S. P. 1

Office of the Secretary of the Senate
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MAY M. ROSS, Secretary of the Senate

Presented by Senator-Elect Collins of Knox.
Cosponsor: Senator-Elect O'Leary of Oxford.

FIRST REGULAR SESSION

ONE HUNDRED AND NINTH LEGISLATURE

Legislative Document **No.** /

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED SEVENTY-NINE

AN ACT to Establish the Maine Probate Code.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. 18-A MRSA is enacted to read:

TITLE 18-A

MAINE PROBATE CODE

ARTICLE I

GENERAL PROVISIONS, DEFINITIONS AND JURISDICTION

PART 1

SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

§ 1-101. Short title

This Act shall be known and may be cited as the Maine Probate Code.

§ 1-102. Purposes; rule of construction

(a) This Code shall be liberally construed and applied to promote its underlying purposes and policies.

(b) The underlying purposes and policies of this Code are:

(1) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons;

(2) to discover and make effective the intent of a decedent in the distribution of his property;

(3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors;

(4) to facilitate use and enforcement of certain trusts;

(5) to make uniform the law among the various jurisdictions.

§ 1-103. Supplementary general principles of law applicable

Unless displaced by the particular provisions of this Code, the principles of law and equity supplement its provisions.

§ 1-104. Severability

If any provision of this Code or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the Code which can be given effect without the invalid provision or application, and to this end the provisions of this Code are declared to be severable.

§ 1-105. Construction against implied repeal

This Code is a general act intended as a unified coverage of its subject matter and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided.

§ 1-106. Effect of fraud and evasion

Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person, other than a bona fide purchaser, benefitting from the fraud, whether innocent or not. Any proceeding must be commenced within 2 years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than 5 years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

UNIFORM PROBATE CODE COMMENT

This is an overriding provision that provides an exception to the procedures and limitations provided in the Code. The remedy of a party wronged by fraud is intended to be supplementary to other protections provided in the Code and can be maintained outside the process of settlement of the estate. Thus, if a will which is known to be a forgery is probated informally, and the forgery is not discovered until after the period for contest has run, the defrauded heirs still could bring a fraud action under this section. Or if a will is fraudulently concealed after the testator's death and its existence not discovered until after the basic three year period (section 3-108) has elapsed,

there still may be an action under this section. Similarly, a closing statement normally provides binding protection for the personal representative after six months from filing (section 3-1005). However, if there is fraudulent misrepresentation or concealment in the preparation of the claim, a later suit may be brought under this section against the personal representative for damages; or restitution may be obtained from those distributees who benefit by the fraud. In any case innocent purchasers for value are protected.

Any action under this section is subject to usual rules of res judicata; thus, if a forged will has been informally probated, an heir discovers the forgery, and then there is a formal proceeding under section 3-1001 of which the heir is given notice, followed by an order of complete settlement of the estate, the heir could not bring a subsequent action under section 1-106 but would be bound by the litigation in which the issue could have been raised.

The usual rules for securing relief for fraud on a court would govern, however.

The final limitation in this section is designed to protect innnocent distributees after a reasonable period of time. There is no limit (other than the 2 years from discovery of the fraud) against the wrongdoer. But there ought to be some limit after which innocent persons who have built up expectations in good faith cannot be deprived of the property by a restitution action.

The time of "discovery" of a fraud is a fact question to be determined in the individual case. In some situations persons may not actually know that a fraud has been perpetrated but have such strong suspicion and evidence that a court may conclude there has been a discovery of the fraud at that stage. On the other hand there is no duty to exercise reasonable care to discover fraud; the burden should not be on the heirs and devisees to check on the honesty of the other interested persons or the fiduciary.

§ 1-107. Evidence as to death or status

In proceedings under this Code the rules of evidence in courts of general jurisdiction including any relating to simultaneous deaths, are applicable unless specifically displaced by the Code or by rules promulgated under section 1-304. In addition, notwithstanding Title 22, section 2707, the following rules relating to determination of death and status are applicable:

(1) a certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie proof of the fact, place, date and time of death and the identity of the decedent;

(2) a certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that a person is missing, detained, dead, or alive is prima facie evidence of the status and of the dates, circumstances and places disclosed by the record or report;

(3) a person who is absent for a continuous period of 5 years, during which he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry is presumed to be dead. His death

is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

UNIFORM PROBATE CODE COMMENT

Subsection (3) is inconsistent with Section 1 of Uniform Absence as Evidence of Death and Absentees' Property Act (1938).

Proceedings to secure protection of property interests of an absent person may be commenced as provided in 5-401.

The preliminary paragraph is designed to accommodate the Uniform Simultaneous Death Act, if it is a part of a state's law.

MAINE COMMENT

Maine change from Uniform Probate Code. Explicit reference is made in this section to Title 22, section 2707 to make it clear that Maine Probate Code, section 1-107, controls situations within its coverage to the extent that there may be any inconsistency between the effect given to records under this section and the effect provided under Title 22, section 2707.

§ 1-108. Acts by holder of general power

For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative or trustee, including relief from liability or penalty for failure to post bond, to register a trust, or to perform other duties, and for purposes of consenting to modification or termination of a trust or to deviation from its terms, the sole holder or all co-holders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests, as objects, takers in default, or otherwise, are subject to the power.

UNIFORM PROBATE CODE COMMENT

The status of a holder of a general power in estate litigation is dealt with by section 1-403.

This section permits the settlor of a revocable trust to excuse the trustee from registering the trust so long as the power of revocation continues.

"General power," as used in this section, is intended to refer to the common law concept, rather than to tax or other statutory meanings. A general power, as used herein, is one which enables the power holder to draw absolute ownership to himself.

§ 1-109. Married women's status

The marriage of a woman shall have no effect on her legal capacity, nor on the rights, privileges, authority, duties or obligations of the married woman or of her husband under this Code, except as expressly provided by statute.

MAINE COMMENT

General. This section was added to the Uniform Probate Code version in order to preserve in a general section the various provisions of married women's legislation and thus clarify that the repeal of any such provisions does not reenact the common law as to the status of married women.

PART 2

DEFINITIONS

§ 1-201. General definitions

Subject to additional definitions contained in the subsequent Articles which are applicable to specific Articles or parts, and unless the context otherwise requires, in this Code:

(1) "Application" means a written request to the registrar for an order of informal probate or appointment under Part 3 of Article III.

(2) "Beneficiary," as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer and as it relates to a charitable trust, includes any person entitled to enforce the trust.

(3) "Child" includes any individual entitled to take as a child under this Code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild or any more remote descendant.

(4) "Claims," in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

(5) "Court" means any one of the several courts of probate of this State established as provided in Title 4, sections 201 and 202.

(6) "Conservator" means a person who is appointed by a Court to manage the estate of a protected person.

(7) "Devise," when used as a noun, means a testamentary disposition of real or personal property and when used as a verb, means to dispose of real or personal property by will.

(8) "Devisee" means any person designated in a will to receive a devise. In the case of a devise to an existing trust or trustee, or to a trustee on trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

(9) "Disability" means cause for a protective order as described by section 5-401.

(10) "Distributee" means any person who has received property of a decedent from his personal representative other than as creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in his hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For purposes of this provision, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

(11) "Estate" includes the property of the decedent, trust, or other person whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration.

(12) "Exempt property" means that property of a decedent's estate which is described in section 2-402.

(13) "Fiduciary" includes personal representative, guardian, conservator and trustee.

(14) "Foreign personal representative" means a personal representative of another jurisdiction.

(15) "Formal proceedings" means those within the exclusive jurisdiction of the court conducted before a judge with notice to interested persons.

(16) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem.

(17) "Heirs" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

(18) "Incapacitated person" is as defined in section 5-101.

(19) "Informal proceedings" means those conducted without notice to interested persons by an officer of the Court acting as a registrar for probate of a will or appointment of a personal representative.

(20) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent, ward or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

(21) "Issue" of a person means all his lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this Code.

(21-A) "Judge" means the judge of any one of the several courts of probate as defined in paragraph (5).

(22) "Lease" includes an oil, gas, or other mineral lease.

(23) "Letters" includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(24) "Minor" means a person who is under 18 years of age.

(25) "Mortgage" means any conveyance, agreement or arrangement in which property is used as security.

(26) "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of his death.

(27) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, 2 or more persons having a joint or common interest, or any other legal entity.

(28) "Parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this Code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

(29) "Person" means an individual, a corporation, an organization, or other legal entity.

(30) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special administrator.

(31) "Petition" means a written request to the court for an order after notice.

(32) "Proceeding" includes any civil action in any court of competent jurisdiction.

(33) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(34) "Protected person" is as defined in section 5-101.

(35) "Protective proceeding" is as defined in section 5-101.

(36) "Register" means the official of the court elected or appointed as provided in section 1-501, or any other person performing the functions of register as provided in section 1-307.

(37) "Security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate,

receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

(38) "Settlement," in reference to a decedent's estate, includes the full process of administration, distribution and closing.

(39) "Special administrator" means a personal representative as described by sections 3-614 through 3-618.

(40) "State" includes any state or the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

(41) "Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

(42) "Successors" means those persons, other than creditors, who are entitled to property of a decedent under his will or this Code.

(43) "Supervised administration" refers to the proceedings described in Article III, Part 5.

(44) "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

(45) "Trust" includes any express trust, private or charitable, with additions thereto, wherever and however created. It also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts, and it excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in Article VI, custodial arrangments pursuant to Title 33, sections 1001 to 1010, or other special custodial arrangements, business trusts provided for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

(46) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

(47) "Ward" is as defined in section 5-101.

(48) "Will" includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will.

UNIFORM PROBATE CODE COMMENT

Additional sections with special definitions for Articles V and VI are 5-101 and 6-101. Except as controlled by special definitions applicable to these particular Articles, the definitions in 1-201 apply to the entire Code.

The definition of "trust" and the use of the term in Article VII eliminate procedural distinctions between testamentary and inter vivos trusts. Article

VII does not deal with questions of substantive validity of trusts where a difference between inter vivos and testamentary trusts will continue to be important.

The exclusions from the definition of "trust" are modelled basically after those in Section 1, Uniform Trustees' Powers Act. The exclusions in the Act for "a trust created in deposits in any financial institution, or other trust the nature of which does not admit of general trust administration" are omitted above. The first of these is inappropriate because of Article VI's treatment of "Totten Trusts." Moreover, the probate court remedies and procedures being established by Article VII would seem suitable to unclassified trustee-beneficiary relationships that are in the nature of express trusts. Perhaps many controversies involving "hold and deliver" trusts or other dubious arrangements will involve the issue of whether there is a trust, but there would seem to be no harm in conferring jurisdiction on the probate court for these controversies.

The meanings of "child," "issue" and "parent" are related to Section 2-109.

See Comment, Section 7-101, concerning the definition of "trustee."

No definition of "community property" and "separate property" is made here because these are defined in other statutes in every community property state.

In 1975, the Joint Editorial Board recommended the addition of the last sentence to the definition of "distributee" in Paragraph (10). The purpose of the addition is to extend to trustees of inter vivos, receptacle trusts, the same power to act as distributees of devised assets that is given to testamentary trustees. "Distributees" are enabled, by Section 3-910, to create a good title to devised assets in purchasers, even though possibilities remain open that the devised assets or the proceeds from any sale thereof may be reclaimed for some other person interested in the estate. Also, Sections 3-1004 and 3-1006 relate to "distributees."

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version of paragraphs (5), (15), (32) and (36) were changed, and paragraph (21-A) was added to conform those definitions to the Maine probate court structure. The definition of "court" was revised to refer to the preexisting probate courts. Where matters within this Code are the subject of actions brought in the Superior Court by virtue of that court's concurrent jurisdiction, however, the context would require that the term "court" be understood to apply to the Superior Court as appropriate. Paragraph (15) was revised to make clear that "formal proceedings" are not within the concurrent jurisdiction of the Superior Court. Paragraph (32) was revised to reflect the merger of law and equity in one form of action called a civil action under Rule 2 of the Maine Rules of Civil Procedure. Paragraph (36) was revised to preserve the preexisting title of the official who performs the ministerial functions of the probate courts, and to reflect the fact that the judge or deputy register may also perform these functions under section 1-307. Paragraph

(21-A) was added to make clear the distinction between the "court" as an institution and the "judge" as an officer of the court. In addition, the definition of "minor" in paragraph (24) is designated as a person under the age of 18 to conform it to the general age of majority in Maine.

PART 3
SCOPE, JURISDICTION AND COURTS

§ 1-301. Territorial application

Except as otherwise provided in this Code, this Code applies to (1) the affairs and estates of decedents, missing persons, and persons to be protected, domiciled in this State, (2) the property of nonresidents located in this State or property coming into the control of a fiduciary who is subject to the laws of this State, (3) incapacitated persons and minors in this State, (4) survivorship and related accounts in this State, and (5) trusts subject to administration in this State.

§ 1-302. Subject matter jurisdiction

(a) To the full extent provided in sections 3-105, 5-102, 5-402, 7-201 and 7-204, the court has jurisdiction over all subject matter relating to (1) estates of decedents, including construction of wills and determination of heirs and successors of decedents and estates of protected persons; (2) protection of minors and incapacitated persons; and (3) trusts.

(b) The Court has full power to make orders, judgments and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by including within subsection (a) specific reference to the jurisdictional sections of the Maine Probate Code. Those sections define the areas of exclusive and concurrent jurisdiction of the Maine probate courts.

§ 1-303. Venue; multiple proceedings; transfer

(a) Where a proceeding under this Code could be maintained in more than one place in this State, the court in which the proceeding is first commenced has the exclusive right to proceed.

(b) If proceedings concerning the same estate, protected person, ward, or trust are commenced in more than one court of this State, the court in which the proceeding was first commenced shall continue to hear the matter, and the other courts shall hold the matter in abeyance until the question of venue is decided, and if the ruling court determines that venue is properly in another court, it shall transfer the proceeding to the other court.

(c) If a court finds that in the interest of justice a proceeding or a file should be located in another court of this State, the court making the finding may transfer the proceeding or file to the other court.

§ 1-304. Rule-making power

(a) The Supreme Judicial Court shall have the power to prescribe by general rules the forms, practice and procedure, including rules of evidence, to be followed in all proceedings under this Code and all appeals therefrom; provided that the rules shall be consistent with the provisions of this Code and shall not abridge, enlarge or modify any substantive right.

(b) These rules shall be promulgated to take effect on the effective date of this Code. After their promulgation, the Supreme Judicial Court may repeal, amend, modify or add to them from time to time with or without a waiting period. After the effective date of the rules as promulgated or amended, all laws in conflict therewith shall be of no further force or effect, except that in the event of conflict with a provision of this Code, the Code provision shall prevail.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was revised to give the Supreme Judicial Court general probate rule-making power consistent with this Code and other substantive rights. This section is in the form of the rules enabling acts for the rules of civil and criminal procedure and the rules of evidence. See Title 4, sections 8, 9 and 9-A.

§ 1-305. Records and certified copies; judicial supervision

The register shall maintain records and files and provide copies of documents as provided in sections 1-501 through 1-511 and such further records and copies as the Supreme Judicial Court may by rule provide. The register shall be subject to the supervision and authority of the judge of the court in which such register serves.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version was revised to incorporate existing statutory provisions concerning the record-keeping functions of the register, to provide that the details of the record-keeping be governed by court rules, and to make clear the supervisory authority of the judge over the register.

§ 1-306. No jury trial; removal

(a) The court shall sit without a jury.

(b) Upon timely demand by any party any proceeding not within the exclusive jurisdiction of the court may be removed for trial to the Superior Court under such procedures as the Supreme Judicial Court may by rule provide.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version was revised to reflect the fact that there is no provision for a jury trial in the probate courts and to provide for removal as of right in any case not

within the probate court's exclusive jurisdiction. A party who claims the right to a jury trial of a matter within the Superior Court's concurrent jurisdiction may on timely demand remove the matter to that court and demand the jury there. Any other matter not within the probate court's exclusive jurisdiction may also be removed.

§ 1-307. Register; powers

The acts and orders which this Code specifies as performable by the register may also be performed by a judge of the court or by a deputy register appointed under the provisions of section 1-506.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version was changed by including specific reference to the deputy register and deleting the provision for court designation of persons to perform the register's duties. The term "register" is also substituted for "clerk" in this section and throughout the Code.

§ 1-308. Appeals

Appeals from all final judgments, orders and decrees of the court shall lie to the Supreme Judicial Court, sitting as the law court, as in other civil actions.

MAINE COMMENT

General. This section provides for appeal from the probate courts to the law court in a manner comparable to appeals from the Superior Court in civil actions. The section thus eliminates the prior provision for an appeal with trial de novo to the Superior Court and the prior role of the Superior Court as the Supreme Court of Probate. A party wishing Superior Court determination of an issue in a case within that court's concurrent jurisdiction must remove the case by timely demand under section 1-306, subsection (b).

Maine change from Uniform Probate Code. The language of the Uniform Probate Code version was changed to achieve an appeal process within Maine's probate court structure that is comparable to other civil appeals. The Rules of Civil Procedure, with such modifications as the Supreme Judicial Court may make under section 1-304, subsection (a), will apply. This section is generally consistent with the policy of the Uniform Probate Code version.

Prior Maine law. Prior Maine law provided for an appeal with trial de novo to the Superior Court sitting as the Supreme Court of Probate, except that an appeal lay directly from a probate court to the law court upon agreement of the parties.

§ 1-309. Judges

A judge of the court shall be chosen and serve as provided in Title 4, sections 301 to 311.

UNIFORM PROBATE CODE COMMENT

In Article VIII, Section 8-101 on transition from old law to new law, provision is made for the continuation in service of a sitting judge not qualified for initial selection.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was modified to incorporate the Maine statutory provisions for the selection and service of judges of probate.

§ 1-310. Oath or affirmation on filed documents

Except as otherwise specifically provided in this Code or by rule, every document filed with the Court under this Code including applications, petitions, and demands for notice, shall be deemed to include an oath, affirmation, or statement to the effect that its representations are true as far as the person executing or filing it knows or is informed, and penalties for perjury may follow deliberate falsification therein.

PART 4

NOTICE, PARTIES AND REPRESENTATION IN ESTATE LITIGATION AND OTHER MATTERS

§ 1-401. Notice

Whenever notice of any proceeding or any hearing is required under this Code, it shall be given to any interested person in such manner as the Supreme Judicial Court shall by rule provide.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed to provide that the manner of giving notice shall be a matter for judicial rulemaking.

§ 1-402. Notice; waiver

A person, including a guardian ad litem, conservator, or other fiduciary, may waive notice in such manner as the Supreme Judicial Court shall by rule provide.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by providing that the manner of waiving notice shall be a matter for judicial rulemaking.

§ 1-403. Pleadings; when parties bound by others; notice

In formal proceedings involving trusts or estates of decedents, minors, protected persons, or incapacitated persons, and in judicially supervised settlements, the following apply:

(1) Interests to be affected shall be described in pleadings which give reasonable information to owners by name or class, by reference to the instrument creating the interests, or in other appropriate manner.

(2) Persons are bound by orders binding others in the following cases:

(i) Orders binding the sole holder or all coholders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, bind other persons to the extent their interests, as objects, takers in default, or otherwise, are subject to the power.

(ii) To the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate he controls; orders binding a guardian bind the ward if no conservator of his estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties; and orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate. If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent his minor child.

(iii) An unborn or unascertained person who is not otherwise represented is bound by an order to the extent his interest is adequately represented by another party having a substantially identical interest in the proceeding.

(3) Notice is required as follows:

(i) Notice as prescribed by section 1-401 shall be given to every interested person or to one who can bind an interested person as described in (2) (i) or (2) (ii) above. Notice may be given both to a person and to another who may bind him.

(ii) Notice is given to unborn or unascertained persons, who are not represented under (2) (i) or (2) (ii) above, by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons.

(4) At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

UNIFORM PROBATE CODE COMMENT

A general power, as used here and in Section 1-108, is one which enables the power holder to draw absolute ownership to himself. The section assumes a valid general power. If the validity of the power itself were in issue, the power holder could not represent others, as for example, the takers in default.

The general rules of civil procedure are applicable where not replaced by specific provision, see Section 1-304. Those rules would determine the mode of giving notice or serving process on a minor or the mode of notice in class suits involving large groups of persons made party to a suit.

Because of Maine's revision of the Uniform Probate Code version of section 1-304, the reference to that section in the 2nd paragraph of this comment is not literally applicable, although in fact the Rules of Probate Procedure promulgated under the Maine Probate Code, section 1-304, may well incorporate the provisions of the general rules of civil procedure with modifications appropriate to probate proceedings under this Code.

PART 5

REGISTERS OF PROBATE

MAINE GENERAL COMMENT

This Part was added to the Uniform Probate Code version in order to retain and integrate existing provisions of Maine law concerning the selection and functions of registers of probate into the Maine Probate Code.

