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Code is a general act intended as a unified coverage of its subject matter and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided.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

§ 3-307. Informal appointment proceedings; delay in order; duty of register; effect of appointment

(a) Upon receipt of an application for informal appointment of a personal representative other than a special administrator as provided in section 3-614, if at least 120 hours have elapsed since the decedent's death, the register, after making the findings required by section 3-308, shall appoint the applicant subject to qualification and acceptance; provided, that if the decedent was a nonresident, the register shall delay the order of appointment until 30 days have elapsed since death unless the personal representative appointed at the decedent's domicile is the applicant, or unless the decedent's will directs that his estate be subject to the laws of this State.

(b) The status of personal representative and the powers and duties pertaining to the office are fully established by informal appointment. An appointment, and the office of personal representative created thereby, is subject to termination as provided in sections 3-608 through 3-612, but is not subject to retroactive vacation.

UNIFORM PROBATE CODE COMMENT

Section 3-703 describes the duty of a personal representative and the protection available to one who acts under letters issued in informal proceedings. The provision requiring a delay of 30 days from death before appointment of a personal representative for a non-resident decedent is new. It is designed to permit the first appointment to be at the decedent's domicile. See Section 3-203.

§ 3-308. Informal appointment proceedings; proof and findings required

(a) In informal appointment proceedings, the register must determine whether:

(1) The application for informal appointment of a personal representative 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) Any will to which the requested appointment relates has been formally or informally probated; but this requirement does not apply to the appointment of a special administrator;

(6) Any notice required by section 3-204 has been given;

(7) From the statements in the application, the person whose appointment is sought has priority entitling him to the appointment.

(b) Unless section 3-612 controls, the application must be denied if it indicates that a personal representative who has not filed a written statement of resignation as provided in section 3-610, subsection (c) has been appointed in this or another county of his state, that, unless the applicant is the domiciliary personal representative or his nominee, the decedent was not domiciled in this State and that a personal representative whose appointment has not been terminated has been appointed by a court in the state of domicile, or that other requirements of this section have not been met.

UNIFORM PROBATE CODE COMMENT

Sections 3-614 and 3-615 make it clear that a special administrator may be appointed to conserve the estate during any period of delay in probate of a will. Even though the will has not been approved, Section 3-614 gives priority for appointment as special administrator to the person nominated by the will which has been offered for probate. Section 3-203 governs priorities for appointment. Under it, one or more of the same class may receive priority through agreement of the others.

The last sentence of the section is designed to prevent informal appointment of a personal representative in this state when a personal representative has been previously appointed at the decedent's domicile. Sections 4-204 and 4-205 may make local appointment unnecessary. Appointment in formal proceedings is possible, however.

§ 3-309. Informal appointment proceedings; register not satisfied

If the register is not satisfied that a requested informal appointment of a personal representative should be made because of failure to meet the requirements of sections 3-307 and 3-308, or for any other reason, he may decline the application. A declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings.

UNIFORM PROBATE CODE COMMENT

Authority to decline an application for appointment is conferred on the Register. Appointment of a personal representative confers broad powers over the assets of a decedent's estate. The process of declining a requested appointment for unclassified reasons should be one which a registrar can use quickly and informally.

§ 3-310. Informal appointment proceedings; notice requirements

The moving party must give notice as described by section 1-401 of his intention to seek an appointment informally: (1) to any person demanding it pursuant to section 3-204; and (2) to any person having a prior or equal right to appointment not waived in writing and filed with the court. No other notice of an informal appointment proceeding is required.

§ 3-311. Informal appointment unavailable in certain cases

If an application for informal appointment indicates the existence of a possible unrevoked testamentary instrument which may relate to property

subject to the laws of this State, and which is not filed for probate in this court, the register shall decline the application.

PART 4

FORMAL TESTACY AND APPOINTMENT PROCEEDINGS

§ 3-401. Formal testacy proceedings; nature; when commenced

A formal testacy proceeding is litigation to determine whether a decedent left a valid will. A formal testacy proceeding may be commenced by an interested person filing a petition as described in section 3-402, subsection (a) in which he requests that the judge, after notice and hearing, enter an order probating a will, or a petition to set aside an informal probate of a will or to prevent informal probate of a will which is the subject of a pending application, or a petition in accordance with section 3-402, subsection (b) for an order that the decedent died intestate.

A petition may seek formal probate of a will without regard to whether the same or a conflicting will has been informally probated. A formal testacy proceeding may, but need not, involve a request for appointment of a personal representative.

During the pendency of a formal testacy proceeding, the register shall not act upon any application for informal probate of any will of the decedent or any application for informal appointment of a personal representative of the decedent.

Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative, after receipt of notice of the commencement of a formal probate proceeding, must refrain from exercising his power to make any further distribution of the estate during the pendency of the formal proceeding. A petitioner who seeks the appointment of a different personal representative in a formal proceeding also may request an order restraining the acting personal representative from exercising any of the powers of his office and requesting the appointment of a special administrator. In the absence of a request, or if the request is denied, the commencement of a formal proceeding has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution.

UNIFORM PROBATE CODE COMMENT

The word "testacy" is used to refer to the general status of a decedent in regard to wills. Thus, it embraces the possibility that he left no will, any question of which of several instruments is his valid will, and the possibility that he died intestate as to a part of his estate, and testate as to the balance. See Section 1-201(44).

The formal proceedings described by this section may be: (i) an original proceeding to secure "solemn form" probate of a will; (ii) a proceeding to secure "solemn form" probate to corroborate a previous informal probate;

(iii) a proceeding to block a pending application for informal probate, or to prevent an informal application from occurring thereafter; (iv) a proceeding to contradict a previous order of informal probate; (v) a proceeding to secure a declaratory judgment of intestacy and a determination of heirs in a case where no will has been offered. If a pending informal application for probate is blocked by a formal proceeding, the applicant may withdraw his application and avoid the obligation of going forward with prima facie proof of due execution. See Section 3-407. The petitioner in the formal proceedings may be content to let matters stop there, or he can frame his petition, or amend, so that he may secure an adjudication of intestacy which would prevent further activity concerning the will.

If a personal representative has been appointed prior to the commencement of a formal testacy proceeding, the petitioner must request confirmation of the appointment to indicate that he does not want the testacy proceeding to have any effect on the duties of the personal representative, or refrain from seeking confirmation, in which case, the proceeding suspends the distributive power of the previously appointed representative. If nothing else is requested or decided in respect to the personal representative, his distributive powers are restored at the completion of the proceeding, with Section 3-703 directing him to abide by the will. "Distribute" and "distribution" do not include payment of claims. See 1-201(10), 3-807 and 3-902.

§ 3-402. Formal testacy or appointment proceedings; petition; contents

(a) Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal representative, must be directed to the judge, request a judicial order after notice and hearing, contain further statements as indicated in this section, and contain such other information and be in such form as the Supreme Judicial Court may by rule provide. A petition for formal probate of a will shall:

(1) Request an order as to the testacy of the decedent in relation to a particular instrument which may or may not have been informally probated and determining the heirs;

(2) Contain the statements required for informal applications as stated in the 6 subparagraphs under section 3-301, subsection (a), paragraph (1), and the statements required by section 3-301, subsection (a), paragraph (2), subparagraphs (ii) and (iii); and

(3) State whether the original of the last will of the decedent is in the possession of the court or accompanies the petition.

If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will and indicate that it is lost, destroyed or otherwise unavailable.

(b) A petition for adjudication of intestacy and appointment of an administrator in intestacy must request a judicial finding and order that the de-

cedent left no will and determining the heirs, contain the statements required by section 3-301, subsection (a), paragraphs (1) and (4) and indicate whether supervised administration is sought and contain such other information and be in such form as the Supreme Judicial Court may by rule provide. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case the statements required by section 3-301, subsection (a), paragraph (4), subparagraph (ii) may be omitted.

UNIFORM PROBATE CODE COMMENT

If a petitioner seeks an adjudication that a decedent died intestate, he is required also to obtain a finding of heirship. A formal proceeding which is to be effective on all interested persons must follow reasonable notice to such persons. It seems desirable to force the proceedings through a formal determination of heirship because the finding will bolster the order, as well as preclude later questions that might arise at the time of distribution.

Unless an order of supervised administration is sought, there will be little occasion for a formal order concerning appointment of a personal representative which does not also adjudicate the testacy status of the decedent. If a formal order of appointment is sought because of disagreement over who should serve, Section 3-414 describes the appropriate procedure.

The words "otherwise unavailable" in subsection (b) are not intended to be read restrictively.

Section 1-310 expresses the verification requirement which applies to all documents filed with the Courts.

MAINE COMMENT

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

§ 3-403. Formal testacy proceeding; notice of hearing on petition

(a) Upon commencement of a formal testacy proceeding, the court shall **fix a time and place of hearing. Notice shall be given in the manner prescribed** by section 1-401 by the petitioner to the persons herein enumerated and to any additional person who has filed a demand for notice under section 3-204.

Notice shall be given to the following persons: the surviving spouse, children, and other heirs of the decedent, the devisees and executors named in any will that is being, or has been, probated, or offered for informal or formal probate in the county, or that is known by the petitioner to have been probated, or offered for informal or formal probate elsewhere, and any personal representative of the decedent whose appointment has not been terminated. Notice may be given to other persons. In addition, the petitioner shall give

notice by publication to all unknown persons and to all known persons whose addresses are unknown who have any interest in the matters being litigated.

(b) If it appears by the petition or otherwise that the fact of the death of the alleged decedent may be in doubt, or on the written demand of any interested person, a copy of the notice of the hearing on said petition shall be sent by registered mail to the alleged decedent at his last known address. The court shall direct the petitioner to report the results of, or make and report back concerning, a reasonably diligent search for the alleged decedent in any manner that may seem advisable, including any or all of the following methods:

(1) By inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;

(2) By notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the alleged decedent;

(3) By engaging the services of an investigator. The costs of any search so directed shall be paid by the petitioner if there is no administration or by the estate of the decedent in case there is administration.

UNIFORM PROBATE CODE COMMENT

Provisions governing the time and manner of notice required by this section and other sections in the Code are contained in 1-401.

The provisions concerning search for the alleged decedent are derived from Model Probate Code, Section 71.

Testacy proceedings involve adjudications that no will exists. Unknown wills as well as any which are brought to the attention of the Court are affected. Persons with potential interests under unknown wills have the notice afforded by death and by publication. Notice requirements extend also to persons named in a will that is known to the petitioners to exist, irrespective of whether it has been probated or offered for formal or informal probate, if their position may be affected adversely by granting of the petition. But, a rigid statutory requirement relating to such persons might cause undue difficulty. Hence, the statute merely provides that the petitioner may notify other persons.

It would not be inconsistent with this section for the Court to adopt rules designed to make petitioners exercise reasonable diligence in searching for as yet undiscovered wills.

Section 3-106 provides that an order is valid as to those given notice, though less than all interested persons were given notice. Section 3-1001(b) provides a means of extending a testacy order to previously unnotified persons in connection with a formal closing.

§ 3-404. Formal testacy preceedings; written objections to probate

Any party to a formal proceeding who opposes the probate of a will for any reason shall state in his pleadings his objections to probate of the will.

UNIFORM PROBATE CODE COMMENT

Model Probate Code section 72 requires a contestant to file written objections to any will he would oppose. The provision prevents potential confusion as to who must file what pleading that can arise from the notion that the probate of a will is in rem. The petition for probate of a revoking will is sufficient warning to proponents of the revoked will.

§ 3-405. Formal testacy proceedings; uncontested cases; hearings and proof

If a petition in a testacy proceeding is unopposed, the court may order probate or intestacy on the strength of the pleadings if satisfied that the conditions of section 3-409 have been met, or conduct a hearing in open court and require proof of the matters necessary to support the order sought. If evidence concerning execution of the will is necessary, the affidavit or testimony of one of any attesting witnesses to the instrument is sufficient. If the affidavit or testimony of an attesting witness is not available, execution of the will may be proved by other evidence or affidavit.

UNIFORM PROBATE CODE COMMENT

For various reasons, attorneys handling estates may want interested persons to be gathered for a hearing before the Court on the formal allowance of the will. The Court is not required to conduct a hearing, however.

If no hearing is required, uncontested formal probates can be completed on the strength of the pleadings. There is no good reason for summoning attestors when no interested person wants to force the production of evidence on a formal probate. Moreover, there seems to be no valid distinction between litigation to establish a will, and other civil litigation, in respect to whether the court may enter judgment on the pleadings.

§ 3-406. Formal testacy proceedings; contested cases; testimony of attesting witnesses

(a) If evidence concerning execution of an attested will which is not self-proved is necessary in contested cases, the testimony of at least one of the attesting witnesses, if within the State competent and able to testify, is required. Due execution of an attested or unattested will may be proved by other evidence.

(b) If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit.

UNIFORM PROBATE CODE COMMENT

Model Probate Code section 76, combined with section 77, substantially unchanged. The self-proved will is described in Article II. See Section 2-504. The "conclusive presumption" described here would foreclose questions such

as whether the witnesses signed in the presence of the testator. It would not preclude proof of undue influence, lack of testamentary capacity, revocation or any relevant proof that the testator was unaware of the contents of the document. The balance of the section is derived from Model Probate Code sections 76 and 77.

§ 3-407. Formal testacy proceedings; burdens in contested cases

In contested cases, petitioners who seek to establish intestacy have the burden of establishing prima facie proof of death, venue, and heirship. Proponents of a will have the burden of establishing prima facie proof of due execution in all cases, and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. If a will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate, and if a will is opposed by a petition for a declaration of intestacy, it shall be determined first whether the will is entitled to probate.

UNIFORM PROBATE CODE COMMENT

This section is designed to clarify the law by stating what is believed to be a fairly standard approach to questions concerning burdens of going forward with evidence in will contest cases.

§ 3-408. Formal testacy proceedings; will construction; effect of final order in another jurisdiction

A final order of a court of another state determining testacy, the validity or construction of a will, made in a proceeding involving notice to and an opportunity for contest by all interested persons must be accepted as determinative by the courts of this State if it includes, or is based upon, a finding that the decedent was domiciled at his death in the state where the order was made.

UNIFORM PROBATE CODE COMMENT

This section is designed to extend the effect of final orders of another jurisdiction of the United States. It should not be read to restrict the obligation of the local court to respect the judgment of another court when parties who were personally before the other court also are personally before the local court. An "authenticated copy" includes copies properly certified under the full faith and credit statute. If conflicting claims of domicile are made in proceedings which are commenced in different jurisdictions, Section 3-202 applies. This section is framed to apply where a formal proceeding elsewhere has been previously concluded. Hence, if a local proceeding is concluded before formal proceedings at domicile are concluded, local law will control.

Informal proceedings by which a will is probated or a personal representative is appointed are not proceedings which must be respected by a local court under either Section 3-202 or this section.

Nothing in this section bears on questions of what assets are included in a decedent's estate.

This section adds nothing to existing law as applied to cases where the parties before the local court were also personally before the foreign court, or where the property involved was subject to the power of the foreign court. It extends present law so that, for some purposes, the law of another state may become binding in regard to due execution or revocation of wills controlling local land, and to questions concerning the meaning of ambiguous words in wills involving local land. But, choice of law rules frequently produce a similar result. See § 240 Restatement of the Law, Second: Conflict of Laws, p. 73, Proposed Official Draft III, 1969.

This section may be easier to justify than familiar choice of law rules, for its application is limited to instances where the protesting party has had notice of, and an opportunity to participate in, previous litigation resolving the question he now seeks to raise.

§ 3-409. Formal testacy proceedings; order; foreign will

After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, if the court finds that the testator is dead, venue is proper and that the proceeding was commenced within the limitation prescribed by section 3-108, it shall determine the decedent's domicile at death, his heirs and his state of testacy. Any will found to be valid and unrevoked shall be formally probated. Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by section 3-612. The petition shall be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead. A will from a foreign jurisdiction, including a place which does not require probate of a will after death, may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has been probated in the foreign jurisdiction or has otherwise become effective under the law of the other place.

UNIFORM PROBATE CODE COMMENT

Model Probate Code section 80(a), slightly changed. If the court is not satisfied that the alleged decedent is dead, it may permit amendment of the proceeding so that it would become a proceeding to protect the estate of a missing and therefore "disabled" person. See Article V of this Code.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version was changed by substituting the word "require" for "provide for" 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 make clear that a will probated in another place may be given effect in this State in the manner provided in this section.

§ 3-410. Formal testacy proceedings; probate of more than one instrument

If 2 or more instruments are offered for probate before a final order is entered in a forma testacy proceeding, more than one instrument may be probated if neither expressly revokes the other or contains provisions which work a total revocation by implication. If more than one instrument is probated, the order shall indicate what provisions control in respect to the nomination of an executor, if any. The order may, but need not, indicate how any provisions of a particular instrument are affected by the other instrument. After a final order in a testacy proceeding has been entered, no petition for probate of any other instrument of the decedent may be entertained, except incident to a petition to vacate or modify a previous probate order and subject to the time limits of section 3-412.

UNIFORM PROBATE CODE COMMENT

Except as otherwise provided in Section 3-412, an order in a formal testacy proceeding serves to end the time within which it is possible to probate after-discovered wills, or to give effect to late-discovered facts concerning heirship. Determination of heirs is not barred by the three year limitation but a judicial determination of heirs is conclusive unless the order may be vacated.

This section authorizes a court to engage in some construction of wills incident to determining whether a will is entitled to probate. It seems desirable to leave the extent of this power to the sound discretion of the court. If wills are not construed in connection with a judicial probate, they may be subject to construction at any time. See Section 3-108.

§ 3-411. Formal testacy proceedings; partial intestacy

If it becomes evident in the course of a formal testacy proceeding that, though one or more instruments are entitled to be probated, the decedent's estate is or may be partially intestate, the court shall enter an order to that effect.

§ 3-412. Formal testacy proceedings; effect of order; vacation

Subject to appeal and subject to vacation as provided herein and in section 3-413, a formal testacy order under sections 3-409 to 3-411, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:

(1) The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding or were unaware of the earlier proceeding and were given no notice thereof, except by publication.

(2) If intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered if it is shown that one or

more persons were omitted from the determination and it is also shown that the persons were unaware of their relationship to the decedent, were unaware of his death or were given no notice of any proceeding concerning his estate, except by publication.

(3) A petition for vacation under either paragraphs (1) or (2) must be filed prior to the earlier of the following time limits:

(i) If a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate, or, if the estate is closed by statement, 6 months after the filing of the closing statement.

(ii) Whether or not a personal representative has been appointed for the estate of the decedent, the time prescribed by Section 3-108 when it is no longer possible to initiate an original proceeding to probate a will of the decedent.

(iii) Twelve months after the entry of the order sought to be vacated.

(4) The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs.

(5) The finding of the fact of death is conclusive as to the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at his last known address and the court finds that a search under section 3-403, subsection (b) was made.

If the alleged decedent is not dead, even if notice was sent and search was made, he may recover estate assets in the hands of the personal representative. In addition to any remedies available to the alleged decedent by reason of any fraud or intentional wrongdoing, the alleged decedent may recover any estate or its proceeds from distributees that is in their hands, or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all of the circumstances.

UNIFORM PROBATE CODE COMMENT

The provisions barring proof of late-discovered wills is derived in part from section 81 of Model Probate Code. The same section is the source of the provisions of (5) above. The provisions permitting vacation of an order determining heirs on certain conditions reflect the effort to offer parallel possibilities for adjudications in testate and intestate estates. See Section 3-401. An objective is to make it possible to handle an intestate estate exactly as a testate estate may be handled. If this is achieved, some of the pressure on persons to make wills may be relieved.

If an alleged decedent turns out to have been alive, heirs and distributees are liable to restore the "estate or its proceeds". If neither can be identified through the normal process of tracing assets, their liability depends upon the

circumstances. The liability of distributees to claimants whose claims have not been barred, or to persons shown to be entitled to distribution when a formal proceeding changes a previous assumption informally established which guided an earlier distribution, is different. See Sections 3-909 and 3-1004.

§ 3-413. Formal testacy proceedings; vacation of order for other cause

For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal.

UNIFORM PROBATE CODE COMMENT

See Sections 1-304 and 1-308.

§ 3-414. Formal proceedings concerning appointment of personal representative

(a) A formal proceeding may be brought for adjudication regarding the priority or qualification of one who is an applicant for appointment as personal representative, or of one who previously has been appointed personal representative in informal proceedings. If an issue concerning the testacy of the decedent is or may be involved, such proceeding is governed by section 3-402, as well as by this section. In other cases, the petition shall contain or adopt the statements required by section 3-301, paragraph (1) and describe the question relating to priority or qualification of the personal representative which is to be resolved. If the proceeding precedes any appointment of a personal representative, it shall stay any pending informal appointment proceedings as well as any commenced thereafter. If the proceeding is commenced after appointment, the previously appointed personal representative, after receipt of notice thereof, shall refrain from exercising any power of administration except as necessary to preserve the estate or unless the judge orders otherwise.

