency in the bills. The bill that provides for intestate succession does not appear to include non-probate property.

You also have toward the end of the Blue Book a provision for POD accounts to be payable to the nominee upon the death of a spouse. Therefore, a spouse may be cut off under your entire plan by making no will but putting all assets in a POD nomination. I believe the reference in the intestate bill is to estate; it does not say probate estate or nonprobate estate or make any definition such as "augmented estate."

So although I am opposed to 899, I would like to bring to your attention in all candor and fairness that it seems that a spouse may still be disinherited by making no will.

Thank you.

SENATOR WOODCOCK: Thank you very much.

Mr. Milton Prigoff, 39 Park Place, Englewood, is next.

MILTON PRIGOFF: Mr. Chairman and members of the Committee, I would just like to address a few remarks to the Committee as a practicing attorney and as a member of the Bar, both of this state and of the State of New York.

I am delighted to see the progress that has been made in approaching the Model Probate Code and also in approaching the thinking which has been advocated for many years of abolition of dower and curtesy.

There has been some indication that dower is a remedy that is of value to a widow or curtesy to a husband. I would just point out that the measurement of dower in our complex society today, based as it is upon life expectancy and the ever-decreasing amount, is of very little value to older people. Because of their shortened life expectancy, they are entitled to a much smaller amount, based on the valuation of the family residence, if in fact there is a family residence.

Practicing in the counties which border on the

State of New York, we are becoming ever more constantly associated with people who have no real estate and who live in high-rises or apartments and to whom dower and curtesy is no remedy and no relief. It is a great shock very often to a second wife to find that the husband did not provide for her adequately in the will that may have been prepared even before the second marriage and that she is given no right of election.

I agree with the remarks that were made by Mr. Saiber, for whom I too have a great deal of respect, except that I would disagree with his suggestion that perhaps these bills would compel a legacy to a child. It seems to me that the bills adequately cover non-payment to a child if there is a reason not to leave a child a bequest and the right of election is given solely to the surviving spouse under the legislation as it is prepared.

I also would speak to Senate 716, I guess it is, which provides for the depositing of wills. I would just like to echo the Surrogate's remarks in that regard because any lawyer who prepares a substantial number of wills and stores them for his clients very often finds that the documentation is of no value because the client has gone elsewhere and prepared subsequent wills or he has moved away, and very frequently the depositor neglects to even have the depositee advised of his death in the event that he dies in some foreign jurisdiction. So this does seem to impose a great burden on the Surrogate's Office without any great compensating effect.

I also would question the efficacy of the provision about incorporation by reference of a pre-existing document, with the suggestion that it perhaps might be limited to disposition of specific personal property. Very frequently this is a good method of disposing of the furniture in the living room - a chair to go to cousin

Martha or a picture to so and so. Rather than have the person have the burden of preparing a new will every time someone dies or she disposes of a piece of furniture, this might have a good deal of effect. But beyond that limitation, when it comes to disposing of other personal property, intangible securities or what have you, it would seem that the dangers of an incorporation by reference are probably much more severe.

I would like to urge action on the series of bills with whatever revisions are suitable to the Legislature because it seems to me that this will greatly facilitate the making of proper wills and the disposition of estates in New Jersey if this body of legislation is adopted. Thank you.

SENATOR WOODCOCK: Thank you very much, Mr. Prigoff. We will now recess for lunch.

(Recess for Lunch)

Afternoon Session

SENATOR WOODCOCK: If everyone will be seated, I think we can proceed.

Before the recess, we had finished with all of those people who had asked to speak. I would now just ask if there is anyone present who has not had an opportunity to speak who would like to address the Committee. (No response.) Seeing there is no one asking to speak, I would ask if Professor Wellman would return for the purpose of responding to some of the remarks that have been made. After he concludes his remarks, we will throw the meeting open to questions from the floor.

R I C H A R D V. W E L L M A N: Thank you, Mr. Chairman.

I thought that I might offer the point of view of the draftsmen and other committees on the Uniform Probate Code on some of the matters that have been commented on

particularly.

First - the Surrogate's position that the provision for the deposit of wills is unsatisfactory. It would not be to any degree offensive to the National Committees if this were dropped. We did not put a high stake in this when it went into the Uniform Code package in the beginning. It was inserted largely because this is traditional in many states and it seemed to be the course of least resistance to put it in rather than to omit it. But it is not a functioning part of the system that is important here.

Several speakers have commented on the registered opposition to the bill's posture on the interested witness, as to whether he should be penalized either totally or kept from getting any more than he would get if there were no will, when inadvertently he becomes a witness on a will in which he is interested.

Now the position of the Uniform Probate Code on interested witnesses briefly is that no particular penalty or stigma attaches from the mere fact that they are witnesses to a will which gives them something, but it is another question as to whether undue influence can be established. And we in our commentary, as we have mentioned this morning, suggest that it is unwise for a person who is a beneficiary under a will also to appear as a witness because he rather invites a question of undue influence. So we don't think it will make good sense or good practice, but we think it is the other question whether it should be penalized.

The reason for our basic position that it should not be penalized is simply this: The effect of statutes that penalize an interested witness, I suppose, is to coerce conduct that is desirable from the standpoint of securing open execution, an uncoerced execution. It is designed, in other words, to keep witnesses from acting

as witnesses to wills in which they have an interest. But the unfortunate situation is that unless a witness knows of a provision in a will that benefits him, and he may well not know of it, or unless he knows of the statute, and he may well not know of it, there is no consequence of the statute tending to discourage him from being a witness in a particular case.

When you think about it, the only thing these statutes do, therefore, is to penalize innocent and unfortunate people who didn't know that there was a benefit for them in the will or were unaware of any consequence that attached to their lending their services as a witness when asked for.

You look at cases around the country and the cases that come up involving an interested witness and they are where people didn't have other people available to act as witnesses. So they turn to their friends and to their family members to help them get this will off the ground, to witness it. It is not strange that it is to those same friends and family members that the will makes gifts.

