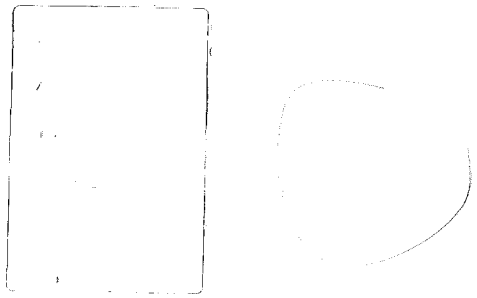
MAINE PROBATE LAW REVISION COMMISSION

REPORT TO THE LEGISLATURE

RECOMMENDATIONS CONCERNING THE PROBATE CODE AND CONSTITUTIONAL AMENDMENT

January 24, 1980



MAINE PROBATE LAW REVISION COMMISSION

January 24, 1980

The Honorable Richard H. Pierce
Chairman
Legislative Council
State House
Augusta, Maine 04333

Dear Senator Pierce:

It is my pleasure, as Chairman of the Maine Probate Law Revision Commission, to transmit to you the Commission's Report to the Legislature with recommendations concerning changes in the new Probate Code and a proposed Constitutional Amendment. The recommended legislation and Constitutional Resolution are attached to this Report in proposed bill form. This Report is pursuant to P.& S.L. 1973, c. 126, P.L. 1975, c. 147, and P.L. 1977, c. 712.

The Commission is continuing its study of Probate Court structure, and will submit its report and proposed legislation concerning changes in the Probate Court structure as soon as possible.

Very truly yours,

John B. Roberts

John B. Roberts
Chairman

MAINE PROBATE LAW REVISION COMMISSION

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Attached:

Proposed Bill to Amend Probate Code

Proposed Constitutional Resolution

MAINE PROBATE LAW REVISION COMMISSION

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January 24, 1980

RECOMMENDATIONS CONCERNING THE PROBATE CODE AND CONSTITUTIONAL AMENDMENT

As part of its charge to study the probate laws and Probate Court structure of the State of Maine, the Probate Law Revision Commission submits this Report to the Legislature. This Report is in two parts. Part I concerns certain items of the new Probate Code as enacted in the last session of the Legislature, and recommends certain changes in that Code. Part II recommends an amendment to the State Constitution, in order to assure that the Legislature has constitutional authority to make changes in the manner of selection of probate judges as part of any enactment of Probate Court reform that the Legislature may desire to enact at some future time. These recommendations have been embodied in proposed legislation, which is attached to this Report.

The Commission continues to work to complete its study and recommendations concerning the structure of the Probate Courts, and will submit a report to the Legislature with recommendations and proposed legislation as soon as possible.

Part I - Revisions of Probate Code

The Commission has studied the new Probate Code as enacted in the past session of the Legislature. While the Commission makes no objection to the great majority of the changes made by the Legislature in the Commission's recommendations, it would suggest

reconsideration of five points which the Commission considers to be important in carrying through the basic policies underlying the new Probate Code.

1. Mandatory Routine Bonding of Personal Representatives. Section 3-603 of the Probate Code was amended by adding a subclause (4) which provides, in effect, for mandatory routine bonding of the personal representative of an estate "when there is no will and all of the heirs have not made a written waiver." This provision applies only when the personal representative has been appointed in informal proceedings.

Perhaps the most basic policy of the newly enacted Probate Code is the elimination of routine probate and administration procedures that cause unnecessary delay and expense. The elimination of mandatory bonding as a routine matter is an important part of the effort to achieve that policy. An almost universal practice among attorneys drafting wills is the inclusion of an express provision waiving the bonding of the executor. As illustrated by this practice, such bonding has obviously been found unnecessary by those most familiar with the needs of probate administration - a useless depletion of estate assets.