§ 1-501. Election; bond; salaries; copies

Registers of probate are elected or appointed as provided in the Constitution. Their election is effected and determined as is provided respecting county commissioners by Title 30, chapter 1, and they enter upon the discharge of their duties on the first day of January following; but the term of those appointed to fill vacancies commences immediately. All registers, before acting, shall give bond to the treasurer of their county with sufficient sureties in the sum of $2,500, except that this sum shall be $10,000 for Cumberland County. Every register, having executed such bond, shall file it in the office of the clerk of the county commissioners of his county, to be presented to them at their next meeting for approval. After the bond has been so approved, the clerk shall record it and certify the fact thereon, and retaining a copy thereof, deliver the original to the register, who shall deliver it to the treasurer of the county within 10 days after its approval, to be filed in his office.

Registers of probate in the several counties shall receive annual salaries as set forth in Title 30, section 2.

The salaries of the registers of probate shall be in full compensation for the performance of all duties required of registers of probate. They may make copies of wills, accounts, inventories, petitions and decrees and furnish the same to persons calling for them and may charge a reasonable fee for

such service, which shall be deemed a fee for the use of the county. Exemplified copies of the record of the probate of wills and the granting of administrations, guardianships and conservatorships, copies of petitions and orders of notice thereon for personal service, appeal copies and the statutory fees for abstracts and copies of the waiver of wills and other copies required to be recorded in the registry of deeds shall be deemed to be official fees for the use of the county.

Nothing in this section shall be construed to change or repeal any provisions of law requiring the furnishing of certain copies without charge.

§ 1-502. Condition of bond

The condition of such bond shall be to account, according to law, for all fees received by him or payable to him by virtue of his office and to pay the same to the county treasurer quarterly, as provided by law; to keep up, seasonably and in good order, the records of the court; to make and keep correct and convenient alphabets of the records and to faithfully discharge all other duties of the office. If such register forfeits his bond, he is thenceforth disqualified from holding said office, and neglect to complete his records for more than 6 months at any time, sickness or extraordinary casualty excepted, shall be adjudged a forfeiture.

§ 1-503. Duties; records; binding of papers

Registers of probate shall have the care and custody of all files, papers and books belonging to the probate office; and shall duly record all wills proved, letters of administration or guardianship granted, bonds approved, accounts allowed, all petitions for distribution and decrees thereon and all petitions, decrees and licenses relating to the sale, exchange, lease or mortgage of real estate, all petitions and decrees relating to adoption and change of name, and such orders and decrees of the judge, and other matters, as he directs. They shall keep a docket of all probate cases and shall, under the appropriate heading of each case, make entries of each motion, order, decree and proceeding so that at all times the docket will show the exact condition of each case. Any register may act as an auditor of accounts when requested to do so by the judge and his decision shall be final unless appeal is taken in the same manner as other probate appeals. The records may be attested by the volume, and it shall be deemed to be a sufficient attestation of such records, when each volume thereof bears the attest with the written signature of the register or other person authorized by law to attest such records. The registers of probate may bind in volumes of convenient size original inventories and accounts filed in their respective offices, and when so bound and indexed, such inventories and accounts shall be deemed to be recorded in all cases where the law requires a record to be made, and no further record shall be required.

§ 1-504. Certification of wills, appointments of personal representatives and elective share petitions involving real estate

Within 30 days after a will has been proved or allowed, or an appointment of a personal representative has been made upon an assumption of intestate status and where the petition for the appointment indicates that the deceased

owned real estate, or a petition for an elective share has been filed where the will or the petition upon which appointment of a personal representative has been granted indicates that the deceased owned real estate, the register shall make out and certify to the register of deeds in the county where any affected real estate is situated (1) a true copy of so much of the will as devises real estate, (2) an abstract of the appointment of the personal representative, or (3) a true copy or abstract of the petition for an elective share, as the case may be. Each certification shall include a description of the real estate, so far as it can be furnished from the probated will or the petition upon which the appointment was made, and the name of the decedent and of the devisees or heirs. In the case of a will, the certification shall also set forth the date of the allowance of the will and designate whether it was probated formally or informally. In the case of the formal probate of a will that was previously informally probated, and of an informally probated will that was subsequently denied probate in formal proceedings, the register of probate shall certify such formal probate or formal denial of probate to the register of deeds to which the prior informally probated will was certified, setting forth the date of the formal probate or denial. The register of deeds receiving such copy or certification shall forthwith file the same, minuting thereon the time of the reception thereof, and record it in the same manner as a deed of real estate.

§ 1-505. Notice to beneficiaries; furnishing of copies

Registers of probate shall, within 30 days after any will is probated, notify by mail all beneficiaries under that will that devises have been made to them, stating the name of the testator and the name of the personal representative, if one has been appointed at the time this notification is sent. Beneficiaries in a will shall, upon application to the register of probate, be furnished with a copy of so much of any probated will as relates to them, upon payment of a fee of $1, provided the copy does not exceed 10 lines of legal cap paper of not less than 10 words in each line, and 10¢ for each additional line of 10 words.

§ 1-506. Deputy register of probate

Any register of probate in this State may appoint a deputy register of probate for the county, with the approval of the county commissioners. The deputy may perform any of the duties prescribed by law to be performed by the register of probate. His signature as the deputy shall have the same force and effect as the signature of the register. The deputy shall give bond to the county for the faithful discharge of his duties in such sum and in the same manner as the register of probate. The deputy register shall act as register in the event of a vacancy or absence of the register, until the register resumes his duties or another is qualified as register. The deputy register shall receive an annual salary as established by the register and approved by the county commissioners.

In case of the absence of the register in any county where no deputy has been appointed as above authorized, or a vacancy in the office of register of probate due to death, resignation or any other cause, the judge shall

appoint a suitable person to act as register pro tempore until the register resumes his duties or another is qualified as register. He shall be sworn and, if the judge requires it, give bond as in the case of the register.

§ 1-507. Inspection of register's conduct of office

Every judge of probate shall constantly inspect the conduct of the register with respect to his records and the duties of his office, and give information in writing of any breach of his bond to the treasurer of his county, who shall bring civil action. The money thus recovered shall be applied toward the expenses of completing the records of such register under the direction of said judge and the surplus, if any, shall inure to the county. If it is not sufficient for that purpose, the treasurer may recover the deficiency from the register in a civil action.

§ 1-508. Register incapable or neglects duties

When a register is unable to perform his duties or neglects them, the judge shall certify such inability or neglect to the county treasurer, the time of its commencement and termination, and what person has performed the duties for the time. Such person shall be paid by the treasurer in proportion to the time that he has served and the amount shall be deducted from the register's salary.

§ 1-509. Records in case of vacancy

When there is a vacancy in the office of register and the records are incomplete, they may be completed and certified by the person appointed to act as register or by the register's successor.

§ 1-510. Register not to counsel or draft documents

No register shall be an attorney or counselor in or out of court in any action or matter pending in the court of which he is register nor in any appeal therefrom; nor be administrator, guardian, commissioner of insolvency, appraiser or divider of any estate, in any case within the jurisdiction of said court, except as provided in Title 4, section 307, nor be in any manner interested in the fees and emoluments arising therefrom, in such capacity; nor commence or conduct, either personally or by his agent or clerk, any matter, petition, process or proceeding in the court of which he is register, in violation of this section, and for each and every violation of the preceding provisions of this section, such register shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 11 months. No register shall draft or aid in drafting any document or paper, which he is by law required to record in full or in part, under a penalty of not more than $100, to be recovered by any complainant in a civil action for his benefit or by indictment for the benefit of the county.

§ 1-511. Fees for approved blanks and forms

For all approved blanks, forms or schedule paper required in probate court proceedings, the register shall charge fees which shall be set by the register and approved by the county commissioners, so as not to incur a loss to the county for such services. Such fees shall be payable by the register to the county treasurer for the use and benefit of the county.

PART 6

COSTS AND FEES

MAINE GENERAL COMMENT

This Part was added to the Uniform Probate Code version in order to retain and integrate existing provisions of Maine law providing for costs and fees in probate matters.

§ 1-601. Costs in contested cases in probate court

In all contested cases in the original or appellate court of probate, costs may be allowed to either party, including reasonable witness fees, cost of depositions, hospital records or medical reports and attorney's fees, to be paid to either or both parties, out of the estate in controversy, as justice requires.

§ 1-602. Filing and certification fees

The register of probate shall receive the following fees for filing or certifying documents:

(1) For making and certifying to the register of deeds copies of devises of real estate, abstracts of petitions for appointment of a personal representative or for an elective share, and any other document for which such certification is required, $4, except as otherwise expressly provided by statute. The fee shall be paid by the personal representative, petitioner or other person filing the document to be certified when the copy of the devise or abstracts are made. Of this fee, $1.50 shall be paid by the register of probate to the register of deeds when the certified copy is furnished to him.

(2) For receiving and entering each petition to probate a will, including foreign wills, and each petition for the administration of an estate in intestacy, when the value of the estate is under $10,000, $5; $10,000 to $20,000, $10; $20,001 to $30,000, $20; $30,001 to $40,000, $30; $40,001 to $50,000, $40; over $50,000, $50. This fee, however, shall be paid only once for the estate of any particular decedent.

(3) For making copies from the records of the court, $1 for the first page plus 50¢ for each additional page; except the charge for furnishing to the personal representative one copy of each will probated shall be $1.

(4) For each certificate, under seal of the court, of the appointment and qualification of a personal representative, guardian, conservator or trustee, $3, and for each double certificate, $5.

(5) For filing a petition for appointment as guardian or conservator, or for other protective proceedings, $5.

(6) For filing application for involuntary hospitalization, $5.

§ 1-603. Registers to account quarterly for fees

Registers of probate shall account for each calendar quarter under oath to the county treasurers for all fees received by them or payable to them by virtue of the office, specifying the items, and shall pay the whole amount for each calendar quarter to the treasurers of their respective counties not later than the 15th day of the following month.

§ 1-604. Expenses of partition

When a partition of real estate is made by order of a judge of probate, the expenses thereof shall be paid by the parties interested in proportion to their interests; but when such expenses accrue prior to the closing order or statement of the personal representative of the deceased owner of such real estate, having in his hands sufficient assets for the purpose, he may pay such expenses and allow the same in his account. In case of neglect or refusal of any person liable to pay such expenses, the judge may issue a warrant of distress against such delinquent for the amount due from him and costs of process.

§ 1-605. Compensation of reporters

Reporters appointed under Title 4, section 751 to 756, shall, if a transcript is requested by the court or a party, file the original transcript with the court and receive the same compensation as provided by law for temporary court reporters, and travel at the rate of 10¢ a mile.

Transcript rates shall be in accordance with Title 4, section 651, for transcript furnished for the files of the court and shall be paid by the county in which the court or examination is held, after the reporter's bill has been allowed by the judge of the court in which the services were rendered. In probate matters, the personal representative, conservator or guardian shall, in each case out of the estate in his hands, pay to the register for the county the amount of the reporter's fees, giving such fees the same priority as provided in section 3-815 for other costs and expenses of administration, or as otherwise provided for in the case of insolvent estates, provided that the court can order payment by the county in case the estate assets are not sufficient.

§ 1-606. Reporters to furnish copies

Reporters shall furnish correct typewritten copies of the oral testimony taken at any hearing or examination, to any person calling for the same, upon payment of transcript rates prescribed in Title 4, section 651.

ARTICLE II

INTESTATE SUCCESSION AND WILLS

PART 1

INTESTATE SUCCESSION

UNIFORM PROBATE CODE GENERAL COMMENT

Part 1 of Article II contains the basic pattern of intestate succession historically called descent and distribution. It is no longer meaningful to have different patterns for real and personal property, and under the proposed statute all property not disposed of by a decedent's will passes to his heirs in the same manner. The existing statutes on descent and distribution in the United States vary from state to state. The most common pattern for the immediate family retains the imprint of history, giving the widow a third of realty (sometimes only for life by her dower right) and a third of the personalty, with the balance passing to issue. Where the decedent is survived by no issue, but leaves a spouse and collateral blood relatives, there is wide variation in disposition of the intestate estate, some states giving all to the surviving spouse, some giving substantial shares to the blood relatives. The Code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death, and for this purpose the prevailing patterns in wills are useful in determining what the owner who fails to execute a will would probably want.

A principal purpose of this Article and Article III of the Code is to provide suitable rules and procedures for the person of modest means who relies on the estate plan provided by law. For a discussion of this important aspect of the Code, see 3 Real Property, Probate and Trust Journal (Fall 1968) p. 199.

The principal features of Part 1 are:

(1) A larger share is given to the surviving spouse, if there are issue, and the whole estate if there are no issue or parent.

(2) Inheritance by collateral relatives is limited to grandparents and those descended from grandparents. This simplifies proof of heirship and eliminates will contests by remote relatives.

(3) An heir must survive the decedent for five days in order to take under the statute. This is an extension of the reasoning behind the Uniform Simultaneous Death Act and is similar to provisions found in many wills.

(4) Adopted children are treated as children of the adopting parents for all inheritance purposes and cease to be children of natural parents; this reflects modern policy of recent statutes and court decisions.

(5) In an era when inter vivos gifts are frequently made within the family, it is unrealistic to preserve concepts of advancement developed when such gifts were rare. The statute provides that gifts during lifetime are not advancements unless declared or acknowledged in writing.

While the prescribed patterns may strike some as rules of law which may in some cases defeat intent of a decedent, this is true of every statute of this type. In assessing the changes it must therefore be borne in mind that the decedent may always choose a different rule by excecuting a will.

§ 2-101. Intestate estate

Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed in the following sections of this Code.

§ 2-102. Share of the spouse

The intestate share of the surviving spouse is:

(1) If there is no surviving issue or parent of the decedent, the entire intestate estate;

(2) If there is no surviving issue but the decedent is survived by a parent or parents, the first $50,000, plus ½ of the balance of the intestate estate;

(3) If there are surviving issue all of whom are issue of the surviving spouse also, the first $50,000, plus ½ of the balance of the intestate estate;

(4) If there are surviving issue one or more of whom are not issue of the surviving spouse, ½ of the intestate estate.

UNIFORM PROBATE CODE COMMENT

This section gives the surviving spouse a larger share than most existing statutes on descent and distribution. In doing so, it reflects the desires of most married persons, who almost always leave all of a moderate estate or at least one-half of a larger estate to the surviving spouse when a will is executed. A husband or wife who desires to leave the surviving spouse less than the share provided by this section may do so by executing a will, subject of course to possible election by the surviving spouse to take an elective share of one-third under Part 2 of this Article. Moreover, in the small estate (less than $50,000 after homestead allowance, exempt property, and allowances) the surviving spouse is given the entire estate if there are only children who are issue of both the decedent and the surviving spouse; the result is to avoid protective proceedings as to property otherwise passing to their minor children.

See Section 2-802 for the definition of spouse which controls for purposes of intestate succession.

§ 2-103. Share of heirs other than surviving spouse

The part of the intestate not passing to the surviving spouse under section 2-102, or the entire estate if there is no surviving spouse, passes as follows:

(1) To the issue of the decedent; to be distributed per capita at each generation as defined in section 2-106;

(2) If there is no surviving issue, to the decedent's parent or parents equally;

(3) If there is no surviving issue or parent, to the issue of the parents or either of them to be distributed per capita at each generation as defined in section 2-106;

(4) If there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased to be distributed per capita at each generation as defined in section 2-106; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparents on either the paternal or maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.

UNIFORM PROBATE CODE COMMENT

This section provides for inheritance by lineal descendants of the decedent, parents and their descendants, and grandparents and collateral relatives descended from grandparents; in line with modern policy, it eliminates more remote relatives tracing through great-grandparents.

In general the principle of representation (which is defined in Section 2-106) is adopted as the pattern which most decedents would prefer.

If the pattern of this section is not desired, it may be avoided by a properly executed will or, after the decedent's death, by renunciation by particular heirs under Section 2-801.

In 1975, the Joint Editorial Board recommended replacement of the original text of subsection (3) which referred to "brothers and sisters" of the decedent, and to their issue. The new language is much simpler, and it avoids the problem that "brother" and "sister" are not defined terms. "Issue" by contrast is defined in Section 1-201(21). The definition refers to other defined terms, "parent" and "child", both of which refer to Section 2-109 where the effect of illegitimacy and adoption on relationships for inheritance purposes is spelled out.

The Joint Editorial Board gave careful consideration to a change in the Code's system for distribution among issue as recommended in Waggoner, "A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants," 66 Nw.U.L.Rev. 626 (1971). Though favored as a recommended change in the Code by a majority of the Board, others opposed on the ground that the original text had been enacted already in several states, and that a change in this basic section of the Code would weaken the case for uniformity of probate law in all states. Nonetheless, since some states as of 1975 had adopted versions of the Code containing deviations from the original text of this and related sections, it was the concensus that Prof. Waggoner's recommendation and the statutory changes that would be necessary to implement it, should be described in Code commentary.

The changes involved would appear in this section and in Section 2-106. The old and the revised text of these sections would be as follows if the Waggoner recommendation is accepted by an enacting state which decides that uniformity of the substantive rules of intestate succession is not vital:

Change Section 2-103(1), (3) and (4) by altering, in each instance, the language referring to taking per capita or by representation, as follows:

2-103 . . .

(1) to the issue of the decedent; **to be distributed per capita at each generation as defined in Section 2-106;** ~~if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree then those of more remote degree take by representation;~~ . . .

(3) if there is no surviving issue or parent, to the issue of the parents or either of them **to be distributed per capita at each generation as defined in Section 2-106;** by ~~representation;~~

(4) . . . or to the issue of the paternal grandparents if both are deceased **to be distributed per capita at each generation as defined in Section 2-106;** ~~the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation.~~

Also, after 2-106 as follows:

Section 2-106, **[Per Capita at Each Generation.]**

If per capita at each generation representation is called for by this Code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship **which contains any surviving heirs** and deceased persons in the same degree who left issue who survive the decedent. **eEach** surviving heir in the nearest degree **which contains any surviving heir is allocated one share and the remainder of the estate is divided in the same manner as if the heirs already allocated a share and their issue had predeceased and decedent.** ~~receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.~~

[As pointed out in the following Maine Comment, the Maine Probate Code adopts the alternate system of succession discussed in this Uniform Probate Code Comment.]

MAINE COMMENT

Maine change from Uniform Probate Code. This section, along with section 2-106, adopts the concept of per capita distribution at each generation, referred to in the above Uniform Probate Code Comment.

§ 2-104. Requirement that heir survive decedent for 120 hours

Any person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property and intestate succession, and the decedent's heirs are determined

accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. This section is not to be applied where its application would result in a taking of intestate estate by the State under section 2-105.

UNIFORM PROBATE CODE COMMENT

This section is a limited version of the type of clause frequently found in wills to take care of the common accident situation, in which several members of the same family are injured and die within a few days of each other. The Uniform Simultaneous Death Act provides only a partial solution, since it applies only if there is no proof that the parties died otherwise than simultaneously. This section requires an heir to survive by five days in order to succeed to decedent's intestate property; for a comparable provision as to wills, see Section 2-601. This section avoids multiple administrations and in some instances prevents the property from passing to persons not desired by the decedent. The five-day period will not hold up administration of a decedent's estate because sections 3-302 and 3-307 prevent informal probate of a will or informal issuance of letters for a period of five days from death. The last sentence prevents the survivorship requirement from affecting inheritances by the last eligible relative of the intestate who survives him for any period.

[I.R.C. § 2056(b) (3) makes it clear that an interest passing to a surviving spouse is **not** made a "terminable interest" and thereby [is not] disqualified for inclusion in the marital deduction by its being conditioned on failure of the spouse to survive a period not exceeding six months after the decedent's death, if the spouse in fact lives for the required period. Thus, the intestate share of a spouse who survives the decedent by five days is available for the marital deduction. To assure a marital deduction in cases where one spouse fails to survive the other by the required period, the decedent must leave a will [in order to make express provision for the preservation of the marital deduction, as provided in UPC 2-601].] The marital deduction is not a problem in the typical intestate estate. The draftsmen and Special Committee concluded that the statute should accommodate the typical estate to which it applies, rather than the unusual case of an unplanned estate involving large sums of money.

[emphasis and bracketed language added by Maine revisors.]

MAINE COMMENT

General. As the above Uniform Probate Code comment points out, this section is designed to avoid unnecessary multiple administrations and to prevent distributions to unintended persons through the estates of heirs who die in a common disaster or otherwise shortly after the decedent himself dies. It is intended to apply to small or moderate size estates in which the marital deduction is not a consideration, which is the typical kind of estate

involved in intestacy. As the Uniform Probate Code comment also points out, an estate in which the marital deduction is important should be disposed of by a will which expressly reverses the effect of this section as provided for in the Maine Probate Code, section 2-601. Similar considerations may apply in the case of an orphan's deduction under I.R.C. § 2057.

§ 2-105. No taker

If there is no taker under the provisions of this Article, the intestate estate passes to the State.