So, respectfully, we submit that the history here has not proved successful. It has not reduced undue influence. There is plenty of opportunity to get undue influence when it exists and we believe the Uniform Probate Code's posture and the posture of your bill on the position of interested witnesses to the effect that there should be no automatic penalty for them is correct.

Let me comment briefly on the forced share, the augmented estate, the elective share. All of these are various names that have been applied to what is in your Bill 899. It was commented that this right to upset a decedent's estate plan would in many instances cut across tax planning.

The bill contains adequate provision permitting people

who are trying to sensibly plan their estate and who are pursuing tax objectives by way of signatures from the other spouse either to the will, consenting to its provisions, or of signature to a waiver of rights, or an ex post facto waiver of rights after death has occurred, to protect and to implement estate planning. And there is no particularly clear reason for asserting that this elective share stands against tax planning. It does not. By the provision permitting free sign-off of rights here, it rather encourages careful planning and careful counselling on these points.

The point that people may marry for money is rather obliquely related to this bill. People have and will continue to marry for money, irrespective of where you stand on whether there should be an elective share or not. The point is simply much broader than this proposal. I just believe that that is not particularly persuasive.

The question was raised as to the rationale for the Uniform Probate Code's position vis-a-vis life insurance. It was accurately pointed out by the lady who spoke that if insurance is made payable by an owner to someone other than the spouse, then that value is not taken into account in computing the augmented estate. But at the same time, if life insurance is made payable to the surviving spouse, then that payment is taken into account, not for purposes of pulling it back in any sense, but of making the spouse who receives that benefit take credit for what has been received before asserting a right to more.

Why was life insurance omitted? For one reason, we were not persuaded that life insurance realistically was used as a property arrangement in order to defeat the rights of spouses. In many settings, life insurance is an unnatural investment, to say the least, and not a particularly good investment. The idea that married

persons massively would sell their land, sell their securities, and move their assets into life policies payable to children by prior marriages or girlfriends or what have you, simply to us was rather incredible. We just didn't think that was a realistic prediction.

Secondly, we were informed, whether rightfully or wrongfully, I do not know, that if we drew a statute setting ourselves against the terms of life policies as they might be made payable to anyone chosen by an insured, we would incur the wrath and opposition of the life insurance industry and in effect jeopardize what otherwise was, we thought, a very rational and probably obtainable goal of rectifying these old and imbalanced rights vis-a-vis husband and wife.

So it was a combination of things. We didn't feel the fight was worth it, particularly when it was predicted that if we went that way, we would pull down really rather heavy and formidable new opposition on the whole package. Therefore, we backed off. As I say, this may or may not be a reason that you will want to accept, but it was the explanation for the thing.

I am sure there are other points. There has been reference to the incorporation by reference idea in here. The suggestion is made that this will foment litigation, that people may in their wills refer to documents that will be difficult to find or will be lost, and this will create questions.

The Code permits incorporation by reference; that is to say, language in a will that says, "I mean what I say in another document," or what has been said in another document. It is kind of a shorthand way of writing a will. The Code permits it for the very simple reason that the law in a very high majority of states permits it today. The rules are that the document that you refer to must be in existence and it must be clearly identified as

the one you mean. And it has always, of course, been the rule that if you can't find the document that has been referred to, then you are in a difficult position and you can't give effect to the language. So it has always carried with it a risk of failure.

I am not advised that there has been consequent to its recognition in other states a great quantity of litigation. What you prevent, if you take that provision out of the will, is use of incorporation by reference for many very legitimate reasons: "I want my will to say the same as my wife's will that was probated sometime ago," specifically referred to and in existence. "I want to incorporate the provisions of a particular statute or the terms of a particular trust instrument." And there are many, many uses of incorporation by reference which are entirely clear, referred to documents that have complete stability and pose no real risk of litigation or insecurity. I think it is kind of an overkill for the Legislature to take a position that you can't do something because if you do it, there is a risk you will use it badly. If we went very far down that road, we would have extremely restrictive legislation on a very wide number of points where presently we don't reach them.

So your bill which does include a broad reference to incorporation by reference does follow the Uniform Probate Code on this. I think it is defensible because that simply would put New Jersey in line with what normally has been permitted in other parts of the country and you have got to bend law one way or the other if we are going to make it uniform.

I would come back to the augmented estate point, the elective-share point. This morning in my prepared remarks I said I didn't understand the proposal as presented by the Judiciary Committee. Let me clarify what my puzzle is.

The bill as it is in your book is limited in its initial paragraph to the surviving spouses of persons who die testate. That means die leaving a will. This is on page 20, I believe, of the book, and is caught first in the title to the act, "granting the surviving spouse of a decedent who dies testate the right to an elective share." I don't know quite where that came from, but I would suggest to you that that is different from the Uniform Probate Code and it is defective because the Uniform Probate Code's elective share remedy is designed to be available in a case such as this, for example, where an owner of property transfers all of his property before death in a revocable trust or by joint tenancy arrangements, and then dies survived by someone other than the spouse who is the beneficiary of those arrangements. He doesn't have any probate estate or he may have a very small probate estate which may be testate or intestate. It is a part of the scheme of the elective share provision that I think you in the main intend to present, at least in bill form, that the spouse should get a third of the augmented estate in that case.

I think this restriction in here that keeps this thing from operating unless the decedent left a will is inadvertent and should be corrected in a rewrite.

I also previously expressed my belief that Bill 2274, I think it is, which concerns the powers and duties of personal representatives, would be a better bill and it would be more in line with the Uniform Probate Code if you deleted the word "personal" where it appears in that bill as a qualification on the word "property." The bill, as you see it, gives the personal representative wide power over the personal property of the decedent. It says nothing about his power over real estate and leaves you, I believe, with presently an overly-complex law when the estate consists of real estate that must be sold and there is no will giving the power of sale.

So I would, at least, alert you to that circumstance and urge you to possibly consider whether that word "personal" could be dropped and the coverage broadened.