The imposition of the routine bonding requirement in the particular situations covered by Section 3-603 is especially unfortunate in two respects. (1) It imposes a distinction between persons who have access to legal counsel and persons who do not have such ready access -- imposing on the less sophisticated and

uncounseled the very practice that those with experience in probate administration have apparently found to be undesirable. A paternalism that purports to protect persons by requiring them to undergo delays and expenses which are generally found to be unnecessary for such protection is especially pernicious. (2) It imposes that delay and expense in precisely those situations where delay and expense are sought to be avoided by the very people who are interested in the estate -- cases in which the interested parties have chosen to proceed informally.

In a state that has not accepted the idea of compulsory insurance as a general proposition, it is especially inappropriate to impose this particular form of compulsory insurance in the kind of situation where the arguments for compulsory insurance are so weak, and within the context of an insurance industry which has repeatedly failed to establish a connection between the costs of its premiums and the costs of the risks that might be insured against. See pages 214-217 and page 221 of the Commission's Report of the Commission's Study and Recommendations Concerning Maine Probate Law (October 1978).

As in cases where the testator has named an executor in a will, the personal representative in an intestate estate is likely to be the person who was closest to the testator and who has the largest share of the estate under the intestacy laws. The routine bonding requirement would usually serve only to protect the major or sole beneficiary of the estate against his own mismanagement

or dishonesty. In the vast majority of intestate estates, the most reasonable assumption is that the same person entitled to appointment as personal representative without a will would be the person named by the decedent as executor if there had been a will. It seems to make no sense, and in fact works an unjust discrimination against the less sophisticated, to require of those who have no will a delay or cost of administration that is almost universally rejected by those who do have wills.

In any event, the new Probate Code provides adequate protection for interested persons who want to require bonding for the personal representative. Section 3-605 provides that any person who apparently has an interest in the estate worth more than $1,000 may demand that the personal representative give bond. Upon filing such a demand, bonding is automatically and immediately required, at least until the Court has an opportunity to have a hearing on the need for bonding.

The Commission gave long and thorough consideration to the question of bonding. Forty-seven pages of the Commission's Study Report (pages 197-240) describe the Commission's consideration of the various factors that are involved. The Commission's conclusion was that there is no significant justification for requiring bonding which almost no one wants, which takes money from the estate, and particularly in light of the opportunities that exist within the Probate Code for obtaining bonding by any person who desires it and who is sufficiently interested in the estate.

For these reasons the Commission recommends that sub-clause (4) of Section 3-603 be repealed.

2. Routine Employment of Appraiser. Section 3-707 requires the personal representative of an estate to employ an appraiser to assist in ascertaining the value of all of the decedent's assets. This language would require the employment of an appraiser in all situations.

As part of the new Code's basic policy of eliminating unnecessary requirements in order to reduce both the time and expense in administering estates, the personal representative is generally authorized to do those things which are necessary to the efficient administration of the estate. The requirement of Section 3-707 to employ an appraiser regardless of the estate's circumstances significantly undercuts this policy. In a large number of situations, the appraisal will cause no problems that require an independent appraiser, and can be more than adequately handled by the personal representative, thus saving money for the estate. Whether independent appraisal is required depends upon the size of the estate and upon the nature of the assets. The personal representative should be given the discretion to employ an appraiser for those estates and for those assets where such employment is necessary or helpful. In addition, under the Code an interested party who believes an independent appraisal is desirable may petition the Court to require such an appraisal. To require routine independent appraisal in all circumstances of all assets will no doubt cost far

more than it is worth, and more than it will save in its effort to assure independent appraisal in the special circumstances where it is appropriate.

For these reasons the Commission recommends that Section 3-707 be amended to change the word "shall" to "may" and to change the word "all" to "any" in the first sentence.

3. Filing and Furnishing of Inventory. Section 3-706 requires the personal representative to file the original inventory of the estate with the Court. In addition, the personal representative is required to send a copy of the inventory to persons who request it and who have an interest in the estate.