§ 2-106. Per capita at each generation

If per capita at each generation representation is called for by this Code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship which contains any surviving heirs and deceased persons in the same degree who left issue who survived the decedent. Each surviving heir in the nearest of degree which contains any surviving heir is allocated one share and the remainder of the estate is divided in the same manner as if the heirs already allocated a share and their issue had predeceased the decedent.

UNIFORM PROBATE CODE COMMENT

Under the system of intestate succession in effect in some states, property is directed to be divided "per stirpes" among issue or descendants of identified ancestors. Applying a meaning commonly associated with the quoted words, the estate is first divided into the number indicated by the number of children of the ancestor who survive, or who leave issue who survive. If, for example, the property is directed to issue "per stirpes" of the intestate's parents, the first division would be by the number of children of parents (other than the intestate) who left issue surviving even though no person of this generation survives. Thus, if the survivors are a child and a grandchild of a deceased brother of the intestate and five children of his deceased sister, the brother's descendants would divide one-half and the five children of the sister would divide the other half. Yet, if the parent of the brother's grandchild also had survived, most statutes would give the seven nephews and nieces equal shares because it is commonly provided that if all surviving kin are in equal degree, they take per capita.

The draft rejects this pattern and keys to a system which assures that the first and principal division of the estate will be with reference to a generation which includes one or more living members. [As pointed out in the following Maine comment, the Maine Probate Code adopts the alternate system of succession discussed in the Uniform Probate Code comment to section 2-103.]

MAINE COMMENT

Maine change from Uniform Probate Code. This section adopts the concept of per capita distribution at each generation referred to in the Uniform Probate Code Comment accompanying section 2-103.

§ 2-107. Kindred of half blood

Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.

§ 2-108. Afterborn heirs

Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.

§ 2-109. Meaning of child and related terms

If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person:

(1) An adopted person is the child of an adopting parent and not of the natural parents except that an adopted child will also inherit from the natural parents and their respective kin if the adoption decree so provides, and except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and either natural parent;

(2) In cases not covered by paragraph (1), a person born out of wedlock is a child of the mother; that person is also a child of the father if:

(i) The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

(ii) The father adopts the child into his family; or

(iii) The father acknowledges in writing before a justice of the peace or notary public that he is the father of the child, or the paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, but the paternity established under this subparagraph is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his and has not refused to support the child.

UNIFORM PROBATE CODE COMMENT

The definition of "child" and "parent" in Section 1-201 incorporates the meanings established by this section, thus extending them for all purposes of the Code. See Section 2-802 for the definition of "spouse" for purposes of intestate succession.

The change in 1975 from "that" to "either" as the third from the last word in subsection (1) was recommended by the Joint Editorial Board so that children would not be detached from any natural relatives for inheritance purposes because of adoption by the spouse of one of its natural parents. The change in this section, which is referred to by the definitions in Section 1-201 of "child", "issue" and "parent", affects, inter alia, the meaning of Sections 2-102, 2-103, 2-106, 2-302, 2-401, 2-402, 2-403, 2-404 and 2-605. As one consequence, the child of a deceased father who has been adopted by the mother's new spouse does not cease to be "issue" of his father and his parents, and so, under Section 2-605, would take a devise from one of his natural, paternal

grandparents in favor of the child's deceased father who predeceased the testator. This situation is suggested by In re Estate of Bissell, 342 N.Y.S. (2d) 718.

The recommended addition of a new section, Section 2-114, dealing with the possibility of double inheritance where a person establishes relationships to a decedent through two lines of relatives is attributable, in part, to the change recommended in Section 2-109 (1).

The approval in 1973 by the National Conference of Commissioners on Uniform State Laws of the Uniform Parentage Act reflects a change of policy by the Conference regarding the status of children born out of wedlock to one which is inconsistent with Section 2-109(2) of the Code as approved in 1969. The new language of 2-109(2) conforms the Uniform Probate Code to the Uniform Parentage Act. In view of the fact that eight states have enacted the 1969 version of 2-109(2), the former language is retained, in brackets, to indicate that states, consistently with enactment of the Uniform Probate Code, may accept either form of approved language.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version was changed by adding language to paragraph (1) in order to allow an adopted child to inherit through his natural parents and their respective kin if the adoption decree so provides. Both the Maine Probate Code and the Uniform Probate Code versions contemplate that the adoptive parents are the child's parents, so that inheritance through the natural parents would ordinarily not be expected or appropriate. The added language in the Maine Probate Code is intended for use in those situations where such inheritance would seem appropriate and where the preservation of confidentiality would not be important. For example, where teenage children whose parents have died are adopted by friends or relatives of the parents, the court decreeing the adoption may, under this section, provide for inheritance from the natural parents and their respective kin.

The Uniform Probate Code version was also changed by adding paragraph (2), subparagraph (ii) and the first clause of paragraph (2), subparagraph (iii) to incorporate into the Maine Probate Code prior Maine provisions for establishing paternity of illegitimates. The prior Maine provision for establishing paternity through acknowledgement by affidavit was incorporated into paragraph (2), subparagraph (iii) in order to subject inheritance by the father and his kindred to the limitation expressly contained therein.

Prior Maine law. Under prior Maine law adopted children inherited through both their natural and adoptive parents.

§ 2-110. Advancements

If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose

the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue, unless the declaration or acknowledgment provides otherwise.

UNIFORM PROBATE CODE COMMENT

This section alters the common law relating to advancements by requiring written evidence of the intent that an inter vivos gift be an advancement. The statute is phrased in terms of the donee being an "heir" because the transaction is regarded as of decedent's death; of course, the donee is only a prospective heir at the time of the transfer during lifetime. Most inter vivos transfers today are intended to be absolute gifts or are carefully integrated into a total estate plan. If the donor intends that any transfer during lifetime be deducted from the donee's share of his estate, the donor may either execute a will so providing or, if he intends to die intestate, charge the gift as an advance by a writing within the present section. The present section applies only when the decedent died intestate and not when he leaves a will.

This section applies to advances to collaterals (such as nephews and nieces) as well as to lineal descendants. The statute does not spell out the method of taking account of the advance, since this process is well settled by the common law and is not a source of litigation.

MAINE COMMENT

Prior Maine law. Prior Maine law covered advances to children and grandchildren but not to collateral relatives and required either a contemporaneous written expression by the donor or a written acknowledgment by the heir to establish that the property given was intended to be an advancement. Porter v. Porter, 51 Me. 376 (1862). Prior Maine law also differed in that the value of the advancement was determined to be the value set by the donor or, if no such value was set, the value at the time the advancement was made.

§ 2-111. Debts to decedent

A debt owed to the decedent is not charged against the intestate share of any person except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's issue.

UNIFORM PROBATE CODE COMMENT

This supplements the content of Section 3-903, infra.

§ 2-112. Alienage

No person is disqualified to take as an heir because he or a person through whom he claims is or has been an alien.

UNIFORM PROBATE CODE COMMENT

The purpose of this section is to eliminate the ancient rule that an alien cannot acquire or transmit land by descent, a rule based on the feudal notions of the obligations of the tenant to the King. Although there never was a corresponding rule as to personalty, the present section is phrased in light of the basic premise of the Code that distinctions between real and personal property should be abolished.

This section has broader vitality in light of the recent decision of the United States Supreme Court in Zschernig v. Miller, 88 S.Ct. 664, 389 U.S. 429, 19 L.Ed.2d 683 (1968) holding unconstitutional a state statute providing for escheat if a nonresident alien cannot meet three requirements: the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country, the right of United States citizens to receive payment here of funds from estates in the foreign country, and the right of the foreign heirs to receive the proceeds of the local estate without confiscation by the foreign government. The rationale was that such a statute involved the local probate court in matters which essentially involve United States foreign policy, whether or not there is a governing treaty with the foreign country. Hence, the statute is "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress".

§ 2-113. Dower and curtesy abolished

The estates of dower and curtesy are abolished.

UNIFORM PROBATE CODE COMMENT

The provisions of this Code replace the common law concepts of dower and curtesy and their statutory counterparts. Those estates provided both a share in intestacy and a protection against disinheritance.

In states which have previously abolished dower and curtesy, or where those estates have never existed, the above section should be omitted.

MAINE COMMENT

General. This section preserves Maine's previous abolition of common law dower and curtesy.

§ 2-114. Persons related to decedent through 2 lines

A person who is related to the decedent through 2 lines of relationship is entitled to only a single share based on the relationship which would entitle him to the larger share. In cases where such an heir would take equal shares, he shall be entitled to the equivalent of a single share. The court shall equitably apportion the amount equivalent in value to the share denied such heir by the provisions of this section.

UNIFORM PROBATE CODE COMMENT

This section was added in 1975.

The language is identical to that appearing as Section 2-112 in U.P.C. Working Drafts 3 and 4, and as Section 2-110 in Working Draft 5. The section was dropped because, with adoptions serving to transplant adopted children from all natural relationships to full relationship with adoptive relatives, and inheritance eliminated as between persons more distantly related than descendants of a common grandparent, the prospects of double inheritance seemed too remote to warrant the burden of an extra section. The changes recommended in Section 2-109(1) increase the prospects of double inheritance to the point where the addition of Section 2-114 seemed desirable. The section would have potential application in the not uncommon case where a deceased person's brother or sister marries the spouse of the decedent and adopts a child of the former marriage; it would block inheritance through two lines if the adopting parent died thereafter leaving the child as a natural and adopted grandchild of its grandparents.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version was changed by adding the last 2 sentences in order to eliminate the possibility that an heir could bargain between 2 groups of heirs to determine through which of the 2 lines of relationship he would take his share, and to expressly provide the court with authority to equitably apportion the amount of any extra share that might result from the application of this section in connection with sections 2-103, 2-106 and 2-109.

PART 2

ELECTIVE SHARE OF SURVIVING SPOUSE

UNIFORM PROBATE CODE GENERAL COMMENT

The sections of this Part describe a system for common law states designed to protect a spouse of a decedent who was a domiciliary against donative transfers by will and will substitutes which would deprive the survivor of a "fair share" of a decedent's estate. Optional sections adapting the elective share system to community property jurisdictions were contained in preliminary drafts, but were dropped from the final Code. Problems of disherison of spouses in community states are limited to situations involving assets acquired by domiciliaries of common law states who later become domiciliaries of a community property state, and to instances where substantially all of a deceased spouse's property is separate property. Representatives of community property states differ in regard to whether either of these problem areas warrant statutory solution.

Almost every feature of the system described herein is or may be controversial. Some have questioned the need for any legislation checking the power of married persons to transfer their property as they please. See Plager, "The Spouse's Nonbarrable Share; A Solution in Search of a Problem," 33 Chi.L.Rev. 681 (1966). Still, virtually all common law states impose some

restriction on the power of a spouse to disinherit the other. In some, the ancient concept of dower continues to prevent free transfer of land by a married person. In most states, including many which have abolished dower, a spouse's protection is found in statutes which give a surviving spouse the power to take a share of the decedent's probate estate upon election rejecting the provisions of the decedent's will. These statutes expand the spouse's protection to all real and personal assets owned by the decedent at death, but usually take no account of various will substitutes which permit an owner to transfer ownership at his death without use of a will. Judicial doctrines identifying certain transfers to the "illusory" or to be in "fraud" of the spouse's share have been evolved in some jurisdictions to offset the problems caused by will substitutes, and in New York and Pennsylvania, statutes have extended the elective share of a surviving spouse to certain non-testamentary transfers.

Questions relating to the proper size of a spouse's protected interest may be raised in addition to those concerning the need for, and method of assuring, any protection. The traditions in both common law and community property states point toward some capital sum related to the size of the deceased spouse's holdings rather than to the needs of the surviving spouse. The community property pattern produces one-half for the surviving spouse, but is somewhat misleading as an analogy, for it takes no account of the decedent's separate property. The fraction of one-third, which is stated in Section 2-201, has the advantage of familiarity, for it is used in many forced share statutes.

Although the system described herein may seem complex, it should not complicate administration of a married person's estate in any but very unusual cases. The surviving spouse rather than the executor or the probate court has the burden of asserting an election, as well as the burden of proving the matters which must be shown in order to make a successful claim to more than he or she has received. Some of the apparent complexity arises from Section 2-202, which has the effect of compelling an electing spouse to allow credit for all funds attributable to the decedent when the spouse, by electing, is claiming that more is due. This feature should serve to reduce the number of instances in which an elective share will be asserted. Finally, Section 2-204 expands the effectiveness of attempted waivers and releases of rights to claim an elective share. Thus, means by which estate planners can assure clients that their estates will not become embroiled in election litigation are provided.

Uniformity of law on the problems covered by this Part is much to be desired. It is especially important that states limit the applicability of rules protecting spouses so that only estates of domiciliary decedents are involved.

§ 2-201. Right to elective share

(a) If a married person domiciled in this State dies, the surviving spouse has a right of election to take an elective share of ⅓ of the augmented estate under the limitations and conditions hereinafter stated.

(b) If a married person not domiciled in this State dies, the right, if any, of the surviving spouse to take an elective share in property in this State is governed by the law of the decedent's domicile at death.

UNIFORM PROBATE CODE COMMENT

See Section 2-802 for the definition of "spouse" which controls in this Part.

Under the common law a widow was entitled to dower, which was a life estate in a fraction of lands of which her husband was seized of an estate of inheritance at any time during the marriage. Dower encumbers titles and provides inadequate protection for widows in a society which classifies most wealth as personal property. Hence the states have tended to substitute a forced share in the whole estate for dower and the widower's comparable common law right of curtesy. Few existing forced share statutes make adequate provisions for transfers by means other than succession to the surviving spouse and others. This and the following sections are designed to do so. The theory of these sections is discussed in Fratcher, "Toward Uniform Succession Legislation," 41 N.Y.U.L.Rev. 1037, 1050-1064 (1966). The existing law is discussed in MacDonald, Fraud on the Widow's Share (1960). Legislation comparable to that suggested here became effective in New York on Sept. 1, 1966. See Decedent Estate Law, § 18.

MAINE COMMENT

Prior Maine law. This section and the Maine Probate Code, section 2-202 replace the previous statutory elective share referred to as the spouse's right by descent.

§ 2-202. Augmented estate

The augmented estate means the estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims, to which is added the sum of the following amounts:

(1) The value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

(i) Any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;

(ii) Any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

(iii) Any transfer whereby property is held at the time of decedent's death by decedent and another with right of survivorship;

(iv) Any transfer made to a donee within two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed $3,000.

Any transfer is excluded if made with the written consent or joinder of the surviving spouse. Property is valued as of the decedent's death except that property given irrevocably to a donee during lifetime of the decedent is

valued as of the date the donee came into possession or enjoyment if that occurs first. Nothing herein shall cause to be included in the augmented estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.

(2) The value of property owned by the surviving spouse at the decedent's death, plus the value of property transferred by the spouse at any time during marriage to any person other than the decedent which would have been includible in the spouse's augmented estate if the surviving spouse had predeceased the decedent to the extent the owned or transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth. For purposes of this paragraph:

(i) Property derived from the decedent includes, but is not limited to, any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime, any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of others than the spouse, any proceeds of insurance, including accidental death benefits, on the life of the decedent attributable to premiums paid by him, any lump sum immediately payable and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant attributable to premiums paid by him, the commuted value of amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan, exclusive of the Federal Social Security system, by reason of service performed or disabilities incurred by the decedent, any property held at the time of decedent's death by decedent and the surviving spouse with right of survivorship, any property held by decedent and transferred by contract to the surviving spouse by reason of the decedent's death and the value of the share of the surviving spouse resulting from rights in community property in this or any other state formerly owned with the decedent. Premiums paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent.

(ii) Property owned by the spouse at the decedent's death is valued as of the date of death. Property transferred by the spouse is valued at the time the transfer became irrevocable, or at the decedent's death, whichever occurred first. Income earned by included property prior to the decedent's death is not treated as property derived from the decedent.

(iii) Property owned by the surviving spouse as of the decedent's death, or previously transferred by the surviving spouse, is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source.

(3) For purposes of this section a bona fide purchaser is a purchaser for value in good faith and without notice of any adverse claim.

UNIFORM PROBATE CODE COMMENT

The purpose of the concept of augmenting the probate estate in computing the elective share is twofold: (1) to prevent the owner of wealth from making

arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share, and (2) to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death by life insurance, joint tenancy assets and other nonprobate arrangements. Thus essentially two separate groups of property are added to the net probate estate to arrive at the augmented net estate which is the basis for computing the one-third share of the surviving spouse. In the first category are transfers by the decedent during his lifetime which are essentially will substitutes, arrangements which give him continued benefits or controls over the property. However, only transfers during the marriage are included in this category. This makes it possible for a person to provide for children by a prior marriage, as by a revocable living trust, without concern that such provisions will be upset by later marriage. The limitation to transfers during marriage reflects some of the policy underlying community property. What kinds of transfers should be included here is a matter of reasonable difference of opinion. The finespun tests of the Federal Estate Tax Law might be utilized, of course. However, the objectives of a tax law are different from those involved here in the Probate Code, and the present section is therefore more limited. It is intended to reach the kinds of transfers readily usable to defeat an elective share in only the probate estate.

In the second category of assets, property of the surviving spouse derived from the decedent and property derived from the decedent which the spouse has, in turn, given away in a transaction that is will-like in effect or purpose, the scope is much broader. Thus a person can during his lifetime make outright gifts to relatives and they are not included in this first category unless they are made within two years of death (the exception being designed to prevent a person from depleting his estate in contemplation of death). But the time when the surviving spouse derives her wealth from the decedent is immaterial; thus if a husband has purchased a home in the wife's name and made systematic gifts to the wife over many years, the home and accumulated wealth she owns at his death as a result of such gifts ought to, and under this section do, reduce her share of the augmented estate. Likewise, for policy reasons life insurance is not included in the first category of transfers to other persons, because it is not ordinarily purchased as a way of depleting the probate estate and avoiding the elective share of the spouse; but life insurance proceeds payable to the surviving spouse are included in the second category, because it seems unfair to allow a surviving spouse to disturb the decedent's estate plan if the spouse has received ample provision from life insurance. In this category no distinction is drawn as to whether the transfers are made before or after marriage.

Depending on the circumstances it is obvious that this section will operate in the long run to decrease substantially the number of elections. This is because the statute will encourage and provide a legal base for counseling of testators against schemes to disinherit the spouse, and because the spouse can no longer elect in cases where substantial provision is made by joint tenancy, life insurance, lifetime gifts, living trusts set up by the decedent, and the other

numerous nonprobate arrangements by which wealth is today transferred. On the other hand the section should provide realistic protection against disinheritance of the spouse in the rare case where decedent tries to achieve that purpose by depleting his probate estate.

The augmented net estate approach embodied in this section is relatively complex and assumes that litigation may be required in cases in which the right to an elective share is asserted. The proposed scheme should not complicate administration in well-planned or routine cases, however, because the spouse's rights are freely releasable under Section 2-204 and because of the time limits in Section 2-205. Some legislatures may wish to consider a simpler approach along the lines of the Pennsylvania Estates Act provision reading:

> "A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved, but the right of the surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor. The provisions of this subsection shall not apply to any contract of life insurance purchased by a decedent, whether payable in trust or otherwise."

In passing, it is to be noted that a Pennsylvania widow apparently may claim against a revocable trust or will even though she has been amply provided for by life insurance or other means arranged by the decedent. Penn. Consol.Stats.Annot. title 20, § 2508.

The New York Estates, Powers and Trusts Law § 5-1.1(b) also may be suggested as a model. It treats as testamentary dispositions all gifts causa mortis, money on deposit by the decedent in trust for another, money deposited in the decedent's name payable on death to another, joint tenancy property, and transfers by decedent over which he has a power to revoke or invade. The New York law also expressly excludes life insurance, pension plans, and United States savings bonds payable to a designated person. One of the drawbacks of the New York legislation is its complexity, much of which is attributable to the effort to prevent a spouse from taking an elective share when the deceased spouse has followed certain prescribed procedures. The scheme described by Sections 2-201 et seq., like that of all states except New York, leaves the question of whether a spouse may or may not elect to be controlled by the economics of the situation, rather than by conditions on the statutory right. Further, the New York system gives the spouse election rights in spite of the possibility that the spouse has been well provided for by insurance or other gifts from the decedent.

In 1975, the Joint Editorial Board recommended the addition of reference to bona fide purchaser in paragraph (1), "to a donee" in paragraph (1)(iv) and the addition of paragraph (3) to the above section to reflect recommendations evolved in discussions by committees of the Colorado Bar Association to meet title problems that had been identified under the Code as originally enacted. One problem that should be cured by the amendments arose when real prop-

erty experts in Colorado took the position that, since any transfer might be found to be for less than "adequate and full consideration in money or money's worth," the language of the original text, all deeds from married persons had to be joined in by the spouse, lest the grantor die within two years and the grantee be subjected to the claim that the value involved was a part of the augmented estate.