Finally I would simply express two biases, both of which are against the present text of your bill, but two areas where I think easily you could improve the bill. The most important to me would be to add back in UPC, Uniform Probate Code, 2503, giving legality and validity to holographic wills. This is a concession that laymen and consumers believe should be made to their wishes to leave a will. I have heard argued that this will generate litigation again because home-made wills will be inaccurately phrased and will cause more trouble than they will give relief to those people using them. But let me submit that our people by and large are quite capable of taking care of themselves on this kind of thing. And I don't see why the law should undertake to keep people, if they want to do it themselves, from making mistakes. I think that is an overly rigid posture of the law and I think it is important to allow people this secure method of expressing their wills by an instrument entirely or substantially in their own handwriting, even though it is not witnessed. That is what we are talking about.

This is particularly vital when we think about the uniformity aspects of this thing. Twenty-three states, we heard from Dean Diab this morning, presently permit holographic wills. You will permit holographic wills in New Jersey if they were written in a state that permits them because you in this bill recognize a will is good if it is good under the law of where it was written, as I understand it. So you are just going to have a confusion if you stop there and don't broadly open the door and say hand-written wills are good in this state because we are following the Uniform Probate Code on this. So I would urge you to take another look at that one.

The other point I would leave you with is that the deviation from the Uniform Probate Code - and I am fumbling for the right bill - but it is on the question that Dean Diab spoke to this morning on revival. I think it is in the second of these bills. Yes, it is on 902, beginning on page 8. Section 9 of that bill takes what I think is an overly harsh stand in regard to the mixed up testator who had one will and then changed his mind and made a second will that revoked the first. Then he changed his mind again and tore up the second will and left the first will. He thought he had a first will that was good. His family thought the first will was good. But here the statute says, no, you can't have that. It is against common sense to tell a person that a perfectly good, signed instrument that is left by him to signal what he wanted can't be good. I know the reason for Section 9 here is because it is the law of some state, that you just can't revive a will without re-executing it. The reason is a sense that there will be difficulty in establishing what the testator wanted if you don't force it into writing. But I don't think it makes sense to cure that difficulty by putting him into a position that you know he didn't want, if you follow me. If you have conceded proof that he wanted to move back to a first will, it doesn't make any sense at all to leave the statute saying, no, we contradict that.

I suggest you have a situation here where no solution you can possibly come up with will be totally satisfactory. There is going to be some confusion and some difficulty, either of proving what he meant or of standing against what you know he meant.

So it seemed to us in putting the Uniform Probate Code together that the best answer to that kind of problem was to let the court listen to the evidence and go where it thought the evidence took it, even though we concede that will be a matter of difficult prediction

in those cases where ill-advised testators fumble around and change back and forth between wills. But that is part of the cost of life. You have got this facility for enforcing their intent. Some people are going to stumble around and misuse it and they are going to cause problems. Don't take the coward's approach and frame your legislation so you pretend there isn't a problem there and you are legislating against it, because it just won't work.

Thank you very much, Mr. Chairman.

SENATOR WOODCOCK: Thank you very much, Professor Wellman.

Now we will entertain questions. But I would ask anyone who has a question to use the microphone in front of the room here. If you would for the benefit of our reporter and the record, please identify yourself once again if you have spoken. If you haven't spoken before, please identify yourself so the record will clearly show who is addressing the Committee. Anyone with a question will please go to the microphone.

GILL C. JOB: Mr. Chairman, I am Surrogate Job, Bergen County.

In response to Professor Wellman - and I want to thank you, Professor, because you enlightened me on several points during your discourse today and I am very happy I had the opportunity to attend - in this matter of interested witnesses, I still think that it presents quite a danger and could be the means of forcing collusion and, of course, undue influence, as far as witnesses' taking is concerned.

Being completely in agreement with your later remarks concerning holographic wills, I would suggest that the solution probably lies there, that in a holographic will the individual remember his interested witness and we wouldn't have that question at all because we would not require attesting witnesses. Thank you.

SENATOR WOODCOCK: Thank you.

Is there anyone else who wishes to address us?

M A H L O N L. F A S T: I am Mahlon Fast.

Since at this time we have an opportunity to ask questions instead of just making comments, I would like to know, if possible, what the deficiency was in existing law that would be cured by 899?

PROFESSOR WELLMAN: That is the forced share, the elective share. The Code started from the position that so far as I know is the position of 46 or 47 of the 50 states, and that is that you cannot disinherit a spouse. In eight states that is because of community property.

The only states like New Jersey having no protection against disinheritance - and again I may be ill-informed - are New Jersey, North Dakota and South Dakota, and North Dakota has now passed the Code, effective in 1975. So we strike that one from the list.

Now it is true that in Ohio and in Massachusetts, if you leave a will in favor of someone other than the spouse, the spouse can elect to take a third of the probate estate. You can sidestep this very easily in those states by simply not using a will but using a revocable trust or using a joint tenancy. You just set up one of those arrangements in favor of a non-spouse and the courts have taken the position that this isn't a will and there is no right of election under a statutory remedy aimed at preventing disinheritance by will.

But the premise of the Code is that the very high majority of our states have taken the position that it is against the institution of the family to allow a decedent at the moment of his death, for whatever reasons of caprice or of what, move him at that point to simply cut out the surviving spouse, cut her out of any capital share of the estate.

In taking that position, we went forward and thought that the only sane law would be one that tried squarely to meet the problem, and that is to say, not only aiming the election at the probate estate but at the augmented estate.

You spoke this morning of the right of a testator to disinherit his spouse. This is a "right" which is simply not recognized by most of the countries of the world and most of the states of this country. So it is not a "right" in the views of most.

If it is to be preserved as a right in New Jersey, I would suggest that it is one that has come in through the back door as distinguished from being accepted squarely because historically dower was thought to stand against the right of election, and dower did before we invented revocable trusts and survivorship arrangements. Before most assets moved away from land to personal, dower was an effective remedy, preventing give-away of family land either during lifetime or at death, without consent or at least some share for the spouse. Curtesy on the other side of the sex line served the same purpose.