(a) This section originally provided that the personal representative "may" file the inventory with the Court. The reason for not requiring a filing with the Court was to protect the interest in maintaining the privacy of the estate. Beneficiaries and other persons who have a legitimate interest in the estate could obtain a copy of the inventory. Other persons, who have no pertinent interest, would not be able to obtain from the public court records information concerning the value or the nature of the particular items owned by the decedent at his death. This interest in privacy is undercut by changing the section so as to require court filing of the inventory.

Under this section the inventory must be drawn up with reasonable detail, indicating the nature of each asset and its value, the kind and amount of any encumbrances, a schedule of

credits of the decedent, names of obligors on those credits, amounts due, a description of the nature of the obligation, and the total amount of all such credits. These are items of information which persons who do not have an interest in the estate have no legitimate business knowing about. Yet, to require the filing of this detailed information about the personal affairs of the decedent, and the nature and value of the various items which will be going to the estate's beneficiaries, makes all of this information a public matter. In some areas, newspapers routinely check the probate records and filings and routinely report these items of personal information for all to read. There is also the possibility that others may check the public probate records and use this kind of information as a basis for pestering or harrassing the successors to the decedent's estate.

In light of the obligation to make and keep an inventory, and to furnish it to persons with a legitimate interest in the estate, there seems to be no reason for requiring that the inventory be filed in the court. At least there seems to be no reason that would be sufficient to outweigh the interest in the privacy of the decedent's personal affairs and those of his beneficiaries.

(b) It has been pointed out to the Commission that the language of the section might benefit from a clarification of the manner in which the personal representative is to furnish an inventory to persons interested in the estate. The first sentence of the section charges the personal representative with the duty of preparing and filing or mailing the inventory, and the first

sentence of the second paragraph of this section provides that the personal representative shall "send" a copy to interested persons. It has been suggested that the terms "file and mail" and "send" might be construed to require the personal representative to furnish the inventory to interested persons only by means of the postal service or a messenger. Since this obviously is not the intent of the section, and although it no doubt would not be so construed, the language would be clarified by changing the term "file or mail" in the first sentence to the word "furnish" and by changing the word "send" in the first sentence of the second paragraph to the word "furnish."

For the above reasons the Commission recommends that Section 3-706 be amended (1) in the manner described in the preceding paragraph, and (2) by changing the word "shall" in the last sentence of the section to the word "may."

4. Notice of Sale of Real Estate. Section 3-711 provides in its last sentence that the personal representative may not sell real estate without giving a ten-day notice to successors to the estate, unless the personal representative is authorized by the will to sell real estate without such notice.

While this provision for notice before sale does not interfere with the basic concept of independent administration as much as the requirement of a license to sell real estate, the Commission believes that reconsideration of this provision is also appropriate. In particular situations, where the successors are minors or where the successors are difficult to reach expeditiously, this provision

would stand in the way of real estate sales which might be necessary to the proper administration of the estate.

The sale of real estate often requires continuing efforts and negotiation. Closing on sales of real estate often requires action which cannot wait ten days. In such situations the requirement of giving notice at least ten days before the sale to successors to the estate, even where they are not minors or not readily available, can cause the loss of opportunities that are important to the estate as a whole and to those beneficiaries. It is the judgment of the Commission that most wills will be drafted in the future to include the kind of waiver provision referred to in the last sentence of this section. The benefits of vesting discretion in the personal representative to handle real estate sales for the benefit of the estate should be available to persons without wills and to persons whose wills are not revised to include such a waiver provision after the effective date of this Code as well as to those who execute or amend wills after the Code is enacted. To leave the section as it stands risks the loss of beneficial opportunities to the estate that are intended to be achieved through the concept of independent administration, with powers in the personal representative analogous to those which are ordinarily exercised by trustees in typical trust administration.

For this reason the Commission recommends that Section 3-711 be amended by deleting from the second sentence the phrase "except as limited by this section" and by deleting the last sentence of this section.