Also, the Joint Editorial Board in 1975 recommended the addition in Section 2-202(2)(i) of language referring to property moving to the surviving spouse via joint and survivorship holdings with the decedent. The addition would not, in all probability, change the meaning of the subsection, but it would clarify it in relation to jointly held property which will be present in a great number of cases.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by omitting the last sentence of paragraph (3) providing that a notation of a state documentary fee on a recorded instrument is prima facie evidence that the transfer was to a bona fide purchaser, since Maine law does not require such notation on recorded instruments.

Prior Maine law. This section and the Maine Probate Code, section 2-201 replace the previous statutory elective share referred to as the spouse's right by descent.

§ 2-203. Right of election personal to surviving spouse

The right of election of the surviving spouse may be exercised only during his lifetime by him. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending, after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy.

UNIFORM PROBATE CODE COMMENT

See Section 5-101 for definitions of protected person and protective proceedings.

§ 2-204. Waiver of right to elect and of other rights

The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

UNIFORM PROBATE CODE COMMENT

The right to homestead allowance is conferred by Section 2-401, that to exempt property by Section 2-402, and that to family allowance by Section 2-403. The right to renounce interests passing by testate or intestate succession is recognized by Section 2-801. The provisions of this section, permitting a spouse or prospective spouse to waive all statutory rights in the other spouse's property seem desirable in view of the common and commendable desire of parties to second and later marriages to insure that property derived from prior spouses passes at death to the issue of the prior spouses instead of to the newly acquired spouse. The operation of a property settlement as a waiver and renunciation takes care of the situation which arises when a spouse dies while a divorce suit is pending.

§ 2-205. Proceeding for elective share; time limit

(a) The surviving spouse may elect to take his elective share in the augmented estate by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within 9 months after the date of death, or within 6 months after the probate of the decedent's will, whichever limitation last expires. However, that nonprobate transfers, described in section 2-202, paragraph (1), shall not be included within the augmented estate for the purpose of computing the elective share, if the petition is filed later than 9 months after death.

The court may extend the time for election as it sees fit for cause shown by the surviving spouse before the time for election has expired.

(b) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented net estate whose interests will be adversely affected by the taking of the elective share.

(c) The surviving spouse may withdraw his demand for an elective share at any time before entry of a final determination by the court.

(d) After notice and hearing, the court shall determine the amount of the elective share and shall order its payment from the assets of the augmented net estate or by contribution as appears appropriate under section 2-207. If it appears that a fund or property included in the augmented net estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount thar he would have been if relief had been secured against all persons subject to contribution.

(e) The order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of the State or other jurisdictions.

UNIFORM PROBATE CODE COMMENT

In 1975, the Joint Editorial Board recommended changes in subsection (a) that were designed to meet a question, arising under the original text, of whether the right to an elective share was ever barred in cases of unadministered estates. The new language also has the effect of clearing included, non-probate transfers to persons other than the surviving spouse of the lien of any possible elective share proceeding unless the spouse's action is commenced within nine months after death. This bar on efforts to recapture non-probate assets for an elective share does not apply to probate assets. Probate assets may be controlled by a will that may not be offered for probate until as late as three years from death. As to these, the limitation on the surviving spouse's proceeding is six months after the probate.

§ 2-206. Effect of election on benefits provided by statute

A surviving spouse is entitled to homestead allowance, exempt property, and family allowance, whether or not he elects to take an elective share.

UNIFORM PROBATE CODE COMMENT

The election does not result in a loss of benefits under the will (in the absence of renunciation) because those benefits are charged against the elective share under Sections 2-201, 2-202 and 2-207(a).

In 1975, the Joint Editorial Board recommended changes in this and the following section that reverse the position of the original text which permitted an electing spouse to accept or reject particular benefits as provided him by the decedent without reducing the dollar value of his elective share. The new language in this section, replacing former Section 2-206 (a) and (b), does not mention renunciation of transfers which is now dealt with in Section 2-207. The remaining content of this section is restricted to a simple statement indicating that the family exemptions described by Article II, Part 4 may be distributed from the probate estate without reference to whether an elective share right is asserted, and without being charged to the electing spouse as a part of the elective share. In the view of the Board, deletion of language in the original form of Section 2-206 (b), dealing with devises that are intended to be in lieu of family exemptions, does not alter the ability of a testator, by express provision in the will, from putting a surviving spouse to an election between accepting the devises provided or accepting the family exemptions provided by law. This matter is dealt with in Sections 2-401, 2-402, 2-403 and 2-404.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version of the title to this section was changed merely to reflect the substantive changes that were made in the Uniform Probate Code itself in 1975, as referred to in the above Uniform Probate Code comment.

§ 2-207. Charging spouse with gifts received; liability of others for balance of elective share

(a) In the proceeding for an elective share, values included in the augmented estate which pass or have passed to the surviving spouse, or which

would have passed to the spouse but were renounced, are applied first to satisfy the elective share and to reduce any contributions due from other recipients of transfers included in the augmented estate. For purposes of this subsection, the electing spouse's beneficial interest in any life estate or in any trust shall be computed as if worth ½ of the total value of the property subject to the life estate, or of the trust estate, unless higher or lower values for these interests are established by proof.

(b) Remaining property of the augmented estate is so applied that liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein.

(c) Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate.

UNIFORM PROBATE CODE COMMENT

Sections 2-401, 2-402 and 2-403 have the effect of giving a spouse certain exempt property and allowances in addition to the amount of the elective share.

In 1975, the Joint Editorial Board recommended changes in Section 2-206 and subsection (a) of this section which have the effect of protecting a decedent's plan as far as it provides values for the surviving spouse. The spouse is not compelled to accept the benefits devised by the decedent, but if these benefits are rejected, the values involved are charged to the electing spouse as if the devises were accepted. The second sentence of new subsection (a) provides a rebuttable presumption of the value of a life estate or an interest in a trust, when this form of benefit is provided for an electing spouse by the decedent's plan.

PART 3

SPOUSE AND CHILDREN UNPROVIDED FOR IN WILLS

§ 2-301. Omitted spouse

(a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) In satisfying a share provided by this section, the devises made by the will abate as provided in section 3-902.

UNIFORM PROBATE CODE COMMENT

Section 2-508 provides that a will is not revoked by a change of circumstances occurring subsequent to its execution other than as described by that section. This section reflects the view that the intestate share of the spouse is what the decedent would want the spouse to have if he had thought about the relationship of his old will to the new situation. One effect of this section should be to reduce the number of instances where a spouse will claim an elective share.

MAINE COMMENT

Prior Maine law. Prior Maine law made no directly comparable provision for a spouse who was presumably omitted from the decedent's will by inadvertence. This section provides for this situation as an alternative to a spouse's right to elect against the will as provided in Part 2.

§ 2-302. Pretermitted children

(a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

(1) It appears from the will that the omission was intentional;

(2) When the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or

(3) The testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

(c) In satisfying a share provided by this section, the devises made by the will abate as provided in section 3-902.

UNIFORM CODE COMMENT

This section provides for both the case where a child was born or adopted after the execution of the will and not foreseen at the time and thus not provided for in the will, and the rare case where a testator omits one of his existing children because of mistaken belief that the child is dead.

Although the sections dealing with advancement and ademption by satisfaction (2-110 and 2-612) provide that a gift during lifetime is not an advancement or satisfaction unless the testator's intent is evidenced in writing, this section permits oral evidence to establish a testator's intent that lifetime gifts

or nonprobate transfers such as life insurance or joint accounts are in lieu of a testamentary provision for a child born or adopted after the will. Here there is no real contradiction of testamentary intent, since there is no provision in the will itself for the omitted child.

To preclude operation of this section it is not necessary to make any provision, even nominal in amount, for a testator's present or future children; a simple recital in the will that the testator intends to make no provision for then living children or any the testator thereafter may have would meet the requirement of (a)(1).

Under subsection (c) and Section 3-902, any intestate estate would first be applied to satisfy the share of a pretermitted child.

This section is not intended to alter the rules of evidence applicable to statements of a decedent.

MAINE COMMENT

Prior Maine law. Prior Maine law provided a pretermitted share generally to issue of the decedent, including children born prior to the execution of the will, and also provided that the inclusion of a child's name in the will in which he was unprovided for created a conclusive presumption that the testator intended to make no provision for that child.

PART 4

EXEMPT PROPERTY AND ALLOWANCES

UNIFORM PROBATE CODE GENERAL COMMENT

This part describes certain rights and values to which a surviving spouse and certain children of a deceased domiciliary are entitled in preference over unsecured creditors of the estate and persons to whom the estate may be devised by will. If there is a surviving spouse, all of the values described in this Part, which total $8,500 plus whatever is allowed to the spouse for support during administration, pass to the spouse. Minor or dependent children become entitled to the homestead exemption of $5,000 and to support allowances if there is no spouse, and may receive some of the support allowance if they live apart from the surviving spouse. The exempt property section confers rights on the spouse, if any, or on all children, to $3,500 in certain chattels, or funds if the unencumbered value of chattels is below the $3,500 level. This provision is designed in part to relieve a personal representative of the duty to sell household chattels when there are children who will have them.

These family protection provisions supply the basis for the important small estate provisions of Article III, Part 12.

States adopting the Code may see fit to alter the dollar amounts suggested in these sections, or to vary the terms and conditions in other ways so as to accommodate existing traditions. Although creditors of estates would be aided somewhat if all family exemption provisions relating to probate estates

were the same throughout the country, there is probably less need for uniformity of law regarding these provisions than for any of the other parts of this article. Still, it is quite important for all states to limit their homestead, support allowance and exempt property provisions, if any, so that they apply only to estates of decedents who were domiciliaries of the state.

Notice that Section 2-104 imposes a requirement of survival of the decedent for 120 hours on any spouse or child claiming under this Part.

§ 2-401. Homestead allowance

A surviving spouse of a decedent who was domiciled in this State is entitled to a homestead allowance of $5,000. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to $5,000 divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent unless otherwise provided, by intestate succession or by way of elective share.

UNIFORM PROBATE CODE COMMENT

See Section 2-802 for the definition of "spouse" which controls in this Part. Also, see Section 2-104. Waiver of homestead is covered by Section 2-204. "Election" between a provision of a will and homestead is not required unless the will so provides.

A set dollar amount for homestead allowance was dictated by the desirability of having a certain level below which administration may be dispensed with or be handled summarily, without regard to the size of allowances under Section 2-402. The "small estate" line is controlled largely, though not entirely, by the size of the homestead allowance. This is because Part 12 of Article III dealing with small estates rests on the assumption that the only justification for keeping a decedent's assets from his creditors is to benefit the decedent's spouse and children.

Another reason for a set amount is related to the fact that homestead allowance may prefer a decedent's minor or dependent children over his other children. It was felt desirable to minimize the consequence of application of an arbitrary age line among children of the testator.

MAINE COMMENT

Prior Maine law. Prior Maine law provided the decedent's estate with exemptions for any property on which the decedent was exempt from claims under Title 14, sections 4401 and 4551. The Maine Probate Code, section 2-401, replaces the homestead exemption for the decedent's estate under Title 14, section 4551, but leaves section 4551 intact as it applies to one's property during his own lifetime. See Title 14, section 4554. The exemptions under Title 14, section 4401 are made available under the Maine Probate Code, section 2-402, to the decedent's surviving spouse or children up to a

value of $3,500 and under the Maine Probate Code, section 2-405, to the decedent's estate if there is no surviving spouse or child of the decedent or to the extent that the exempt property exceeds the value allotted to the surviving spouse or children under the Maine Probate Code, section 2-402.

§ 2-402. Exempt property

In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this State is entitled from the estate to value not exceeding $3,500 in excess of any security interests therein in property exempt under Title 14, section 4401 on the date of death of the decedent. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than $3,500, or if there is not $3,500 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the $3,500 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share.

UNIFORM PROBATE CODE COMMENT

Unlike the exempt values described in Section 2-401 and 2-403, the exempt values described in this section are available in a case where the decedent left no spouse but left only adult children. The possible difference between beneficiaries of the exemptions described by Sections 2-401 and 2-403, and this section, explain the provision in this section which establishes priorities.

Section 2-204 covers waiver of exempt property rights. This section indicates that a decedent's will may put a spouse to an election with reference to exemptions, but that no election is presumed to be required.

MAINE COMMENT

Maine changes from Uniform Probate Code. The last part of the first sentence of this section was changed from the Uniform Probate Code version to conform the definition of exempt property under this section with the types of property in which the decedent has an exemption under the law of this State during his lifetime.

Prior Maine law. See Maine comment to the Maine Probate Code, section 2-401.

§ 2-403. Family allowance

In addition to the right to homestead allowance and exempt property, if the decedent was domiciled in this State, the surviving spouse and minor

children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody; but in case any minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his guardian or other person having his care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims but not over the homestead allowance.

The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates his right to allowance not yet paid.

UNIFORM PROBATE CODE COMMENT

The allowance provided by this section does not qualify for the marital deduction under the Federal Estate Tax Act because the interest is terminable. A broad code must provide the best possible protection for the family in all cases, even though this may not provide desired tax advantages for certain larger estates. In estates falling in the federal estate tax bracket where careful planning may be expected, it is important to the operation of formula clauses that the family allowance be clearly terminable or clearly nonterminable. With the proposed section clearly creating a terminable interest, estate planners can create a plan which will operate with certainty. Finally, in order to facilitate administration of this allowance without court supervision it is necessary to provide a fairly simple and definite framework.

In determining the amount of the family allowance, account should be taken of both the previous standard of living and the nature of other resources available to the family to meet current living expenses until the estate can be administered and assets distributed. While the death of the principal income producer may necessitate some change in the standard of living, there must also be a period of adjustment. If the surviving spouse has a substantial income, this may be taken into account. Whether life insurance proceeds payable in a lump sum or periodic installments were intended by the decedent to be used for the period of adjustment or to be conserved as capital may be considered. A living trust may provide the needed income without resorting to the probate estate. If a husband has been the principal source of family support, a wife should not be expected to use her capital to support the family.

Obviously, need is relative to the circumstances, and what is reasonable must be decided on the basis of the facts of each individual case. Note,

however, that under the next section the personal representative may not determine an allowance of more than $500 per month for one year; a Court order would be necessary if a greater allowance is reasonably necessary.

MAINE COMMENT

Prior Maine law. Prior Maine law provided for an allowance for a decedent's widow, to be determined by the Probate Court, allowable only out of personal property, and only in cases where (1) there was no will, (2) the widow is not provided for in the will, (3) the widow waived the provisions made for her in a will, or (4) the decedent's estate is insolvent. The court could also allow the widow one mettinghouse pew of which the decedent died seized. A similar allowance could be made by the court from personal property for the widower of a decedent who died solvent, and for children under 14 and sick children between 14 and 18 in an insolvent estate, and for children under 12 in a solvent estate.

§ 2-404. Source, determination and documentation

If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to homestead and exempt property. Subject to this restriction, the surviving spouse, the guardians of the minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make these selections if the surviving spouse, the children or the guardians of the minor children are unable or fail to do so within a reasonable time or if there are no guardians of the minor children. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. He may determine the family allowance in a lump sum not exceeding $6,000 or periodic installments not exceeding $500 per month for one year, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief, which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined.

UNIFORM PROBATE CODE COMMENT

See Sections 3-902, 3-906 and 3-907.

§ 2-405. Estate property exempt

Notwithstanding any provisions to the contrary, any part of the decedent's estate which shall be exempt under Title 14, section 4401, on the date of decedent's death, shall not be liable for payment of debts of the decedent or claims against his estate; provided, however, that nothing in this section shall be deemed to affect the provisions of sections 2-401 through 2-404.

MAINE COMMENT

General. This section was added to this Part of the Uniform Probate Code version to incorporate provisions in prior Maine law providing exemption

for the estate of certain kinds of property set forth in Title 14, section 4401 to the extent that the value of such property exceeds the amount of the exemption provided for the surviving spouse or children under the Maine Probate Code, section 2-402. This section replaces the former Title 18, section 1858.

PART 5

WILLS

UNIFORM PROBATE CODE GENERAL COMMENT

Part 5 of Article II deals with capacity and formalities for execution and revocation of wills. If the will is to be restored to its role as the major instrument for disposition of wealth at death, its execution must be kept simple. The basic intent of these sections is to validate the will whenever possible. To this end, the age for making wills is lowered to eighteen, formalities for a written and attested will are kept to a minimum, holographic wills written and signed by the testator are authorized, choice of law as to validity of execution is broadened, and revocation by operation of law is limited to divorce or annulment. However, the statute also provides for a more formal method of execution with acknowledgment before a public officer (the self-proved will).

§ 2-501. Who may make a will

Any person 18 or more years of age who is of sound mind may make a will.

UNIFORM PROBATE CODE COMMENT

This section states a uniform minimum age of eighteen for capacity to execute a will. "Minor" is defined in Section 1-201, and may involve a different age than that prescribed here.

MAINE COMMENT

Prior Maine law. Prior Maine law provided that a person of the age of 18 years, or a married person, widow or widower of any age could make a will.

§ 2-502. Execution

Except as provided for holographic wills, writings within section 2-513, and wills within section 2-506, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least 2 persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

UNIFORM PROBATE CODE COMMENT

The formalities for execution of a witnessed will have been reduced to a minimum. Execution under this section normally would be accomplished by signature of the testator and of two witnesses; each of the persons signing as witnesses must "witness" any of the following: the signing of the will by the testator, an acknowledgment by the testator that the signature is his, or

an acknowledgment by the testator that the document is his will. Signing by the testator may be by mark under general rules relating to what constitutes a signature; or the will may be signed on behalf of the testator by another person signing the testator's name at his direction and in his presence. There is no requirement that the testator publish the document as his will, or that he request the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other. The testator may sign the will outside the presence of the witnesses if he later acknowledges to the witnesses that the signature is his or that the document is his will, and they sign as witnesses. There is no requirement that the testator's signature be at the end of the will; thus, if he writes his name in the body of the will and intends it to be his signature, this would satisfy the statute. The intent is to validate wills which meet the minimal formalities of the statute.

A will which does not meet these requirements may be valid under Section 2-503 as a holograph.

MAINE COMMENT

Prior Maine law. Prior Maine law required that 3 witnesses subscribe the will in the testator's presence.

§ 2-503. Holographic will

A will which does not comply with section 2-502 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator.

UNIFORM PROBATE CODE COMMENT

This section enables a testator to write his own will in his handwriting. There need be no witnesses. The only requirement is that the signature and the material provisions of the will be in the testator's handwriting. By requiring only the "material provisions" to be in the testator's handwriting (rather than requiring, as some existing statutes do, that the will be "entirely" in the testator's handwriting) a holograph may be valid even though immaterial parts such as date or introductory wording be printed or stamped. A valid holograph might even be executed on some printed will forms if the printed portion could be eliminated and the handwritten portion could evidence the testator's will. For persons unable to obtain legal assistance, the holographic will may be adequate.

MAINE COMMENT

Prior Maine law. Prior Maine law did not provide for holographic wills.

§ 2-504. Self-proved will

(a) Any will may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate in substantially the following form:

I, ..., the testator, sign my name to this instrument this ..... day of ....., 19..., and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me). that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

.....
Testator

We, ..., ..., the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

.....
Witness

.....
Witness

The State of .....

County of .....

Subscribed, sworn to and acknowledged before me by ....., the testator and subscribed and sworn to before me by ....., and ....., witnesses, this .... day of .....

(Seal) (Signed) .....

.....
(Official capacity of officer)

(b) An attested will may at any time subsequent to its execution be made self-proved by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where the acknowledgment occurs and evidenced by the officer's certificate, attached or annexed to the will in substantially the following form:

The State of .....

County of .....

We, ..., ..., and ....., the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly (or willingly directed another to sign for him), and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hear-

ing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time eighteen years of age or older, of sound mind and under no constraint or undue influence.

.....
Testator

.....
Witness

.....
Witness

Subscribed, sworn to and acknowledged before me by ....., the testator, and subscribed and sworn to before me by ....., and ....., witnesses, this .... day of .....

(Seal) **(Signed) .....**

.....
(Official capacity of officer)

UNIFORM PROBATE CODE COMMENT

A self-proved will may be admitted to probate as provided in Sections 3-303, 3-405 and 3-406 without the testimony of any subscribing witness, but otherwise it is treated no differently than a will not self-proved. Thus, a self-proved will may be contested (except in regard to signature requirements), revoked, or amended by a codicil in exactly the same fashion as a will not self-proved. The significance of the procedural advantage for a self-proved will is limited to formal testacy proceedings because Section 3-303 dealing with informal probate dispenses with the necessity of testimony of witnesses even though the instrument is not self-proved under this section.