(b) After notice to interested persons, including all persons interested in the administration of the estate as successors under the applicable assumption concerning testacy, any previously appointed personal representative and any person having or claiming priority for appointment as personal representative, the judge shall determine who is entitled to appointment under section 3-203, make a proper appointment and, if appropriate, terminate any prior appointment found to have been improper as provided in cases of removal under section 3-611.

UNIFORM PROBATE CODE COMMENT

A petition raising a controversy concerning the priority or qualifications of a personal representative may be combined with a petition in a formal testacy proceeding. However, it is not necessary to petition formally for the appointment of a personal representative as a part of a formal testacy proceeding. A personal representative may be appointed on informal application either before or after formal proceedings which establish whether the decedent died testate or intestate or no appointment may be desired. See Sections 3-107, 3-301 (3), (4) and 3-307. Furthermore, procedures for securing the appoint-

ment of a new personal representative after a previous assumption as to testacy has been changed are provided by Section 3-612. These may be informal, or related to pending formal proceedings concerning testacy. A formal order relating to appointment may be desired when there is a dispute concerning priority or qualification to serve but no dispute concerning testacy. It is important to distinguish formal proceedings concerning appointment from "supervised administration". The former includes any proceeding after notice involving a request for an appointment. The latter originates in a "formal proceeding" and may be requested in addition to a ruling concerning testacy or priority or qualifications of a personal representative, but is descriptive of a special proceeding with a different scope and purpose than those concerned merely with establishing the bases for an administration. In other words, a personal representative appointed in a "formal" proceeding may or may not be "supervised".

Another point should be noted. The Court may not immediately issue letters even though a formal proceeding seeking appointment is involved and results in an order authorizing appointment. Rather, Section 3-601 et seq. control the subject of qualification. Section 1-305 deals with letters.

MAINE COMMENT

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

PART 5

SUPERVISED ADMINISTRATION

§ 3-501. Supervised administration; nature of proceeding

Supervised administration is a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the court which extends until entry of an order approving distribution of the estate and discharging the personal representative or other order terminating the proceeding. A supervised personal representative is responsible to the court, as well as to the interested parties, and is subject to directions concerning the estate made by the Court on its own motion or on the motion of any interested party. Except as otherwise provided in this Part, or as otherwise ordered by the court, a supervised personal representative has the same duties and powers as a personal representative who is not supervised.

UNIFORM PROBATE CODE COMMENT

This and the following sections of this Part describe an optional procedure for settling an estate in one continuous proceeding in the Court. The proceeding is characterized as "in rem" to align it with the concepts described by the Model Probate Code. See Section 62, M.P.C. In cases where supervised administration is not requested or ordered, no compulsion other than

self-interest exists to compel use of a formal testacy proceeding to secure an adjudication of a will or no will, because informal probate or appointment of an administrator in intestacy may be used. Similarly, unless administration is supervised, there is no compulsion other than self-interest to use a formal closing proceeding. Thus, even though an estate administration may be begun by use of a formal testacy proceeding which may involve an order concerning who is to be appointed personal representative, the proceeding is over when the order concerning testacy and appointment is entered. See Section 3-107. Supervised administration, therefore, is appropriate when an interested person desires assurance that the essential steps regarding opening and closing of an estate will be adjudicated. See the Comment following the next section.

§ 3-502. Supervised administration; petition; order

A petition for supervised administration may be filed by any interested person or by a personal representative at any time or the prayer for supervised administration may be joined with a petition in a testacy or appointment proceeding. If the testacy of the decedent and the priority and qualification of any personal representative have not been adjudicated previously, the petition for supervised administration shall include the matters required of a petition in a formal testacy proceeding and the notice requirements and procedures applicable to a formal testacy proceeding apply. If not previously adjudicated, the court shall adjudicate the testacy of the decedent and questions relating to the priority and qualifications of the personal representative in any case involving a request for supervised administration, even though the request for supervised administration may be denied. After notice to interested persons, the court shall order supervised administration of a decedent's estate: (1) if the decedent's will directs supervised administration, it shall be ordered unless the court finds that circumstances bearing on the need for supervised administration have changed since the execution of the will and that there is no necessity for supervised administration; (2) if the decedent's will directs unsupervised administration, supervised administration shall be ordered only upon a finding that it is necessary for protection of persons interested in the estate; or (3) in other cases if the court finds that supervised administration is necessary under the circumstances.

UNIFORM PROBATE CODE COMMENT

The expressed wishes of a testator regarding supervised administration should bear upon, but not control, the question of whether supervised administration will be ordered. This section is designed to achieve a fair balance between the wishes of the decedent, and the interests of successors in regard to supervised administration.

Since supervised administration normally will result in an adjudicated distribution of the estate, the issue of will or no will must be adjudicated. This section achieves this by forcing a petition for supervised administration to include matters necessary to put the issue of testacy before the Court. It is possible, however, that supervised administration will be requested because administrative complexities warranting it develop after the issue of will or no will has been resolved in a previously concluded formal testacy proceeding.

It should be noted that supervised administration, though it compels a judicial settlement of an estate, is not the only route to obtaining judicial review and settlement at the close of an administration. The procedures described in Sections 3-1101 and 3-1102 are available for use by or against personal representatives who are not supervised. Also efficient remedies for breach of duty by a personal representative who is not supervised are available under Part 6 of this Article. Finally, each personal representative consents to jurisdiction of the Court as invoked by mailed notice of any proceeding relating to the estate which may be initiated by an interested person. Also, persons interested in the estate may be subjected to orders of the Court following mailed notices made in proceedings initiated by the personal representative. In combination, these possibilities mean that supervised administration will be valuable principally to persons who see some advantage in a single judicial proceeding which will produce adjudications on all major points involved in an estate settlement.

§ 3-503. Supervised administration; effect on other proceedings

(a) The pendency of a proceeding for supervised administration of a decedent's estate stays action on any informal application then pending or thereafter filed.

(b) If a will has been previously probated in informal proceedings, the effect of the filing of a petition for supervised administration is as provided for formal testacy proceedings by Section 3-401.

(c) After he has received notice of the filing of a petition for supervised administration, a personal representative who has been appointed previously shall not exercise his power to distribute any estate. The filing of the petition does not affect his other powers and duties unless the Court restricts the exercise of any of them pending full hearing on the petition.

UNIFORM PROBATE CODE COMMENT

The duties and powers of personal representative are described in Part 7 of this Article. The ability of a personal representative to create a good title in a purchaser of estate assets is not hampered by the fact that the personal representative may breach a duty created by statute, court order or other circumstances in making the sale. See Section 3-715. However, formal proceedings against a personal representative may involve requests for qualification of the power normally possessed by personal representatives which, if granted, would subject the personal representative to the penalties for contempt of Court if he disregarded the restriction. See Section 3-607. If a proceeding also involved a demand that particular real estate be kept in the estate pending determination of a petitioner's claim thereto, notice of the pendency of the proceeding could be recorded as is usual under the jurisdiction's system for the lis pendens concept.

The word "restricts" in the last sentence is intended to negate the idea that a judicial order specially qualifying the powers and duties of a personal representative is a restraining order in the usual sense. The section means simply that some supervised personal representatives may receive the same powers

and duties as ordinary personal representatives, except that they must obtain a Court order before paying claimants or distributing, while others may receive a more restricted set of powers. Section 3-607 governs petitions which seek to limit the power of a personal representative.

§ 3-504. Supervised administration; powers of personal representative

Unless restricted by the court, a supervised personal representative has, without interim orders approving exercise of a power, all powers of personal representatives under this Code, but he shall not exercise his power to make any distribution of the estate without prior order of the court. Any other restriction on the power of a personal representative which may be ordered by the court must be endorsed on his letters of appointment and, unless so endorsed, is ineffective as to persons dealing in good faith with the personal representative.

UNIFORM PROBATE CODE COMMENT

This section provides authority to issue letters showing restrictions of power of supervised administrators. In general, persons dealing with personal representatives are not bound to inquire concerning the authority of a personal representative, and are not affected by provisions in a will or judicial order unless they know of it. But, it is expected that persons dealing with personal representatives will want to see the personal representative's letters, and this section has the practical effect of requiring them to do so. No provision is made for noting restrictions in letters except in the case of supervised representatives. See Section 3-715.

§ 3-505. Supervised administration; interim orders; distribution and closing orders

Unless otherwise ordered by the court, supervised administration is terminated by order in accordance with time restrictions, notices and contents of orders prescribed for proceedings under section 3-1001. Interim orders approving or directing partial distributions or granting other relief may be issued by the court at any time during the pendency of a supervised administration on the application of the personal representative or any interested person.

UNIFORM PROBATE CODE COMMENT

Since supervised administration is a single proceeding, the notice requirement contained in 3-106 relates to the notice of institution of the proceedings which is described with particularity by Section 3-502. The above section makes it clear that an additional notice is required for a closing order. It was discussed whether provision for notice of interim orders should be included. It was decided to leave the point to be covered by court order or rule. There was a suggestion for a rule as follows: "Unless otherwise required by order, notice of interim orders in supervised administration need be given only to interested persons who request notice of all orders entered in the proceeding." 1-402 permits any person to waive notice by a writing filed in the proceeding.

A demand for notice under Section 3-204 would entitle any interested person to notice of any interim order which might be made in the course of supervised administration.

PART 6

PERSONAL REPRESENTATIVE: APPOINTMENT, CONTROL AND TERMINATION OF AUTHORITY

§ 3-601. Qualification

Prior to receiving letters, a personal representative shall qualify by filing with the appointing court any required bond and a statement of acceptance of the duties of the office.

UNIFORM PROBATE CODE COMMENT

This and related sections of this Part describe details and conditions of appointment which apply to all personal representatives without regard to whether the appointment proceeding involved is formal or informal, or whether the personal representative is supervised. Section 1-305 authorizes issuance of copies of letters and prescribes their content. The section should be read with Section 3-504 which directs endorsement on letters of any restrictions of power of a supervised administrator.

§ 3-602. Acceptance of appointment; consent to jurisdiction

By accepting appointment, a personal representative submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be delivered to the personal representative, or mailed to him by ordinary first class mail at his address as listed in the application or petition for appointment or as thereafter reported to the court and to his address as then known to the petitioner.

UNIFORM PROBATE CODE COMMENT

Except for personal representatives appointed pursuant to Section 3-502, appointees are not deemed to be "officers" of the appointing court or to be parties in one continuous judicial proceeding that extends until final settlement. See Section 3-107. Yet, it is desirable to continue present patterns which prevent a personal representative who might make himself unavailable to service within the state from affecting the power of the appointing court to enter valid orders affecting him. See Michigan Trust Co. v. Ferry, 33 S.Ct. 550, 228 U.S. 346, 57 L.Ed. 867 (1912). The concept employed to accomplish this is that of requiring each appointee to consent in advance to the personal jurisdiction of the Court in any proceeding relating to the estate that may be instituted against him. The section requires that he be given notice of any such proceeding, which, when considered in the light of the responsibility he has undertaken, should make the procedure sufficient to meet the requirements of due process.

§ 3-603. Bond not required without court order, exceptions

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. Bond may be required by court order at the time of appointment of a personal representative appointed in any formal proceeding except that bond is not required of a personal representative appointed in formal proceedings if the will relieves the personal representative of bond, unless bond has been requested by an interested party and the court is satisfied that it is desirable. Bond required by any will may be dispensed with in formal proceedings upon determination by the court that it is not necessary. No bond is required of any personal representative who, pursuant to statute, has deposited cash or collateral with an agency of this State to secure performance of his duties.

UNIFORM PROBATE CODE COMMENT

This section must be read with the next three sections. The purpose of these provisions is to move away from the idea that bond always should be required of a probate fiduciary, or required unless a will excuses it. Also, it is designed to keep the registrar acting pursuant to application in informal proceedings, from passing judgment in each case on the need for bond. The point is that the court and registrar are not responsible for seeing that personal representatives perform as they are supposed to perform. Rather, performance is coerced by the remedies available to interested persons. Interested persons are protected by their ability to demand prior notice of informal proceedings (Section 3-204), to contest a requested appointment by use of a formal testacy proceeding or by use of a formal proceeding seeking the appointment of another person. Section 3-105 gives general authority to the court in a formal proceeding to make appropriate orders as desirable incident to estate administration. This should be sufficient to make it clear that an informal application may be blocked by a formal petition which disputes the matters stated in the petition. Furthermore, an interested person has the remedies provided in Sections 3-605 and 3-607. Finally, interested persons have assurance under this Code that their rights in respect to the values of a decedent's estate cannot be terminated without a judicial order after notice or before the passage of three years from the decedent's death.

It is believed that the total package of protection thus afforded may represent more real protection than a blanket requirement of bond. Surely, it permits a reduction in the procedures which must occur in uncomplicated estates where interested persons are perfectly willing to trust each other and the fiduciary.

§ 3-604. Bond amount; security; procedure; reduction

If bond is required and the provisions of the will or order do not specify the amount, unless stated in his application or petition, the person qualifying shall file a statement under oath with the register indicating his best estimate of the value of the personal estate of the decedent and of the income expected from the personal and real estate during the next year, and he shall execute and file a bond with the registers, or give other suitable security, in an amount not less than the estimate. The register shall determine that the bond is

duly executed by a corporate surety, or one or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property or other adequate security. The register may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic financial institution, as defined in section 6-101, in a manner that prevents their unauthorized disposition. On petition of the personal representative or another interested person the judge may excuse a requirement of bond, increase or reduce the amount of the bond, release sureties, or permit the substitution of another bond with the same or different sureties.

UNIFORM PROBATE CODE COMMENT

This section permits estimates of value needed to fix the amount of required bond to be filed when it becomes necessary. A consequence of this procedure is that estimates of value of estates no longer need appear in the petitions and applications which will attend every administered estate. Hence, a measure of privacy that is not possible under most existing procedures may be achieved. A co-signature arrangement might constitute adequate security within the meaning of this section.

§ 3-605. Demand for bond by interested person

Any person apparently having an interest in the estate worth in excess of $1000, or any creditor having a claim in excess of $1000, may make a written demand that a personal representative give bond. The demand must be filed with the register and a copy mailed to the personal representative, if appointment and qualification have occurred. Thereupon, bond is required, but the requirement ceases if the person demanding bond ceases to be interested in the estate, or if bond is excused as provided in sections 3-603 or 3-604. After he has received notice and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of his office except as necessary to preserve the estate. Failure of the personal representative to meet a requirement of bond by giving suitable bond within 30 days after receipt of notice is cause for his removal and appointment of a successor personal representative.

UNIFORM PROBATE CODE COMMENT

The demand for bond described in this section may be made in a petition or application for appointment of a personal representative, or may be made after a personal representative has been appointed. The mechanism for compelling bond is designed to function without unnecessary judicial involvement. If demand for bond is made in a formal proceeding, the judge can determine the amount of bond to be required with due consideration for all circumstances. If demand is not made in formal proceedings, methods for computing the amount of bond are provided by statute so that the demand can be complied with without resort to judicial proceedings. The information which a personal representative is required by Section 3-705 to give each beneficiary includes a statement concerning whether bond has been required.

§ 3-606. Terms and conditions of bonds

(a) The following requirements and provisions apply to any bond required by this Part:

(1) Bonds shall name the judge as obligee for the benefit of the persons interested in the estate and shall be conditioned upon the faithful discharge by the fiduciary of all duties according to law.

(2) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the personal representative and with each other. The address of sureties shall be stated in the bond.

(3) By executing an approved bond of a personal representative, the surety consents to the jurisdiction of the court which issued letters to the primary obligor in any proceedings pertaining to the fiduciary duties of the personal representative and naming the surety as a party. Notice of any proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the court where the bond is filed and to his address as then known to the petitioner.

(4) On petition of a successor personal representative, any other personal representative of the same decedent, or any interested person, a proceeding in the Court may be initiated against a surety for breach of the obligation of the bond of the personal representative.

(5) The bond of the personal representative is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(b) No action or proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

UNIFORM PROBATE CODE COMMENT

Paragraph (2) is based, in part, on Section 109 of the Model Probate Code. Paragraph (3) is derived from Section 118 of the Model Probate Code.

§ 3-607. Order restraining personal representative

On petition of any person who appears to have an interest in the estate, the judge by temporary order may restrain a personal representative from performing specified acts of administration, disbursement, or distribution, or exercise of any powers or discharge of any duties of his office, or make any other order to secure proper performance of his duty, if it appears to the judge that the personal representative otherwise may take some action which would jeopardize unreasonably the interest of the applicant or of some other interested person. Persons with whom the personal representative may transact business may be made parties.

UNIFORM PROBATE CODE COMMENT

Cf. Section 3-401 which provides for a restraining order against a previously

appointed personal representative incident to a formal testacy proceeding. The above section describes a remedy which is available for any cause against a previously appointed personal representative, whether appointed formally or informally.

This remedy, in combination with the safeguards relating to the process for appointment of a personal representative, permit "control" of a personal representative that is believed to be equal, if not superior to that presently available with respect to "supervised" personal representatives appointed by inferior courts. The request for a restraining order may mark the beginning of a new proceeding but the personal representative, by the consent provided in Section 3-602, is practically in the position of one who, on motion, may be cited to appear before a judge.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version was changed by deleting subsection (b) of the Uniform Probate Code version so that the procedural matters contained therein are governed by court rule.

§ 3-608. Termination of appointment; general

Termination of appointment of a personal representative occurs as indicated in sections 3-609 to 3-612, inclusive. Termination ends the right and power pertaining to the office of personal representative as conferred by this Code or any will, except that a personal representative, at any time prior to distribution or until restrained or enjoined by court order, may perform acts necessary to protect the estate and may deliver the assets to a successor representative. Termination does not discharge a personal representative from liability for transactions or omissions occurring before termination, or relieve him of the duty to preserve assets subject to his control, to account therefor and to deliver the assets. Termination does not affect the jurisdiction of the court over the personal representative, but terminates his authority to represent the estate in any pending or future proceeding.

UNIFORM PROBATE CODE COMMENT

"Termination", as defined by this and succeeding provisions, provides definiteness respecting when the powers of a personal representative (who may or may not be discharged by court order) terminate.

It is to be noted that this section does not relate to jurisdiction over the estate in proceedings which may have been commenced against the personal representative prior to termination. In such cases, a substitution of successor or special representative should occur if the plaintiff desires to maintain his action against the estate.

It is important to note that "termination" is not "discharge". However, an order of the Court entered under 3-1001 or 3-1002 both terminates the appointment of, and discharges, a personal representative.

§ 3-609. Termination of appointment; death or disability

The death of a personal representative or the appointment of a conservator for the estate of a personal representative, terminates his appointment. Until appointment and qualification of a successor or special representative to replace the deceased or protected representative, the representative of the estate of the deceased or protected personal representative, if any, has the duty to protect the estate possessed and being administered by his decedent or ward at the time his appointment terminates, has the power to perform acts necessary for protection and shall account for and deliver the estate assets to a successor or special personal representative upon his appointment and qualification.

UNIFORM PROBATE CODE COMMENT

See Section 3-718, which establishes the rule that a surviving co-executor may exercise all powers incident to the office unless the will provides otherwise. Read together, this section and Section 3-718 mean that the representative of a deceased co-representative would not have any duty or authority in relation to the office held by his decedent.

§ 3-610. Termination of appointment; voluntary

(a) An appointment of a personal representative terminates as provided in section 3-1003, one year after the filing of a closing statement.

(b) An order closing an estate as provided in section 3-1001 or 3-1002 terminates an appointment of a personal representative.

(c) A personal representative may resign his position by filing a written statement of resignation with the register after he has given at least 15 days written notice to the persons known to be interested in the estate. If no one applies or petitions for appointment of a successor representative within the time indicated in the notice, the filed statement of resignation is ineffective as a termination of appointment and in any event is effective only upon the appointment and qualification of a successor representative and delivery of the assets to him.

UNIFORM PROBATE CODE COMMENT

Subparagraph (c) above provides a procedure for resignation by a personal representative which may occur without judicial assistance.

§ 3-611. Termination of appointment by removal; cause; procedure

(a) A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the court may order. Except as otherwise ordered as provided in section 3-607, after receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration or preserve the estate. If removal is ordered, the court also shall direct by order the disposition of the

assets remaining in the name of, or under the control of, the personal representative being removed.

(b) Cause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office. Unless the decedent's will directs otherwise, a personal representative appointed at the decedent's domicile, incident to securing appointment of himself or his nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this State to administer local assets.