5. Devise to Interested Witness. Section 2-505 retains the present Maine statutory provision limiting the devise to a witness subscribing a will to the value of his intestate share.

The Commission originally omitted this limiting provision as part of the general policy to formulate law that would give effect to the intention of testators to the greatest degree that is possible. One of the major, and most pertinent, criticisms of the law of wills is that it so often seems to violate the intention of testators as to the disposition of their property when they die. One of the reasons that the law has done this in the past is its unduly protective efforts to prevent all possibilities of fraud, undue influence and other such abuses. In the traditional policy of overprotectiveness, more damage was generally done in situations where all would agree as to the intent of the deceased person, but could not give effect to that intent because of technicalities in the law - technicalities that were ironically designed to protect the very interests that they so often ended up defeating.

This provision, limiting the benefits to witnesses to a will, is of this nature. It is not likely, however, to achieve the protection that it seeks to. It is likely, in the rare cases where it will be applicable, to defeat the intent of the very person the section is designed to protect.

This section addresses a situation in which a person who witnesses the will also is the beneficiary of the will. This is a situation which will almost never occur when a will is drafted

by an attorney, since the common and proper practice is to avoid such situations. It is a situation that probably will never occur when a person is inducing another to execute a will through undue influence or coercion or similar techniques. One who has gone to the trouble of obtaining the execution of a will under such circumstances is no doubt likely to take equal care to avoid the effect of this section, and so will consciously and intentionally avoid being a witness to the will which gives him a benefit. The only situation in which this provision is likely to be applicable is when an unsophisticated and uncounseled testator wants those closest to him to be his witnesses as well as his beneficiaries. The injustice of this application of the rule may come into play only rarely. When it does, the injustice will be no less in that individual case.

When this rule was first adopted in Maine it marked a desirable step in reform. It is preferable to a rule that the will itself is invalid because of the interest of the witness. It is preferable to saying that the witness can take nothing under the will. But the need for any such compromise rule as a necessary step toward reform has long passed. There is no really good reason for keeping it and there is good reason for eliminating it.

While this provision does not involve a major point, it is a rule which violates a basic desirable policy of the new Code - effectuating the obvious intent of the testator. It is the kind of law which, whenever it has occasion to be applied, is likely

to open the law to criticism because of its obvious frustration of the legitimate expectations that law is supposed to protect and facilitate.

For these reasons the Commission recommends that Subsection (c) of Section 2-505 be deleted.

Part II - Constitutional Amendment

There is, at the present time, some significant question concerning the authority of the Legislature to enact changes in the Probate Court structure in any way which would provide for the appointment of probate judges. For this reason the Commission recommends the passage of a proposed constitutional amendment that would provide the Legislature with sufficient authority to enact such changes in the Probate Court structure as the Legislature may deem desirable, and which would correct an oversight in the constitutional amendment process which occurred in 1967.

The Constitution provides that judges and registrars of probate shall be elected. Maine Constitution, Article VI, §6. This section of the Constitution was repealed by amendment in 1967, but the amendment was not to become effective until "such time as the Legislature by proper enactment shall establish a different Probate Court system with full-time judges." This 1967 amendment was designed to achieve the same purposes as the further amendment which the Commission proposes at this time.

This further amendment is necessary because of an inadvertent omission in 1967 to include in this amendment process a change in

Article V, Part 1, Section 8 of the Maine Constitution, which provides that the Governor shall nominate and appoint judicial officers except judges of probate. An advisory opinion of the Supreme Judicial Court Justices indicates that this inadvertent omission precludes the Legislature from enacting a system of probate which includes the appointment of "judges of probate" without further amendment of that remaining section.

The Commission recommends that an amendment be proposed for referendum in the coming elections in November that would remove the language "except judges of probate" from Section 8 of Article V, Part 1 of the Maine Constitution to become effective in the same manner as the 1967 amendment to Article VI, Section 6.