The original text of this section directed that the officer who assisted the execution of a self-proved will be authorized to act by virtue of the laws of "this State", thereby restricting this mode of execution to wills offered for probate in the state where they were executed. Also, the original text authorized only the addition to an already signed and witnessed will, of an acknowledgment of the testator and affidavits of the witnesses, thereby requiring testator and witnesses to sign twice even though the entire execution ceremony occurred in the presence of a notary or other official. In 1975, the Joint Editorial Board recommended the substitution of new text that eliminates these problems.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate version was changed by deletion of the requirement of an official seal in each of the subsections. Under Maine law, district court judges, attorneys and justices of the peace are officers authorized to administer oaths, but no provision is made for their use of official seals. See Title 4, sections 169 and 1056.

Prior Maine law. Prior Maine law contained no provision for self-proved wills.

§ 2-505. Who may witness

(a) Any person generally competent to be a witness may act as a witness to a will.

(b) A will or any provision thereof is not invalid because the will is signed by an interested witness.

UNIFORM PROBATE CODE COMMENT

This section simplifies the law relating to interested witnesses. Interest no longer disqualifies a person as a witness, nor does it invalidate or forfeit a gift under the will. Of course, the purpose of this change is not to foster use of interested witnesses, and attorneys will continue to use disinterested witnesses in execution of wills. But the rare and innocent use of a member of the testator's family on a homedrawn will would no longer be penalized. This change does not increase appreciably the opportunity for fraud or undue influence. A substantial gift by will to a person who is one of the witnesses to the execution of the will would itself be a suspicious circumstance, and the gift could be challenged on grounds of undue influence. The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as witness but to use disinterested witnesses.

An interested witness is competent to testify to prove execution of the will, under Section 3-406.

MAINE COMMENT

Prior Maine law. Under prior Maine law a witness to the execution of a will could not take under that will except to the extent of the value of any share that he would be entitled to take by intestacy.

§ 2-506. Choice of law as to execution

A written will is valid if executed in compliance with section 2-502 or 2-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.

UNIFORM PROBATE CODE COMMENT

This section permits probate of wills in this state under certain conditions even if they are not executed in accordance with the formalities of Section 2-502. Such wills must be in writing but otherwise are valid if they meet the requirements for execution of the law of the place where the will is executed (when it is executed in another state or country) or the law of testator's domicile, abode or nationality at either the time of execution or at the time of death. Thus, if testator is domiciled in state 1 and executes a typed will merely by signing it without witnesses in state 2 while on vacation there, the Court of this state would recognize the will as valid if the law of either state 1 or state 2 permits execution by signature alone. Or if a national of Mexico executes a written will in this state which does not meet the requirements of Section 2-502 but meets the requirements of Mexican law, the will would be recognized as validly executed under this section. The purpose of this section is to provide a wide opportunity for validation of expectations of testators. When the Uniform Probate Code is widely adopted, the impact of this section will become minimal.

A similar provision relating to choice of law as to revocation was considered but was not included. Revocation by subsequent instruments are covered. Revocations by act, other than partial revocations, do not cause much difficulty in regard to choice of laws.

MAINE COMMENT

Prior Maine law. Prior Maine law authorized the probate of any will that was executed in a foreign jurisdiction in compliance with the law of that jurisdiction.

§ 2-507. Revocation by writing or by act

A will or any part thereof is revoked

(1) By a subsequent will which revokes the prior will or part expressly or by inconsistency; or

(2) By being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction.

UNIFORM PROBATE CODE COMMENT

Revocation of a will may be by either a subsequent will or an act done to the document. If revocation is by a subsequent will, it must be properly executed. This section employs the traditional language which has been interpreted by the courts in many cases. It leaves to the Court the determination of whether a subsequent will which has no express revocation clause is inconsistent with the prior will so as to revoke it wholly or partially, and in the case of an act done to the document the determination of whether the act is a sufficient burning, tearing, canceling, obliteration or destruction and was done with the intent and for the purpose of revoking. The latter necessarily involves exploration of extrinsic evidence, including statements of testator as to intent.

The section specifically permits partial revocation. Each Court is free to apply its own doctrine of dependent relative revocation.

The section does not affect present law in regard to the case of accidental destruction which is later confirmed by revocatory intention.

MAINE COMMENT

Prior Maine law. Prior Maine law had no express statutory provision for partial revocation, although partial revocation by obliteration had been upheld in case law. **Swan v. Swan,** 154 Me. 276, 147 A 2d 140 (1958).

§ 2-508. Revocation by divorce; no revocation by other changes of circumstances

If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of

the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of Section 2-802, subsection (b). A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of circumstances other than as described in this section revokes a will.

UNIFORM PROBATE CODE COMMENT

The section deals with what is sometimes called revocation by operation of law. It provides for revocation by a divorce or annulment only. No other change in circumstances operate to revoke the will; this is intended to change the rule in some states that subsequent marriage or marriage plus birth of issue operate to revoke a will. Of course, a specific devise may be adeemed by transfer of the property during the testator's lifetime except as otherwise provided in this Code; although this is occasionally called revocation, it is not within the present section. The provisions with regard to invalid divorce decrees parallel those in Section 2-802. Neither this section nor 2-802 includes "divorce from bed and board" as an event which affects devises or marital rights on death.

But see Section 2-204 providing that a complete property settlement entered into after or in anticipation of separation or divorce constitutes a renunciation of all benefits under a prior will, unless the settlement provides otherwise.

Although this Section does not provide for revocation of a will by subsequent marriage of the testator, the spouse may be protected by Section 2-301 or an elective share under Section 2-201.

MAINE COMMENT

General. While a decree of separation does not in itself revoke a will under this section, the Maine Probate Code, section 2-204, provides that a complete property settlement entered into after or in contemplation of separation or divorce constitutes a renunciation of all benefits under a prior will, in the absence of contrary provisions in the settlement.

Prior Maine law. Prior Maine law, in former Title 18, section 8, provided in general terms for revocation by law from subsequent changes in the condition and circumstances of the maker of the will. The combination of a divorce and property settlement had been held to revoke a will under that statute, Caswell v. Kent, 158 Me. 493, 186 A.2d 581 (1962), however, it had also been held that remarriage and birth of a child to a decedent 3 years after the execution of his will did not revoke the will under the former statute in light

of other statutory protections for the omitted new spouse and child, Appeal of de Mendoza, 141 Me. 299, 43 A.2d 816 (1945).

§ 2-509. Revival of revoked will

(a) If a 2nd will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by acts under Section 2-507, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the 2nd will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed.

(b) If a 2nd will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by a 3rd will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the 3rd will that the testator intended the first will to take effect.

UNIFORM PROBATE CODE COMMENT

This section adopts a limited revival doctrine. If testator executes will no. 1 and later executes will no. 2 revoking will no. 1 and still later revokes will no. 2 by act such as destruction, there is a question as to whether testator intended to die intestate or have will no. 1 revived as his last will. Under this section will no. 1 can be probated as testator's last will if his intent to that effect can be established. For this purpose testimony as to his statements at the time he revokes will no. 2 or at a later date can be admitted. If will no. 2 is revoked by a third will, will no. 1 would remain revoked except to the extent that will no. 3 showed an intent to have will no. 1 effective.

MAINE COMMENT

Prior Maine law. No prior Maine statutes or cases expressly covered revival of revoked wills, although one case had applied the doctrine of dependent relative revocation. Appeal of Thompson, 114 Me. 338, 96 A. 238 (1915).

§ 2-510. Incorporation by reference

Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

MAINE COMMENT

Prior Maine law. No prior Maine statutes covered incorporation by reference, but prior Maine case law is generally consistent with this section. Canal National Bank v. Chapman, 157 Me. 309, 171 A.2d 919 (1961).

§ 2-511. Testamentary additions to trusts

A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will to the trustee of a trust established or to be established by the testator or by the testator and some other person or by some other person, including a funded or unfunded life insurance trust, although

the trustor has reserved any or all rights of ownership of the insurance contracts, if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will, executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator, regardless of the existence, size, or character of the corpus of the trust. The devise is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised (1) is not deemed to be held under a testamentary trust of the testator but becomes a part of the trust to which it is given and (2) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator, regardless of whether made before or after the execution of the testator's will, and, if the testator's will so provides, including any amendments to the trust made after the death of the testator. A revocation or termination of the trust before the death of the testator causes the devise to lapse.

UNIFORM PROBATE CODE COMMENT

This is Section 1 of the Uniform Testamentary Additions to Trusts Act.

MAINE COMMENT

Prior Maine law. Prior Maine law contained essentially identical provisions under former Title 18, section 7, except that the phrase "to be established" was not previously contained in the first sentence. In light of the modifying language that follows that phrase, the new section makes no change from prior Maine law. The phrase "to be established" in the new section conforms to the language in Section 1 of the Uniform Testamentary Additions to Trusts Act and to Section 2-511 of the Uniform Probate Code and is included in the Maine Probate Code, section 2-511 to avoid any implication of an intent to depart from those uniform acts.

§ 2-512. Events of independent significance

A will may dispose of property by reference to acts and events which have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of a will of another person is such an event.

§ 2-513. Separte writing identifying bequest of tangible property

Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, and securities, and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by him and must describe the items and the devisees with reasonable certainty. The writing may be referred to as

one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing which has no significance apart from its effect upon the dispositions made by the will.

UNIFORM PROBATE CODE COMMENT

As part of the broader policy of effectuating a testator's intent and of relaxing formalities of execution, this section permits a testator to refer in his will to a separate document disposing of certain tangible personality. The separate document may be prepared after execution of the will, so would not come within Section 2-510 on incorporation by reference. It may even be altered from time to time. It need only be either in the testator's handwriting or signed by him. The typical case would be a list of personal effects and the persons whom the testator desired to take specified items.

PART 6

RULES OF CONSTRUCTION

UNIFORM PROBATE CODE GENERAL COMMENT

Part 6 deals with a variety of construction problems which commonly occur in wills. All of the "rules" set forth in this part yield to a contrary intent expressed in the will and are therefore merely presumptions. Some of the sections are found in all states, with some variation in wording; others are relatively new. The sections deal with such problems as death before the testator (lapse), the inclusiveness of the will as to property of the testator, effect of failure of a gift in the will, change in form of securities specifically devised, ademption by reason of fire, sale and the like, exoneration, exercise of power of appointment by general language in the will, and the kinds of persons deemed to be included within various class gifts which are expressed in terms of family relationships.

§ 2-601. Requirement that devisee survive testator by 120 hours

A devisee who does not survive the testator by 120 hours is treated as if he predeceased the testator, unless the will of decedent contains some language dealing explicitly with simultaneous deaths or deaths in a common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will.

UNIFORM PROBATE CODE COMMENT

This parallels Section 2-104 requiring an heir to survive by 120 hours in order to inherit.

MAINE COMMENT

General. Any will included in an estate plan involving a marital deduction should take into account the possible tax consequences of this section. See the Uniform Probate Code comment to section 2-104. As in section 2-104, this section is drafted to apply to a typical small estate in which the marital deduction is not a consideration, and where this section will serve to avoid un-

necessary multiple administrations and in some instances prevent the property from passing to persons whom the testator would presumably not intend to be takers under the will. The section expressly provides for contrary provisions in the will which may be used to avoid undesired tax consequences.

§ 2-602. Choice of law as to meaning and effect of wills

The meaning and legal effect of a disposition in a will shall be determined by the local law of a particular state selected by the testator in his instrument unless the application of that law is contrary to the provisions relating to the elective share described in Part 2, the provisions relating to exempt property and allowances described in Part 4 or any other public policy of this State otherwise applicable to the disposition.

UNIFORM PROBATE CODE COMMENT

New York Estates, Powers & Trusts Law Sec. 3-5.1(h) and Illinois Probate Act Sec. 896(b) direct respect for a testator's choice of local law with reference to personal and intangible property situated in the enacting state. This provision goes further and enables a testator to select the law of a particular state for purposes of interpreting his will without regard to the location of property covered thereby. So long as local public policy is accommodated, the section should be accepted as necessary and desirable to add to the utility of wills. Choice of law regarding formal validity of a will is in Sec. 2-506. See also Sections 3-202 and 3-408.

In 1975, the Joint Editorial Board recommended the addition of explicit reference to the elective share described in Article II, Part 2, and the exemptions and allowances described in Article II, Part 4, as embodying policies of this state which may not be circumvented by a testator's choice of applicable law.

§ 2-603. Rules of construction and intention

The intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this Part apply unless a contrary intention is indicated by the will.

§ 2-604. Construction that will passes all property; after-acquired property

A will is construed to pass all property which the testator owns at his death including property acquired after the execution of the will. A devise of property conveys all the estate of a devisor unless it appears by his will that he intended to convey a lesser estate.

MAINE COMMENT

Maine change from Uniform Probate Code. The last sentence was added to the Uniform Probate Code version to make clear that the prior Maine presumption that a devise passes the testator's full interest in the property is being retained.

§ 2-605. Anti-lapse; deceased devisee; class gifts

If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive

the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee, and if they are all of the same degree of kinship they take equally, but if of unequal degree then those of more remote degree take by per capita at each generation as provided in section 2-106. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will.

UNIFORM PROBATE CODE COMMENT

This section prevents lapse by death of a devisee before the testator if the devisee is a relative and leaves issue who survives the testator. A relative is one related to the testator by kinship and is limited to those who can inherit under Section 2-103 (through grandparents); it does not include persons related by marriage. Issue include adopted persons and illegitimates to the extent they would inherit from the devisee; see Section 1-201 and 2-109. Note that the section is broader than some existing anti-lapse statutes which apply only to devises to children and other descendants, but is narrower than those which apply to devises to any person. The section is expressly applicable to class gifts, thereby eliminating a frequent source of litigation. It also applies to the so-called "void" gift, where the devisee is dead at the time of execution of the will. This, though contrary to some decisions, seems justified. It still seems likely that the testator would want the issue of a person included in a class term but dead when the will is made to be treated like the issue of another member of the class who was alive at the time the will was executed but who died before the testator.

The five day survival requirement stated in Section 2-601 does not require issue who would be substituted for their parent by this section to survive **their parent** by any set period.

Section 2-106 describes the method of division when a taking by representation is directed by the Code.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by the substitution of the reference to per capita representation at each generation instead of "by representation" in order to conform this section to the modification of the Uniform Probate Code version of section 2-106.

§ 2-606. Failure of testamentary provision

(a) Except as provided in section 2-605 if a devise other than a residuary devise fails for any reason, it becomes a part of the residue.

(b) Except as provided in section 2-605 if the residue is devised to 2 or more persons and the share of one of the residuary devisees fails for any reason, his share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue.

UNIFORM PROBATE CODE COMMENT

If a devise fails by reason of lapse and the conditions of Section 2-605 are met, the latter section governs rather than this section. There is also a special rule for renunciation contained in Section 2-801; a renounced devise may be governed by either Section 2-605 or the present section, depending on the circumstances.

MAINE COMMENT

Prior Maine law. Prior Maine law contained substantially similar provisions except that a lapsed gift to a residuary devisee did not pass to the other residuary devisees, as provided in subsection (b)

§ 2-607. Change in securities; accessions; nonademption

(a) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

(1) As much of the devised securities as is a part of the estate at the time of the testator's death;

(2) Any additional or other securities of the same entity owned by the testator that arise from the specifically devised securities by reason of action initiated by the entity excluding any acquired by exercise of purchase options;

(3) Securities of another entity owned by the testator that are received in exchange for the specifically devised securities as a result of a merger, consolidation or reorganization or other similar action initiated by the entity; and

(4) Any additional securities of the entity owned by the testator that arise from the specifically devised securities as a result of a plan of reinvestment if it is a regulated investment company.

(b) Distributions prior to death with respect to a specifically devised security not provided for in subsection (a) are not part of the specific devise.

UNIFORM PROBATE CODE COMMENT

The Joint Editorial Board considered amending Subsection (a) (2) so as to exclude additional securities of the same entity that were not acquired by testator as a result of his ownership of the devised securities. It concluded that, in context, the present language is clear enough to make the proposed amendment unnecessary.

Subsection (b) is intended to codify existing law to the effect that cash dividends declared and payable as of a record date occurring before the testator's death do not pass as a part of the specific devise even though paid after death. See Section 4, Revised Uniform Principal and Income Act.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code

version was changed by adding the language referring to the securities covered by subsection (a), paragraphs (2), (3) and (4) as being those which arise from the specifically devised securities. The change was made solely to clarify the intended meaning of the section, not to make any substantive change from the Uniform Probate Code version.

§ 2-608. Nonademption of specific devises in certain cases; unpaid proceeds of sale, condemnation or insurance; sale by conservator

(a) A specific devisee has the right to the remaining specifically devised property and:

(1) Any balance of the purchase price, together with any security interest, owing from a purchaser to the testator at death by reason of sale of the property;

(2) Any amount of a condemnation award for the taking of the property unpaid at death;

(3) Any proceeds unpaid at death on fire or casualty insurance on the property; and

(4) Property owned by testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation.

(b) If specifically devised property is sold by a conservator, or if a condemnation award or insurance proceeds are paid to a conservator as a result of condemnation, fire, or casualty, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the condemnation award, or the insurance proceeds. This subsection does not aply if after the sale, condemnation or casualty, it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by one year. The right of the specific devisee under this subsection is reduced by any right he has under subsection (a).

UNIFORM PROBATE CODE COMMENT

In 1975, the Joint Editorial Board recommended a re-ordering of the title of this section and a reversal of the original order of the subsections. This recommendation was designed to correct an unintended interpretation of the section to the effect that all of the events described in subsections (a) and (b) had relevance only when the testator was under a conservatorship. The original intent of the section, made more apparent by this re-ordering, was to prevent ademption in all cases involving sale, condemnation or destruction of specifically devised assets where testator's death occurred before the proceeds of the sale, condemnation or any insurance, had been paid to the testator.

§ 2-609. Nonexoneration

A specific devise passes subject to any mortgage interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

UNIFORM PROBATE CODE COMMENT

See Section 3-814 empowering the personal representative to pay an encumbrance under some circumstances; the last sentence of that section makes it clear that such payment does not increase the right of the specific devisee. The present section governs the substantive rights of the devisee. The common law rule of exoneration of the specific devise is abolished by this section, and the contrary rule is adopted.

For the rule as to exempt property, see Section 2-402.

MAINE COMMENT

Prior Maine law. Prior Maine case law held that debts secured by mortgage on real property would be exonerated in the absence of a contrary provision in the will. Eaton v. MacDonald, 154 Me. 227, 145 A.2d 369 (1958)

§ 2-610. Exercise of power of appointment

A general residuary clause in a will, or a will making general disposition of all of the testator's property, does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other indication of intention to include the property subject to the power.

UNIFORM PROBATE CODE COMMENT

Although there is some indication that more states will adopt special legislation on powers of appointment, and this Code has therefore generally avoided any provisions relating to powers of appointment, there is great need for uniformity on the subject of exercise by a will purporting to dispose of all of the donee's property, whether by a standard residuary clause or a general recital of property passing under the will. Although a substantial number of states have legislation to the effect that a will with a general residuary clause does manifest an intent to exercise a power, the contrary rule is stated in the present section for two reasons: (1) this is still the majority rule in the United States, and (2) most powers of appointment are created in marital deduction trusts and the donor would prefer to have the property pass under his trust instrument unless the donee affirmatively manifests an intent to exercise the power.

Under this section and Section 2-603 the intent to exercise the power is effective if it is "indicated by the will." This wording permits a Court to find the manifest intent if the language of the will interpreted in light of all the surrounding circumstances shows that the donee intended an exercise, except, of course, if the donor has conditioned exercise on an express reference to the original creating instrument. In other words, the modern liberal rule on interpretation of the donee's will would be available.

MAINE COMMENT

Prior Maine law. Prior Maine case law had held that a general residuary clause exercises a general testamentary power of appointment held by the

testator where the testator knew that he had such a power and unless the circumstances surrounding the execution of the will indicated an intent not to exercise the power. Bar Harbor Banking and Trust Co. v. Preachers' Aid Society, 244 A.2d 558 (Me. 1968).

§ 2-611. Construction of generic terms in wills and trust instruments

Halfbloods, adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship in wills and in trust instruments in accordance with rules for determining relationships for purposes of intestate succession, but a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father or is so recognized by the testator or settlor of the trust.

UNIFORM PROBATE CODE COMMENT

The purpose of this section is to facilitate a modern construction of gifts, usually class gifts, in wills.

In 1975, the Joint Editorial Board recommended that the section end with the words, "of intestate succession", in order to align the section with the Uniform Parentage Act of 1973. The Board also recommended retention, as a bracketed alternative form for states that do not enact the Uniform Parentage Act, of the language of the 1969 text beginning with "but a person born out of wedlock", and continuing through to the end of the original section.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version was changed by adding explicit reference to wills and trust instruments in order to clearly conform the rule of construction for intervivos trusts to the rule of Uniform Probate Code construction for similar terms in wills and by further providing for inclusion of illegitimate children as children of the father where they are so recognized by the testator or settlor even though not treated as children by the father himself.