I think with dower and curtesy in New Jersey history, you cannot take a position -- As a matter of pure theory, this state has stood for the proposition of absolute freedom of testamentary authority. What you have with those things anchored firmly in your history is a development that can only be described as sporatic and uncontrolled as against that theory that has tended to make it possible totally to contradict the traditional dower and courtesy rights.

So if there is a right to disinherit, it is a funny kind of right. It isn't natural in terms of the world populations or of the populations of the country and I would suggest that it isn't clear as a theory you have accepted foursquare under the history and shape of your

present statutes.

MR. FAST: If I may pursue that a little further, I can see where as a matter of whim this would be justifiable legislation. However, I was addressing myself to what, I believe, may be certain circumstances where it would be justifiable to disinherit a surviving spouse.

I think certainly, as Mr. Saiber said, there are circumstances that could be illustrated where it would be justifiable, but I don't think it serves any necessary purpose to illustrate those cases. But those are the circumstances that I am concerned about.

Also I believe the Committee has acknowledged that in the overwhelming number of circumstances a surviving spouse is the beneficiary, and I believe will continue to be the beneficiary. The situation where the wife is not the beneficiary is the unusual circumstance.

SENATOR WOODCOCK: Mr. Fast, if I may just ask you a question: Wouldn't the number of justifiable and unjustifiable cases be almost even? In other words, take the situation where the husband in the last ten days of his life has an argument with his wife and says, "OK, you're out." He writes up a will and she is out. That certainly to my mind would be unjustifiable. Now don't you think that the chances of it being an unjustifiable situation would equal the times it would be justifiable?

MR. FAST: You are getting close to a compromise that I have had in the back of my mind which I would hate to envision as ultimately becoming the law, which is that in circumstances where there is a claim of unjustifiable disinheritance it be, shall we say, put into a court of equity for the court to determine what is or what is not unjustifiable. I hate to think of that coming to pass because of the burden that would be put upon the courts. But, yes, I can see circumstances in both regards.

SENATOR WOODCOCK: Well then, should we not opt for that situation where we do away with the unjustifiable disinheritance?

MR. FAST: But your question would presume an equal amount of injustices and justices. If we are going to presume that, I would like to side with the freedom of the testator.

SENATOR WOODCOCK: I could understand this point a lot better if we were not in a state that had a very liberal divorce law. But we now have a divorce law that lets you get a divorce without reason, just on the basis of separation. So you can do that, and we do have the equitable disposition of the assets of the marriage. Certainly if you were justified in not giving her the estate, you could go in the Matrimonial Division and I am sure if you could demonstrate that, she would come out with nothing. Then you wouldn't have a wife to worry about and you could make any will you want.

I just wonder in the balance if there are more people who are going to be unjustifiably denied what I think society agrees is theirs as opposed to those who would be justifiably denied.

MR. FAST: We are perhaps getting to a point of line drawing. But your premise has come to my mind. I have discussed this with certain other people who have the same questions you have. My answer is that there may be religious reasons why a divorce could not be obtained or family reasons. A husband and wife may want to tolerate each other for the benefit of children living with them and not want to get a divorce. So it would not be applicable in those two circumstances, religious or family reasons.

SENATOR WOODCOCK: I can understand that, but I still get back to my original point that I think those would be in comparison the lesser number than those who would

be unjustifiably denied.

MR. FAST: I suppose.

SENATOR WOODCOCK: Well, I guess we are guessing.

MR. FAST: Yes. And I think it is a socio-economic estimate on a person's part. I say all things being equal, I am in favor of the freedom of the testator.

SENATOR WOODCOCK: Thank you.

Is there anyone else who wishes to address a question to the Committee or our expert?

G I L L C. J O B: I am Surrogate Job.

I might as well take the professor's range because I am always interested in learning.

Sir, in Senate 902, paragraph 7, I seriously question, in view of the existing statutes, the inclusion of the appointment of a guardian as one of those appointments which should be invalidated in the face of a divorce or an annulment.

The reason I say that is that we have in New Jersey two statutes at the present time concerning testamentary guardians. One states, of course, that either parent may appoint. And the main one indicates that the appointment of the spouse is invalid unless it is consented to by the surviving spouse, in writing, in the same manner in which wills are executed.

That means, of course, that it is not a sole power which the individual has to name. It is a power exercised only jointly with the surviving spouse who must consent to it.

Why then under a divorce proceeding should the husband, let's say in this instance, have the right to invalidate the appointment of the testamentary guardian, solely on his own?

PROFESSOR WELLMAN: Your case is one where there has been a divorce and the child has been awarded to the wife, for example, and the wife dies naming a

testamentary guardian of her choice to succeed her. The Code steps in and says, no, the surviving parent here is still around, so, therefore, the testamentary appointment is ineffective.

We were reflecting here, Judge, the idea that the award of custody of a child to one parent or another is a resolution of a problem that is here and now. We have two people who want this child, one more fitting as against the other in that context. So the wife is awarded custody. What would the court do if the wife were assumed to be dead? Would we still screen the husband out and say that for all time and for all purposes he is unfit to have any control over what is, after all, his child? Would we prefer the wife's choice by her will over the natural connection of the husband?

MR. JOB: That is precisely my point.

PROFESSOR WELLMAN: The posture of the Code is that death comes in and interrupts the validity and the basis upon which custody was awarded and we had better key back to natural paternity here, the connection that still makes that child a child for inheritance purposes of that father.

MR. JOB: That is precisely my point. Doesn't this just say the converse?

PROFESSOR WELLMAN: What bill is it, sir? I misheard you.

MR. JOB: Page 10, sir.

PROFESSOR WELLMAN: I think that has nothing to do with it.

MR. JOB: It is in paragraph 7. (Reading) "If after having executed a will the testator is divorced or his marriage annulled,. . . . and any nomination of the former spouse as executor, trustee, or guardian. . . ." Now they are eliminating her as guardian. It is just the converse of what you were speaking about.