The proposed amendment would have no substantive effect, other than to make it constitutionally possible for the Legislature to consider any proposals for changes in the Probate Court system on their own merits, and enact legislation which may include the appointment of judges of probate. The proposed amendment would not in any way change the present Probate Court system unless the Legislature acted by appropriate legislation to do so.

It is highly desirable and important to proceed with this amendment in this session of the Legislature since a significant question also exists as to the ability of the Legislature to pass legislation while simultaneously proposing a constitutional amendment that would enable that legislation to take effect only upon

the ratification of that amendment by the people of the state. Opinion of the Justices, 237 A.2d 400 (Me. 1968), Opinion of the Justices, 137 Me. 350, 19 A.2d 53 (1941). The two above-cited opinions of the justices indicate the necessity for a constitutional amendment authorizing particular legislative action to become effective prior to the passage of the questioned legislation by the Legislature. Thus, if the Supreme Judicial Court would adhere to these earlier opinions, any legislation providing for the appointment of judges of probate would have to be delayed for one session. Amending the Constitution to allow such legislation would clearly avoid the need for such delay. In short, it would free the Legislature's hands to do what it sees fit to do at the appropriate time.

There is also significant legal ambiguity concerning what is meant by "judges of probate" in the as yet unamended Section 8 of Article V, Part 1. The Justices of the Supreme Judicial Court have given their opinion that legislation directly providing for the appointment of judges of probate in a separate probate court system cannot validly be enacted without a constitutional amendment such as recommended by the Commission. Opinion of the Justices, 237 A.2d 400 (Me. 1968). This view of the Justices does not directly address other possible kinds of changes in the Probate Court system such as transferring Probate Court jurisdiction to a different and already established court such as the Superior Court. It is presently legally uncertain whether such a change,

in effect eliminating the Probate Court system as a separate court and transfering probate jurisdiction to the judges of another already established court,would result in the appointment of "judges of probate" within the meaning of the present constitutional provisions. The Superior Court, for example, is an established court and its Justices are constitutionally appointive officers.

While the Justices of the Supreme Judicial Court have never addressed this problem, an Opinion of the Attorney General, dated April 8, 1969, concludes that even that kind of change would be precluded in the face of the remaining language concerning judges of probate in Section 8 of Article V, Part 1. While none of this provides a definitive answer to the authority of the legislature to enact particular kinds of probate court structural changes, the enactment of the amendment proposed by the Commission would resolve these legal issues and would conform the Constitution with the purposes of the amendment ratified by the people of the state in 1967.

For these reasons the Commission proposes that this amendment be passed by the Legislature and sent to referendum in 1980.

Conclusion

The Commission notes more than twenty other modifications made by the Legislature in the Commission's original recommendations. No objection is made by the Commission to those changes. Indeed some of them may constitute desirable refinement in the probate

law reform effort.

The changes in the new Probate Code that are here recommended represent, in the Commission's view, items that are important to the basic policies of the new Code. The Commission urges their consideration and enactment in order to make the new Code as fine, as workable, and as internally consistent as possible.

Respectfully submitted,

Maine Probate Law Revision Commission

PROPOSED BILL

TO AMEND THE PROBATE CODE

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED EIGHTY

AN ACT to Amend the Probate Code

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

Sec. 1. 18-A MRSA §3-603, first sentence, is amended to read:

No bond is required of a personal representative appointed in informal proceedings, except (1) upon the appointment of a special administrator; (2) when an executor or other personal representative is appointed to administer an estate under a will containing an express requirement of bond; or (3) when bond is required under section 3-605~~; or (4) when there is no will and all of the heirs have not made a written waiver~~.

Sec. 2. 18-A MRSA §3-707, first sentence, is amended to read:

The personal representative may ~~shall~~ employ a qualified and disinterested appraiser to assist him in ascertaining the fair market value as of the date of the decedent's death of any ~~all~~ assets.