Prior Maine law. Prior Maine case law had held that an illegitimate child of a testatrix's brother, although a statutory heir of his father, was not included within the testatrix's bequest to "nephews." Lyon v. Lyon, 88 Me. 395, 41 Atl. 180 (1896). By providing that the persons specified are construed to be included in class gift terminology and terms of relationship, a child coming within the classification of persons covered by the section would be a nephew or niece of a testator if the child were construed under this section to be a child of the testator's sibling.

Prior Maine case law had also held that words in contracts or wills were to be given their legal meaning unless the contract or will contained a different indication. See Bolton v. Bolton, 73 Me. 299 (1882).

§ 2-612. Ademption by satisfaction

Property which a testator gave in his lifetime to a person is treated as a

satisfaction of a devise to that person in whole or in part, only if the will provides for deduction of the lifetime gift, or the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in writing that the gift is in satisfaction. For purpose of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first.

UNIFORM PROBATE CODE COMMENT

This section parallels Section 2-110 on advancements and follows the same policy of requiring written evidence that lifetime gifts are to be taken into account in distribution of an estate, whether testate or intestate. Although Courts traditionally call this "ademption by satisfaction" when a will is involved, and "advancement" when the estate is intestate, the difference in terminology is not significant. Some wills expressly provide for lifetime advances by a hotchpot clause. Where the will is silent, the above section would require either the testator to declare in writing that the gift is an advance or satisfaction or the devisee to acknowledge the same in writing. The second sentence on value accords with Section 2-110 and would apply if property such as stock is given. If the devise is specific, a gift of the specific property during lifetime would adeem the devise by extinction rather than by satisfaction, and this section would be inapplicable. If a devisee to whom an advancement is made predeceases the testator and his issue take under 2-605, they take the same devise as their ancestor; if the devise is reduced by reason of this section as to the ancestor, it is automatically reduced as to his issue. In this respect the rule in testacy differs from that in intestacy; see Section 2-110.

PART 7

CONTRACTUAL ARRANGEMENTS RELATING TO DEATH

(See also Article VI)

§ 2-701. Contracts concerning succession

A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this Act, can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

UNIFORM PROBATE CODE COMMENT

It is the purpose of this section to tighten the methods by which contracts concerning succession may be proved. Oral contracts not to revoke wills have given rise to much litigation in a number of states; and in many states if two persons execute a single document as their joint will, this gives rise to a pre-

sumption that the parties had contracted not to revoke the will except by consent of both.

This section requires that either the will must set forth the material provisions of the contract, or the will must make express reference to the contract and extrinsic evidence prove the terms of the contract, or there must be a separate writing signed by the decedent evidencing the contract. Oral testimony regarding the contract is permitted if the will makes reference to the contract, but this provision of the statute is not intended to affect normal rules regarding admissibility of evidence.

PART 8

GENERAL PROVISIONS

UNIFORM PROBATE CODE GENERAL COMMENT

Part 8 contains three general provisions which cut across both testate and intestate succession. The first section permits renunciation; the existing law in mose states permits renunciation of gifts by will but not by intestate succession, a distinction which cannot be defended on policy grounds. The second section deals with the effect of divorce and separation on the right to elect against a will, exempt property and allowances, and an intestate share. The last section, an optional provision, spells out the legal consequence of murder on the right of the murderer to take as heir, devisee, joint tenant or life insurance beneficiary.

§ 2-801. Renunciation of property interests

(a) A person, or a person with legal authority to represent an incapacitated or protected person or the estate of a deceased person, to whom an interest in or with respect to property or an interest therein or a power of appointment over such property devolves by whatever means may renounce it in whole or in part by delivering a written renunciation under this section. The right to renounce exists notwithstanding any limitation on the interest of the person renouncing in the nature of a spendthrift provision of similar restriction.

(b) A renunciation under this section must be an irrevocable and unqualified refusal by a person to accept an interest in property, and must comply with the following requirements:

(1) If the property, interest or power has devolved to the person renouncing under a testamentary instrument or by the laws of intestacy, the renunciation must be received by the personal representative, or other fiduciary, of the decedent or deceased donee of a power of appointment, or by the holder of the legal title to the property to which the interest relates, (i) in the case of a present interest, not later than 9 months after the death of the deceased owner or deceased donee of the power, or (ii) in the case of a future interest, not later than 9 months after the event determining that the taker of the property, interest or power has become finally ascertained and his interest is indefeasibly vested. A copy of the renunciation

may be filed in the Registry of Probate of the court in which proceedings for the administration of the deceased owner or deceased donee of the power have been commenced, or if no administration has been commenced, in the court where such proceedings could be commenced.

(2) If the property, interest or power has devolved to the person renouncing under a nontestamentary instrument or contract, the renunciation must be received by the transferor, his legal representative, or the holder of the legal title to the property to which the interest relates (i) in the case of a present interest, not later than 9 months after the effective date of the nontestamentary instrument or contract, or (ii) in the case of a future interest, not later than 9 months after the event determining that the taker of the property, interest or power has become finally ascertained and his interest is indefeasibly vested. If the person entitled to renounce does not have actual knowledge of the existence of his interest, the time limits for receipt of the renunciation shall be extended to not later than 9 months after he has knowledge of the existence of his interest. The effective date of a revocable instrument or contract is the date on which the maker no longer has power to revoke it or to transfer to himself or another the entire legal and equitable ownership of the interest.

(c) A surviving joint tenant may renounce as a separate interest any property or interest therein devolving to him by right of survivorship. A surviving joint tenant may renounce the entire interest in any property or interest therein that is the subject of a joint tenancy devolving to him, if the joint tenancy was created by act of a deceased joint tenant and the survivor did not join in creating the joint tenancy.

(d) If real property or an interest therein or a power thereover is renounced, a copy of the renunciation may be recorded in the Registry of Deeds of the county in which the property is located, and the recording or lack of recording shall have the same effect for purposes of the recording act as the recording or lack of recording of other instruments under Title 33, section 201.

(e) A renunciation under this section shall describe the property, interest or power renounced, declare the renunciation and extent thereof, be signed by the person renouncing, and if within the provisions of subsection (b), paragraph (2), declare the date the person renouncing first had actual knowledge of the existence of his interest whenever that date is material under subsection (b), paragraph (2).

(f) The devolution of any property or interest renounced under this section is governed by the following provisions of this subsection:

(1) If the property or interest devolved to the person renouncing under a testamentary instrument or under the laws of intestacy and the deceased owner or donee of a power of appointment has not provided for another disposition, it devolves as if the person renouncing had predeceased the decedent or, if the person renouncing was designated to take under a power of appointment exercised by a testamentary instrument, it devolves

as if the person renouncing had pre-deceased the donee of the power. Any future interest that takes effect in possession or enjoyment after the termination of the estate or interest renounced, takes effect as if the person renouncing had died before the event determining that the taker of the property or interest had become finally ascertained and his interest is indefeasibly vested. A renunciation relates back for all purposes to the date of death of the decedent, or of the donee of the power, or the determinative event, as the case may be.

(2) If the property or interest devolved to the person renouncing under a nontestamentary instrument or contract and the instrument or contract does not provide for another disposition, it devolves as if the person renouncing had died before the effective date of the instrument or contract. Any future interest that takes effect in possession or enjoyment at or after the termination of the renounced estate or interest, takes effect as if the person renouncing had died before the event determining the taker of the property or interest had become finally ascertained and his interest indefeasibly vested. A renunciation relates back for all purposes to the effective date of the instrument or the date of the determinative event, as the case may be.

(3) The renunciation or the written waiver of the right to disclaim is binding upon the person renouncing or waiving and upon all persons claiming through or under him.

(g) The right to renounce property or an interest therein or a power of appointment is barred by (1) an assignment, conveyance, encumbrance, pledge or transfer of the property or interest, or a contract therefor, (2) a written waiver of the right to renounce, (3) an acceptance of the property or interest or a benefit thereunder, or (4) a sale of the property or interest under judicial sale made before the renunciation is effected.

(h) This section does not abridge the right of a person to waive, release, disclaim or renounce property or an interest therein or a power of appointment under any other statute.

(i) An interest in property that exists on the effective date of this section as to which the time for renouncing has not expired under this section, may be renounced by compliance with this section.

(j) Any renunciation which is effective as a "qualified disclaimer" under section 2518(b) of the Internal Revenue Code is effective as a renunciation under this section, notwithstanding any provisions of this section to the contrary.

MAINE COMMENT

General. Although this section states the general requirements for an effective renunciation under the law of Maine, subject to subsection (h), federal requirements for disclaimers to be effective for federal tax purposes are governed by federal law. Whenever a renunciation may have federal tax consequences, special consideration must be given to the federal requirements,

particularly with respect to special time limitation extensions under Maine law concerning future interests under subsection (b), paragraphs (1) and (2) and the lack of knowledge of the disclaimant's interest under subsection (b), paragraph (2). Subsection (j) however, does assure that any disclaimer effective for federal tax purposes will also be an effective renunciation under state law.

Maine Changes from Uniform Probate Code. This section of the Uniform Probate Code, covering renunciation of testamentary interests, was generally redrafted in order to incorporate provisions for renouncing interests under both testamentary and nontestamentary instruments, and in order to achieve greater conformity between state renunciation requirements and federal tax disclaimer requirements without unduly sacrificing the state interest in allowing renunciations in certain situations where they would not be available under the federal tax requirements.

§ 2-802. **Effect of divorce, annulment and decree of separation**

(a) **A person who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he is married to the decedent at the time of death. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section.**

(b) For purposes of Parts 1, 2, 3 and 4 and of section 3-203, a surviving spouse does not include:

(1) A person who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each to the other, or subsequently live together as man and wife;

(2) A person who, following a decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a 3rd person, or

(3) A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

UNIFORM PROBATE CODE COMMENT

See Section 2-508 for similar provisions relating to the effect of divorce to revoke devises to a spouse.

Although some existing statutes bar the surviving spouse for desertion or adultery, the present section requires some definitive legal act to bar the surviving spouse. Normally, this is divorce. Subsection (a) states an obvious proposition, but subsection (b) deals with the difficult problem of invalid divorce or annulment, which is particularly frequent as to foreign divorce decrees but may arise as to a local decree where there is some defect in jurisdiction; the basic principle underlying these provisions is estoppel against the surviving spouse. Where there is only a legal separation, rather than a

divorce, succession patterns are not affected; but if the separation is accompanied by a complete property settlement, this may operate under Section 2-204 as a renunciation of benefits under a prior will and by intestate succession.

In 1975, the Joint Editorial Board recommended the addition, in the preliminary statement of subsection (b), of explicit reference to Section 3-203 which controls priorities for appointment as personal representative.

MAINE COMMENT

General. While a decree of separation does not terminate the status of husband and wife, the Maine Probate Code, section 2-204, provides that a complete property settlement entered into after or in contemplation of separation or divorce constitutes a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse, and constitutes a renunciation of all benefits by intestacy or by any provisions of a will executed prior to the settlement, in the absence of contrary provisions in the settlement. In addition, that section also provides for express waiver of all rights provided by Parts 1 and 2.

Prior Maine law. Prior Maine law provided that divorce, judicial separation and annulment terminated both spouse's rights of descent and distribution and rights to elect against a will.

§ 2-803. Effect of homicide on intestate succession, wills, joint assets, life insurance and beneficiary designations

(a) A surviving spouse, heir or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the will or under this Article, and the estate of decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

(b) Any joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and the killer has no rights by survivorship. This provision applies to joint tenancies in real and personal property, joint and multiple-party accounts in banks, savings and loan associations, credit unions and other institutions, and any other form of coownership with survivorship incidents.

(c) A named beneficiary of a bond, life insurance policy, or other contractual arrangement who feloniously and intentionally kills the principal obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent.

(d) Any other acquisition of property or interest by the killer shall be treated in accordance with the principles of this section.

(e) A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this section. In the absence of a conviction of

felonious and intentional killing a Court may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of this section.

(f) This section does not affect the rights of any person who, before rights under this section have been adjudicated, purchases from the killer for value and without notice property which the killer would have acquired except for this section, but the killer is liable for the amount of the proceeds or the value of the property. Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this section unless prior to payment it has received at its home office or principal address written notice of a claim under this section.

UNIFORM PROBATE CODE COMMENT

This section is bracketed to indicate that it may be omitted by an enacting state without difficulty.

A growing group of states have enacted statutes dealing with the problems covered by this section, and uniformity appears desirable. The section is confined to intentional and felonious homicide and excludes the accidental manslaughter killing.

At first it may appear that the matter dealt with is criminal in nature and not a proper matter for probate courts. However, the concept that a wrongdoer may not profit by his own wrong is a civil concept, and the probate court is the proper forum to determine the effect of killing on succession to property of the decedent. There are numerous situations where the same conduct gives rise to both criminal and civil consequences. A killing may result in criminal prosecution for murder and civil litigation by the murdered person's family under wrongful death statutes. While conviction in the criminal prosecution under this section treated as conclusive on the matter of succession to the murdered person's property, acquittal does not have the same consequences. This is because different considerations as well as a different burden of proof enter into the finding of guilty in the criminal prosecution. Hence it is possible that the defendant on a murder charge may be found not guilty and acquitted, but if the same person claims as an heir or devisee of the decedent, he may in the probate court be found to have feloniously and intentionally killed the decedent and thus be barred under this section from sharing in the estate. An analogy exists in the tax field, where a taxpayer may be acquitted of tax fraud in a criminal prosecution but found to have committed the fraud in a civil proceeding. In many of the cases arising under this section there may be no criminal prosecution because the murderer has committed suicide.

§ 2-804. Actions for wrongful death

(a) Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then the person or the corporation that

would have been liable if death had not ensued shall be liable for damages as provided in this section, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as shall amount to a felony.

(b) Every such action shall be brought by and in the name of the personal representative of the deceased person, and the amount recovered in every such action, except as otherwise provided, shall be for the exclusive benefit of the widow or widower, if no children, and of the children if no widow or widower, and ½ for the exclusive benefit of the surviving spouse and ½ for the exclusive benefit of the children to be divided equally among them, if there are both surviving spouse and children, and to the deceased's heirs to be distributed as provided in section 2-106, if there is neither surviving spouse nor children. The jury may give such damages as it shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the persons for whose benefit the action is brought, and in addition thereto shall give such damages as will compensate the estate of the deceased person for reasonable expenses of medical, surgical and hospital care and treatment and for reasonable funeral expenses, and in addition thereto may give damages not exceeding $10,000 for the loss of comfort, society and companionship of the deceased to the persons for whose benefit the action is brought, provided that the action shall be commenced within 2 years after the decedent's death. If a claim under this section is settled without an action having been commenced, the amount paid in settlement shall be distributed as provided in this subsection. No settlement on behalf of minor children shall be valid unless approved by the court, as provided in Title 14, section 1605.

(c) Whenever death ensues following a period of conscious suffering, as a result of personal injuries due to the wrongful act, neglect or default of any person, the person who caused the personal injuries resulting in such conscious suffering and death shall, in addition to the action at common law and damages recoverable therein, be liable in damages in a separate count in the same action for such death, brought, commenced and determined and subject to the same limitation as to the amount recoverable for such death and exclusively for the beneficiaries in the manner set forth in subsection (b), separately found, but in such cases there shall be only one recovery for the same injury.

MAINE COMMENT

General. This section was added to the Uniform Probate Code version in order to preserve and integrate prior Maine law concerning wrongful death actions.

§ 2-805. Simultaneous death

(a) This section may be cited as the "Uniform Simultaneous Death Act."

(b) Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons died otherwise than simultaneously, the property of each person shall be disposed of as if he were the survivor, except as provided otherwise in this chapter.

(c) Where a testamentary disposition of property depends upon the priority of death of the designated beneficiaries and there is no sufficient evidence that these beneficiaries died otherwise than simultaneously, the property thus disposed of shall be divided into as many equal portions as there are designated beneficiaries and these portions shall be distributed respectively to those who would take in the event that each designated beneficiary were the survivor.

(d) Where there is no sufficient evidence that 2 joint tenants died otherwise than simultaneously, the property so held shall be distributed ½ as if one had survived and ½ as if the other had survived. If there are more than 2 joint tenants and all of them have so died the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants.

(e) Where the decedents are the insured and the beneficiary respectively in policies of life or accident insurance and there is no sufficient evidence that they died otherwise than simultaneously, the proceeds of each policy shall be distributed as if the person whose life was insured therein survived.

(f) This section shall not apply to the distribution of the property of any person dying before July 26, 1941, nor to the distribution of the proceeds of any policy of life or accident insurance the effective date of which is prior to that date.

(g) This section shall not apply in the case of wills, deeds or tracts of insurance wherein provision has been made for distribution different from the provisions of said section.

(h) This section shall be so construed and interpreted as to effectuate their general purpose to make uniform the law in those states which enact them.

MAINE COMMENT

Prior Maine law. To the extent that the issues covered by this section had been resolved by case law, prior Maine law appeared to reach the same results indirectly by imposing a constructive trust on the murderer beneficiary. Dutill v. Dana, 148 Me. 541, 113 A.2d 499 (1955); Metropolitan Life Insurance Co. v. Wenckus, 244 A.2d 424 (Me. 1968).

PART 9

CUSTODY AND DEPOSIT OF WILLS

§ 2-901. Deposit of will with court in testator's lifetime

A will may be deposited by the testator or his agent for safekeeping, under rules of the court, with the court in the office of the register of probate in the county in which the testator is domiciled at the time of the will's deposit. Such will shall be enclosed in a sealed wrapper, endorsed with the name and residence of the testator and the date when deposited, and may have endorsed thereon the name of any person to whom it is to be delivered after the death of the testator. During the testator's lifetime a deposited will shall be delivered only to him or to a person authorized in writing signed by him to receive the will. A conservator may be allowed to examine a

deposited will of a protected testator under procedures designed to maintain the confidential character of the document to the extent possible and to assure that it will be resealed and left on deposit after the examination. Upon being informed of the testator's death, the court shall notify any person designated to receive the will and deliver it to him on request; or the court may deliver the will to the appropriate court.

UNIFORM PROBATE CODE COMMENT

Many states already have statutes permitting deposit of wills during a testator's lifetime. Most of these statutes have elaborate provisions governing purely administrative matters: how the will is to be enclosed in a sealed wrapper, what is to be endorsed on the wrapper, the form of receipt or certificate given to the testator, the fee to be charged, how the will is to be opened after testator's death and who is to be notified. Under this section, details have been left to Court rule, except as other relevant statutes such as one governing fees may apply.

It is, of course, vital to maintain the confidential nature of deposited wills. However, this obviously does not prevent the opening of the will after the death of the testator if necessary in order to determine the executor or other interested persons to be notified. Nor should it prevent opening the will to microfilm for confidential record storage, for example. These matters could again be regulated by Court rule.

It is suggested that in the near future it may be desirable to develop a central filing system regarding the presence of deposited wills, because the mobility of our modern population makes it probable that the testator will not die in the county where his will is deposited. Thus a statute might require that the local registrar notify an appropriate official, that the will is on file; the state official would in effect provide a clearing-house for information on location of deposited wills without disrupting the local administration.

The provision permitting examination of a will of a protected person by the conservator supplements Section 5-427.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version was changed by specifying that the deposit shall be made in the registry in the county of the testator's domicile rather than in any court and by incorporating the explicit provision of prior Maine law for sealing the will and endorsing the name of the person to whom it is to be delivered upon the testator's death.

Prior Maine law. This section replaces former Title 18, section 2.

§ 2-902. Duty of custodian of will; liability

After the death of a testator, any person having custody of a will of the testator shall deliver it with reasonable promptness to a person able to secure its probate and if none is known, to an appropriate court. Any person who willfully fails to deliver a will, or who willfully defaces or destroys any will

of a deceased person, is liable to any person aggrieved for the damages which may be sustained by such failure to deliver, or by such defacement or destruction. Any person who willfully refuses or fails to deliver a will, or who so defaces or destroys it, after being ordered by the court in a proceeding brought for the purpose of compelling delivery is subject to penalty for contempt of court.

UNIFORM PROBATE CODE COMMENT

Model Probate Code Section 63, slightly changed. A person authorized by a Court to accept delivery of a will from a custodian may, in addition to a registrar or clerk, be a universal successor or other person authorized under the law of another nation to carry out the terms of a will.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version was changed by incorporating express provisions of prior Maine law to protect against willful defacement or destruction as well as against willful nondelivery and by deleting the words "and on request of an interested person" in the first sentence in order to make clear that the duty to deliver such a will exists with or without a request by an interested person.

Prior Maine law. Prior Maine law under former Title 18, section 9, imposed a duty to deliver a will to the executor or to the Probate Court, and provided civil damage remedies for neglect to do so and contempt remedies, including being committed to jail, for neglect to do so without reasonable cause within 30 days after being so ordered by a court. Former Title 18, section 10 made it a misdemeanor to willfully suppress, secrete, deface or destroy the last will and testament of a deceased person with intent to injure or defraud.