PROFESSOR WELLMAN: No, it is not. We are simply saying that the reason probably why in his will he named her guardian might cease and simply not be his intention once there is a divorce. He can provide otherwise. He can make a will that names her as testamentary guardian.

I was tangled up with a provision that it is in the guardianship provision of the Code. I am sorry. I guess my first response was wrong.

MR. JOB: What I am saying, sir, is: This is not an individual power vested in him. His right to appoint a testamentary guardian is contingent upon the consent of the wife to that appointment.

PROFESSOR WELLMAN: Oh, yes.

MR. JOB: Now he could very well under testamentary guardianship name somebody other than the wife.

PROFESSOR WELLMAN: That's right, he could.

MR. JOB: That would be an invalid appointment unless the wife consented to it.

PROFESSOR WELLMAN: No.

MR. JOB: Yes, under our New Jersey laws it would be.

PROFESSOR WELLMAN: I am sorry. That is something that is outside this.

MR. JOB: This is precisely my point. If you are not acquainted with the New Jersey law on that score, then, of course, I realize why we have some confusion.

PROFESSOR WELLMAN: Let's back up, if we may. This is a provision that deals with what this man's will should be read as meaning at his death - no more. It doesn't really say who can or cannot be testamentary guardian. It simply says that we are going to listen to his request on this.

MR. JOB: Right.

PROFESSOR WELLMAN: If the case is one where he made the will while they were married and he named his wife to several capacities - maybe beneficiary, maybe executor, maybe

guardian of his children - then divorce severs that marriage and he dies with that same will unrevoked, the Code simply comes in and says that divorce has thrown such a question between us and what this man really intended under the circumstances that we should not draw any meaning out of his will. So we revoke the gift to the wife. We revoke the appointment of her as executor. She is not by his will qualified to be testamentary guardian. Now it leaves open the question of who is qualified to be guardian.

MR. JOB: She would still retain that right under our law.

PROFESSOR WELLMAN: Of course. That's right. But this simply goes to the testator's probable intention and says since this will was made while they were man and wife and since that status has ceased, what we really have honestly is a big question mark as to what he meant, that he had better be clear, re-execute his will, or we simply will take a statutory position of no meaning.

MR. JOB: I understand. Thank you.

One other question, if I may, if I can find the bill. It is the bill that refers to the perpetrator of a felonious and intentional homicide, of course, eliminating him from any possibility of taking.

The portion I don't quite understand is this: "A final judgment of conviction of felonious and intentional killing is conclusive. . . ." evidence. That we can understand. "In the absence of" such conviction, "the court may determine by a preponderance of evidence whether the killing was felonious and intentional . . ."

Do we have a situation of double jeopardy here where the court says a man is not convicted of a crime, but then another court in a civil suit steps in and says, however, for our intents and purposes as concerns distribution, that we can declare it to be that kind of an intention?

PROFESSOR WELLMAN: I think not, although this has been a debatable point and some have characterized it as double jeopardy, as you have. But what we are saying again is rooted in the endeavor to give effect to the probable intention of a decedent. Now we are talking about a decedent who was done in by a person who was named a beneficiary in the will and we say it really is immaterial whether that beneficiary is convicted of the crime or not if it is found that this was an intentional and felonious homicide in a court having only property jurisdiction over the estate.

It should be accepted as a reason for not carrying forth the apparent words of the will.

Take the case, sir, which is not uncommon, where we have a testator who is murdered by a devisee or a beneficiary of the will and thereafter that beneficiary of the will commits suicide or dies before we get around to convicting him. Now he can never be convicted after he is dead. But should we be left with our property law in the absurd posture that since he wasn't convicted, he still takes or his estate takes and his heirs to his estate take that benefit that came to him in the will of the victim?

We felt there were two questions. There is a question for the criminal law and that may be resolved one way or another. If it is resolved in favor of conviction, we could see no reason for not saying that conviction is good across the board. But if there was an acquittal or simply a hung jury and we have one of these cases that is just not prosecuted thereafter or a death prevents prosecution, or a plea of insanity, etc., etc., etc., all of these seem to us to be terribly relevant for a court concerned and charged with giving intention its probable consequence.

MR. JOB: Well, perhaps I was thinking of a recent political case in Bergen County where two public officials

were charged with conspiracy. One public official was convicted and on the same evidence the other public official was acquitted. I just wondered if this was a similar case where a man is completely cleared of a crime but he still is penalized under the law, as far as inheritance rights are concerned.

PROFESSOR WELLMAN: It is an excellent point.

MR. JOB: Thank you very much, sir.

W I L L I A M W E R K S M A N: My name is William Werksman and I am an officer of the Title Abstractors Association of New Jersey, and also an attorney of many years standing.

Over the past twenty years, I have done nothing but search titles and a large part of my work has been right in this building in Surrogate Job's office. It would be amazing if I were to try to tell you how diversified and how ineffectual and how self-contradictory and self-emaciating wills can be when drawn by, first, laymen; secondly, young lawyers; and thirdly, even old practitioners who don't know too much about wills.

As I was sitting with Mr. Egan here, I thought maybe this body might get up, as has been gotten up in connection with deeds in New Jersey, a simplified form of will which might be a guide for young lawyers or even for older practitioners, not so much to present a rigid format or to freeze into a particular body of paragraphs a formalized will, but something that would be a guide and enlightenment. For example, what happens when there isn't enough money to pay the legacies? What happens if the executor doesn't have the power of sale? We know that recently in the last three or four years a statute was passed which seems to give him enlarged powers.

Would this Committee consider it advisable - and I haven't given too much thought to it - to get up a form of will with perhaps 20 or 30 paragraphs that form the

grey area of our law and so incorporate it into our probate law as a guide for drawers of wills?