UNIFORM PROBATE CODE COMMENT

Thought was given to qualifying (a) above so that no formal removal proceedings could be commenced until after a set period from entry of any previous order reflecting judicial consideration of the qualifications of the personal representative. It was decided, however, that the matter should be left to the judgment of interested persons and the Court.

§ 3-612. Termination of appointment; change of testacy status

Except as otherwise ordered in formal proceedings, the probate of a will subsequent to the appointment of a personal representative in intestacy or under a will which is superseded by formal probate of another will, or the vacation of an informal probate of a will subsequent to the appointment of the personal representative thereunder, does not terminate the appointment of the personal representative although his powers may be reduced as provided in section 3-401. Termination occurs upon appointment in informal or formal appointment proceedings of a person entitled to appointment under the later assumption concerning testacy. If no request for new appointment is made within 30 days after expiration of time for appeal from the order in formal testacy proceedings, or from the informal probate, changing the assumption concerning testacy, the previously appointed personal representative upon request may be appointed personal representative under the subsequently probated will, or as in intestacy as the case may be.

UNIFORM PROBATE CODE COMMENT

This section and Section 3-401 describe the relationship between formal or informal proceedings which change a previous assumption concerning the testacy of the decedent, and a previously appointed personal representative. The basic assumption of both sections is that an appointment, with attendant powers of management, is separable from the basis of appointment; i.e., intestate or testate?; what will is the last will? Hence, a previously appointed personal representative continues to serve in spite of formal or informal proceedings that may give another a prior right to serve as personal representative. But, if the testacy status is changed in formal proceedings, the petitioner also may request appointment of the person who would be entitled to serve if

his assumption concerning the decedent's will prevails. Provision is made for a situation where all interested persons are content to allow a previously appointed personal representative to continue to serve even though another has a prior right because of a change relating to the decedent's will. It is not necessary for the continuing representative to seek reappointment under the new assumption for Section 3-703 is broad enough to require him to administer the estate as intestate, or under a later probated will, if either status is established after he was appointed. Under Section 3-403, notice of a formal testacy proceeding is required to be given to any previously appointed personal representative. Hence, the testacy status cannot be changed without notice to a previously appointed personal representative.

§ 3-613. Successor personal representative

Parts 3 and 4 of this Article govern proceedings for appointment of a personal representative to succeed one whose appointment has been terminated. After appointment and qualification, a successor personal representative may be substituted in all actions and proceedings to which the former personal representative was a party, and no notice, process or claim which was given or served upon the former personal representative need be given to or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative. Except as otherwise ordered by the court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated.

§ 3-614. Special administrator; appointment

A special administrator may be appointed:

(1) Informally by the register on the application of any interested person when necessary to protect the estate of a decedent prior to the appointment of a general personal representative or if a prior appointment has been terminated as provided in section 3-609;

(2) In a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice.

UNIFORM PROBATE CODE COMMENT

The appointment of a special administrator other than one appointed pending original appointment of a general personal representative must be handled by the Court. Appointment of a special administrator would enable the estate to participate in a transaction which the general personal representative could not, or should not, handle because of conflict of interest. If a need arises because of temporary absence or anticipated incapacity for delegation of the

authority of a personal representative, the problem may be handled without judicial intervention by use of the delegation powers granted to personal representatives by Section 3-716.

§ 3-615. Special administrator; who may be appointed

(a) If a special administrator is to be appointed pending the probate of a will which is the subject of a pending application or petition for probate, the person named executor in the will shall be appointed if available, and qualified.

(b) In other cases, any proper person may be appointed special administrator.

UNIFORM PROBATE CODE COMMENT

In some areas of the country, particularly where wills cannot be probated without full notice and hearing, appointment of special administrators pending probate is sought almost routinely. The provisions of this Code concerning informal probate should reduce the number of cases in which a fiduciary will need to be appointed pending probate of a will. Nonetheless, there will be instances where contests begin before probate and where it may be necessary to appoint a special administrator. The objective of this section is to reduce the likelihood that contestants will be encouraged to file contests as early as possible simply to gain some advantage via having a person who is sympathetic to their cause appointed special administrator. Most will contests are not successful. Hence, it seems reasonable to prefer the named executor as special administrator where he is otherwise qualified.

§ 3-616. Special administrator; appointed informally; powers and duties

A special administrator appointed by the register in informal proceedings pursuant to section 3-614, paragraph (1) has the duty to collect and manage the assets of the estate, to preserve them, to account therefor and to deliver them to the general personal representative upon his qualification. The special administrator has the power of a personal representative under the Code necessary to perform his duties.

§ 3-617. Special administrator; formal proceedings; power and duties

A special administrator appointed by order of the court in any formal proceeding has the power of a general personal representative except as limited in the appointment and duties as prescribed in the order. The appointment may be for a specified time, to perform particular acts or on other terms as the court may direct.

§ 3-618. Termination of appointment; special administrator

The appointment of a special administrator terminates in accordance with the provisions of the order of appointment or on the appointment of a general personal representative. In other cases, the appointment of a special administrator is subject to termination as provided in sections 3-608 through 3-611.

§ 3-619. Public administrators

(a) The Governor shall appoint in each county for a term of 4 years, unless

sooner removed, a public administrator who shall, upon petition to the court and after notice and hearing, be appointed to administer the estates of persons who die intestate within the county, or who die intestate elsewhere leaving property within the county, and who are not known to have within the state any heirs who can lawfully inherit the estate, and for whom no other administration has been commenced. The public administrator shall have the same powers and duties of a personal representative under supervised administration as provided in section 3-504, and shall give bond as provided for other personal representatives in cases of ordinary administration under sections 3-603 through 3-606. If any person entitled to appointment as personal representative under section 3-203 shall, prior to the appointment of the public administrator, file a petition for informal or formal appointment as personal representative, the court shall withhold any appointment of the public administrator pending denial of the petition for the appointment of the private personal representative.

(b) The public administrator may be allowed fees and compensation for his services as in the case of ordinary administration as provided in sections 3-719, 3-720 and 3-721, except that no fee for his own services shall be paid without prior approval by the court.

(c) Pending the appointment of the public administrator, and in the absence of any local administration or any administration by a domiciliary foreign personal representative under sections 4-204 and 4-205, the public administrator may proceed to conserve the property of the estate when it appears necessary or expedient.

(d) If, before the estate of such deceased in the hands of the public administrator is fully settled, any last will and testament of the decedent is granted informal or formal probate, or if any person entitled under section 3-203 to appointment as personal representative is informally or formally appointed, the appointment of the public administrator is terminated as provided in section 3-608, and he shall account for and deliver the assets of the estate to the private personal representative as provided therein, or to the successors under the will as provided by law if no private personal representative has been appointed.

(e) When there is in the hands of such public administrator an amount of money more than is necessary for the payment of the decedent's debts and for other purposes of administration, if no heirs have been discovered, the public administrator shall be required by the judge to deposit it as provided in section 3-914. Any income earned on such funds shall be paid into the General Fund as compensation for administration.

(f) In all cases where a public administrator is appointed, the register shall immediately send to the Treasurer of State a copy of the petition and the decree thereon, and in all cases where the public administrator is ordered to pay the balance of the estate as provided in subsection (e) the judge shall give notice to the county treasurer of the amount and from what estate it is receivable. If the public administrator neglects for 3 months after the order of the judge to deposit the money, the county treasurer shall petition the court

for enforcement of the order or bring a civil action upon any bond of the public administrator for the recovery thereof. The records and accounts of the public administrator shall be audited annually by the State Department of Audit.

MAINE COMMENT

General. This section was added to the Uniform Probate Code version in order to preserve the Maine provisions for public administration of estates where no heirs appeared to be within the state to pursue their own interests in the estate or provide for its administration. The provisions of prior Maine law were modified to fit with the Maine Probate Code system of administration, and to provide for supervised administration by the public administrator so that full opportunity for notice and hearing would be available before distribution of the estate in these cases where no heirs appear to be available oversee the administration as in the ordinary case.

PART 7

DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

§ 3-701. Time of accrual of duties and powers

The duties and powers of a personal representative commence upon his appointment. The powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. Prior to appointment, a person named executor in a will may carry out written instructions of the decedent relating to his body, funeral and burial arrangements. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.

UNIFORM PROBATE CODE COMMENT

This section codifies the doctrine that the authority of a personal representative relates back to death from the moment it arises. It also makes it clear that authority of a personal representative stems from his appointment. The sentence concerning ratification is designed to eliminate technical questions that might arise concerning the validity of acts done by others prior to appointment. Section 3-715 (21) relates to delegation of authority after appointment. The third sentence accepts an idea found in the Illinois Probate Act, § 79 [S.H.A. ch. 3, § 79].

§ 3-702. Priority among different letters

A person to whom general letters are issued first has exclusive authority under the letters until his appointment is terminated or modified. If, through error, general letters are afterwards issued to another, the first appointed representative may recover any property of the estate in the hands of the representative subsequently appointed, but the acts of the latter done in good faith before notice of the first letters are not void for want of validity of appointment.

UNIFORM PROBATE CODE COMMENT

The qualification relating to "modification" of an appointment is intended to refer to the change that may occur in respect to the exclusive authority of one with letters upon later appointment of a co-representative or of a special administrator. The sentence concerning erroneous dual appointment is derived from recent New York legislation. See Section 704, Surrogate's Court Procedure Act [McKinney's SCPA 704].

Erroneous appointment of a second personal representative is possible if formal proceedings after notice are employed. It might be desirable for a state to promulgate a system whereby a notation of letters issued by each county probate office would be relayed to a central record keeping office which, in turn could indicate to any other office whether letters for a particular decedent, perhaps identified by social security number, had been issued previously. The problem can arise even though notice to known interested persons and by publication is involved.

§ 3-703. General duties; relation and liability to persons interested in estate; standing to sue

(a) A personal representative is a fiduciary who shall observe the standards of care applicable to trustees as described by section 7-302. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this Code, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this Code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors of the estate.

(b) A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will is authority to administer and distribute the estate according to its terms. An order of appoinment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning his appointment or fitness to continue, or a supervised administration proceeding. Nothing in this section affects the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants, the surviving spouse, any minor and dependent children and any pretermitted child of the decedent as described elsewhere in this Code.

(c) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death.

UNIFORM PROBATE CODE COMMENT

This and the next section are especially important sections for they state the basic theory underlying the duties and powers of personal representatives. Whether or not a personal representative is supervised, this section applies to describe the relationship he bears to interested parties. If a supervised representative is appointed, or if supervision of a previously appointed personal representative is ordered, an additional obligation to the court is created. See Section 3-501.

The fundamental responsibility is that of a trustee. Unlike many trustees, a personal representative's authority is derived from appointment by the public agency known as the Court. But, the Code also makes it clear that the personal representative, in spite of the source of his authority, is to proceed with the administration, settlement and distribution of the estate by use of statutory powers and in accordance with statutory directions. See Sections 3-107 and 3-704. Subsection (b) is particularly important, for it ties the question of personal liability for administrative or distributive acts to the question of whether the act was "authorized at the time". Thus, a personal representative may rely upon and be protected by a will which has been probated without adjudication or an order appointing him to administer which is issued in no-notice proceedings even though proceedings occurring later may change the assumption as to whether the decedent died testate or intestate. See Section 3-302 concerning the status of a will probated without notice and Section 3-102 concerning the ineffectiveness of an unprobated will. However, it does not follow from the fact that the personal representative distributed under authority that the distributees may not be liable to restore the property or values received if the assumption concerning testacy is later changed. See Sections 3-909 and 3-1004. Thus, a distribution may be "authorized at the time" within the meaning of this section, but be "improper" under the latter section.

Paragraph (c) is designed to reduce or eliminate differences in the amenability to suit of personal representatives appointed under this Code and under traditional assumptions. Also, the subsection states that so far as the law of the appointing forum is concerned, personal representatives are subject to suit in other jurisdictions. It, together with various provisions of Article IV, are designed to eliminate many of the present reasons for ancillary administrations.

§ 3-704. Personal representative to proceed without court order; exception

A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified or ordered in regard to a supervised personal representative, do so without adjudication, order, or direction of the court, but he may invoke the jurisdiction of the court, in proceedings authorized by this Code, to resolve questions concerning the estate or its administration.

UNIFORM PROBATE CODE COMMENT

This section is intended to confer authority on the personal representative to initiate a proceeding at any time when it is necessary to resolve a question

relating to administration. Section 3-105 grants broad subject matter jurisdiction to the probate court which covers a proceeding initiated for any purpose other than those covered by more explicit provisions dealing with testacy proceedings, proceedings for supervised administration, proceedings concerning disputed claims and proceedings to close estates.

§ 3-705. Duty of personal representative; information to heirs and devisees

Not later than 30 days after his appointment every personal representative, except any special administrator, shall give information of his appointment to the heirs and devisees, including, if there has been no formal testacy proceeding and if the personal representative was appointed on the assumption that the decedent died intestate, the devisees in any will mentioned in the application for appointment of a personal representative and, in any case where there has been no formal testacy proceedings, to the devisees in any purported will whose existence and the names of the devisees thereunder are known to the personal representative. The information shall be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the personal representative. The duty does not extend to require information to persons who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate. The information shall include the name and address of the personal representative, indicate that it is being sent to persons who have or may have some interest in the estate being administered, indicate whether bond has been filed, and describe the court where papers relating to the estate are on file. The personal representative's failure to give this information is a breach of his duty to the persons concerned but does not affect the validity of his appointment, his powers or other duties. A personal representative may inform other persons of his appointment by delivery or ordinary first class mail.

UNIFORM PROBATE CODE COMMENT

This section requires the personal representative to inform persons who appear to have an interest in the estate as it is being administered, of his appointment. Also, it requires the personal representative to give notice to persons who appear to be disinherited by the assumption concerning testacy under which the personal representative was appointed. The communication involved is not to be confused with the notice requirements relating to litigation. The duty applies even though there may have been a prior testacy proceeding after notice, except that persons who have been adjudicated to be without interest in the estate are excluded. The rights, if any, of persons in regard to estates cannot be cut off completely except by the running of the three year statute of limitations provided in Section 3-108, or by a formal judicial proceeding which will include full notice to all interested persons. The interests of some persons may be shifted from rights to specific property of the decedent to the proceeds from sale thereof, or to rights to values received by distributees. However, such a shift of protected interest from one thing to another, or to funds or obligations, is not new in relation to trust beneficiaries. A personal representative may initiate formal proceedings to determine whether persons, other than those appearing to have interests, may

be interested in the estate, under Section 3-401 or, in connection with a formal closing, as provided by Section 3-1001.

No information or notice is required by this section if no personal representative is appointed.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by adding an express requirement for giving information of the appointment to any known devisees under a purported will that is not the basis for the informal application and not mentioned in that application.

§ 3-706. Duty of personal representative; inventory and appraisal

Within 3 months after his appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall prepare and file or mail an inventory of property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item. The inventory shall also include a schedule of credits of the decedent, with the names of the obligors, the amounts due, a description of the nature of the obligation, and the amount of all such credits, exclusive of expenses and risk of settlement or collection.

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

UNIFORM PROBATE CODE COMMENT

This and the following sections eliminate the practice now required by many probate statutes under which the judge is involved in the selection of appraisers. If the personal representative breaches his duty concerning the inventory, he may be removed. Section 3-611. Or, an interested person seeking to surcharge a personal representative for losses incurred as a result of his administration might be able to take advantage of any breach of duty concerning inventory. The section provides two ways in which a personal representative may handle an inventory. If the personal representative elects to send copies to all interested persons who request it, information concerning the assets of the estate need not become a part of the records of the probate court. The alternative procedure is to file the inventory with the court. This procedure would be indicated in estates with large numbers of interested persons, where the burden of sending copies to all would be substantial. The Court's role in respect to the second alternative is simply to receive and file the inventory with the file relating to the estate. See 3-204, which permits any interested person to demand notice of any document relating to an estate which may be filed with the Court.

In 1975, the Joint Editorial Board recommended elimination of the word "or" that separated the language dealing with the duty to send a copy of the

inventory to interested persons requesting it, from the final part of the paragraph dealing with filing of the original. The purpose of the change was to prevent a literal interpretation of the original text that would have permitted a personal representative who filed the original inventory with the court to avoid compliance with requests for copies from interested persons.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by adding the last sentence of the first paragraph in order to carry over a prior Maine provision concerning the contents of the inventory.

§ 3-707. Employment of appraisers

The personal representative may 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 asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate. The names and addresses of any appraiser shall be indicated on the inventory with the item or items he appraised.

§ 3-708. Duty of personal representative; supplementary inventory

If any property not included in the original inventory comes to the knowledge of a personal representative or if the personal representative learns that the value or description indicated in the original inventory for any item is erroneous or misleading, he shall make a supplementary inventory or appraisement showing the market value as of the date of the decedent's death of the new item or the revised market value or descriptions, and the appraisers or other data relied upon, if any, and file it with the court if the original inventory was filed, or furnish copies thereof or information thereof to persons interested in the new information.

§ 3-709. Duty of personal representative; possession of estate

Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by him will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection and preservation of, the estate in his possession. He may maintain an action to recover possession of property or to determine the title thereto.

UNIFORM PROBATE CODE COMMENT

Section 3-101 provides for the devolution of title on death. Section 3-712 defines the status of the personal representative with reference to "title" and "power" in a way that should make it unnecessary to discuss the "title" to decedent's assets which his personal representative acquires. This section deals with the personal representative's duty and right to possess assets. It proceeds from the assumption that it is desirable whenever possible to avoid disruption of possession of the decedent's assets by his devisees or heirs. But, if the personal representative decides that possession of an asset is necessary or desirable for purposes of administration, his judgment is made conclusive in any action for possession that he may need to institute against an heir or devisee. It may be possible for an heir or devisee to question the judgment of the personal representative in later action for surcharge for breach of fiduciary duty, but this possibility should not interfere with the personal representative's administrative authority as it relates to possession of the estate.

This Code follows the Model Probate Code in regard to partnership interests. In the introduction to the Model Probate Code, the following appears at p. 22:

"No provisions for the administration of partnership estates when a partner dies have been included. Several states have statutes providing that unless the surviving partner files a bond with the probate court, the personal representative of the deceased partner may administer the partnership estate upon giving an additional bond. Kan.Gen.Stat. (Supp.1943) §§ 59-1001 to 59-1005; Mo.Rev.Stat.Ann. (1942) §§ 81 to 93 [V.A.M.S. §§ 473.220 to 473.230]. In these states the administration of partnership estates upon the death of a partner is brought more or less completely under the jurisdiction of the probate court. While the provisions afford security to parties in interest, they have caused complications in the settlement of partnership estates and have produced much litigation. Woener, Administration (3rd ed., 1923) §§ 128 to 130; annotation, 121 A.L.R. 860. These statutes have been held to be inconsistent with section 37 of the Uniform Partnership Act providing for winding up by the surviving partner. Davis v. Hutchinson C.C.A. 9th, 1929) 36 F.(2d) 309. Hence the Model Probate Code contains no provision regarding partnership property except for inclusion in the inventory of the decedent's proportionate share of any partnership. See § 120. However, it is suggested that the Uniform Partnership Act should be included in the statutes of the states which have not already enacted it."

§ 3-710. Power to avoid transfers

The property liable for the payment of unsecured debts of a decedent includes all property transferred by him by any means which is in law void or voidable as against his creditors, and subject to prior liens, the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative. The personal representative is not required to institute such an action unless requested by creditors, who must pay or secure the cost and expenses of litigation.

UNIFORM PROBATE CODE COMMENT

Model Probate Code section 125, with additions. See, also, Section 6-201, which saves creditors' rights in regard to non-testamentary transfers effective at death.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by addition of the last sentence.

§ 3-711. **Powers of personal representatives; in general**

Until termination of his appointment a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.

UNIFORM PROBATE CODE COMMENT

The personal representative is given the broadest possible "power over title". He receives a "power", rather than title, because the power concept eases the succession of assets which are not possessed by the personal representative. Thus, if the power is unexercised prior to its termination, its lapse clears the title of devisees and heirs. Purchasers from devisees or heirs who are "distributees" may be protected also by Section 3-910. The power over title of an absolute owner is conceived to embrace all possible transactions which might result in a conveyance or encumbrance of assets, or in a change of rights of possession. The relationship of the personal representative to the estate is that of a trustee. Hence, personal creditors or successors of a personal representative cannot avail themselves of his title to any greater extent than is true generally of creditors and successors of trustees. Interested persons who are apprehensive of possible misuse of power by a personal representative may secure themselves by use of the devices implicit in the several sections of Parts 1 and 3 of this Article. See especially Sections 3-501, 3-605, 3-607 and 3-611.

§ 3-712. **Improper exercise of power; breach of fiduciary duty**

If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust. The rights of purchasers and others dealing with a personal representative shall be determined as provided in sections 3-713 and 3-714.