ARTICLE III

PROBATE OF WILLS AND ADMINISTRATION

UNIFORM PROBATE CODE GENERAL COMMENT

The provisions of this Article describe the Flexible System of Administration of Decedents' Estates. Designed to be applicable to both intestate and testate estates and to provide persons interested in decedents' estates with as little or as much by way of procedural and adjudicative safeguards as may be suitable under varying circumstances, this system is the heart of the Uniform Probate Code.

The organization and detail of the system here described may be expressed in varying ways and some states may see fit to reframe parts of this Article to better accommodate local institutions. Variations in language from state to state can be tolerated without loss of the essential purposes of procedural uniformity and flexibility, if the following essential characteristics are carefully protected in the re-drafting process:

(1) Post-mortem probate of a will must occur to make a will effective and appointment of a personal representative by a public official after the decedent's death is required in order to create the duties and powers attending

the office of personal representative. Neither are compelled, however, but are left to be obtained by persons having an interest in the consequence of probate or appointment. Estates descend at death to successors identified by any probated will, or to heirs if no will is probated, subject to rights which may be implemented through administration.

(2) Two methods of securing probate of wills which include a non-adjudicative determination (informal probate) on the one hand, and a judicial determination after notice to all interested persons (formal probate) on the other, are provided.

(3) Two methods of securing appointment of a personal representative which include appointment without notice and without final adjudication of matters relevant to priority for appointment (informal appointment), on the one hand, and appointment by judicial order after notice to interested persons (formal appointment) on the other, are provided.

(4) A five day waiting period from death preventing informal probate or informal appointment of any but a special administrator is required.

(5) Probate of a will by informal or formal proceedings or an adjudication of intestacy may occur without any attendant requirement of appointment of a personal representative.

(6) One judicial, in rem, proceeding encompassing formal probate of any wills (or a determination after notice that the decedent left no will), appointment of a personal representative and complete settlement of an estate under continuing supervision of the Court (supervised administration) is provided for testators and persons interested in a decedent's estate, whether testate or intestate, who desire to use it.

(7) Unless supervised administration is sought and ordered, persons interested in estates (including personal representatives, whether appointed informally or after notice) may use an "in and out" relationship to the Court so that any question or assumption relating to the estate, including the status of an estate as testate or intestate, matters relating to one or more claims, disputed titles, accounts of personal representatives, and distribution, may be resolved or established by adjudication after notice without necessarily subjecting the estate to judicial orders in regard to other or further questions or assumptions.

(8) The status of a decedent in regard to whether he left a valid will or died intestate must be resolved by adjudication after notice in proceedings commenced within three years after his death. If not so resolved, any will probated informally becomes final, and if there is no such probate, the status of the decedent as intestate is finally determined by a statute of limitations which bars probate and appointment unless requested within three years after death.

(9) Personal representatives appointed informally or after notice, and whether supervised or not, have statutory powers enabling them to collect, protect, sell, distribute and otherwise handle all steps in administration with-

out further order of the Court, except that supervised personal representatives may be subjected to special restrictions on power as endorsed on their letters.

(10) Purchasers from personal representatives and from distributees of personal representatives are protected so that adjudications regarding the testacy status of a decedent or any other question going to the propriety of a sale are not required in order to protect purchasers.

(11) Provisions protecting a personal representative who distributes without adjudication are included to make nonadjudicated settlements feasible.

(12) Statutes of limitation bar creditors of the decedent who fail to present claims within four months after legal advertising of the administration and unsecured claims not previously barred by non-claim statutes are barred after three years from the decedent's death.

Overall, the system accepts the premise that the Court's role in regard to probate and administration, and its relationship to personal representatives who derive their power from public appointment, is wholly passive until some interested person invokes its power to secure resolution of a matter. The state, through the Court, should provide remedies which are suitable and efficient to protect any and all rights regarding succession, but should refrain from intruding into family affairs unless relief is requested, and limit its relief to that sought.

PART 1

GENERAL PROVISIONS

§ 3-101. Devolution of estate at death; restrictions

The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this Code to facilitate the prompt settlement of estates. Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estate, or in the absence of testamentary disposition, to his heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to homestead allowance, exempt property and family allowance, to rights of creditors, elective share of the surviving spouse, and to administration.

§ 3-102. Necessity of order of probate for will

Except as provided in section 3-1201, to be effective to prove the transfer **of any property or to nominate an executor, a will must be declared to be valid by an order of informal probate by the registers or an adjudication of probate by the judge, except that a duly executed and unrevoked will which has not been probated may be admitted as evidence of a devise if (1) no** court proceeding concerning the succession or administration of the estate

has occurred, and (2) either the devisee or his successors and assigns possessed the property devised in accordance with the provisions of the will, or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings.

UNIFORM PROBATE CODE COMMENT

The basic idea of this section follows Section 85 of the Model Probate Code. The exception referring to Section 3-1201 relates to affidavit procedures which are authorized for collection of estates worth less than $5,000.

Section 3-107 and various sections in Parts 3 and 4 of this Article make it clear that a will may be probated without appointment of a personal representative, including any nominated by the will.

The requirement of probate stated here and the limitations on probate provided in 3-108 mean that questions as to testacy may be eliminated simply by the running of time. Under these sections, an informally probated will cannot be questioned after the later of three years from the decedent's death or one year from the probate whether or not an executor was appointed, or, if an executor was appointed, without regard to whether the estate has been distributed. If the decedent is believed to have died without a will, the running of three years from death bars probate of a late-discovered will and so makes the assumption of intestacy conclusive.

The exceptions to the section (other than the exception relevant to small estates) are not intended to accommodate cases of late-discovered wills. Rather, they are designed to make the probate requirement inapplicable where circumstances led survivors of a decedent to believe that there was no point to probating a will of which they may have had knowledge. If any will was probated within three years of death, or if letters of administration were issued in this period, the exceptions to the section are inapplicable. If there has been no proceeding in probate, persons seeking to establish title by an unprobated will must show, with **reference to the estate they claim,** either that it has been possessed by those to whom it was devised or that it has been unknown to the decedent's heirs or devisees and not possessed by any.

It is to be noted, also, that devisees who are able to claim under one of the exceptions to this section may not obtain probate of the will or administration of the estate to assist them in their efforts to obtain the estate in question. The exceptions are to a rule which bars admission of a will into evidence, rather than to the section barring late probate and late appointment of personal representatives. Still, the exceptions should serve to prevent two "hard" cases which can be imagined readily. In one, a surviving spouse fails to seek probate of a will, giving her the entire estate of the decedent because she is informed or believes that all of her husband's property was held by them jointly, with right of survivorship. Later, it is discovered that she was mistaken as to the nature of her husband's title. The other case involves a devisee who sees no point to securing probate of a will in his favor because he is unaware of any estate. Subsequently, valuable rights of the decedent are discovered.

§ 3-103. Necessity of appointment for administration

Except as otherwise provided in Article IV, to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the judge or registers, qualify and be issued letters. Administration of an estate is commenced by the issuance of letters.

UNIFORM PROBATE CODE COMMENT

This section makes it clear that appointment by a public official is required before one can acquire the status of personal representative. "Qualification" is dealt with in Section 3-601. "Letters" are the subject of Section 1-305. Section 3-701 is also related, since it deals with the time of accrual of duties and powers of personal representatives.

See 3-108 for the time limit on requests for appointment of personal representatives.

In Article IV, Sections 4-204 and 4-205 permit a personal representative from another state to obtain the powers of one appointed locally by filing evidence of his authority with a local Court.

§ 3-104. Claims against decedent; necessity of administration

No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this Article. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in section 3-1004 or from a former personal representative individually liable as provided in section 3-1005. This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.

UNIFORM PROBATE CODE COMMENT

This and sections of Part 8, Article III, are designed to force creditors of decedents to assert their claims against duly appointed personal representatives. Creditors of a decedent are interested persons who may seek the appointment of a personal representative (Section 3-301). If no appointment is granted to another within 45 days after the decedent's death, a creditor may be eligible to be appointed if other persons with priority decline to serve or are ineligible (Section 3-203). But, if a personal representative has been appointed and has closed the estate under circumstances which leave a creditor's claim unbarred, the creditor is permitted to enforce his claims against distributees, as well as against the personal representative if any duty owed to creditors under 3-807 or 3-1003 has been breached. The methods for closing estates are outlined in Sections 3-1001 through 3-1003. Termination of appointment under Sections 3-608 et seq. may occur though the estate is not closed and so may be irrelevant to the question of whether creditors may pursue distributees.

§ 3-105. Proceedings affecting devolution and administration; jurisdiction of subject matter

Persons interested in decedents' estates may apply to the register for determination in the informal proceedings provided in this Article, and may petition the court for orders in formal proceedings within the court's jurisdiction including but not limited to those described in this Article. The court has exclusive jurisdiction of informal and formal proceedings to determine how decedents' estates subject to the laws of this State are to be administered, expended and distributed. The court has concurrent jurisdiction of any other action or proceeding concerning a succession or to which an estate, through a personal representative, may be a party, including actions to determine title to property alleged to belong to the estate, and of any action or proceeding in which property is distributed by a personal representative or its value is sought to be subjected to rights of creditors or successors of the decedent.

UNIFORM PROBATE CODE COMMENT

This and other sections of Article III contemplate a non-judicial officer who will act on informal application and a judge who will hear and decide formal petitions. See Section 1-307 which permits the judge to perform or delegate the functions of the Registrar. **However, the primary purpose of Article III is to describe functions to be performed by various public officials, rather than to prescribe how these responsibilities should be assigned within a given state or county.** Hence, any of several alternatives to the organizational scheme assumed for purposes of the Code would be acceptable.

For example, a state might assign responsibility for maintenance of probate files and records, and for receiving and acting upon informal applications, to existing limited power probate offices. Responsibility for hearing and deciding formal petitions would then be assigned to the court of general jurisdiction of each county or district.

If separate courts or offices are not feasible, it may be preferable to concentrate authority for allocating responsibility respecting formal and informal proceedings in the judge. To do so helps fix responsibility for the total operation of the office. This is the assumption of the Code.

It will be up to each adopting state to select the organizational arrangement which best meets its needs.

If the office with jurisdiction to hear and decide formal petitions is the county or district court of general jurisdiction, there will be little basis for objection to the broad statement of concurrent jurisdiction of this section. However, if a more specialized "estates" court is used, there may be pressure to prevent it from hearing negligence and other actions involving jury trials, even though it may be given unlimited power to decide other cases to which a personal representative is a party. A system for certifying matters involving jury trials to the general trial court could be provided, although the alternative of permitting the estates court to empanel juries where neces-

sary might not be unworkable. In any event, the jurisdiction of the "estates" or "probate" court in regard to negligence litigation would only be concurrent with that of the general trial court. The important point is that the estates court, whatever it is called, should have unlimited power to hear and finally dispose of all matters relevant to determination of the extent of the decedent's estate and of the claims against it. The jury trial question is peripheral.

See the comment to the next section regarding adjustments which might be made in the Code by a state with a single court of general jurisdiction for each county or district.

MAINE COMMENT

Maine change from Uniform Probate Code. The wording of the Uniform Probate Code version was changed by adding the reference to the court's jurisdiction over informal proceedings in order to better conform the definition of jurisdiction in this section with the definition of "court" in the Maine Probate Code, section 1-201, paragraph (5). The court includes the judge and the other officers of the court and the Maine modification makes no change in the nature of the informal proceedings that occur before the register rather than the judge.

§ 3-106. Proceedings within the jurisdiction of court; service; jurisdiction over persons

In proceedings within the exclusive jurisdiction of the court where notice is required by this Code or by rule, and in proceedings to construe probated wills or determine heirs which concern estates that have not been and cannot now be opened for administration, interested persons may be bound by the orders of the court in respect to property in or subject to the laws of this state by notice in conformity with section 1-401. An order is binding as to all who are given notice of the proceeding though less than all interested persons are notified.

UNIFORM PROBATE CODE COMMENT

The language in this and the preceding section which divides matters coming before the probate court between those within the court's "exclusive" jurisdiction and those within its "concurrent" jurisdiction would be inappropriate if probate matters were assigned to a branch of a single court of general jurisdiction. The Code could be adjusted to an assumption of a single court in various ways. Any adjusted version should contain a provision permitting the court to hear and settle certain kinds of matters after notice as provided in 1-401. It must be suitable to combine the second sentence of 3-105 and 3-106 into a single section as follows:

"The Court may hear and determine formal proceedings involving administration and distribution of decedents' estates after notice to interested persons in conformity with Section 1-401. Persons notified are bound though less than all interested persons may have been given notice."

An adjusted version also might provide:

"Subject to general rules concerning the proper location of civil litigation and jurisdiction of persons, the Court (meaning the probate division) may hear and determine any other controversy concerning a succession or to which an estate, through a personal representative, may be a party."

The propriety of this sort of statement would depend upon whether questions of docketing and assignment, including the division of matters between co-ordinate branches of the Court, should be dealt with by legislation.

The Joint Editorial Board, in 1975, recommended the addition after "rule", of the language "and in proceedings to construe probated wills or determine heirs which concern estates that have not been and cannot now be opened for administration." This addition, coupled with the exceptions to the limitations provisions in Section 3-108 that permit proceedings to construe wills and to determine heirs of intestates to be commenced more than three years after death, clarifies the purpose of the draftsmen to offer a probate proceeding to aid the determination of rights of inheritance of estates that were not opened for administration within the time permitted by Section 3-108.

§ 3-107. Scope of proceedings; proceedings independent; exception

Unless supervised administration as described in Part 5 is involved, (1) each proceeding before the judge or register is independent of any other proceeding involving the same estate; (2) petitions for formal orders of the judge may combine various requests for relief in a single proceeding if the orders sought may be finally granted without delay. Except as required for proceedings which are particularly described by other sections of this Article, no petition is defective because it fails to embrace all matters which might then be the subject of a final order; (3) proceedings for probate of wills or adjudications of no will may be combined with proceedings for appointment of personal representatives; and (4) a proceeding for appointment of a personal representative is concluded by an order making or declining the appointment.

UNIFORM PROBATE CODE COMMENT

This section and others in Article III describe a system of administration of decedents' estates which gives interested persons control of whether matters relating to estates will become occasions for judicial orders. Sections 3-501 through 3-505 describe supervised administration, a judicial proceeding which is continuous throughout administration. It corresponds with the theory of administration of decedents' estates which prevails in many states. See, section 62, Model Probate Code. If supervised administration is not requested, persons interested in an estate may use combinations of the formal proceedings (order by judge after notice to persons concerned with the relief sought), informal proceedings (request for the limited response that non-judicial personnel of the probate court are authorized to make in response to verified application) and filings provided in the remaining Parts of Article III to secure authority and protection needed to administer the estate.

Nothing except self-interest will compel resort to the judge. When resort to the judge is necessary or desirable to resolve a dispute or to gain protection, the scope of the proceeding if not otherwise prescribed by the Code is framed by the petition. The securing of necessary jurisdiction over interested persons in a formal proceeding is facilitated by Sections 3-106 and 3-602. 3-201 locates venue for all proceedings at the place where the first proceeding occurred.

§ 3-108. Probate, testacy and appointment proceedings; ultimate time limit

No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than 3 years after the decedent's death, except (1) if a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding; (2) appropriate probate, appointment or testacy proceedings may be maintained in relation to the estate of an absent, disappeared or missing person for whose estate a conservator has been appointed, at any time within 3 years after the conservator becomes able to establish the death of the protected person; and (3) a proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful, may be commenced within the later of 12 months from the informal probate or 3 years from the decedent's death. These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate. In cases under (1) or (2) above, the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitations provisions of this Code which relate to the date of death.

UNIFORM PROBATE CODE COMMENT

This section establishes a basic limitation period of three years within which it may be determined whether a decedent left a will and to commence administration of his estate. But, an exception assures that heirs will have at least one year after an informal probate to initiate a contest and to secure administration of the estate as intestate.

If no will is probated within three years from death, the section has the effect of making the assumption of intestacy final. If a will has been informally probated within the period, the section has the effect of making the informal probate conclusive after three years or within twelve months from informal probate, if later. Heirs or devisees can protect themselves against change within the three years of assumption concerning whether the decedent left a will or died intestate by bringing a formal proceeding shortening the period to that described in Sections 3-412 and 3-413.

A personal representative who has been appointed under an assumption concerning testacy which may be reversed in the three-year period if there

has been no formal proceeding, is protected by Section 3-703. It relieves a personal representative of liability for surcharge for certain distributions made pursuant to an informally probated will, or under authority of informally issued letters of administration. Distributees who receive an estate distributed before the three-year period expires where there has been no formal determination accelerating the time for certainty, remain potentially liable to persons determined to be entitled by formal proceedings instituted within the basic period under Sections 3-909 and 3-1006.

Purchasers from personal representatives and distributees may be protected without regard to whether the three-year period has run. See Sections 3-715 and 3-910.

All creditors' claims are barred after three years from death. See Section 3-803(a) (2). Because of this, and since any possibility that letters may be issued at any time would be seen as a "cloud" on the title of heirs or devisees otherwise secure under 3-101, the three year statute of limitations applies to bar appointment of a personal representative after the basic period has passed. Section 83 of the Model Probate Code barred probate and administration after five years, and other statutes imposing time limits on these proceedings are cited at pp. 307-310 of Model Probate Code. A qualification covers the situation where a closed administration is sought to be re-opened to administer after discovered assets. See Section 3-1008. If there has been no probate or appointment within three years, and if either exception to Section 3-102 applies, devisees under a late-discovered will may use a will to establish their title. But, they may not secure probate of the will, nor may they obtain appointment of a personal representative. The same pattern applies to heirs who, in a case where there has been no administration discover assets after the three year period has run. Such persons will not be able to protect purchasers with the ease of those interested in an estate where a personal representative has been appointed.

The basic premise underlying all of these time provisions is that interested persons who want to assume the risks implicit in the three-year period of limitations should be provided legitimate means by which they can do so. At the same time, parties should be afforded ample opportunity for earlier protection if they want it.

§ 3-109. **Statutes of limitation on decedent's cause of action**

No statute of limitation running on a cause of action belonging to a decedent which had not been barred as of the date of his death, shall apply to bar a cause of action surviving the decedent's death sooner than 4 months after death. A cause of action which, but for this section, would have been barred less than 4 months after death, is barred after 4 months unless tolled.

§ 3-110. **Discovery of property**

(a) Upon petition by a county attorney, personal representative, heir, devisees, creditor or other person interested in the estate of a decedent, anyone suspected of having concealed, withheld or conveyed away any property

of the decedent, or of having fraudulently received any such property, or of aiding others in so doing, may be cited by the judge to appear before him to be examined on oath in relation thereto, and the judge may require him to produce for the inspection of the court and parties all documents within his control relating to the matter under examination. The time for filing such petitions shall be governed by section 1-106.

(b) If a person duly cited refuses to appear and submit himself to such examination, or to answer all lawful interrogatories, or to produce such documents he shall be subject to contempt of the court and is liable to any injured party in a civil action for all the damages, expenses and charges arising from such refusal.

MAINE COMMENT

General. This section was added to the Uniform Probate Code version in order to preserve prior provisions of Maine law formerly contained in Title 18, sections 1751 and 1753. The provisions of the former Title 18, section 1752 are covered by sections 3-712, 3-703, 3-704, 3-607 and 3-105 of this Title.

PART 2

VENUE FOR PROBATE AND ADMINISTRATION; PRIORITY TO ADMINISTER; DEMAND FOR NOTICE

§ 3-201. Venue for first and subsequent estate proceedings; location of property

(a) Venue for the first informal or formal testacy or appointment proceedings after a decedent's death is:

(1) In the county where the decedent had his domicile at the time of his death; or

(2) If the decedent was not domiciled in this State, in any county where property was located either at the time of his death or at any time thereafter.

(b) Venue for all subsequent proceedings within the exclusive jurisdiction of the court is in the place where the initial proceeding occurred, unless the initial proceeding has been transferred as provided in subsection (c) of section 1-303.

(c) If the first proceeding was informal, on application of an interested person and after notice to the proponent in the first proceeding, the judge, upon finding that venue is elsewhere, may transfer the proceeding and the file to the other court.

(d) For the purpose of aiding determinations concerning location of assets which may be relevant in cases involving non-domiciliaries, a debt, other than one evidenced by investment or commercial paper or other instrument in favor of a non-domiciliary, is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its

principal office. Commercial paper, investment paper and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued.

UNIFORM PROBATE CODE COMMENT

Sections 1-303 and 3-201 cover the subject of venue for estate proceedings. Sections 3-202, 3-301, 3-303 and 3-309 also may be relevant.

Provisions for transfer of venue appear in Section 1-303.

The interplay of these several sections may be illustrated best by examples:

(1) A formal probate or appointment proceeding is initiated in A County. Interested persons who believe that venue is in B County rather than A County must raise their question about venue in A County, because 1-303 gives the Court in which the proceeding is first commenced authority to resolve disputes over venue. If the Court in A County erroneously determines that it has venue, the remedy is by appeal.