I happen to have been at a very, very pitiful closing of title where a man had obtained property in his own name and had drawn a will leaving everything to his wife. We were at this closing and it was in August. She was enceinte. No one could tell at the moment until she took off her coat. One of the two lawyers said to her, "I see that you are pregnant, that you are carrying a child." She said, "yes." We had to hold she didn't own the property because this will had been drawn without an after-born clause to take care of the child. It was the most pitiful and most extraordinary situation that I was ever in and I always felt that if there ever came a body of men like yourselves in the public interest that could clarify the grey areas of the law and without holding a seminar in the law give the young lawyers a chance to pick out a clause here or there as to who should take care of the children, what should happen if one of the executors dies, things of that kind, it would be a good idea. Am I off base in suggesting that possibly a form of will for selected purposes could be put into a statute?

MR. DURAND: Let me try to answer that question for you. I know the Professor has a better answer than I have. But it is possible, probably premature in this country, to draw a will in which you provide that I dispose of my property outright in accordance with Statutory Form A or I dispose of my property and trust in accordance with Statutory Form B. That has been done in England and there is no reason why it couldn't be done here. All the powers that are necessary are included in the Uniform Probate Code power statute. We don't need powers anymore and that would be the beginning of the end of the will. It could be done, but I don't think this country is ready for it.

PROFESSOR WELLMAN: I would simply comment that the

provision in here permitting incorporation by reference tends in your direction. It would permit a Bar committee, for example, to establish approved forms or a court committee or even the Legislature, if it felt moved to exhibit leadership here, and then permit these to be pulled in by draftsmen who wanted to be sure to stay safe.

I can't quite envisage any other approach to it. I think this is a solid one. I am not sure that it is something that should be attempted right at this stage of the game, but certainly I am sympathic to your goals.

SENATOR WOODCOCK: Is there anyone else? There being no one else wishing to be heard, I would adjourn this meeting of the Senate Judiciary Committee, with thanks to Professor Wellman and Harrison Durand for coming here today and working with the Committee.

I think this has been a most productive session. I thank everybody for attending. I think the record will speak for itself.

(Hearing Concluded)

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SUBMITTED BY PROFESSOR RICHARD V. WELLMAN

Concerning 1972-73 Proposals in New Jersey for

Legislation Adapted from the Uniform Probate Code

Hackensack, New Jersey
September 11, 1973

by Richard V. Wellman.

(Professor of Law, University of Michigan currently Visiting Professor of Law, University of Georgia, Athens, Georgia, and Educational Director, Joint Editorial Board for the Uniform Probate Code.)

Eighteen of the nineteen bills that are the subject of today's public hearing before the Senate Judiciary Committee are derived from the Uniform Probate Code. The exception is No. 2145, the so-called "Prudent Investment Law". This is a good bill that would put New Jersey in line with more than thirty states that have modernized their laws governing investments by fiduciaries by substituting a simple test of prudence for older, rigid tests that are no longer realistic.

The other eighteen proposals would bring a very significant portion of the Uniform Probate Code to New Jersey. It is appropriate, therefore, that this Committee should be informed about the sources and purposes of the Uniform Probate Code, and about the effect it is having on inheritance and guardianship laws in other states.

The Code is the product of discussions and study by lawyers and teachers from many parts of the country. In the late 30's and early 40's, a committee of the American Bar

Association aided by luminaries from the field of law teaching including Thomas E. Atkinson, Lewis M. Simes and Paul Basye, produced the Model Probate Code. As published in 1946 by Michigan Law School, the model code was accompanied by detailed notes reflecting careful search of probate laws from all states, and several articles that evaluated the study and explained the proposal. Eventually, this work formed the basis for probate codes in Arkansas, Indiana, Iowa and Missouri.

The Model Probate Code was not conceived to be a code that every state should enact; rather, it was a demonstration of how states might consolidate scattered probate laws, and a model of the kinds of provisions that should be included in a modern probate code. Not surprisingly, it had little effect in reducing the wide diversity among the States in existing estates laws. Further, it followed mid-western and western patterns in the area of probate procedure. These involve mandatory court orders to distribute and close estates. They probably serve more to complicate than to simplify estate settlements.

The Uniform Probate Code project, as originally conceived, was designed to update the Model Probate Code project and to use the earlier work as a basis for a probate code that would be suitable for common enactment by all states. The work began in 1961 and was completed, in a formal sense, in 1969. The job was accomplished by a group of nine law teachers, many with practice experience, who served under the direction of a special committee of Uniform Law commissioners, and a cooperating supervisory committee from the American Bar Association. The work was observed and influenced to some extent by other committees and observers from state and

local bar associations, the Trust Division, American Bankers Association, the title insurance industry, and other interested groups. A total of seven complete drafts were involved. Every effort was made to achieve wide circulation of the emerging proposals. Preliminary and final drafts were read and discussed in six consecutive annual sessions of the National Conference of Commissioners on Uniform State Laws. After that body formally approved the Code, it was accepted first by the Real Property, Probate and Trust Law Section of the American Bar Association and later by the ABA's House of Delegates.

The Uniform Law Conference and the American Bar Association are continuing their sponsorship of the Uniform Probate Code through the Joint Editorial Board which I serve as Educational Director. One of the Board's purposes is to spread information about the Code among as many persons as possible. We offer free distributions of a bi-monthly newsletter, copies of articles and various other publications. Next month, we will offer a third national institute for persons willing to spend a couple of days in an intensive short course on the Code. We are in touch with law teachers in more than 100 schools who are offering instruction on the Code in regular courses. Another Board purpose is to monitor literature and other discussions of the Code to the end of recommending changes or alternative forms that are identified as improvements.

As you can see, we are very serious in our purpose to see the Code accepted in a large number of states.

Our zeal is rooted in more than mere interest in publicity.

From a national point of view, our inheritance laws are in disgraceful shape. Intestacy laws have been allowed to become badly out-of-time with the needs of most persons. Consequently, almost everyone needs a will. But, people are now learning from probate law critics that wills offer no assurance against disappointment if one moves to another state or owns land in two or more states. Traditionally, each state has insisted on its own probate procedure, even though this means invalidation for wills good under the law of the place where drawn, or expensive proofs involving collection of statements of witnesses now distant from the matter. And, even if a will is found sufficient to be eligible for probate under all laws, each state has its own parochial rules about exemptions from claims, protection for widows and the meaning of words commonly found in wills. Finally, people have been made acutely aware of expenses and delays that have been involved in guiding estates through probate procedure.