Sec. 3. 18-A MRSA §3-706, first sentence, is amended by striking the words "file or mail" and inserting in their place the word "furnish."

Sec. 4. 18-A MRSA §3-706, second paragraph, is amended to read:

The personal representative shall furnish ~~send~~ a copy of the inventory to interested persons who request it. He may ~~shall~~ also file the original of the inventory with the court.

Sec. 5. 18-A MRSA §3-711 is amended by striking from the second sentence the words "except as limited by this section" and the comma preceding them, and by striking the last sentence.

Sec. 6. 18-A MRSA §2-505, sub-§ (c) is repealed.

STATEMENT OF FACT

The purposes of this bill are (a) to eliminate unnecessary delay and expense in the administration of probate estates by eliminating the requirement of routine bonding of the personal representative or the obtaining of a waiver from all of the heirs in intestate estates where the personal representative is appointed informally, by eliminating the requirement of employing an appraiser in cases where it is not necessary, and by eliminating the requirement of a notice before the sale of real estate by the personal representative; (b) to protect the privacy of information concerning the nature and value of the property of a deceased person and his successors by making the filing of an inventory as a matter of public record discretionary rather than mandatory; (c) to effectuate the intent of deceased testators by allowing a witness to a will to succeed to the share provided in the will; and (d) to clarify certain language in the Probate Code.

PROPOSED CONSTITUTIONAL AMENDMENT

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED EIGHTY

RESOLUTION, Proposing an Amendment to the Constitution of Maine Repealing the Exclusion of Judges of Probate from the Governor's Authority to Appoint all Judicial Officers.

Constitutional amendment. RESOLVED: Two-thirds of each branch of the Legislature concurring, that the following amendment to the Constitution of this State be proposed:

Sec. 1. Constitution, Art. V, Pt. 1, §8, first sentence, is amended to read:

He shall nominate, and, subject to confirmation as provided herein, appoint all judicial officers ~~except judges of probate~~ and justices of the peace, and all other civil and military officers whose appointment is not by this Constitution, or shall not by law be otherwise provided for.

Constitutional referendum procedure; form of question; effective date. RESOLVED: That the city aldermen, town selectmen and plantation assessors of this State shall notify the inhabitants of their respective cities, towns and plantations to meet, in the manner prescribed by law for holding a statewide election for the election of Senators and Representatives at the next general election in the month of November following the passage of this resolution to vote upon the ratification of the amendment proposed in this resolution by voting upon the following question:

"Shall the Constitution be amended as proposed by a resolution of the Legislature Repealing the Exclusion of Judges of Probate from the Governor's Authority to Appoint All Judicial Officers?"

The legal voters of each city, town and plantation shall vote by ballot on this question, and shall designate their choice by a cross or check mark placed within the corresponding square below the word "Yes" or "No." The ballots shall be received, sorted,

counted and declared in open ward, town and plantation meetings and returns made to the Secretary of State in the same manner as votes for Members of the Legislature. The Governor shall review the returns and, if it appears that a majority of the legal votes are in favor of the amendment, the Governor shall proclaim that fact without delay and the amendment shall become effective at such time as the Legislature by proper enactment shall establish a different Probate Court system with full-time judges.

Secretary of State shall prepare ballots. RESOLVED: That the Secretary of State shall prepare and furnish to each city, town and plantation all ballots, returns and copies of this resolution necessary to carry out the purpose of this referendum.

STATEMENT OF FACT

The purpose of this resolution is to remove the constitutional prohibition on the appointment of judges of probate by the Governor in the same manner provided for the appointment of other judicial officers, and to conform Section 8 of Part 1 of Article V of the Maine Constitution with the previous amendment to Section 6 of Article VI proposed by the Legislature and ratified by the people in 1967. The ratification of this amendment would make no change in the Constitution except to enable the Legislature to pass legislation providing for the appointment of judges of probate at such time as the Legislature sees fit.