UNIFORM PROBATE CODE COMMENT

An interested person has two principal remedies to forestall a personal representative from committing a breach of fiduciary duty. (1) Under Section 3-607 he may apply to the Court for an order restraining the personal representative from performing any specified act or from exercising any power in the course of administration. (2) Under Section 3-611 he may petition the Court for an order removing the personal representative.

Evidence of a proceeding, or order, restraining a personal representative from selling, leasing, encumbering or otherwise affecting title to real property subject to administration, if properly recorded under the laws of this state, would be effective to prevent a purchaser from acquiring a marketable title under the usual rules relating to recordation of real property titles.

In addition, Sections 1-302 and 3-105 authorize joinder of third persons who may be involved in contemplated transactions with a personal representative in proceedings to restrain a personal representative under Section 3-607.

§ 3-713. Sale, encumbrance or transaction involving conflict of interest; voidable; exceptions

Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one who has consented after fair disclosure, unless

(1) The will or a contract entered into by the decedent expressly authorized the transaction; or

(2) The transaction is approved by the court after notice to interested persons.

UNIFORM PROBATE CODE COMMENT

If a personal representative violates the duty against self-dealing described by this section, a voidable title to assets sold results. Other breaches of duty relating to sales of assets will not cloud titles except as to purchasers with actual knowledge of the breach. See Section 3-714. The principles of bona fide purchase would protect a purchaser for value without notice of defect in the seller's title arising from conflict of interest.

§ 3-714. Persons dealing with personal representative; protection

A person who in good faith either assists a personal representative or deals with him for value is protected as if the personal representative properly exercised his power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise. Except for restrictions on powers of supervised personal representatives which are endorsed on letters as provided in section 3-504, no provision in any will or order of court purporting to limit the power of a personal representative is effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters, including a case in which the alleged decedent is found to be alive. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

UNIFORM PROBATE CODE COMMENT

This section qualifies the effect of a provision in a will which purports to prohibit sale of property by a personal representative. The provisions of a will may prescribe the duties of a personal representative and subject him to surcharge or other remedies of interested persons if he disregards them. See Section 3-703. But, the will's prohibition is not relevant to the rights of a purchaser unless he had actual knowledge of its terms. Interested persons who want to prevent a personal representative from having the power described here must use the procedures descdibed in Sections 3-501 to 3-505. Each state will need to identify the relation between this section and other statutory provisions creating liens on estate assets for inheritance and other taxes. The section cannot control whether a purchaser takes free of the lien of unpaid federal estate taxes. Hence, purchasers from personal representatives appointed pursuant to this Code will have to satisfy themselves concerning whether estate taxes are paid, and if not paid, whether the tax lien follows the property they are acquiring. See section 6234, Internal Revenue Code [26 U.S.C.A. § 6324].

The impact of formal recording systems beyond the usual probate procedure depends upon the particular statute. In states in which the recording spstem provides for recording wills as muniments of title, statutory adaptation should be made to provide that recording of wills should be postponed until the validity has been established by probate or limitation. Statutory limitation to this effect should be added to statutes which do not so provide to avoid conflict with power of the personal representative during administration. The purpose of the Code is to make the deed or instrument of distribution the usual muniment of title. See Sections 3-907, 3-908, 3-910. However, this is not available when no administration has occurred and in that event reliance upon general recording statutes must be had.

If a state continues to permit wills to be recorded as muniments of title, the above section would need to be qualified to give effect to the notice from recording.

§ 3-715. Transactions authorized for personal representatives; exceptions

Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 3-902, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) Retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment;

(2) Receive assets from fiduciaries, or other sources;

(3) Perform, compromise or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to

convey or lease land, the personal representative, among other possible courses of action, may:

(i) Execute and deliver a deed of conveyance for cash payment of all sums remaining due or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or

(ii) Deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement;

(4) Satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances;

(5) If funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit or invest liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements or other prudent investments which would be reasonable for use by trustees generally;

(6) Acquire or dispose of an asset, including land in this or another state, for cash or on credit, at public or private sale; and manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;

(7) Make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, raze existing or erect new party walls or buildings;

(8) Subdivide, develop or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; or adjust differences in valuation on exchange or partition by giving or receiving considerations; or dedicate easements to public use without consideration;

(9) Enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the period of administration;

(10) Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(11) Abandon property when, in the opinion of the personal representative, it is valueless, or is so encumbered, or is in condition that it is of no benefit to the estate;

(12) Vote stocks or other securities in person or by general or limited proxy;

(13) Pay calls, assessments, and other sums chargeable or accruing against or on account of securities, unless barred by the provisions relating to claims;

(14) Hold a security in the name of a nominee or in other form without disclosure of the interest of the estate but the personal representative is liable for any act of the nominee in connection with the security so held;

(15) Insure the assets of the estate against damage, loss and liability and himself against liability as to third persons;

(16) Borrow money with or without security to be repaid from the estate assets or otherwise; and advance money for the protection of the estate;

(17) Effect a fair and reasonable compromise with any debtor or obligor, or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner thereof in satisfaction of the indebtedness secured by lien;

(18) Pay taxes, assessments, compensation of the personal representative, and other expenses incident to the administration of the estate. In the collection and payment of state inheritance taxes, the personal representative shall observe the provisions of Title 36, chapter 557;

(19) Sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(20) Allocate items of income or expense to either estate income or principal, as permitted or provided by law;

(21) Employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; act without independent investigation upon their recommendations; and instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary;

(22) Prosecute or defend claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties;

(23) Sell, mortgage, or lease any real or personal property of the estate or any interest therein for cash, credit, or for part cash and part credit, and with or without security for unpaid balances;

(24) Continue any unincorporated business or venture in which the decedent was engaged at the time of his death (i) in the same business form for a period of not more than 4 months from the date of appointment of a general personal representative if continuation is a reasonable means of preserving the value of the business including good will, (ii) in the same

business form for any additional period of time that may be approved by order of the court in a formal proceeding to which the persons interested in the estate are parties; or (iii) throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate;

(25) Incorporate any business or venture in which the decedent was engaged at the time of his death;

(26) Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate;

(27) Satisfy and settle claims and distribute the estate as provided in this Code.

UNIFORM PROBATE CODE COMMENT

This section accepts the assumption of the Uniform Trustee's Powers Act that it is desirable to equip fiduciaries with the authority required for the prudent handling of assets and extends it to personal representatives. The section requires that a personal representative act reasonably and for the benefit of the interested person. Subject to this and to the other qualifications described by the preliminary statement, the enumerated transactions are made authorized transactions for personal representatives. Sub-paragraphs (27) and (18) support the other provisions of the Code, particularly Section 3-704, which contemplates that personal representatives will proceed with all of the business of administration without court orders.

In part, sub-paragraph (4) involves a substantive question of whether non-contractual charitable pledges of a decedent can be honored by his personal representative. It is believed, however, that it is not desirable from a practical standpoint to make much turn on whether a charitable pledge is, or is not, contractual. Pledges are rarely made the subject of claims. The effect of sub-paragraph (4) is to permit the personal representative to discharge pledges where he believes the decedent would have wanted him to do so without exposing himself to surcharge. The holder of a contractual pledge may, of course, pursue the remedies of a creditor. If a pledge provides that the obligation ceases on the death of the pledgor, no personal representative would be safe in assuming that the decedent would want the pledge completed under the circumstances.

Subsection (3) is not intended to affect the right to performance or to damages of any person who contracted with the decedent. To do so would constitute an unreasonable interference with private rights. The intention of the subsection is simply to give a personal representative who is obligated to carry out a decedent's contracts the same alternatives in regard to the contractual duties which the decedent had prior to his death.

MAINE COMMENT

General. As pointed out in the Uniform Probate Code comment to section 3-717, section 3-715, paragraph (21) is intended to authorize some limited

delegations of authority by the personal representative which are reasonable and for the benefit of interested persons as stated in the language of the beginning of this section.

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by adding the last sentence to paragraph (18) in order to conform to state inheritance tax procedures.

§ 3-716. **Powers and duties of successor personal representative**

A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate, as expeditiously as possible, but he shall not exercise any power expressly made personal to the executor named in the will.

§ 3-717. Corepresentatives; when joint action required

If 2 or more persons are appointed corepresentatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate. This restriction does not apply when any corepresentative receives and receipts for propperty due the estate, when the concurrence of all cannot readily be obtained in the same time reasonably available for emergency action necessary to preserve the estate, or when a co representative has been delegated to act for the others. Persons dealing with a corepresentative if actually unaware that another has been appointed to serve with him or if advised by the personal representative with whom they deal that he has authority to act alone for any of the reasons mentioned herein, are as fully protected as if the person with whom they dealt had been the sole personal representative.

UNIFORM PROBATE CODE COMMENT

With certain qualifications, this section is designed to compel co-representatives to agree on all matters relating to administration when circumstances permit. Delegation by one to another representative is a form of concurrence in acts that may result from the delegation. A co-representative who abdicates his responsibility to co-administer the estate by a blanket delegation breaches his duty to interested persons as described by Section 3-703. Section 3-716(21) authorizes some limited delegations, which are reasonable and for the benefit of interested persons.

§ 3-718. **Powers of surviving personal representative**

Unless the terms of the will otherwise provide, every power exercisable by personal corepresentatives may be exercised by the one or more remaining after the appointment of one or more is terminated, and if one of 2 or more nominated as co executors is not appointed, those appointed may exercise all the powers incident to the office.

UNIFORM PROBATE CODE COMMENT

Source, Model Probate Code section 102. This section applies where one of two or more co-representatives dies, becomes disabled or is removed. In

regard to co-executors, it is based on the assumption that the decedent would not consider the powers of his fiduciaries to be personal, or to be suspended if one or more could not function. In regard to co-administrators in intestacy, it is based on the idea that the reason for appointing more than one ceases on the death or disability of either of them.

§ 3-719. Compensation of personal representative

A personal representative is entitled to reasonable compensation for his services. If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, he may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative also may renounce his right to all or any part of the compensation. A written renunciation of fee may be filed with the court.

UNIFORM PROBATE CODE COMMENT

This section has no bearing on the question of whether a personal representative who also serves as attorney for the estate may receive compensation in both capacities. If a will provision concerning a fee is framed as a condition on the nomination as personal representative, it could not be renounced.

§ 3-720. Expenses in estate litigation

If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred.

UNIFORM PROBATE CODE COMMENT

Litigation prosecuted by a personal representative for the primary purpose of enhancing his prospects for compensation would not be in good faith.

A personal representative is a fiduciary for successors of the estate (Section 3-703). Though the will naming him may not yet be probated, the priority for appointment conferred by Section 3-203 on one named executor in a probated will means that the person named has an interest, as a fiduciary, in seeking the probate of the will. Hence, he is an interested person within the meaning of Sections 3-301 and 3-401. Section 3-912 gives the successors of an estate control over the executor, provided all are competent adults. So, if all persons possibly interested in the probate of a will, including trustees of any trusts created thereby, concur in directing the named executor to refrain from efforts to probate the instrument, he would lose standing to proceed. All of these observations apply with equal force to the case where the named executor of one instrument seeks to contest the probate of another instrument. Thus, the Code changes the idea followed in some jurisdictions that an executor lacks standing to contest other wills which, if valid, would supersede the will naming him, and standing to oppose other contests that may be mounted against the instrument nominating him.

§ 3-721. Proceedings for review of employment of agents and compensation of personal representatives and employees of estate

(a) After notice to all interested persons, on petition of an interested person or on appropriate motion if administration is supervised, the propriety of employment of any person by a personal representative, including the employment of any attorney, auditor, investment advisor or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

(b) Factors to be considered as guides in determining the reasonableness of a fee includes the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the service properly;

(2) The likelihood, if apparent to the personal representative, that the acceptance of the particular employment will preclude the person employed from other employment;

(3) The fee customarily charged in the locality for similar services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the personal representative or by the circumstances;

(6) The experience, reputation and ability of the person performing the services.

UNIFORM PROBATE CODE COMMENT

In view of the broad jurisdiction conferred on the probate court by Section 3-105, description of the special proceeding authorized by this section might be unnecessary. But, the Code's theory that personal representatives may fix their own fees and those of estate attorneys marks an important departure from much existing practice under which fees are determined by the court in the first instance. Hence, it seemed wise to emphasize that any interested person can get judicial review of fees if he desires it. Also, if excessive fees have been paid, this section provides a quick and efficient remedy.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by the addition of subsection (b).

PART 8

CREDITORS' CLAIM

UNIFORM PROBATE CODE GENERAL COMMENT

The need for uniformity of law regarding creditors' claims against estates is especially strong. Commercial and consumer credit depends upon efficient

collection procedures. The cost of credit is pushed up by the cost of credit life insurance which becomes a practical necessity for lenders unwilling to bear the expense of understanding or using the cumbersome and provincial collection procedures found in 50 codes of probate.

The sections which follow facilitate collection of claims against decedents in several ways. First, a simple written statement mailed to the personal representative is a sufficient "claim." Allowance of claims is handled by the personal representative and is assumed if a claimant is not advised of disallowance. Also, a personal representative may pay any just claims without presentation and at any time, if he is willing to assume risks which will be minimal in many cases. The period of uncertainty regarding possible claims is only four months from first publication. This should expedite settlement and distribution of estates.

§ 3-801. Notice to creditors

Unless notice has already been given under this section, a personal representative upon his appointment shall publish a notice once a week for 2 successive weeks in a newspaper of general circulation in the county announcing his appointment and address and notifying creditors of the estate to present their claims within 4 months after the date of the first publication of the notice or be forever barred.

UNIFORM PROBATE CODE COMMENT

Section 3-1203, relating to small estates, contains an important qualification on the duty created by this section.

Failure to advertise for claims would involve a breach of duty on the part of the personal representative. If, as a result of such breach, a claim is later asserted against a distributee under Section 3-1004, the personal representative may be liable to the distributee for costs related to discharge of the claim and the recovery of contribution from other distributees. The protection afforded personal representatives under Section 3-1003 would not be available, for that section applies only if the personal representative truthfully recites that he has advertised for claims as required by this section.

It would be appropriate, by court rule, to channel publications through the personnel of the probate court. See Section 1-401. If notices are controlled by a centralized authority, some assurance could be gained against publication in newspapers of small circulation. Also, the form of notices could be made uniform and certain efficiencies could be achieved. For example, it would be compatible with this section for the Court to publish a single notice each day or each week listing the names of personal representatives appointed since the last publication, with addresses and dates of non-claim.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by retaining the prior Maine law requirement of 2 weeks notice instead of the Uniform Probate Code requirement of 3 weeks notice.

§ 3-802. Statutes of limitations

Unless the estate is insolvent the personal representative, with the consent of all successors whose interests would be affected, may waive any defense of limitations available to the estate. If the defense is not waived, no claim which was barred by any statute of limitations at the time of the decedent's death shall be allowed or paid. The running of any statute of limitations measured from some other event than death and advertisement for claims against a decedent is suspended during the 4 months following the decedent's death but resumes thereafter as to claims not barred pursuant to the sections which follow. For purposes of any statute of limitations, the proper presentation of a claim under section 3-804 is equivalent to commencement of a proceeding on the claim.

UNIFORM PROBATE CODE COMMENT

This section means that four months is added to the normal period of limitations by reason of a debtor's death before a debt is barred. It implies also that after the expiration of four months from death, the normal statute of limitations may run and bar a claim even though the non-claim provisions of Section 3-803 have not been triggered. Hence, the non-claim and limitation provision of Section 3-803 are not exclusive.

It should be noted that under Sections 3-803 and 3-804 it is possible for a claim to be barred by the process of claim, disallowance and failure by the creditors to commence a proceeding to enforce his claim prior to the end of the four month suspension period. Thus, the regular statute of limitations applicable during the debtor's lifetime, the non-claim provisions of Sections 3-803 and 3-804, and the three-year limitations of Section 3-803 all have potential application to a claim. The first of the three to accomplish a bar controls.

In 1975, the Joint Editorial Board recommended a change that makes it clear that only those successors who would be affected thereby, must agree to a waiver of a defense of limitations available to an estate. As the original text stood, the section appeared to require the consent of "all successors," even though this would include some who, under the rules of abatement, could not possibly be affected by allowance and payment of the claim in question.

§ 3-803. Limitations on presentation of claims

(a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) Within 4 months after the date of the first publication of notice to creditors if notice is given in compliance with section 3-801; provided, claims barred by the non-claim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state.

(2) Within 3 years after the decedent's death, if notice to creditors has not been published.

(b) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) A claim based on a contract with the personal representative, within four months after performance by the personal representative is due;

(2) Any other claim, within 4 months after it arises.

(c) Nothing in this section affects or prevents:

(1) Any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate; or

(2) To the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance.

UNIFORM PROBATE CODE COMMENT

There was some disagreement among the Reporters over whether a short period of limitations, or of non-claim, should be provided for claims arising at or after death. Sub-paragraph (b) was finally inserted because most felt it was desirable to accelerate the time when unadjudicated distributions would be final. The time limits stated would not, of course, affect any personal liability in contract, tort, or by statute, of the personal representative. Under Section 3-808 a personal representative is not liable on transactions entered into on behalf of the estate unless he agrees to be personally liable or unless he breaches a duty by making the contract. Creditors of the estate and not of the personal representative thus face a special limitation that runs four months after performance is due from the personal representative. Tort claims normally will involve casualty insurance of the decedent or of the personal representative, and so will fall within the exception of subparagraph (c). If a personal representative is personally at fault in respect to a tort claim arising after the decedent's death, his personal liability would not be affected by the running of the special short period provided here.

The limitation stated in subparagraph (2) of (a) dove-tails with the three-year limitation provided in Section 3-108 to eliminate most questions of succession that are controlled by state law after 3 years from death have elapsed. Questions of interpretation of any will probated within such period, or of the identity of heirs in intestacy are not barred, however.

§ 3-804. Manner of presentation of claims

Claims against a decedent's estate may be presented as follows:

(1) The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, or may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. The claim is deemed presented on the first to occur of receipt of the written statement of claim by the personal representative, or the filing of the claim with the court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made.

(2) The claimant may commence a proceeding against the personal represensative in any court where the personal representative may be subjected to jurisdiction, to obtain payment of his claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his death.

(3) If a claim is presented under paragraph (1), no proceeding thereon may be commenced more than 60 days after the personal representative has mailed a notice of disallowance; but, in the case of a claim which is not presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the 60-day period, or to avoid injustice to the court, on petition, may order an extension of the 60-day period, but in no event shall the extension run beyond the applicable statute of limitations.

UNIFORM PROBATE CODE COMMENT

The filing of a claim with the probate court under (1) of this section does not serve to initiate a proceeding concerning the claim. Rather, it serves merely to protect the claimant who may anticipate some need for evidence to show that his claim is not barred. The probate court acts simply as a depository of the statement of claim, as is true of its responsibility for an inventory filed with it under Section 3-706.

In reading this section it is important to remember that a regular statute of limitation may run to bar a claim before the non-claim provisions run. See Section 3-802.

§ 3-805. Classification of claims

(a) If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

(1) Costs and expenses of administration;

(2) Reasonable funeral expenses;

(3) Debts and taxes with preference under federal law;

(4) Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him;

(5) Debts and taxes with preference under other laws of this State;

(6) All other claims.

(b) No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due.

UNIFORM PROBATE CODE COMMENT

In 1975, the Joint Editorial Board recommended the separation of funeral expenses from the items now accorded fourth priority. Under federal law, funeral expenses, but not debts incurred by the decedent can be given priority over claims of the United States.

§ 3-806. Allowance of claims

(a) As to claims presented in the manner described in section 3-804 within the time limit prescribed in section 3-803, the personal representative may mail a notice to any claimant stating that the claim has been disallowed. If, after allowing or disallowing a claim, the personal representative changes his decision concerning the claim, he shall notify the claimant. The personal representative may not change a disallowance of a claim after the time for the claimant to file a petition for allowance or to commence a proceeding on the claim has run and the claim has been barred. Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than 60 days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar. Failure of the personal representative to mail notice to a claimant of action on his claim for 60 days after the time for original presentation of the claim has expired has the effect of a notice of allowance.

(b) Upon the petition of the personal representative or of a claimant in a proceeding for the purpose, the court may allow in whole or in part any claim or claims presented to the personal representative or filed with the clerk of the court in due time and not barred by subsection (a). Notice in this proceeding shall be given to the claimant, the personal representative and those other persons interested in the estate as the court may direct by order entered at the time the proceeding is commenced.

(c) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

(d) Unless otherwise provided in any judgment in another court entered against the personal representative, allowed claims bear interest at the legal rate for the period commencing 60 days after the time for original presentation of the claim has expired unless based on a contract making a provision

for interest, in which case they bear interest in accordance with that provision.