As a result of this accumulation of difficulties surrounding the traditional inheritance process, increasing thousands of persons in all parts of the country are seeking and using some alternative devices, principally joint tenancies and revocable trusts to avoid probate law. For example, in California, 1964 inheritance tax statistics show that 60% or more of all dollars moving at death in estates above $10,000.00 and below $400,000.00 passed via rights of survivorship in joint tenancies.

But, use of these devices carries personal and social costs that have not been adequately perceived. Putting a title

in two or more names as joint tenants involves a give-away that commonly is unwanted by persons interested only in planning for testamentary disposition. Owners learn to their shock and sorrow that they have lost control of their property, or have translated their freedom into dependence on the cooperativeness of another that may disappear or be cancelled by incompentency. Homemade trusts, possibly consisting only of an understanding with a joint tenant that he will re-divide the property after the death of the source-owner, invite misunderstanding and disappointment.

From the public's point of view, probate avoidance frequently means that inheritance tax procedures are frustrated and unsecured creditors are left to scramble for collections that should be assured by the probate process. Perhaps of greater concern, a generation is learning that basic laws are outmoded and ought to be avoided whenever possible. Disrespect for other laws follows quite easily.

The proponents of the Uniform Probate Code view it as an effort of unprecedented magnitude to straighten out the laws relating to transfers at death and to restore public confidence in sole ownership during life. The effort includes an ambitious restatement of guardianship laws which, like inheritance rules, have been allowed to slip into shocking obsolescence in almost all states. Elderly persons need the help of new rules to aid them in arranging for management of their affairs when and if illness or senility renders then helpless; estate planners need simple and workable rules governing ownership by minors; all of

us need relief from old assumptions that require court-oriented guardianship procedures whenever a minor has a claim for injuries or a small amount of property to be collected.

Though the Code has been available for less than four years, UPC proponents already have much cause for believing that their long-range goals ultimately may be achieved. In two states, Idaho and Alaska, the entire code has been put into effect and is working quite well. Three other states, Arizona, Colorado and North Dakota, enacted the Code in 1973 to become effective in 1974 and 1975. Oregon recently enacted all of the UPC guardianship article. New Jersey, Texas and possibly other states have picked up UPC's idea of a durable power of attorney to provide elderly persons and others anticipating absence or incapacity with an extremely simple legal arrangement. Tennessee has enacted UPC's article dealing with various forms of bank accounts in two or more names. Wisconsin recently amended its new probate code, originally modelled in important respects on preliminary drafts of UPC, to give that State the advantage of UPC procedures which enable estates to be settled with only minimum use of judicial procedures. Serious legislation or other official state study of the Code is underway in many states including Maine, Vermont, Florida, Tennessee, Montana, Wyoming, California, Hawaii, Nebraska and South Dakota. In these and in other states including Pennsylvania, Michigan and Missouri, bar association committees are preparing acceptable local versions of the Code. Much of this interest has resulted from strong endorsements the Code has received from lay authors who have published descriptions of the

project in Readers Digest, Parade Magazine, Changing Times, National Observer and other publications, and from Senior Citizens, Inc., and American Association of Retired Persons. It is my belief that 1974 will see the Code accepted in at least a half-dozen more states and that the pace of adoptions will increase in ensuing years.

The eighteen bills based on the Uniform Probate Code will not bring all of the advantages of the Code to New Jersey, but they clearly constitute an excellent start in that direction. The proposed new rules for persons who leave no wills are right in line with UPC's purpose to relieve most persons of ordinary means of any need to make wills. However, since New Jersey considers matters of court procedure to be within the control of court rules rather than of the legislature, the intestacy bill (#903) omits reference to some points that are an important part of the Uniform Probate Code. These include the question of who will be appointed to administer an intestate estate, and whether bond must be posted. Wills may still be required to control these points. Also, the bill dealing with the duties and powers of personal representatives (#2274) discriminates against persons who leave no will who also own land that must be sold by their estates to pay debts, taxes or costs. The bill would continue existing rules that make it necessary to have a special court proceeding in order to sell intestate land. Under the Uniform Probate Code, there is no distinction between land and other assets when it comes to powers of an administrator. I do not understand why 2274 is limited as it is to personal property.

Perhaps there is a good reason.

These reservations do not mean that the bills are inconsistent with the Uniform Probate Code, but only that they do not go as far as they might.

As far as decedents' estates are concerned, the most desirable features of the package are those that will put New Jersey law in line with the Uniform Probate Code in respect to the meaning of words in a will, the provision for self-proving wills, the power of a fiduciary acting under laws of another state which was a decedent's domicile to collect and transfer New Jersey assets belonging to the estate without a special New Jersey ancillary proceeding, and rules governing the office of personal representative. The package also includes very desirable improvements in the law of guardianship and joint accounts that closely follow UPC. I have no comment about the bill (#905) dealing with disinheritance of a surviving spouse because I do not understand the proposal as it has been amended in committee.

Overall, I conclude that the package of proposals we are discussing here today is well worth support. It should give New Jersey immediate relief from some ancient probate law problems and possibly hasten the day when your state may move to a more complete acceptance of the Uniform Probate Code.

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STATEMENT FOR PUBLIC HEARING ON 1972-73 LEGISLATION
ADAPTED FROM THE PROPOSED UNIFORM PROBATE CODE---
NEW JERSEY SENATE JUDICIARY COMMITTEE, BERGEN COUNTY
ADMINISTRATION BUILDING, HACKENSACK, SEPTEMBER 11, 1973

I am Douglas J. Hollywood, Trust Officer of Colonial First National Bank, Red Bank, and Chairman of the Probate Subcommittee of the New Jersey Bankers Association Trust Division. I am pleased to appear before this committee, and appreciate the opportunity to present a statement on behalf of the 99 members of the Trust Division of the New Jersey Bankers Association. I am accompanied by the Chairman of our New Jersey Bankers Association Trust Division, David T. Pyne, who is Vice President and Senior Trust officer of American National Bank and Trust of New Jersey, Morristown, and the Chairman of the Trust Legislation Committee, Gilbert C. Turner, Senior Vice President and Trust Officer of Garden State National Bank, Teaneck.