(2) An informal probate or appointment application is filed and granted without notice in A County. If interested persons wish to challenge the registrar's determination of venue, they may not simply file a formal proceeding in the county of their choice and thus force the proponent in the prior proceeding to debate the question of venue in their county, 3-201(b) locates the venue of any subsequent proceeding where the first proceeding occurred. The function of (b) is obvious when one thinks of subsequent proceedings as those which relate to claims, or accounts, or to efforts to control a personal representative. It is less obvious when it seems to locate the forum for squabbles over venue at the place accepting the first informal application. Still, the applicant seeking an informal order must be careful about the statements he makes in his application because he may be charged with perjury under Section 1-310 if he is deliberately inaccurate. Moreover, the registrar must be satisfied that the allegations in the application support a finding of venue. 3-201(c) provides a remedy for one who is upset about the venue-locating impact of a prior order in an informal proceeding and who does not wish to engage in full litigation about venue in the forum chosen by the other interested person unless he is forced to do so. Using it, he may succeed in getting the A County Court to transfer the proceedings to the county of his choice. He would be well advised to initiate formal proceedings if he gets the chance, for if he relies on informal proceedings, he, too, may be "bumped" if the judge in B County agrees with some movant that venue was not in B County.

(3) If the decedent's domicile was not in the state, venue is proper under 3-201 and 1-303 in any county where he had assets.

One contemplating starting administration because of the presence of local assets should have several other sections of the Code in mind. First, by use of the recognition provisions in Article IV, it may be possible to avoid administration in any state other than that in which the decedent was domiciled. Second, Section 3-203 may apply to give priority for local appointment to the

representative appointed at domicile. Third, under Section 3-309, informal appointment proceedings in this state will be dismissed if it is known that a personal representative has been previously appointed at domicile.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version of subsection (a), paragraph (2) was changed by providing venue in the county where property is located at the time of suit as well as at the time of the decedent's death.

§ 3-202. Appointment or testacy proceedings; conflicting claim of domicile in another state

If conflicting claims as to the domicile of a decedent are made in a formal testacy or appointment proceeding commenced in this State, and in a testacy or appointment proceeding after notice pending at the same time in another state, the court of this State must stay, dismiss, or permit suitable amendment in, the proceeding here unless it is determined that the local proceeding was commenced before the proceeding elsewhere. The determination of domicile in the proceeding first commenced must be accepted as determinative in the proceeding in this State.

UNIFORM PROBATE CODE COMMENT

This section is designed to reduce the possibility that conflicting findings of domicile in two or more states may result in inconsistent administration and distribution of parts of the same estate. Section 3-408 dealing with the effect of adjudications in other states concerning testacy supports the same general purpose to use domiciliary law to unify succession of property located in different states.

Whether testate or intestate, succession should follow the presumed wishes of the decedent whenever possible. Unless a decedent leaves a separate will for the portion of his estate located in each different state, it is highly unlikely that he would want different portions of his estate subject to different rules simply because courts reach conflicting conclusions concerning his domicile. It is pointless to debate whether he would prefer one or the other of the conflicting rules, when the paramount inference is that the decedent would prefer that his estate be unified under either rule rather than wasted in litigation.

The section adds very little to existing law. If a previous estate proceeding in State A has determined that the decedent was a domiciliary of A, persons who were personally before the court in A would be precluded by the principles of **res judicata** or collateral estoppel (and full faith and credit). from relitigating the issue of domicile in a later proceeding in State B. Probably, it would not matter in this setting that domicile was a jurisdictional fact. Stoll v. Gottlieb, 59 S.Ct. 134, 305 U.S. 165, 83 L.Ed. 104 (1938). Even if the parties to a present proceeding were not personally before the Court in an earlier proceeding in State A involving the same decedent, the prior judgment would be binding as to property subject to the power of the

courts in A, on persons to whom due notice of the proceeding was given. Riley v. New York Trust Co., 62 S.Ct. 608, 315 U.S. 343, 86 L.Ed. 885 (1942); Mullane v. Central Hanover Bank and Trust Co., 70 S.Ct. 652, 339 U.S. 306, 94 L.Ed. 865 (1950).

Where a court learns that parties before it are also parties to previously initiated litigation involving a common question, traditional judicial reluctance to deciding unnecessary questions, as well as considerations of comity, are likely to lead it to delay the local proceedings to await the result in the other court. A somewhat more troublesome question is involved when one of the parties before the local court manifests a determination not to appear personally in the prior initiated proceedings so that he can preserve his ability to litigate contested points in a more friendly, or convenient, forum. But, the need to preserve all possible advantages available to particular litigants should be subordinated to the decedent's probable wish that his esetate not be wasted in unnecessary litigation. Thus, the section requires that the local claimant either initiate litigation in the forum of his choice before litigation is started somewhere else, or accept the necessity of contesting unwanted views concerning the decedent's domicile offered in litigation pending elsewhere.

It is to be noted, in this connection, that the local suitor always will have a chance to contest the question of domicile in the other state. His locally initiated proceedings may proceed to a valid judgment accepting his theory of the case unless parties who would oppose him appear and defend on the theory that the domicile question is currently being litigated elsewhere. If the litigation in the other state has proceeded to judgment, Section 3-408 rather than the instant section will govern. If this section applies, it will mean that the foreign proceedings are still pending, so that the local person's contention concerning domicile can be made therein even though until the defense of litigation elsewhere is offered in the local proceedings, he may not have been notified of the foreign proceeding.

§ 3-203. Priority among persons seeking appointment as personal representative

(a) Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

(1) The person with priority as determined by a probated will including a person nominated by a power conferred in a will;

(2) The surviving spouse of the decedent who is a devisee of the decedent;

(3) Other devisees of the decedent;

(4) The surviving spouse of the decedent;

(5) Other heirs of the decedent;

(6) Forty-five days after the death of the decedent, any creditor;

(7) Six months after the death of the decedent if no testacy proceedings have been held or no personal representative has been appointed, the State

Tax Assessor upon application by that officer.

(b) An objection to an appointment can be made only in formal proceedings. In case of objection the priorities stated in (a) apply except that

(1) If the estate appears to be more than adequate to meet exemptions and costs of administration but inadequate to discharge anticipated unsecured claims, the judge, on petition of creditors, may appoint any qualified person;

(2) In case of objection to appointment of a person other than one whose priority is determined by will by an heir or devisee appearing to have a substantial interest in the estate, the judge may appoint a person who is acceptable to heirs and devisees whose interests in the estate appear to be worth in total more than ½ of the probable distributable value, or, in default of this accord any suitable person.

(c) A person entitled to letters under subsection (a), paragraphs (2) through (5) may nominate a qualified person to act as personal representative. Any person may renounce his right to nominate or to an appointment by appropriate writing filed with the court. When 2 or more persons share a priority, those of them who do not renounce must concur in nominating another to act for them or in applying for appointment.

(d) Conservators of the estates of protected persons, or if there is no conservator, any guardian except a guardian ad litem of a minor or incapacitated person, may exercise the same right to nominate, to object to another's appointment, or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person or ward would have if qualified for appointment.

(e) Appointment of one who does not have priority, including priority resulting from renunciation or nomination determined pursuant to this section, may be made only in formal proceedings. Before appointing one without priority, the judge must determine that those having priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment, and that administration is necessary.

(f) No person is qualified to serve as a personal representative who is:

(1) Under the age of 18;

(2) A person whom the court finds unsuitable in formal proceedings.

(g) A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates different persons to be personal representative in this State and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

(h) This section governs priority for appointment of a successor personal representative but does not apply to the selection of a special administrator.

UNIFORM PROBATE CODE COMMENT

The priorities applicable to informal proceedings are applicable to formal proceedings. However, if the proceedings are formal, a person with a substantial interest may object to the selections of one having priority other than because of will provisions. The provision for majority approval which is triggered by such a protest can be handled in a formal proceeding since all interested persons will be before the court, and a judge capable of handling discretionary matters, will be involved.

In considering this section as it relates to a devise to a trustee for various beneficiaries, it is to be noted that "interested persons" is defined by 1-201(20) to include fiduciaries. Also, 1-403(2) and 3-912 show a purpose to make trustees serve as representatives of all beneficiaries. The provision in (d) is consistent.

If a state's statutes recognize a public administrator or public trustee as the appropriate agency to seek administration of estates in which the state may have an interest, it would be appropriate to indicate in this section the circumstances under which such an officer may seek administration. If no officer is recognized locally, the state could claim as heir by virtue of 2-105.

Subsection (g) was inserted in connection with the decision to abandon the effort to describe ancillary administration in Article IV. Other provisions in Article III which are relevant to administration of assets in a state other than that of the decedent's domicile are 1-301 (terriorial effect), 3-201 (venue), 3-308 (informal appointment for non-resident decedent delayed 30 days), 3-309 (no informal appointment here if a representative has been appointed at domicile), 3-815 (duty of personal representative where administration is more than one state) and 4-201-4-205 (local recognition of foreign personal representatives).

The meaning of "spouse" is determined by Section 2-802.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by adding the State Tax Assessor to the list of persons with priority for appointment in subsection (a), paragraph (7) and by using 18 rather than 21 as the age of qualification for a personal representative.

§ 3-204. Demand for notice of order or filing concerning decedent's estate

Any person desiring notice of an order or filing pertaining to a decedent's estate in which he has a financial or property interest may file a demand for notice with the court at any time after the death of the decedent, and may thereupon have notice of such demand given to the personal representative, and shall thereafter receive service of every filing, notice or order to which the demand relates, in such manner and form as the Supreme Judicial Court shall by rule provide. The validity of an order or notice which is issued or a filing which is accepted without compliance with this requirement shall not be affected by the error, but the person receiving the order, giving notice, or making the filing may be liable for any damage caused by the absence

of service. The requirement of notice arising from demand under this provision may be waived by the demandant in such manner and form as the Supreme Judicial Court shall by rule provide, and shall cease upon the termination of his interest in the estate.

UNIFORM PROBATE CODE COMMENT

The notice required as the result of demand under this section is regulated as far as time and manner requirements are concerned by Section 1-401.

This section would apply to any order which might be made in a supervised administration proceeding.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by providing that the manner and form of service be governed by judicial rulemaking rather than set as a matter of statutory policy.

PART 3
INFORMAL PROBATE AND APPOINTMENT PROCEEDINGS

§ 3-301. Informal probate or appointment proceedings; application; contents

(a) Applications for informal probate or informal appointment shall be directed to the register and be verified by the applicant to be accurate and complete to the best of his knowledge and belief and shall contain the following information and such other information as the Supreme Judicial Court may by rule provide:

(1) Every application for informal probate of a will or for informal appointment of a personal representative, other than a special or successor representative, shall contain the following:

(i) A statement of the interest of the applicant;

(ii) The name, and date of death of the decedent, his age, and the county and state of his domicile at the time of death, and the names and addresses of the spouse, children, heirs and devisees and the ages of any who are minors so far as known or ascertainable with reasonable diligence by the applicant;

(iii) If the decedent was not domiciled in the state at the time of his death, a statement showing venue;

(iv) A statement identifying and indicating the address of any personal representative of the decedent appointed in this State or elsewhere whose appointment has not been terminated;

(v) A statement indicating whether the applicant has received a demand for notice, or is aware of any demand for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere; and

(vi) That the time limit for informal probate or appointment as provided in this Article has not expired either because 3 years or less have passed

since the decedent's death, or, if more than 3 years from death have passed, circumstances as described by section 3-108 authorizing tardy probate or appointment have occurred.

(2) An application for informal probate of a will shall state the following in addition to the statements required by paragraph (1):

(i) That the original of the decedent's last will is in the possession of the court, or accompanies the application, or that an authenticated copy of a will probated in another jurisdiction accompanies the application;

(ii) That the applicant, to the best of his knowledge, believes the will to have been validly executed;

(iii) That after the exercise of reasonable diligence, the applicant is unaware of any instrument revoking the will, and that the applicant believes that the instrument which is the subject of the application is the decedent's last will.

(3) An application for informal appointment of a personal representative to administer an estate under a will shall describe the will by date of execution and state the time and place of probate or the pending application or petition for probate. The application for appointment shall adopt the statements in the application or petition for probate and state the name, address and priority for appointment of the person whose appointment is sought.

(4) An application for informal appointment of an administrator in intestacy shall state in addition to the statements required by paragraph (1):

(i) That after the exercise of reasonable diligence, the applicant is unaware of any unrevoked testamentary instrument relating to property having a situs in this State under section 1-301, or a statement why any such instrument of which he may be aware is not being probated;

(ii) The priority of the person whose appointment is sought and the names of any other persons having a prior or equal right to the appointment under section 3-203.

(5) An application for appointment of a personal representative to succeed a personal representative appointed under a different testacy status shall refer to the order in the most recent testacy proceeding, state the name and address of the person whose appointment is sought and of the person whose appointment will be terminated if the application is granted, and describe the priority of the applicant.

(6) An application for appointment of a personal representative to succeed a personal representative who has tendered a resignation as provided in section 3-610, subsection (c), or whose appointment has been terminated by death or removal, shall adopt the statements in the application or petition which led to the appointment of the person being succeeded except as specifically changed or corrected, state the name and address of the person who seeks appointment as successor, and describe the priority of the applicant.

(b) By verifying an application for informal probate, or informal appointment, the applicant submits personally to the jurisdiction of the court in any proceeding for relief from fraud relating to the application, or for perjury, that may be instituted against him.

UNIFORM PROBATE CODE COMMENT

Forcing one who seeks informal probate or informal appointment to make oath before a public official concerning the details required of applications should deter persons who might otherwise misuse the no-notice feature of informal proceedings. The application is available as a part of the public record. If deliberately false representation is made, remedies for fraud will be available to injured persons without specified time limit (see Article I). The section is believed to provide important safeguards that may extend well beyond those presently available under supervised administration for persons damaged by deliberate wrong doing.

Section 1-310 deals with verification.

In 1975, the Joint Editorial Board recommended the addition of subsection (b) to reflect an improvement accomplised in the first enactment in Idaho. The addition, which is a form of long-arm provision that affects everyone who acts as an applicant in informal proceedings, in conjunction with Section 1-106 provides a remedy in the court of probate against anyone who might make known misstatements in an application. The addition is not needed in the case of an applicant who becomes a personal representative as a result of his application for the implied consent provided in Section 3-602 would cover the matter. Also, the requirement that the applicant state that time limits on informal probate and appointment have not run, formerly appearing as (iv) under paragraph (2) was expanded to refer to informal appointment and moved into (1). Correcting an oversight in the original text, this change coordinates the statements required in an application with the limitations provisions of Section 3-108.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by providing expressly for additional judicial rulemaking power as to the content of the application under this section.

§ 3-302. Informal probate; duty of register; effect of informal probate

Upon receipt of an application requesting informal probate of a will, the register upon making the findings required by section 3-303 shall issue a written statement of informal probate if at least 120 hours have elapsed since the decedent's death. Informal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding. No defect in the application or procedure relating thereto which leads to informal probate of a will renders the probate void.

UNIFORM PROBATE CODE COMMENT

Model Probate Code Sections 68 and 70 contemplate probate by judicial order as the only method of validating a will. This "umbrella" section and

the sections it refers to describe an alternative procedure called "informal probate". It is a statement of probate by the Registrar. A succeeding section describes cases in which informal probate is to be denied. "Informal probate" is subjected to safeguards which seem appropriate to a transaction which has the effect of making a will operative and which may be the only official reaction concerning its validity. "Informal probate", it is hoped, will serve to keep the simple will which generates no controversy from becoming involved in truly judicial proceedings. The procedure is very much like "probate in common form" as it is known in England and some states.

§ 3-303. Informal probate; proof and findings required

(a) In an informal proceeding for original probate of a will, the register shall determine whether:

(1) The application is complete;

(2) The applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;

(3) The applicant appears from the application to be an interested person as defined in section 1-201, paragraph (20);

(4) On the basis of the statements in the application, venue is proper;

(5) An original, duly executed and apparently unrevoked will is in the register's possession;

(6) Any notice required by section 3-204 has been given and that the application is not within section 3-304; and

(7) It appears from the application that the time limit for original probate has not expired.

(b) The application shall be denied if it indicates that a personal representative has been appointed in another county of this state or except as provided in subsection (d), if it appears that this or another will of the decedent has been the subject of a previous probate order.

(c) A will which appears to have the required signatures and which contains an attestation clause showing that requirements of execution under sections 2-502, 2-503 or 2-506 have been met shall be probated without further proof. In other cases, the register may assume execution if the will appears to have been properly executed, or he may accept a sworn statement or affidavit of any person having knowledge of the circumstances of execution, whether or not the person was a witness to the will.

(d) Informal probate of a will which has been proviously probated elsewhere may be granted at any time upon written application by any interested person, together with deposit of an authenticated copy of the will and of the statement probating it from the office of court where it was first probated.

(e) A will from a foreign jurisdiction, including a place that does not require probate of a will after death and which is not eligible for probate under

subsection (a), may be probated in this state upon receipt by the register of a duly authenticated copy of the will and a duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has been probated in the foreign jurisdiction or has otherwise become operative under the law of that place.

UNIFORM PROBATE CODE COMMENT

The purpose of this section is to permit informal probate of a will which, from a simple attestation clause, appears to have been executed properly. It is not necessary that the will be notarized as is the case with "pre-proved" wills in some states. If a will is "pre-proved" as provided in Article II, it will, of course, "appear" to be well executed and include the recital necessary for easy probate here. If the instrument does not contain a proper recital by attesting witnesses, it may be probated informally on the strength of an affidavit by a person who can say what occurred at the time of execution.

Except where probate or its equivalent has occurred previously in another state, informal probate is available only where an original will exists and is available to be filed. Lost or destroyed wills must be established in formal proceedings. See Section 3-402. Under Section 3-401, pendency of formal testacy proceedings blocks informal probate or appointment proceedings.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version was changed by substituting the word "require" for "provide for" in subsection (e) in order to include wills from places that provide for, but do not require, probate, as well as from places that do not provide for probate, and by adding other language to subsection (e) to make clear that a will probated in another place may be given effect in this State in the manner provided in that subsection.

§ 3-304. Informal probate; unavailable in certain cases

Applications for informal probate which relate to one or more of a known series of testamentary instruments, other than a will and its codicil, the latest of which does not expressly revoke the earlier, shall be declined.

UNIFORM PROBATE CODE COMMENT

The Registrar handles the informal proceeding, but is required to decline applications in certain cases where circumstances suggest that formal probate would provide desirable safeguards.

§ 3-305. Informal probate; register not satisfied

If the register is not satisfied that a will is entitled to be probated in informal proceedings because of failure to meet the requirements of sections 3-303 and 3-304 or any other reason, he may decline the application. A declination of informal probate is not an adjudication and does not preclude formal probate proceedings.

UNIFORM PROBATE CODE COMMENT

The purpose of this section is to recognize that the Registrar should have some authority to deny probate to an instrument even though all stated statutory requirements may be said to have been met. Denial of an application for informal probate cannot be appealed. Rather, the proponent may initiate a formal proceeding so that the matter may be brought before the judge in the normal way for contested matters.

§ 3-306. Informal probate; notice requirements

The moving party must give notice as described by section 1-401 of his application for informal probate to any person demanding it pursuant to section 3-204, and to any personal representative of the decedent whose appointment has not been terminated. No other notice of informal probate is required.

UNIFORM PROBATE CODE COMMENT

This provision assumes that there will be a single office within each county or other area of jurisdiction of the probate court which can be checked for demands for notice relating to estates in that area. If there are or may be several registrars within a given area, provision would need to be made so that information concerning demands for notice might be obtained from the chief registrar's place of business.

In 1975, the Joint Editorial Board recommended the addition, as a bracketed, optional provision, of subsection (b). The recommendation was derived from a provision added to the Code in Idaho at the time of original enactment. The Board viewed the addition as interesting, possibly worthwhile, and worth being brought to the attention of enacting states as an optional addition. The Board views the informational notice required by Section 3-705 to be of more importance in preventing injustices under the Code, because the opening of an estate via appointment of a personal representative instantly gives the estate representative powers over estate assets that can be used wrongfully and to the possible detriment of interested persons. Hence, the 3-705 duty is a part of the recommended Code, rather than a bracketed, optional provision. By contrast, the informal probate of a will that is not accompanied or followed by appointment of a personal representative only serves to shift the burden of making the next move to disinterested heirs who, inter alia, may initiate a Section 3-401 formal testacy proceeding to contest the will at any time within the limitations prescribed by Section 3-108.

MAINE COMMENT

General. The option subsection (b) referred to in the above Uniform Probate Code Comment was not adopted because the informational notice provisions of the Maine Probate Code, section 3-705 constitute adequate protection for persons interested in the estate and because of the lesser need for giving similar kind of notice in the case of informal probate of a will where no appointment of a personal representative has been made and thus no administration of the estate has begun.