§ 3-807. Payment of claims

(a) Upon the expiration of 4 months from the date of the first publication of the notice to creditors, the personal representative shall proceed to pay the claims allowed against the estate in the order of priority prescribed, after making provision for homestead, family and support allowances, for claims already presented which have not yet been allowed or whose allowance has been appealed, and for unbarred claims which may yet be presented, including costs and expenses of administration. By petition to the court in a proceeding for the purpose, or by appropriate motion if the administration is supervised, a claimant whose claim has been allowed but not paid as provided herein may secure an order directing the personal representative to pay the claim to the extent that funds of the estate are available for the payment.

(b) The personal representative at any time may pay any just claim which has not been barred, with or without formal presentation, but he is personally liable to any other claimant whose claim is allowed and who is injured by such payment if

(1) The payment was made before the expiration of the time limit stated in subsection (a) and the personal representative failed to require the payee to give adequate security for the refund of any of the payment necessary to pay other claimants; or

(2) The payment was made, due to the negligence or wilful fault of the personal representative, in such manner as to deprive the injured claimant of his priority.

§ 3-808. Individual liability of personal representative

(a) Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.

(b) A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(c) Claims based on contracts entered into by a personal representative in his fiduciary capacity, on obligations arising from ownership or control of the estate or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor.

(d) Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding.

UNIFORM PROBATE CODE COMMENT

In the absence of the statute an executor, administrator or a trustee is personally liable on contracts entered into in his fiduciary capacity unless he expressly excludes personal liability in the contract. He is commonly personally liable for obligations stemming from ownership or possession of the property, (e.g., taxes) and for torts committed by servants employed in the management of the property. The claimant ordinarily can reach the estate only after exhausting his remedies against the fiduciary as an individual and then only to the extent that the fiduciary is entitled to indemnity from the property. This and the following sections are designed to make the estate a quasi-corporation for purposes of such liabilities. The personal representative would be personally liable only if an agent for a corporation would be under the same circumstances, and the claimant has a direct remedy against the quasi-corporate property.

§ 3-809. Secured claims

Payment of a secured claim is upon the basis of the amount allowed if the creditor surrenders his security; otherwise payment is upon the basis of one of the following:

(1) If the creditor exhausts his security before receiving payment, unless precluded by other law, upon the amount of the claim allowed less the fair value of the security; or

(2) If the creditor does not have the right to exhaust his security or has not done so, upon the amount of the claim allowed less the value of the security determined by converting it into money according to the terms of the agreement pursuant to which the security was delivered to the creditor, or by the creditor and personal representative by agreement, arbitration, compromise or litigation.

§ 3-810. Claims not due and contingent or unliquidated claims

(a) If a claim which will become due at a future time or a contingent or unliquidated claim becomes due or certain before the distribution of the estate, and if the claim has been allowed or established by a proceeding, it is paid in the same manner as presently due and absolute claims of the same class.

(b) In other cases the personal representative or, on petition of the personal representative or the claimant in a special proceeding for the purpose, the court may provide for payment as follows:

(1) If the claimant consents, he may be paid the present or agreed value of the claim, taking any uncertainty into account;

(2) Arrangement for future payment, or possible payment, on the happening of the contingency or on liquidation may be made by creating a trust, giving a mortgage, obtaining a bond or security from a distributee, or otherwise.

§ 3-811. Counterclaims

In allowing a claim the personal representative may deduct any counterclaim which the estate has against the claimant. In determining a claim against an estate a court shall reduce the amount allowed by the amount of any counterclaims and, if the counterclaims exceed the claim, render a judgment against the claimant in the amount of the excess. A counterclaim, liquidated or unliquidated, may arise from a transaction other than that upon which the claim is based. A counterclaim may give rise to relief exceeding in amount or different in kind from that sought in the claim.

§ 3-812. Execution and levies prohibited

No execution may issue upon nor may any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but this section shall not be construed to prevent the enforcement of mortgages, pledges or liens upon real or personal property in an appropriate proceeding.

§ 3-813. Compromise of claims

When a claim against the estate has been presented in any manner, the personal representative may, if it appears for the best interest of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated.

§ 3-814. Encumbered assets

If any assets of the estate are encumbered by mortgage, pledge, lien, or other security interest, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance or convey or transfer the assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has presented a claim, if it appears to be for the best interest of the estate. Payment of an encumbrance does not increase the share of the distributee entitled to the encumbered assets unless the distributee is entitled to exoneration.

UNIFORM PROBATE CODE COMMENT

Section 2-609 establishes a rule of construction against exoneration. Thus, unless the will indicates to the contrary, a specific devisee of mortgaged property takes subject to the lien without right to have other assets applied to discharge the secured obligation.

In 1975, the Joint Editorial Board recommended substitution of the word "presented", in the first sentence, for the word "filed" in the original text. The change aligns this section with Section 3-804, which describes several methods, including mailing or delivery to the personal representative, as methods of protecting a claim against non-claim provisions of the Code.

§ 3-815. Administration in more than one state; duty of personal representative

(a) All assets of estates being administered in this State are subject to all claims, allowances and charges existing or established against the personal representative wherever appointed.

(b) If the estate either in this state or as a whole is insufficient to cover all family exemptions and allowances determined by the law of the decedent's domicile, prior charges and claims, after satisfaction of the exemptions, allowances and charges, each claimant whose claim has been allowed either in this state or elsewhere in administrations of which the personal representative is aware, is entitled to receive payment of an equal proportion of his claim. If a preference or security in regard to a claim is allowed in another jurisdiction but not in this State, the creditor so benefited is to receive dividends from local assets only upon the balance of his claim after deducting the amount of the benefit.

(c) In case the family exemptions and allowances, prior charges and claims of the entire estate exceed the total value of the portions of the estate being administered separately and this State is not the state of the decedent's last domicile, the claims allowed in this State shall be paid their proportion if local assets are adequate for the purpose, and the balance of local assets shall be transferred to the domiciliary personal representative. If local assets are not sufficieent to pay all claims allowed in this State the amount to which they are entitled, local assets shall be marshalled so that each claim allowed in this state is paid its proportion as far as possible, after taking into account all dividends on claims allowed in this State from assets in other jurisdictions.

UNIFORM PROBATE CODE COMMENT

Under Section 3-803(a) (1), if a local (property only) administration is commenced and proceeds to advertisement for claims before non-claim statutes have run at domicile, claimants may prove claims in the local administration at any time before the local non-claim period expires. Section 3-815 has the effect of subjecting all assets of the decedent, wherever they may be located and administered, to claims properly presented in any local administration. It is necessary, however, that the personal representative of any portion of the estate be aware of other administrations in order for him to become responsible for claims and charges established against other administrations.

§ 3-816. Final distribution to domiciliary representative

The estate of a non-resident decedent being administered by a personal representative appointed in this state shall, if there is a personal representative of the decedent's domicile willing to receive it, be distributed to the domiciliary personal representative for the benefit of the successors of the decedent unless (1) by virtue of the decedent's will, if any, and applicable choice of law rules, the successors are identified pursuant to the local law of this state without reference to the local law of the decedent's domicile; (2) the personal representative of this state, after reasonable inquiry, is unaware of the existence or identity of a domiciliary personal representative; or (3)

the court orders otherwise in a proceeding for a closing order under section 3-1001 or incident to the closing of a supervised administration. In other cases, distribution of the estate of a decedent shall be made in accordance with the other Parts of this Article.

§ 3-817. Survival of actions

(a) No personal action or cause of action shall be lost by the death of either party, but the same shall survive for and against the personal representative of the deceased, except that actions or causes of action for the recovery of penalties and forfeitures of money under penal statutes and proceedings in bastardy cases shall not survive the death of the defendant. A personal representative may seek relief from a judgment in an action to which the deceased was a party to the same extent that the deceased might have done so.

(b) When the only plaintiff or defendant dies while an action that survives is pending, or after its commencement and before entry of judgment, his personal representative may appear and enter the action or any appeal that has been made, and suggest on the record the death of the party. If the personal representative does not appear within 90 days after his appointment, he may be cited to appear, and after due notice judgment may be entered against him by dismissal or default if no such appearance is made.

(c) When either of several plaintiffs or defendants in an action that survives dies, the death may be suggested on the record, and the personal representative of the deceased may appear or be cited to appear as provided in subsection (b). The action may be further prosecuted or defended by the survivors and the personal representative jointly or by either of them. The survivors, if any, on both sides of the action may testify as witnesses.

(d) When a judgment creditor dies before the first execution issues or before an execution issued in his lifetime is fully satisfied, such execution may be issued or be effective in favor of the deceased judgment creditor's personal representative, but no execution shall issue or be effective beyond the time within which it would have been effective or issued if the party had not died.

(e) An execution issued under subsection (d) shall set forth the fact that the judgment creditor has died since the rendition of the judgment and that the substituted party is the personal representative of the decedent's estate.

(f) The personal representative proceeding under this section shall be liable, and shall hold any recovered property or award, in his representative capacity, except as otherwise provided in section 3-808.

MAINE COMMENT

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

§ 3-818. Damages limited to actual damages

In any tort action against the personal representative of a decedent's estate, in his representative capacity, the plaintiff can recover only the value of the goods taken or damage actually sustained.

MAINE COMMENT

General. This section was added to the Uniform Probate Code version in order to preserve the prior Maine law prohibiting the recovery of punitive, penal or double damages against the estate of a deceased party in the hands of the personal representative.

PART 9
SPECIAL PROVISIONS RELATING TO DISTRIBUTION

§ 3-901. Successors' rights if no administration

In the absence of administration, the heirs and devisees are entitled to the estate in accordance with the terms of a probated will or the laws of intestate succession. Devisees may establish title by the probated will to devised property. Persons entitled to property by homestead allowance, exemption or intestacy may establish title thereto by proof of the decedent's ownership, his death, and their relationship to the decedent. Successors take subject to all charges incident to administration, including the claims of creditors and allowances of surviving spouse and dependent children, and subject to the rights of others resulting from abatement, retainer, advancement, and ademption.

UNIFORM PROBATE CODE COMMENT

Title to a decedent's property passes to his heirs and devisees at the time of his death. See Section 3-101. This section adds little to Section 3-101 except to indicate how successors may establish record title in the absence of administration.

§ 3-902. Distribution; order in which assets appropriated; abatement

(a) Except as provided in subsection (b) and except as provided in connection with the share of the surviving spouse who elects to take an elective share, shares of distributees abate, without any preference or priority as between real and personal property, in the following order: (1) property not disposed of by the will; (2) residuary devises; (3) general devises; (4) specific devises. For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

(b) If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(c) If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

UNIFORM PROBATE CODE COMMENT

A testator may determine the order in which the assets of his estate are applied to the payment of his debts. If he does not, then the provisions of this section express rules which may be regarded as approximating what testators generally want. The statutory order of abatement is designed to aid in resolving doubts concerning the intention of a particular testator, rather than to defeat his purpose. Hence, subsection (b) directs that consideration be given to the purpose of a testator. This may be revealed in many ways. Thus, it is commonly held that, even in the absence of statute, general legacies to a wife, or to persons with respect to which the testator is in loco parentis, are to be preferred to other legacies in the same class because this accords with the probable purpose of the legacies.

§ 3-903. Right of retainer

The amount of a noncontingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest; but the successor has the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt. Such debt constitutes a lien on the successor's interest in favor of the estate, having priority over any attachment or transfer of the interest by the successor.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by adding the last sentence in order to retain the prior Maine provision creating a lien on the indebted successor's interest.

§ 3-904. Interest on general pecuniary devise

General pecuniary devises bear interest at the legal rate of 6% per year beginning one year after the first appointment of a personal representative until payment, unless a contrary intent is indicated in the will or is implicit in light of the unproductive or underproductive nature or decline in value, during the administration of the estate, of the portion of the estate out of which such devise is payable.

UNIFORM PROBATE CODE COMMENT

Unlike the common law, this section provides that a general pecuniary devisee's right to interest begins one year from the time when administration was commenced, rather than one year from death. The rule provided here is similar to the common law rule in that the right to interest for delayed pay-

ment does not depend on whether the estate in fact realized income during the period of delay. The section is consistent with Section 5(b) of the Revised Uniform Principal and Income Act which allocates realized net income of an estate between various categories of successors.

MAINE COMMENT

General. The exception to the payment of the specified legal rate of interest on such devises is tied to the construction of the intent of the testator or testatrix and therefore could be more or less than the specified rate if such an intent can be shown to be implicit in the will by use of the factors traditionally present in seeking such intent. Also, this section does not itself affect the duty of the personal representative toward all persons interested in the estate or require him, aside from his general fiduciary duties, to seek investments at that rate in order to pay the interest required under this section.

Maine changes from Uniform Probate Code. The Uniform Probate Code version was changed by specifying the legal rate of interest within the section, and by adding language suggesting particular situations which might, among others, indicate in an intent by the testator or testatrix that no interest or a different rate of interest should be paid on such a devise.

§ 3-905. Penalty clause for contest

A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

§ 3-906. Distribution in kind; valuation; method

(a) Unless a contrary intention is indicated by the will, the distributable assets of a decedent's estate shall be distributed in kind to the extent possible through application of the following provisions:

(1) A specific devisee is entitled to distribution of the thing devised to him, and a spouse or child who has selected particular assets of an estate as provided in section 2-402 shall receive the items selected.

(2) Any homestead or family allowance or pecuniary devise may be satisfied by value in kind provided

(i) The person entitled to the payment has not demanded payment in cash;

(ii) The property distributed in kind is valued at fair market value as of the date of its distribution, and

(iii) No residuary devisee has requested that the asset in question remain a part of the residue of the estate.

(iv) Any person to whom appreciated carryover basis property under the Internal Revenue Code is to be distributed is informed of the basis which that property will have under the Internal Revenue Code.

(3) For the purpose of valuation under paragraph (2) securities regularly traded on recognized exchanges, if distributed in kind, are valued at the price for the last sale of like securities traded on the business day prior to distribution, or if there was no sale on that day, at the median between amounts bid and offered at the close of that day; but any effects of the carryover basis of appreciated carryover basis property under the Internal Revenue Code must be taken into consideration in fulfilling the duty of the personal representative to act fairly with regard to all distributees and with regard to the interests of all persons interested in the estate. Assets consisting of sums owed the decedent or the estate by solvent debtors as to which there is no known dispute or defense are valued at the sum due with accrued interest or discounted to the date of distribution. For assets which do not have readily ascertainable values, a valuation as of a date not more than 30 days prior to the date of distribution, if otherwise reasonable, controls. For purposes of facilitating distribution, the personal representative may ascertain the value of the assets as of the time of the proposed distribution in any reasonable way, including the employment of qualified appraisers, even if the assets may have been previously appraised.

(4) The residuary estate shall be distributed in kind if there is no objection to the proposed distribution and it is practicable to distribute undivided interests. In other cases, residuary property may be converted into cash for distribution.

(b) After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset he is to receive, if not waived earlier in writing, terminates if he fails to object in writing received by the personal representative within 30 days after mailing or delivery of the proposal.

UNIFORM PROBATE CODE COMMENT

This section establishes a preference for distribution in kind. It directs a personal representative to make distribution in kind whenever feasible and to convert assets to cash only where there is a special reason for doing so. It provides a reasonable means for determining value of assets distributed in kind. It is implicit in Sections 3-101, 3-901 and this section that each residuary beneficiary's basic right is to his proportionate share of each asset constituting the residue.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by adding subsection (a), paragraph (2), subparagraph (iv) and the last clause of the first sentence of subsection (a), paragraph (3) to provide for consideration by the personal representative and distributee of the tax consequences of the carryover basis in a manner consistent with the general duty of the personal representative to all persons interested in the estate.

§ 3-907. **Distribution in kind; evidence**

If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring or releasing the assets to the distributee as evidence of the distributee's title to the property.

UNIFORM PROBATE CODE COMMENT

This and sections following should be read with Section 3-709 which permits the personal representative to leave certain assets of a decedent's estate in the possession of the person presumptively entitled thereto. The "release" contemplated by this section would be used as evidence that the personal representative had determined that he would not need to disturb the possession of an heir or devisee for purposes of administration.

Under Section 3-711, a personal representative's relationship to assets of the estate is described as the "same power over the title to property of the estate as an absolute owner would have." A personal representative may, however, acquire a full title to estate assets, as in the case where particular items are conveyed to the personal representative by sellers, transfer agents or others. The language of Section 3-907 is designed to cover instances where the instrument of distribution operates as a transfer, as well as those in which its operation is more like a release.

§ 3-908. Distribution; right or title of distributee

Proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative, is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper.

UNIFORM PROBATE CODE COMMENT

The purpose of this section is to channel controversies which may arise among successors of a decedent because of improper distributions through the personal representative who made the distribution, or a successor personal representative. Section 3-108 does not bar appointment proceedings initiated to secure appointment of a personal representative to correct an erroneous distribution made by a prior representative. But see Section 3-1006.

§ 3-909. Improper distribution; liability of distributee

Unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a distributee of property improperly distributed or paid, or a claimant who was improperly paid, is liable to return the property improperly received and its income since distribution if he has the property. If he does not have the property, then he is liable to return the value as of the date of disposition of the property improperly received and its income and gain received by him.

UNIFORM PROBATE CODE COMMENT

The term "improperly" as used in this section must be read in light of Section 3-703 and the manifest purpose of this and other sections of the Code

to shift questions concerning the propriety of various distributions from the fiduciary to the distributees in order to prevent every administration from becoming an adjudicated matter. Thus, a distribution may be "authorized at the time" as contemplated by Section 3-703, and still be "improper" under this section. Section 3-703 is designed to permit a personal representative to distribute without risk in some cases, even though there has been no adjudication. When an unadjudicated distribution has occurred, the rights of persons to show that the basis for the distribution (e.g., an informally probated will, or informally issued letters of administration) is incorrect, or that the basis was improperly applied (erroneous interpretation, for example) is preserved against distributees by this section.

The definition of "distributee" to include the trustee and beneficiary of a testamentary trust in 1-201(10) is important in allocating liabilities that may arise under Sections 3-909 and 3-910 on improper distribution by the personal representative under an informally probated will. The provisions of 3-909 and 3-910 are based on the theory that liability follows the property and the fiduciary is absolved from liability by reliance upon the informally probated will.

§ 3-910. Purchasers from distributees protected

If property distributed in kind or a security interest therein is acquired for value by a purchaser from or lender to a distributee who has received an instrument or deed of distribution from the personal representative, or is so acquired by a purchaser from or lender to a transferee from such distributee, the purchaser or lender takes title free of rights of any interested person in the estate and incurs no personal liability to the estate, or to any interested person, whether or not the distribution was proper or supported by court order or the authority of the personal representative was terminated before execution of the instrument or deed. This section protects a purchaser from or lender to a distributee who, as personal representative, has executed a deed of distribution to himself, as well as a purchaser from or lender to any other distributee or his transferee. To be protected under this provision, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind, even if the personal representative and the distributee are the same person, or whether the authority of the personal representative had terminated before the distribution.

UNIFORM PROBATE CODE COMMENT

The words "instrument or deed of distribution" are explained in Section 3-907. The effect of this section may be to make an instrument or deed of distribution a very desirable link in a chain of title involving succession of land. Cf. Section 3-901.

In 1975, the Joint Editorial Board recommended additions that strengthen the protection extended by this section to bona fide purchasers from distributees. The additional language was derived from recommendations evolved with respect to the Colorado version of the Code by probate and title authorities who agreed on language to relieve title assurers of doubts they had identified in relation to some cases.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by deletion of the last sentence of the Uniform Probate Code section concerning the evidentiary significance of a state documentary fee notation, since it was not applicable to Maine.

§ 3-911. Partition for purposes of distribution

When 2 or more heirs or devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one or more of the heirs or devisees may petition the court prior to the formal or informal closing of the estate, to make partition. After notice to the interested heirs or devisees, the court shall partition the property in the same manner as provided by the law for civil actions of partition. The court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party.

UNIFORM PROBATE CODE COMMENT

Ordinarily heirs or devisees desiring partition of a decedent's property will resolve the issue by agreement without resort to the courts. (See Section 3-912.) If court determination is necessary, the court with jurisdiction to administer the estate has jurisdiction to partition the property.

§ 3-912. Private agreements among successors to decedent binding on personal representative

Subject to the rights of creditors and taxing authorities competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing herein relieves trustees of any duties owed to beneficiaries of trust.

UNIFORM PROBATE CODE COMMENT

It may be asserted that this section is only a restatement of the obvious and should be omitted. Its purpose, however, is to make it clear that the successors to an estate have residual control over the way it is to be distributed. Hence, they may compel a personal representative to administer and distribute as they may agree and direct. Successors should compare the consequences and possible advantages of careful use of the power to renounce as

described by Section 2-801 with the effect of agreement under this section. The most obvious difference is that an agreement among successors under this section would involve transfers by some participants to the extent it changed the pattern of distribution from that otherwise applicable.