We are here today to state the general support of our Trust Division for 18 of the bills in the probate area which are the subject of today's hearing, and to indicate that we have a position of no action on one of the bills because present New Jersey procedure seems adequate.

Three committees within the New Jersey Bankers Association Trust Division have given detailed study to the 19 bills, both in the form they were introduced in the Legislature and in the very helpful pamphlet which was prepared by the Legislative Services Agency of the New Jersey Division of Law Revision.

In this presentation we plan to follow the same sequence of bills as listed in the Division of Law Revision pamphlet rather than follow the numerical sequence of the bills themselves, in hopes that our comments will be easier to follow.

Our Trust Division supports the enactment of Senate, No. 903 concerning the disposition of intestate estates and abolishing dower and curtesy.

The Trust Division supports Senate, No. 1104, which tightens up the methods by which contracts concerning succession of property may be proved. The enactment of this bill should aid in minimizing litigation in this area.

Senate, No. 2277, sets up procedures to determine when a Will is properly executed and the effect of final orders in other states regarding testacy. The Trust Division feels this is good legislation and therefore supports this bill.

The Trust Division supports Senate, No. 2275, which we believe will tend to reduce litigation and construction proceedings by providing a firm set of rules to be used in construing Wills.

We support Senate, No. 2293, concerning title to property or the devolution thereof, depending upon priority of death, where there is no sufficient evidence that the persons have died otherwise than simultaneously. We feel that this bill represents a significant improvement when compared to existing law in this area.

The Trust Division also supports Senate, No. 902, will facilitate the execution and probate of Wills.

Senate, No. 905, deals with the rights of the spouse and children of a testate decedent not provided for in his Will. The Trust Division feels this is good legislation and therefore supports this bill.

Under Senate, No. 899, the surviving spouse of a decedent who dies testate is given the right to an elective share of that decedent's estate. This bill represents a significant change in New Jersey law, which presently permits a decedent to effectively disinherit his spouse. We feel that this bill is an improvement over present New Jersey law in this regard and accordingly support this bill.

The Trust Division feels that Senate, No. 2274, which deals with the powers and duties of personal representatives, the effect of homicide upon the distribution of estates and the establishment of times and procedures for establishing certain interests in testate and intestate estates is good legislation and therefore supports the enactment of this bill.

The New Jersey Bankers Association Trust Division strongly supports the enactment of Senate, No. 2145, known as the "Prudent Investment Law." The statement on the bill, in our opinion, lists compelling reasons for the prompt enactment of this legislation.

S. 2145 would vest in those administering trust estates the power to invest the assets of such estates in any kind of investments in which persons of prudence and reasonable discretion would invest their own funds, having regard to the probable income as well as the probable safety of their own capital.

The concept of prudent investment was first developed in the United States in 1830 by the Massachusetts Supreme Court, and is presently the law in 32 states, including New Jersey's close neighboring states of New York, Pennsylvania and Delaware. In addition, at least 5 other states have adopted the prudent investment rule by judicial decision. And 5 more, including New Jersey, have modified prudent investment rules.

The bill is consistent with the modern concept and guideline for fiduciary investment and embodies provisions uniformly used for many years in Wills and trust instruments and we urge its prompt enactment.

Our Trust Division also urges the enactment of Senate, No. 2146, a companion bill to S. 2145, whose purpose is to authorize banks acting in fiduciary capacities to make the same kind of investments which fiduciaries will be authorized to make if the bill designated as the Prudent Investment Law is enacted.

While S.2146 is not on the list for consideration at today's hearing, we do want to incorporate it by reference as it is a companion bill to S. 2145 which is included in the 19 bill package.

Senate, No. 2276, deals with claims against a decedent's estate and the Trust Division supports this bill.

Senate, No. 2327, concerning powers of and jurisdiction over foreign fiduciaries is supported by the Trust Division since one primary purpose of this bill is to simplify estate procedures involving more than one state.

The Trust Division supports the enactment of Senate, No. 2326. We feel that this bill represents a significant improvement over present New Jersey law regarding the distribution of estates. We also are very much in favor of the provisions of this bill regarding the law of abatement.

The Trust Division supports the enactment of Senate, No. 904, which concerns the matters of presumption of death and the consent to or approval of actions of fiduciaries acting under powers of appointment.

Senate, No. 2328, concerns persons who have disappeared, been confined or detained by a foreign power; and also concerns proceedings desirable for the protection or disposition of property of those persons as well as other persons. The Trust Division supports the enactment of this bill.

Senate, No. 2329, concerning minors and mental incompetents, and their guardians, is looked upon by the Trust Division as desirable legislation and therefore supports the bill.

The Trust Division supports the enactment of Senate, No. 2318, dealing with multiple party deposit accounts in certain financial institutions. However, our support also includes a recommendation that the Commissioner of Banking be granted regulatory power concerning deposit contracts. For example, we feel that the Commissioner be empowered to issue a regulation specifying that each financial institution's deposit contract shall include a question asking whether, on the death of one of the parties, the ownership of the account shall pass to the surviving parties.

Senate, No. 716, concerning the custody of deposit of Wills is supported by the Trust Division provided that this bill is amended to enable the filing of a Will with the surrogate by a trust department as well as by the testator or his agent.

The Trust Division has taken a "no action" position on Senate, No. 2273, which deals with the power of attorney for service of process on fiduciaries of estates. We felt that present law and practice in New Jersey is sufficiently adequate in this area.

Conclusion. We appreciate this opportunity to present the recommendations of the New Jersey Bankers Association Trust Division on these important legislative subjects.

JUN 27 1985