Differing from a pattern that is familiar in many states, this Code does not subject testamentary trusts and trustees to special statutory provisions, or supervisory jurisdiction. A testamentary trustee is treated as a devisee with special duties which are of no particular concern to the personal representative. Article VII contains optional procedures extending the safeguards available to personal representatives to trustees of both inter vivos and testamentary trusts.

§ 3-913. Distributions to trustee

(a) Before distributing to a trustee, the personal representative may require that the trust be registered if the state in which it is to be administered requires registration and that the trustee inform the beneficiaries as provided in section 7-303.

(b) If the trust instrument does not excuse the trustee from giving bond, the personal representative may petition the appropriate court to require that the trustee post bond if he apprehends that distribution might jeopardize the interests of persons who are not able to protect themselves, and he may withhold distribution until the court has acted.

(c) No inference of negligence on the part of the personal representative shall be drawn from his failure to exercise the authority conferred by subsections (a) and (b).

UNIFORM PROBATE CODE COMMENT

This section is concerned with the fiduciary responsibility of the executor to beneficiaries of trusts to which he may deliver. Normally the trustee represents beneficiaries in matters involving third persons, including prior fiduciaries. Yet, the executor may apprehend that delivery to the trustee may involve risks for the safety of the fund and for him. For example, he may be anxious to see that there is no equivocation about the devisee's willingness to accept the trust, and no problem of preserving evidence of the acceptance. He may have doubts about the integrity of the trustee, or about his ability to function satisfactorily. The testator's selection of the trustee may have been based on facts which are still current, or which are of doubtful relevance at the time of distribution. If the risks relate to the question of the trustee's intention to handle the fund without profit for himself, a conflict of interest problem is involved. If the risk relates to the ability of the trustee to manage prudently, a more troublesome question is posed for the executor. Is he, as executor, not bound to act in the best interests of the beneficiaries?

In many instances involving doubts of this sort, the executor probably will want the protection of a Court order. Sections 3-1001 and 3-1002 provide ample authority for an appropriate proceeding in the Court which issued the executor's letters.

In other cases, however, the executor may believe that he may be adequately protected if the acceptance of the trust by the devisee is unequivocal, or if the trustee is bonded. The purpose of this section is to make it clear that it is proper for the executor to require the trustee to register the trust and to notify beneficiaries before receiving distribution. Also, the section complements Section 7-304 by providing that the personal representative may petition an appropriate court to require that the trustee be bonded.

Status of testamentary trustees under the Uniform Probate Code. Under the Uniform Probate Code, the testamentary trustee by construction would be considered a devisee, distributee, and successor to whom title passes at time of the testator's death even though the will must be probated to prove the transfer. The informally probated will is conclusive until set aside and the personal representative may distribute to the trustee under the informally probated will or settlement agreement and the title of the trustee as distributee represented by the instrument or deed of distribution is conclusive until set aside on showing that it is improper. Should the informally probated will be set aside or the distribution to the trustee be shown to be improper, the trustee as distributee would be liable for value received but purchasers for value from the trustee as distributee under an instrument of distribution would be protected. Section 1-201's definition of "distributee" limits the distributee liability of the trustee and substitutes that of the trust beneficiaries to the extent of distributions by the trustee.

As a distributee as defined by 1-201, the testamentary trustee or beneficiary of a testamentary trust is liable to claimants like other distributees, would have the right of contribution from other distributees of the decedent's estate and would be protected by the same time limitations as other distributees (3-1006).

Incident to his standing as a distributee of the decedent's estate, the testamentary trustee would be an interested party who could petition for an order of complete settlement by the personal representative or for an order terminating testate administration. He also could appropriately receive the personal representative's account and distribution under a closing statement. As distributee he could represent his beneficiaries in compromise settlements in the decedent's estate which would be binding upon him and his beneficiaries. See Section 3-912.

The general fiduciary responsibilities of the testamentary trustee are not altered by the Uniform Probate Code and the trustee continues to have the duty to collect and reduce to possession within a reasonable time the assets of the trust estate including the enforcement of any claims on behalf of the trust against prior fiduciaries, including the personal representative, and third parties.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed in subsection (a) by substituting "requires" in place of "provides for" in order to conform the section to Maine's adoption of permissive trust registration.

§ 3-914. Disposition of unclaimed assets

(a) If an heir, devisee or claimant cannot be found, the personal representative shall distribute the share of the missing person to his conservator, if any, otherwise to the county treasurer in the county having jurisdiction over the probate administration, to be held on deposit by the county treasurer until claimed under subsection (b) or until the expiration of the time specified for making such claim under subsection (b).

(b) The money received by the county treasurer shall be paid to the person entitled on proof of his right thereto or, if the county treasurer refuses or fails to pay, the person may petition the court which appointed the personal representative, whereupon the court upon notice to the county treasurer may determine the person entitled to the money and order the treasurer to pay it to him. No interest is allowed thereon and the heir, devisee or claimant shall pay all costs and expenses incident to the proceeding. If no petition is made to the court within 8 years after payment to the county treasurer, the right of recovery is barred, and the county treasurer shall pay the money to the treasurer of the state as escheated property.

UNIFORM PROBATE COURT COMMENT

The foregoing section is bracketed to indicate that the National Conference does not urge the specific content as set forth above over recent comprehensive legislation on the subject which may have been enacted in an adopting state.

This section applies when it is believed that a claimant, heir or distributee exists but he cannot be located. See 2-105.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by providing for deposit with the county treasurer until final escheat in order to hold the money in a location where it may be more likely to be found, and to preserve the prior Maine system for handling the money prior to its ultimate escheat.

§ 3-915. Distribution to person under disability

A personal representative may discharge his obligation to distribute to any person under legal disability by distributing to his conservator, or any other person authorized by this Code or otherwise to give a valid receipt and discharge for the distribution.

UNIFORM PROBATE CODE COMMENT

Section 5-103 is especially important as a possible source of authority for a valid discharge for payment or distribution made on behalf of a minor.

§ 3-916. Apportionment of estate taxes

(a) For purposes of this section:

(1) "Estate" means the gross estate of a decedent as determined for the purpose of federal estate tax and the estate tax payable to this state;

(2) "Person" means any individual, partnership, association, joint stock company, corporation, government, political subdivision, governmental agency, or local governmental agency;

(3) "Person interested in the estate" means any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's estate. It includes a personal representative, conservator, and trustee;

(4) "State" means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico;

(5) "Tax" means the federal estate tax, the Maine estate tax whenever it is imposed, and interest and penalties imposed in addition to the tax.

(6) "Fiduciary" means personal representative or trustee.

(b) Unless the will otherwise provides, the tax shall be apportioned among all persons interested in the estate. The apportionment is to be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax are to be used for that purpose. If the decedent's will directs a method of apportionment of tax different from the method described in this Code, the method described in the will controls.

(c) (1) The court in which venue lies for the administration of the estate of a decedent, on petition for the purpose may determine the apportionment of the tax.

(2) If the court finds that it is inequitable to apportion interest and penalties in the manner provided in subsection (b), because of special circumstances, it may direct apportionment thereof in the manner it finds equitable.

(3) If the court finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by the negligence of the fiduciary, the court may charge him with the amount of the assessed penalties and interest.

(4) In any action to recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this Code the determination of the court in respect thereto shall be prima facie correct.

(d) (1) The personal representative or other person in possession of the property of the decedent required to pay the tax may withhold from any property distributable to any person interested in the estate, upon its distribution to him, the amount of tax attributable to his interest. If the property in possession of the personal representative or other person required to pay the tax and distributable to any person interested in the

estate is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative or other person required to pay the tax may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative or the other person required to pay the tax, the personal representative or the other person required to pay the tax may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this Act.

(2) If property held by the personal representative is distributed prior to final apportionment of the tax, the distributee shall provide a bond or other security for the apportionment liability in the form and amount prescribed by the personal representative.

(e) (1) In making an apportionment, allowances shall be made for any exemptions granted, any classification made of persons interested in the estate and for any deductions and credits allowed by the law imposing the tax.

(2) Any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purposes of the gift inures to the benefit of the person bearing such relationship or receiving the gift; but if an interest is subject to a prior present interest which is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal.

(3) Any deduction for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate inures to the proportionate benefit of all persons liable to apportionment.

(4) Any credit for inheritance, succession or estate taxes or taxes in the nature thereof applicable to property or interests includable in the estate, inures to the benefit of the persons or interests chargeable with the payment thereof to the extent proportionately that the credit reduces the tax.

(5) To the extent that property passing to or in trust for a surviving spouse or any charitable, public or similar purpose is not an allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property is not included in the computation provided for in subsection (b), and to that extent no apportionment is made against the property. The sentence immediately preceding does not apply to any case if the result would be to deprive the estate of a deduction otherwise allowable under section 2053(d) of the Internal Revenue Code of 1954, as amended, of the United States, relating to deduction for state death taxes on transfers for public, charitable, or religious uses.

(f) No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder is chargeable against the

corpus of the property or funds subject to the temporary interest and remainder.

(g) Neither the personal representative nor other person required to pay the tax is under any duty to institute any action to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the 3 months next following final determination of the tax. A personal representative or other person required to pay the tax who institutes the action within a reasonable time after the 3 months' period is not subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectible at a time following the death of the decedent but thereafter became uncollectible. If the personal representative or other person required to pay the tax cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be equitably apportioned among the other persons interested in the estate who are subject to apportionment.

(h) A personal representative acting in another state or a person required to pay the tax domiciled in another state may institute an action in the courts of this state and may recover a proportionate amount of the federal estate tax, of an estate tax payable to another state or of a death duty due by a decedent's estate to another state, from a person interested in the estate who is either domiciled in this State or who owns property in this State subject to attachment or execution. For the purposes of the action the determination of apportionment by the court having jurisdiction of the administration of the decedent's estate in the other state is prima facie correct.

UNIFORM PROBATE CODE COMMENT

Section 3-916 copies the Uniform Estate Tax Apportionment Act.

PART 10

CLOSING ESTATES

§ 3-1001. Formal proceedings terminating administration; testate or intestate; order of general protection

(a) A personal representative or any interested person may petition for an order of complete settlement of the estate. The personal representative may petition at any time, and any other interested person may petition after one year from the appointment of the original personal representative except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the court to determine testacy, if not previously determined, to consider the final account or compel or approve an accounting and distribution, to construe any will or determine heirs and adjudicate the final settlement and distribution of the estate. After notice to all interested persons and hearing the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate, and,

as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any interested person.

(b) If one or more heirs or devisees were omitted as parties in, or were not given notice of, a previous formal testacy proceeding, the court, on proper petition for an order of complete settlement of the estate under this section, and after notice to the omitted or unnotified persons and other interested parties determined to be interested on the assumption that the previous order concerning testacy is conclusive as to those given notice of the earlier proceeding, may determine testacy as it affects the omitted persons and confirm or alter the previous order of testacy as it affects all interested persons as appropriate in the light of the new proofs. In the absence of objection by an omitted or unnotified person, evidence received in the original testacy proceeding shall constitute prima facie proof of due execution of any will previously admitted to probate, or of the fact that the decedent left no valid will if the prior proceedings determined this fact.

UNIFORM PROBATE CODE COMMENT

Subsection (b) is derived from § 64(b) of the Illinois Probate Act (1967) [S.H.A. ch. 3, § 64(b)]. Section 3-106 specifies that an order is binding as to all who are given notice even though less than all interested persons were notified. This section provides a method of curing an oversight in regard to notice which may come to light before the estate is finally settled. If the person who failed to receive notice of the earlier proceeding succeeds in obtaining entry of a different order from that previously made, others who received notice of the earlier proceeding may be benefitted. Still, they are not entitled to notice of the curative proceeding, nor should they be permitted to appear.

See, also, Comment following Section 3-1002.

§ 3-1002. Formal proceedings terminating testate administration; order construing will without adjudicating testacy

A personal representative administering an estate under an informally probated will or any devisee under an informally probated will may petition for an order of settlement of the estate which will not adjudicate the testacy status of the decedent. The personal representative may petition at any time, and a devisee may petition after one year, from the appointment of the original personal representative, except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the court to consider the final account or compel or approve an accounting and distribution, to construe the will and adjudicate final settlement and distribution of the estate. After notice to all devisees and the personal representative and hearing, the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate under the will, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal repre-

sentative from further claim or demand of any devisee who is a party to the proceeding and those he represents. If it appears that a part of the estate is intestate, the proceedings shall be dismissed or amendments made to meet the provisions of Section 3-1001.

UNIFORM PROBATE CODE COMMENT

Section 3-1002 permits a final determination of the rights between each other and against the personal representative of the devisees under a will when there has been no formal proceeding in regard to testacy. Hence, the heirs in intestacy need not be made parties. Section 3-1001 permits a final determination of the rights between each other and against the personal representative of all persons interested in an estate. If supervised administration is used, Section 3-505 directs that the estate be closed by use of procedures like those described in 3-1001. Of course, testacy will have been adjudicated before time for the closing proceeding if supervised administration is used.

§ 3-1003. Closing estates; by sworn statement of personal representative

(a) Unless prohibited by order of the court and except for estates being administered in supervised administration proceedings, a personal representative may close an estate by filing with the court no earlier than 6 months after the date of original appointment of a general personal representative for the estate, a verified statement stating that he, or a prior personal representative whom he has succeeded, has or have:

(1) Published notice to creditors as provided by section 3-801 and that the first publication occurred more than 6 months prior to the date of the statement.

(2) Fully administered the estate of the decedent by making payment, settlement or other disposition of all claims which were presented, expenses of administration and estate, inheritance and other death taxes, except as specified in the statement, and that the assets of the estate have been distributed to the persons entitled. If any claims remain undischarged, the statement shall state whether the personal representative has distributed the estate subject to possible liability with the agreement of the distributees or it shall state in detail other arrangements which have been made to accommodate outstanding liabilities; and

(3) Sent a copy thereof to all distributees, to all persons who would have a claim to succession under the testacy status upon which the personal representative is authorized to proceed, and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred and has furnished a full account in writing of his administration to the distributees whose interests are affected thereby.

(b) If no proceedings involving the personal representative are pending in the court one year after the closing statement is filed, the appointment of the personal representative terminates.

UNIFORM PROBATE CODE COMMENT

The Code uses "termination" to refer to events which end a personal representative's authority. See Sections 3-608, et seq. The word "closing" refers to circumstances which support the conclusions that the affairs of the estate either are, or have been alleged to have been, wound up. If the affairs of the personal representative are reviewed and adjudicated under either Sections 3-1001 or 3-1002, the judicial conclusion that the estate is wound up serves also to terminate the personal representative's authority. See Section 3-610(b). On the other hand, a "closing" statement under 3-1003 is only an affirmation by the personal representative that he believes the affairs of the estate to be completed. The statement is significant because it reflects that assets have been distributed. Any creditor whose claim has not been barred and who has not been paid is permitted by Section 3-1004 to assert his claim against distributees. The personal representative is also still fully subject to suit under Sections 3-602 and 3-608, for his authority is not "terminated" under Section 3-610(a) until one year after a closing statement is filed. Even if his authority is "terminated," he remains liable to suit unless protected by limitation or unless an adjudication settling his accounts is the reason for "termination". See Sections 3-1005 and 3-608.

From a slightly different viewpoint, a personal representative may obtain a complete discharge of his fiduciary obligations through a judicial proceeding after notice. Sections 3-1001 and 3-1002 describe two proceedings which enable a personal representative to gain protection from all persons or from devisees only. A personal representative who neither obtains a judicial order of protection nor files a closing statement, is protected by 3-703 in regard to acts or distributions which were authorized when done but which become doubtful thereafter because of a change in testacy status. On the other questions, the personal representative who does not take any of the steps described by the Code to gain more protection, has no protection against later claims of breach of his fiduciary obligation other than any arising from consent or waiver of individual distributees who may have bound themselves by receipts given to the personal representative.

This section increases the prospects of full discharge of a personal representative who uses the closing statement route over those of a personal representative who relies on receipts. Full protection follows from the running of the six months limitations period described in 3-1005. But, 3-1005's protection does not prevent distributees from claiming lack of full disclosure. Hence, it offers little more protection than a receipt. Still, it may be useful to decrease the likelihood of later claim of non-disclosure. Its more significant function, however, is to provide a means for terminating the office of personal representative in a way that will be obvious to third persons.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by addition of the language in subsection (a), paragraph (3) requiring copies to be sent to persons who would have a claim to suc-

cession under the testacy status upon which the personal representative received his appointment. Since "distributee" is defined in section 1-201, paragraph (10) as one who "has received" decedent's property from the personal representative, it was felt that the additional language was necessary in order to include an heir or devisee who might not in fact have received any distribution.

§ 3-1004. **Liability of distributees to claimants**

After assets of an estate have been distributed and subject to section 3-1006, an undischarged claim not barred may be prosecuted in a proceeding against one or more distributees. No distributee shall be liable to claimants for amounts received as exempt property, homestead or family allowances, or for amounts in excess of the value of his distribution as of the time of distribution. As between distributees, each shall bear the cost of satisfaction of unbarred claims as if the claim had been satisfied in the course of administration. Any distributee who shall have failed to notify other distributees of the demand made upon him by the claimant in sufficient time to permit them to join in any proceeding in which the claim was asserted against him loses his right of contribution against other distributees.

UNIFORM PROBATE CODE COMMENT

This section creates a ceiling on the liability of a distributee of "the value of his distribution" as of the time of distribution. The section indicates that each distributee is liable for all that a claimant may prove to be due, provided the claim does not exceed the value of the defendant's distribution from the estate. But, each distributee may preserve a right of contribution against other distributees. The risk of insolvency of one or more, but less than all distributees is on the distributee rather than on the claimant.

In 1975, the Joint Editorial Board recommended the addition, after "claimants for amounts" in the second sentence, of "received as exempt property, homestead or family allowances, or for amounts . . ." The purpose of the addition was to prevent unpaid creditors of a decedent from attempting to enforce their claims against a spouse or child who had received a distribution of exempt values.

§ 3-1005. **Limitations on proceedings against personal representative**

Unless previously barred by adjudication and except as provided in the closing statement, the rights of successors and of creditors whose claims have not otherwise been barred against the personal representative for breach of fiduciary duty are barred unless a proceeding to assert the same is commenced within 6 months after the filing of the closing statement. The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's estate.

UNIFORM PROBATE CODE COMMENT

This and the preceding section make it clear that a claimant whose claim has not been barred may have alternative remedies when an estate has been

distributed subject to his claim. Under this section, he has six months to prosecute an action against the personal representative if the latter breached any duty to the claimant. For example, the personal representative may be liable to a creditor if he violated the provisions of Section 3-807. The preceding section describes the fundamental liability of the distributees to unbarred claimants to the extent of the value received. The last sentence emphasizes that a personal representative who fails to disclose matters relevant to his liability in his closing statement and in the account of administration he furnished to distributees, gains no protection from the period described here. A personal representative may, however, use Section 3-1001, or, where appropriate, 3-1002 to secure greater protection.

§ 3-1006. Limitations on actions and proceedings against distributees

Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of any claimant to recover from a distributee who is liable to pay the claim, and the right of any heir or devisee, or of a successor personal representative acting in their behalf, to recover property improperly distributed or the value thereof from any distributee is forever barred at the later of (1) three years after the decedent's death; or (2) one year after the time of distribution thereof. This section does not bar an action to recover property or value received as the result of fraud.

UNIFORM PROBATE CODE COMMENT

This section describes an ultimate time limit for recovery by creditors, heirs and devisees of a decedent from distributees. It is to be noted: (1) Section 3-108 imposes a general limit of three years from death on one who must set aside an informal probate in order to establish his rights, or who must secure probate of a late-discovered will after an estate has been administered as intestate. Hence the time limit of 3-108 may bar one who would claim as an heir or devisee sooner than this section, although it would never cause a bar prior to three years from the decedent's death. (2) This section would not bar recovery by a supposed decedent whose estate has been probated. See Section 3-412. (3) The limitation of this section ends the possibility of appointment of a personal representative to correct an erroneous distribution as mentioned in Sections 3-1005 and 3-1008. If there have been no adjudications under Section 3-409, or possibly 3-1001 or 3-1002, estate of the decedent which is discovered after administration has been closed may be the subject of different distribution than that attending the estate originally administered.

The last sentence excepting actions or suits to recover property kept from one by the fraud of another may be unnecessary in view of the blanket provision concerning fraud in Article I. See Section 1-106.

§ 3-1007. Certificate discharging liens securing fiduciary performance

After his appointment has terminated, the personal representative, his sureties, or any successor of either, upon the filing of a verified application showing, so far as is known by the applicant, that no action concerning the estate is pending in any court, is entitled to receive a certificate from the

Registrar that the personal representative appears to have fully administered the estate in question. The certificate evidences discharge of any lien on any property given to secure the obligation of the personal representative in lieu of bond or any surety, but does not preclude action against the personal representative or the surety.

UNIFORM PROBATE CODE COMMENT

This section does not affect the liability of the personal representative, or of any surety, but merely permits a release of security given by a personal representative, or his surety, when, from the passage of time and other conditions, it seems highly unlikely that there will be any liability remaining undischarged. See Section 3-607.

§ 3-1008. Subsequent administration

If other property of the estate is discovered after an estate has been settled and the personal representative discharged or after one year after a closing statement has been filed, the court upon petition of any interested person and upon notice as it directs may appoint the same or a successor personal representative to administer the subsequently discovered estate. If a new appointment is made, unless the court orders otherwise, the provisions of this Code apply as appropriate; but no claim previously barred may be asserted in the subsequent administration.

UNIFORM PROBATE CODE COMMENT

This section is consistent with Section 3-108 which provides a general period of limitations of three years from death for appointment proceedings, but makes appropriate exception for subsequent administrations.

PART 11

COMPROMISE OF CONTROVERSIES

§ 3-1101. Effect of approval of agreements involving trusts inalienable interests, or interests of third persons

A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of any probated will, the rights or interests in the estate of the decedent, of any successor, or the administration of the estate, if approved in a formal proceeding in the court for that purpose, is binding on all the parties thereto including those unborn, unascertained or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it.

§ 3-1102. Procedure for securing court approval of compromise

The procedure for securing court approval of a compromise is as follows:

(1) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons, and parents or

legal guardians who have both actual custody and legal responsibility for a minor child acting for any such minor child, who have beneficial interests or claims which will or may be affected by the compromise. Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.

(2) Any interested person, including the personal representative or a trustee, then may submit the agreement to the court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives.

(3) After notice to all interested persons or their representatives, including the personal representative of the estate and all affected trustees of trusts, the court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement. Minor children represented only by their parents may be bound only if their parents join with other competent persons in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

UNIFORM PROBATE CODE COMMENT

This section and the one preceding it outline a procedure which may be initiated by competent parties having beneficial interests in a decedent's estate as a means of resolving controversy concerning the estate. If all competent persons with beneficial interests or claims which might be affected by the proposal and parents properly representing interests of their children concur, a settlement scheme differing from that otherwise governing the devolution may be substituted. The procedure for securing representation of minors and unknown or missing persons with interests must be followed. See Section 1-403. The ultimate control of the question of whether the substitute proposal shall be accepted is with the court which must find: "that the contest or controversy is in good faith and that the effect of the agreement upon the interests of parties represented by fiduciaries is just and reasonable."

The thrust of the procedure is to put the authority for initiating settlement proposals with the persons who have beneficial interests in the estate, and to prevent executors and testamentary trustees from vetoing any such proposal. The only reason for approving a scheme of devolution which differs from that framed by the testator or the statutes governing intestacy is to prevent dissipation of the estate in wasteful litigation. Because executors and trustees may have an interest in fees and commissions which they might earn through efforts to carry out testator's intention, the judgment of the court is substituted for that of such fiduciaries in appropriate cases. A controversy which the court may find to be in good faith, as well as concurrence of all beneficially interested and competent persons and parent-representatives provide prerequisites which should prevent the procedure from being abused. Thus, the procedure does not threaten the planning of a testator who plans and

drafts with sufficient clarity and completeness to eliminate the possibility of good faith controversy concerning the meaning and legality of his plan.

See Section 1-403 for rules governing representatives and appointment of guardians ad litem.

These sections are modeled after Section 93 of the Model Probate Code. Comparable legislative provisions have proved quite useful in Michigan. See M.C.L.A. §§ 702.45-702.49.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by addition of the language in paragraph (1) broadening the class of persons who can execute an agreement for a minor child in order to include legal guardians as well as parents, and limiting the class of such persons to those who have both actual custody and legal responsibility for such a minor child.

PART 12

COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT AND SUMMARY ADMINISTRATION PROCEDURES FOR SMALL ESTATES

UNIFORM PROBATE CODE GENERAL COMMENT

The four sections which follow include two designed to facilitate transfer of small estates without use of a personal representative, and two designed to simplify the duties of a personal representative, who is appointed to handle a small estate.

The Flexible System of Administration described by earlier portions of Article III lends itself well to situations involving small estates. Letters may be obtained quickly without notice or judicial involvement. Immediately, the personal representative is in a position to distribute to successors whose deeds or transfers will protect purchasers. This route accommodates the need for quick and inexpensive transfers of land of small value as well as other assets. Consequently, it was unnecessary to frame complex provisions extending the affidavit procedures to land.

Indeed, transfers via letters of administration may prove to be less troublesome than use of the affidavit procedure. Still, it seemed desirable to provide a quick collection mechanism which avoids all necessity to visit the probate court. For one thing, unpredictable local variations in probate practice may produce situations where the alternative procedure will be very useful. For another, the provision of alternatives is in line with the overall philosophy of Article III to provide maximum flexibility.

Figures gleaned from a recent authoritative report of a major survey of probated estates in Cleveland, Ohio, demonstrate that more than one-half of all estates in probate had a gross value of less than $15,000. This means

that the principal measure of the relevance of any legislation dealing with probate procedures is to be found in its impact on very small and moderate size estates. Here is the area where probate affects most people.

§ 3-1201. Collection of personal property by affidavit

(a) Thirty days after the death of a decedent, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action to a person claiming to be the successor of the decedent upon being presented an affidavit made by or on behalf of the successor stating that:

(1) The value of the entire estate, wherever located, less liens and encumbrances, does not exceed $10,000;

(2) Thirty days have elapsed since the death of the decedent;

(3) No application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction; and

(4) The claiming successor is entitled to payment or delivery of the property.

(b) A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subsection (a).

UNIFORM PROBATE CODE COMMENT

This section provides for an easy method for collecting the personal property of a decedent by affidavit prior to any formal disposition. Existing legislation generally permits the surviving widow or children to collect wages and other small amounts of liquid funds. Section 3-1201 goes further in that it allows the collection of personal property as well as money and permits any devisee or heir to make the collection. Since the appointment of a personal representative may be obtained easily under the Code, it is unnecessary to make the provisions regarding small estates applicable to realty.

MAINE COMMENT

General. Collections by affidavit under this section and section 3-1202 provide means of informally collecting the assets in a small estate in addition to those previously existing under Maine law. These 2 sections would have no effect on the right of a surviving spouse to the ownership of a decedent's automobile provided by Title 29, section 2372, subsection 5, but would provide a means for transferring ownership of the automobile to the decedent's successor where there was no surviving spouse and the estate was within the limitations of this section, and would be authorization for the motor vehicle registry to transfer registration and title to such successor. These sections also provide means for collection of such a decedent's bank deposits and accounts under Title 9-B, section 427, subsection 8, as amended, and for trans-

fer of securities under Title 11, section 8-401, subsection 1, paragraph F, as amended.

§ 3-1202. Effect of affidavit

The person paying, delivering, transferring, or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer, or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer, or issuance compelled upon proof of their right in a proceeding brought for the purpose by or on behalf of the persons entitled thereto. Any person to whom payment, delivery, transfer or issuance is made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right.

UNIFORM PROBATE CODE COMMENT

Sections 3-1201 and 3-1202 apply to any personal property located in this state whether or not the decedent died domiciled in this state, to any successor to personal property located in this state whether or not a resident of this state, and, to the extent that the laws of this state may control the succession to personal property, to personal property wherever located of a decedent who died domiciled in this state.

§ 3-1203. Small estates; summary administrative procedure

If it appears from the inventory and appraisal that the value of the entire estate, less liens and encumbrances, does not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, the personal representative, without giving notice to creditors, may immediately disburse and distribute the estate to the persons entitled thereto and file a closing statement as provided in section 3-1204.

UNIFORM PROBATE CODE COMMENT

This section makes it possible for the personal representative to make a summary distribution of a small estate without the necessity of giving notice to creditors. Since the probate estate of many decedents will not exceed the amount specified in the statute, this section will prove useful in many estates.

§ 3-1204. Small estates; closing by sworn statement of personal representative

(a) Unless prohibited by order of the court and except for estates being administered by supervised personal representatives, a personal representative may close an estate administered under the summary procedures of section 3-1203 by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that:

(1) To the best knowledge of the personal representative, the value of the entire estate, less liens and encumbrances, did not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable, necessary medical and hospital expenses of the last illness of the decedent;

(2) The personal representative has fully administered the estate by disbursing and distributing it to the persons entitled thereto; and

(3) The personal representative has sent a copy of the closing statement to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred and has furnished a full account in writing of his administration to the distributees whose interests are affected.

(b) If no actions or proceedings involving the personal representative are pending in the court one year after the closing statement is filed, the appointment of the personal representative terminates.

(c) A closing statement filed under this section has the same effect as one filed under section 3-1003.

UNIFORM PROBATE CODE COMMENT

The personal representative may elect to close the estate under Section 3-1002 in order to secure the greater protection offered by that procedure.

The remedies for fraudulent statement provided in Section 1-106 of course would apply to any intentional misstatements by a personal representative.

MAINE COMMENT

General. If in any case the assets of an estate in which the personal representative has proceeded under sections 3-1203 and 3-1204 turn out to exceed the amount of exempt property as provided in section 3-1203, a constitutional question would arise in attempting to bar creditors under section 3-1005 on the basis of a closing statement under section 3-1204 where the creditors had never received notice. This should be taken into consideration by any personal representative contemplating the use of sections 3-1203 and 3-1204.

§ 3-1205. Social security payments

If, (1) not less than 30 days after the death of a Maine resident entitled, at the time of his death, to a monthly benefit or benefits under Title II of the Social Security Act, all or part of the amount of such benefit or benefits not in excess of $1,000 is paid by the United States to the surviving spouse, one or more of the deceased's children, or descendants of his deceased children, the deceased's father or mother, or the deceased's brother or sister, preference being given in the order named if more than one request for payment shall have been made by or for such individuals, upon an affidavit made and filed with the Department of Health, Education and Welfare by the surviving spouse or other relative by whom or on whose behalf request for payment is made, and (2) the affidavit shows the date of death of the deceased, the rela-

tionship of the affiant to the deceased, that no personal representative for the deceased has been appointed and qualified, and that, to the affiant's knowledge, there exists at the time of filing of the affidavit, no relative of a closer degree of kindred to the deceased than the affiant, then such payment pursuant to the affidavit shall be deemed to be a payment to the legal representative of the decedent and, regardless of the truth or falsity of the statements made therein, shall constitute a full discharge and release of the United States from any further claim for such payment to the same extent as if such payment had been made to the personal representative of the decedent's estate.

MAINE COMMENT

General. This section was added to the Uniform Probate Code version in order to retain and integrate this existing provision of Maine law for facilitating the payment of social security benefits as provided therein. This section provides a means of collecting such payments in situations that might not be covered by section 3-1201 because of that section's limitation on the size of the estates that are covered, and is merely supplemental to that section.

ARTICLE IV

FOREIGN PERSONAL REPRESENTATIVE; ANCILLARY

UNIFORM PROBATE CODE COMMENT

This Article concerns the law applicable in estate problems which involve more than a single state. It covers the powers and responsibilities in the adopting state of personal representatives appointed in other states.

Some provisions of the Code covering local appointment of personal representatives for non-residents appear in Article III. These include the following: 3-201 (venue), 3-202 (resolution of conflicting claims regarding domicile), 3-203 (priority as personal representative of representative previously appointed at domicile), 3-307(a) (30 days delay required before appointment of a local representative for a non-resident), 3-803(a) (claims barred by non-claim at domicile before local administration commenced are barred locally) and 3-815 (duty of personal representative in regard to claims where estate is being administered in more than one state). See also 3-308, 3-611(a) and 3-816. Also, see Section 4-207.

The recognition provisions contained in Article IV and the various provisions of Article III which relate to administration of estates of non-residents are designed to coerce respect for domiciliary procedures and administrative acts to the extent possible.

The first part of Article IV contains some definitions of particular relevance to estates located in two or more states.

The second part of Article IV deals with the powers of foreign personal representatives in a jurisdiction adopting the Uniform Probate Code. There are different types of power which may be exercised. First, a foreign personal

representative has the power under Section 4-201 to receive payments of debts owed to the decedent or to accept delivery of property belonging to the decedent. The foreign personal representative provides an affidavit indicating the date of death of the nonresident decedent, that no local administration has been commenced and that the foreign personal representative is entitled to payment or delivery. Payment under this provision can be made any time more than 60 days after the death of the decedent. When made in good faith the payment operates as a discharge of the debtor. A protection for local creditors of the decedent is provided in Section 4-203, under which local debtors of the non-resident decedent can be notified of the claims which local creditors have against the estate. This notification will prevent payment under this provision.

A second type of power is provided in Section 4-204 to 4-206. Under these provisions a foreign personal representative can file with the appropriate court a copy of his appointment and official bond if he has one. Upon so filing, the foreign personal representative has all of the powers of a personal representative appointed by the local court. This would be all of the powers provided for in an unsupervised administration as provided in Article III of the Code.

The third type of power which may be obtained by a foreign personal representative is conferred by the priority the domiciliary personal representative enjoys in respect to local appointment. This is covered by Section 3-203. Also, see Section 3-611 (b).

Part 3 provides for power in the local court over foreign personal representatives who act locally. If a local or ancillary administration has been started, provisions in Article III subject the appointee to the power of the court. See Section 3-602. In Part 3 of this Article, it is provided that a foreign personal representative submits himself to the jurisdiction of the local court by filing a copy of his appointment to get the powers provided in Section 4-205 or by doing any act which would give the state jurisdiction over him as an individual. In addition, the collection of funds as provided in Section 4-201 gives the court quasi-in-rem jurisdiction over the foreign personal representative to the extent of the funds collected.

Finally, Section 4-303 provides that the foreign personal representative is subject to the jurisdiction of the local court "to the same extent that his decedent was subject to jurisdiction immediately prior to death." This is similar to the typical non-resident motorist provision that provides for jurisdiction over the personal representative of a deceased non-resident motorist, see Note, 44 Iowa L.Rev. 384 (1959). It is, however, a much broader provision. Section 4-304 provides for the mechanical steps to be taken in serving the foreign personal representatives.

Part 4 of the Article deals with the res judicata effect to be given adjudications for or against a foreign personal representative. Any such adjudication is to be conclusive on a local personal representative "unless it resulted from fraud or collusion . . . to the prejudice of the estate." This provision must be read with Section 3-408 which deals with certain out-of-state findings concerning a decedent's estate.

PART 1

DEFINITIONS

§ 4-101. Definitions

(1) "Local administration" means administration by a personal representative appointed in this state pursuant to appointment proceedings described in Article III.

(2) "Local personal representative" includes any personal representative appointed in this state pursuant to appointment proceedings described in Article III and excludes foreign personal representatives who acquire the power of a local personal representative pursuant to section 4-205.

(3) "Resident creditor" means a person domiciled in, or doing business in this state, who is, or could be, a claimant against an estate of a non-resident decedent.

UNIFORM PROBATE CODE COMMENT

Section 1-201 includes definitions of "foreign personal representative," "personal representative" and "non-resident decedent".

PART 2

POWERS OF FOREIGN PERSONAL REPRESENTATIVES

§ 4-201. Payment of debt and delivery of property to domiciliary foreign personal representative without local administration

At any time after the expiration of 60 days from the death of a nonresident decedent, any person indebted to the estate of the nonresident decedent or having possession or control of personal property, or of an instrument evidencing a debt, obligation, stock or chose in action belonging to the estate of the nonresident decedent may pay the debt, deliver the personal property, or the instrument evidencing the debt, obligation, stock or chose in action, to the domiciliary foreign personal representative of the nonresident decedent upon being presented with proof of his appointment and an affidavit made by or on behalf of the representative stating:

(1) The date of the death of the nonresident decedent,

(2) That no local administration, or application or petition therefor, is pending in this state,

(3) That the domiciliary foreign personal representative is entitled to payment or delivery.

UNIFORM PROBATE CODE COMMENT

Section 3-201(d) refers to the location of tangible personal estate and intangible personal estate which may be evidenced by an instrument. The instant section includes both categories. Transfer of securities is not covered by this section since that is adequately covered by Section 3 of the Uniform Act for Simplification of Fiduciary Security Transfers.

§ 4-202. Payment or delivery discharges

Payment or delivery made in good faith on the basis of the proof of authority and affidavit releases the debtor or person having possession of the personal property to the same extent as if payment or delivery had been made to a local personal representative.

§ 4-203. Resident creditor notice

Payment or delivery under section 4-201 may not be made if a resident creditor of the nonresident decedent has notified the debtor of the nonresident decedent or the person having possession of the personal property belonging to the nonresident decedent that the debt should not be paid nor the property delivered to the domiciliary foreign personal representative.

UNIFORM PROBATE CODE COMMENT

Similar to provision in Colorado Revised Statute, 153-6-9.

§ 4-204. Proof of authority; bond

If no local administration or application or petition therefor is pending in this state a domiciliary foreign personal representative may file with a court in this State in a county in which property belonging to the decedent is located, authenticated copies of his appointment and of any official bond he has given.

§ 4-205. Powers

A domiciliary foreign personal representative who has complied with section 4-204 may exercise as to assets in this state all powers of a local personal representative and may maintain actions and proceedings in this State subject to any conditions imposed upon nonresident parties generally.

§ 4-206. Power of representatives in transition

The power of a domiciliary foreign personal representative under section 4-201 or 4-205 shall be exercised only if there is no administration or application therefor pending in this state. An application or petition for local administration of the estate terminates the power of the foreign personal representative to act under section 4-205, but the local court may allow the foreign personal representative to exercise limited powers to preserve the estate. No person who, before receiving actual notice of a pending local administration, has changed his position in reliance upon the powers of a foreign personal representative shall be prejudiced by reason of the application or petition for, or grant of, local administration. The local personal representative is subject to all duties and obligations which have accrued by virtue of the exercise of the powers by the foreign personal representative and may be substituted for him in any action or proceedings in this State.

§ 4-207. Ancillary and other local administrations; provisions governing

In respect to a nonresident decedent, the provisions of Article III of this Code govern (1) proceedings, if any, in a Court of this State for probate of the

will, appointment, removal, supervision, and discharge of the local personal representative, and any other order concerning the estate; and (2) the status, powers, duties and liabilities of any local personal representative and the rights of claimants, purchasers, distributees and others in regard to a local administration.

UNIFORM PROBATE CODE COMMENT

The purpose of this section is to direct attention to Article III for sections controlling local probates and administrations. See in particular, 1-301, 3-201, 3-202, 3-203, 3-307(a), 3-308, 3-611(b), 3-803(a), 3-815 and 3-816.

PART 3

JURISDICTION OVER FOREIGN REPRESENTATIVES

§ 4-301. Jurisdiction by act of foreign personal representative

A foreign personal representative submits personally to the jurisdiction of the courts of this State in any proceeding relating to the estate by (1) filing authenticated copies of his appointment as provided in section 4-204, (2) receiving payment of money or taking delivery of personal property under section 4-201, or (3) doing any act as a personal representative in this State which would have given the state jurisdiction over him as an individual. Jurisdiction under (2) is limited to the money or value of personal property collected.

UNIFORM PROBATE CODE COMMENT

The words "courts of this state" are sufficient under federal legislation to include a federal court having jurisdiction in the adopting state.

A foreign personal representative appointed at the decedent's domicile has priority for appointment in any local administration proceeding. See Section 3-203(g). Once appointed, a local personal representative remains subject to the jurisdiction of the appointing court under Section 3-602.

In 1975, the Joint Editorial Board recommended substitution of the word "personally" for "himself," in the preliminary language of the first sentence. Also, language restricting the submission to jurisdiction to cases involving the estate was added in 1975.

§ 4-302. Jurisdiction by act of decedent

In addition to jurisdiction conferred by Section 4-301, a foreign personal representative is subject to the jurisdiction of the courts of this state to the same extent that his decedent was subject to jurisdiction immediately prior to death.

§ 4-303. Service on foreign personal representative

Service of process may be made upon the foreign personal representative in such manner as the Supreme Judicial Court shall by rule provide.

UNIFORM PROBATE CODE COMMENT

The provision for ordinary mail as a substitute for registered or certified mail is provided because, under the present postal regulations, registered mail may not be available to reach certain addresses, 39 C.F.R. Sec. 51.3(c), and also certified mail may not be available as a process for service because of the method of delivery used, 39 C.F.R. Sec. 58.5(c) (rural delivery) and (d) (star route delivery.) [See Maine Comment for this section for Maine changes from Uniform Probate Code.]

MAINE COMMENT

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

PART 4

JUDGMENTS AND PERSONAL REPRESENTATIVE

§ 4-401. Effect of adjudication for or against personal representative

An adjudication rendered in any jurisdiction in favor of or against any personal representative of the estate is as binding on the local personal representative as if he were a party to the adjudication.

UNIFORM PROBATE CODE COMMENT

Adapted from Uniform Ancillary Administration of Estates Act, Section 8.

ARTICLE V

PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY

UNIFORM PROBATE CODE GENERAL COMMENT

Article V, entitled "Protection of Persons Under Disability and Their Property" embodies separate systems of guardianship to protect persons of minors and mental incompetents. It also includes provisions for a type of power of attorney that does not terminate on disability of the principal which may be used by adults approaching senility or incompetence to avoid the necessity for other kinds of protective regimes. Finally, Part 4 of the Article offers a system of protective proceedings, including conservatorships, to provide for the management of substantial aggregations of property of persons who are, for one reason or another, including minority and mental incompetence, unable to manage their own property.

It should be emphasized that the Article contains many provisions designed to minimize or avoid the necessity of guardianship and protective proceedings, as well as provisions designed to simplify and minimize arrangements which become necessary for care of persons or their property. The power of attorney which confers authority notwithstanding later incompetence is one example of the former. Another is a facility of payment provision which per-

mits relatively small sums owed to a minor to be paid whether or not there is a guardian or other official who has been designated to act for the minor. A new device tending to simplify necessary protective proceedings, is found in provisions in Part 4 which permit a judge to make appropriate orders concerning the property of a disabled person without appointing a fiduciary.

The highspots of the several parts of Article V, considered in somewhat more detail, include the following:

(a) The facility of payment clause, which is Section 5-103 in Part 1, permits one owing up to $5,000 per year to a minor to be validly discharged by payment to the minor, if he is over eighteen or married, to the minor's parent or grandparent or other adult with whom the minor resides, to a guardian, or by deposit in an account in the name of the minor.

(b) A provision in Part 2 permits the surviving parent of a minor to designate a guardian by will. A similar provision in Part 3 authorizes a parent or spouse to designate a guardian for an incapacitated person by will. Such designation becomes effective upon probate of the will and the filing of an acceptance by the guardian. Thereafter the status of guardian and ward arises. It is like guardianship of **the person**, rather than **of estate.** It is described as a parental relationship without the parental obligation of support. The relationship follows the guardian and ward and is properly recognized and implemented, as and when necessary, by the courts of any jurisdiction where these persons may be located. No requirement of periodic reports or accounts is imposed on a testamentary guardian. The question of his proper expenditure of the small sums which he may receive for the ward is left to be settled by the guardian and ward after the ward attains full age. If the amounts involved become more than the guardian cares to be responsible for on this basis, he or any other interested person may seek the appointment of a property manager who is called a "conservator" by the Code. The guardian may be eligible to be appointed to this position.

Part 2 also permits a testamentary guardian of a minor to receive and expend sums payable to the minor for the minor's support and education without court order. He may not pay himself for services, however, and is under a duty to deposit excess funds, or to seek a suitable property-protection order if other management is needed.

(c) A parent or guardian is permitted to delegate his authority for short periods as necessitated by anticipated absence or incapacity.

(d) As previously mentioned, Part 4 of the Article deals with protective proceedings designed to permit substantial property interests of minors and others unable properly to manage their own affairs to be controlled by court order or managed by a conservator appointed by the court. The causes for inability of owner-management that are listed by the statute are quite broad. Technical incompetency is but one of several reasons why one may be unable to manage his affairs. See Section 5-401(2). The draftsmen's view was that reliance should be placed on the fact that the court applying the statute would be a full power court and on the various procedural safeguards, including a

right to jury trial, to protect against unwise use of the proceedings, rather than to attempt to state and rely upon a narrow or technical test of lack of ability.

Section 5-409 is important, for it makes it clear that a court entertaining a protective proceeding has full power, through its orders, to do anything the protected person himself might have done if not disabled. Another provision broadens the form of relief so that the court may handle a single transaction, like renewal of a mortgage, or a sale and related investment of proceeds, which is recommended in respect to the affairs of a protected person directly by its orders rather than through the appointment of a conservator.

(e) If a conservator is appointed, provisions in Part 4 of the draft give him broad powers of management that may be exercised without a court order. On the other hand, provision is made for restricting the managerial or distribution powers of a conservator, provided notation of the restriction appears on his letters of appointment. Unless restricted, the fiduciary may be able to distribute and end the arrangement without court order if he can meet the terms of the Act. Among other kinds of expenditures and disbursements authorized, payments for the support and education of the protected person as determined by a guardian of the protected person, if any, or by the conservator, if there is no guardian, are approved. Also, certain payments for the support of dependents of the protected person are approved by the Code and hence would require no special approval.

(f) Other provisions in Part 4 round out the relationship of protective proceedings to creditors of the protected person and persons who deal with a conservator. Claims are handled by the conservator who is given a fiduciary responsibility to claimants and suitable discretion concerning allowance. If questions arise, the appointing court has all needed power to deal with disputes with creditors. The draft changes the common law rule that contracts of a guardian are his personal responsibility. A conservator is not liable personally on contracts made for the estate unless he agrees to such liability. A section buttresses the managerial powers given to conservator by protecting all persons who deal with them.

(g) Another section seeks to reduce the importance of state lines in respect to the authority of conservators by permitting appointees of foreign courts to act locally. Also, it follows the pattern of Article III dealing with ancillary administration of decedents' estates by giving the conservator appointed at the domicile of the protected person priority for appointment locally in case local administration of a protected person's assets becomes necessary.

(h) The many states which have adopted the Uniform Veterans Guardianship Act now have two systems for protection of the property of minors and mental incompetents, one of which applies if the property was derived, in whole or in part, from benefits paid by the Veterans Administration and its minor or incompetent owner is or has been a beneficiary of the Veterans Administration, and the other of which applies to all other property. It is some-

times difficult to ascertain whether a person has ever received a benefit from the Veterans Administration and commonly impossible to determine whether property was derived in part from benefits paid by the Veterans Administration. Part 4 would provide a single system for the protection of property of minors and others unable to manage their own property, thus superseding the Uniform Veterans Guardianship Act. It would preserve the right of the Veterans Administration to appear in protective proceedings involving the property of its beneficiaries and would permit the imposition of the same safeguards provided by the superseded Uniform Veterans Guarianship Act.

PART 1

GENERAL PROVISIONS

§ 5-101. Definitions and use of terms

Unless otherwise apparent from the context, in this Code:

(1) "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause except minority to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person;

(2) A "protective proceeding" is a proceeding under the provisions of section 5-401 to determine that a person cannot effectively manage or apply his estate to necessary ends, either because he lacks the ability or is otherwise inconvenienced, or because he is a minor, and to secure administration of his estate by a conservator or other appropriate relief;

(3) A "protected person" is a minor or other person for whom a conservator has been appointed or other protective order has been made;

(4) A "ward" is a person for whom a guardian has been appointed. A "minor ward" is a minor for whom a guardian has been appointed solely because of minority.

UNIFORM PROBATE CODE COMMENT

"Conservator," "estate," "guardian" and "minor," and other terms having relevance to Article V, are defined in 1-201. "Disability" as defined in Section 1-201(9) keys to an adjudication for the causes listed in Section 5-401. The definition of "incapacitated" on the other hand contains the bases for appointment of a guardian under Section 5-303.

§ 5-102. Jurisdiction of subject matter; consolidation of proceedings

(a) The court has exclusive jurisdiction over guardianship proceedings and has jurisdiction over protective proceedings to the extent provided in section 5-402.

(b) When both guardianship and protective proceedings as to the same person are commenced or pending in the same court, the proceedings may be consolidated.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed in subsection (a) to make clear that guardianship proceedings are exclusive in the Probate Court and that protective proceedings are governed by section 5-402.

§ 5-103. Facility of payment or delivery

Any person under a duty to pay or deliver money or personal property to a minor may perform this duty, in amounts not exceeding $5,000 per year, by paying or delivering the money or property to (1) the minor, if he is married; (2) any person having the care and custody of the minor with whom the minor resides; (3) a guardian of the minor; or (4) a financial institution incident to a deposit in a federally insured savings account in the sole name of the minor and giving notice of the deposit to the minor. This section does not apply if the person making payment or delivery has actual knowledge that a conservator has been appointed or proceedings for appointment of a conservator of the estate of the minor are pending. The persons, other than the minor or any financial institution under (4) above, receiving money or property for a minor, are obligated to apply the money to the support and education of the minor, but may not pay themselves except by way of reimbursement for out-of-pocket expenses for goods and services necessary for the minor's support. Any excess sums shall be preserved for future support of the minor and any balance not so used and any property received for the minor must be turned over to the minor when he attains majority. Persons who pay or deliver in accordance with provisions of this section are not responsible for the proper application thereof.

UNIFORM PROBATE CODE COMMENT

Where a minor has only a small amount of property, it would be wasteful to require protective proceedings to deal with the property. This section makes it possible for other persons, such as the guardian, to handle the less complicated property affairs of the ward. Protective proceedings, including the possible establishment of a conservatorship, will be sought where substantial property is involved.

This section does not go as far as many facility of payment provisions found in trust instrument which usually permit application of sums due minor beneficiary to any expense or charge for the minor. It was felt that a grant of so large an area of discretion to any category of person who might owe funds to a minor would be unwise. Nonetheless, the section as drafted should reduce the need for trust facility of payment provision somewhat, while extending opportunities to insurance companies and other debtors to minors for relatively simple methods of gaining discharge.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by deleting from clause (1) the Uniform Probate Code reference to a minor under the age of 18, since that is the age of majority in Maine.

§ 5-104. Delegation of powers by parent or guardian

A parent or a guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not exceeding 6 months, any of his powers regarding care, custody, or property of the minor child or ward, except his power to consent to marriage or adoption of a minor ward.

UNIFORM PROBATE CODE COMMENT

This section permits a temporary delegation of parental powers. For example, parents (or guardian) of a minor plan to be out of the country for several months. They wish to empower a close relative (an uncle, e.g.) to take any necessary action regarding the child while they are away. Using this section, they could execute an appropriate power of attorney giving the uncle custody and power to consent. Then if an emergency operation were required, the uncle could consent on behalf of the child; as a practical matter he would of course attempt to communicate with the parents before acting. The section is designed to reduce problems relating to consents for emergency treatment.

§ 5-105. Limited guardianships

In any case in which a guardian can be appointed by the court, the judge may appoint a limited guardian with fewer than all of the legal powers and duties of a guardian. The specific duties and powers of a limited guardian shall be enumerated in the decree or court order. A person for whom a limited guardian has been appointed retains all legal and civil rights except those which have been suspended by the decree or order.

MAINE COMMENT

General. This section was added to the Uniform Probate Code version in order to preserve this prior provision in Maine law for flexibility in dealing with special circumstances.

PART 2

GUARDIANS OF MINORS

§ 5-201. Status of guardian of minor; general

A person becomes a guardian of a minor by acceptance of a testamentary appointment or upon appointment by the court. The guardianship status continues until terminated, without regard to the location from time to time of the guardian and minor ward.

§ 5-202. Testamentary appointment of guardian of minor

The parent of a minor may appoint by will a guardian of an unmarried minor. Subject to the right of the minor under section 5-203, a testamentary appointment becomes effective upon filing the guardian's acceptance in the court in which the will is probated, if before acceptance, both parents are dead or the surviving parent is adjudged incapacitated. If both parents are

dead, an effective appointment by the parent who died later has priority. This state recognizes a testamentary appointment effected by filing the guardian's acceptance under a will probated in another state which is the testator's domicile. Upon acceptance of appointment, written notice of acceptance must be given by the guardian to the minor and to the person having his care, or to his nearest adult relation.

UNIFORM PROBATE CODE COMMENT

In 1975, the Joint Editorial Board recommended the addition of the last sentence to adopt a safeguard suggested by the first enactment of the Code in Idaho.

§ 5-203. Objection by minor of 14 or older to testamentary appointment

A minor of 14 or more years may prevent an appointment of his testamentary guardian from becoming effective, or may cause a previously accepted appointment to terminate, by filing with the court in which the will is probated a written objection to the appointment before it is accepted or within 30 days after notice of its acceptance. An objection may be withdrawn. An objection does not preclude appointment by the court in a proper proceeding of the testamentary nominee, or any other suitable person.

UNIFORM PROBATE CODE COMMENT

In 1975, the Joint Editorial Board recommended the addition of the words "notice of" in the first sentence, to relate the section to notice requirements then being added to Section 5-202.

§ 5-204. Court appointment of guardian of minor; conditions for appointment

The court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated or suspended by circumstances or prior court order. A guardian appointed by will as provided in section 5-202 whose appointment has not been prevented or nullified under section 5-203 has priority over any guardian who may be appointed by the court but the court may proceed with an appointment upon a finding that the testamentary guardian has failed to accept the testamentary appointment within 30 days after notice of the guardianship proceeding.

UNIFORM PROBATE CODE COMMENT

The words "all parental rights of custody" are to be read with Sections 5-201 and 5-209 which give testamentary and court-appointed guardians of minors certain parental rights respecting the minor. Hence, no authority to appoint a guardian for a minor exists if a testamentary guardian has accepted an effective appointment by will. The purpose of this restriction is to support and encourage testamentary appointments which may occur without judicial act. If a testamentary guardian proves to be unsatisfactory, removal proceedings as provided in Section 5-211 may be used if the objection device of Section 5-203 is unavailable.

§ 5-205. Court appointment of guardian of minor; venue

The venue for guardianship proceedings for a minor is in the place where the minor resides or is present.

UNIFORM PROBATE CODE COMMENT

Section 1-303 provides for conflicts of venue and for transfer of venue.

§ 5-206. Court appointment of guardian of minor; qualifications; priority of minor's nominee

The court may appoint as guardian any person whose appointment would be in the best interests of the minor. The court shall appoint a person nominated by the minor, if the minor is 14 years of age or older, unless the Court finds the appointment contrary to the best interests of the minor.

UNIFORM PROBATE CODE COMMENT

Rather than provide for priorities among various classes of relatives, it was felt that the only priority should be for the person nominated by the minor. The important point is to locate someone whose appointment will be in the best interests of the minor. If there is contention among relatives over who should be named, it is not likely that a statutory priority keyed to degrees of kinship would help resolve the matter. For example, if the argument involved a squabble between relatives of the child's father and relatives of its mother, priority in terms of degrees of kinship would be useless.

Guardianships under this Code are not likely to be attractive positions for persons who are more interested in handling a minor's estate than in his personal well being. An order of a court having equity power is necessary if the guardian is to receive payment for services where there is no conservator for the minor's estate. Also, the powers of management of a ward's estate conferred on a guardian are restricted so that if a substantial estate is involved, a conservator will be needed to handle the financial matters.

§ 5-207. Court appointment of guardian of minor; procedure

(a) Notice of the time and place of hearing of a petition for the appointment of a guardian of a minor is to be given by the petitioner in the manner prescribed by court rule under section 1-401 to:

(1) The minor, if he is 14 or more years of age;

(2) The person who has had the principal care and custody of the minor during the 60 days preceding the date of the petition; and

(3) Any living parent of the minor.

(b) Upon hearing, if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of section 5-204 have been met, and the welfare and best interests of the minor will be served by the requested appointment, it shall make the appointment. In other cases the court may dismiss the proceedings, or make any other disposition of the matter that will best serve the interest of the minor.

(c) If necessary, the court may appoint a temporary guardian, with the status of an ordinary guardian of a minor, but the authority of a temporary guardian shall not last longer than six months.

(d) If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is fourteen years of age or older.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version of subsection (a) was changed to conform to Maine's enactment of section 1-401, providing that the manner of giving notice is a matter for judicial rulemaking.

§ 5-208. Consent to service by acceptance of appointment; notice

By accepting a testamentary or court appointment as guardian, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of any proceeding shall be delivered to the guardian, or mailed to him by ordinary mail at his address as listed in the court records and to his address as then known to the petitioner. Letters of guardianship must indicate whether the guardian was appointed by will or by court order.

UNIFORM PROBATE CODE COMMENT

The "long-arm" principle behind this section is well established. It seems desirable that the Court in which acceptance is filed be able to serve its process on the guardian wherever he has moved. The continuing interest of that court in the welfare of the minor is ample to justify this provision. The consent to service is real rather than fictional in the guardianship situation, where the guardian acts voluntarily in filing acceptance. It is probable that the form of acceptance will expressly embody the provisions of this section, although the statute does not expressly require this.

§ 5-209. Powers and duties of guardian of minor

A guardian of a minor has the powers and responsibilities of a parent who has not been deprived of custody of his minor and unemancipated child, except that a guardian is not legally obligated to provide from his own funds for the ward and is not liable to 3rd persons by reason of the parental relationship for acts of the ward. In particular, and without qualifying the foregoing, a guardian has the following powers and duties:

(a) He must take reasonable care of his ward's personal effects and commence protective proceedings if necessary to protect other property of the ward.

(b) He may receive money payable for the support of the ward to the ward's parent, guardian or custodian under the terms of any statutory benefit or insurance system, or any private contract, devise, trust, conservatorship or custodianship. He also may receive money or property of the ward paid or

delivered by virtue of section 5-103. Any sums so received shall be applied to the ward's current needs for support, care and education. He must exercise due care to conserve any excess for the ward's future needs unless a conservator has been appointed for the estate of the ward, in which case excess shall be paid over at least annually to the conservator. Sums so received by the guardian are not to be used for compensation for his services except as approved by order of court or as determined by a duly appointed conservator other than the guardian. A guardian may institute proceedings to compel the performance by any person of a duty to support the ward or to pay sums for the welfare of the ward.

(c) The guardian is empowered to facilitate the ward's education, social, or other activities and to authorize medical or other professional care, treatment, or advice. A guardian is not liable by reason of this consent for injury to the ward resulting from the negligence or acts of 3rd persons unless it would have been illegal for a parent to have consented. A guardian may consent to the marriage or adoption of his ward.

(d) A guardian must report the condition of his ward and of the ward's estate which has been subject to his possession or control, as ordered by court on petition of any person interested in the minor's welfare or as required by court rule.

UNIFORM PROBATE CODE COMMENT

See Section 5-212. See, also, Section 5-424(a) which confers the powers of a guardian on a conservator who is responsible for the estate of a minor under 18 for whom no guardian has been named.

§ 5-210. Termination of appointment of guardian; general

A guardian's authority and responsibility terminates upon the death, resignation or removal of the guardian or upon the minor's death, adoption, marriage or attainment of majority, but termination does not affect his liability for prior acts, nor his obligation to account for funds and assets of his ward. Resignation of a guardian does not terminate the guardianship until it has been approved by the court. A testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding.

§ 5-211. Proceedings subsequent to appointment; venue

(a) The court where the ward resides has concurrent jurisdiction with the court which appointed the guardian, or in which acceptance of a testamentary appointment was filed, over resignation, removal, accounting and other proceedings relating to the guardianship.

(b) If the court located where the ward resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other court, in this or another state, and after consultation with that court determine whether to retain jurisdiction or transfer he proceedings to the other court, whichever is in the best interest of the ward. A copy of any order

accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed.

UNIFORM PROBATE CODE COMMENT

Under Section 1-302, the Court is designated as the proper court to handle matters relating to guardianship. The present section is intended to give jurisdiction to the forum where the ward resides as well as to the one where appointment initiated. This has primary importance where the ward's residence has been moved from the appointing state. Because the Court where acceptance of appointment is filed may as a practical matter be the only forum where jurisdiction over the person of the guardian may be obtained (by reason of Section 5-208), that Court is given concurrent jurisdiction.

§ 5-212. Resignation or removal proceedings

(a) Any person interested in the welfare of a ward, or the ward, if 14 or more years of age, may petition for removal of a guardian on the ground that removal would be in the best interest of the ward. A guardian may petition for permission to resign. A petition for removal or for permission to resign may, but need not, include a request for appointment of a successor guardian.

(b) After notice and hearing on a petition for removal or for permission to resign, the court may terminate the guardianship and make any further order that may be appropriate.

(c) If, at any time in the proceeding, the court determines that the interests of the ward are, or may be, inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is 14 or more years of age.

PART 3

GUARDIANS OF INCAPACITATED PERSONS

§ 5-301. Testamentary appointment of guardian for incapacitated person

(a) The parent of an incapacitated person may by will appoint a guardian of the incapacitated person. A testamentary appointment by a parent becomes effective when, after having given 7 days prior written notice of his intention to do so to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is formally or informally probated, if prior thereto both parents are dead or the surviving parent is judged incapacitated, and if the incapacitated person is not under the care of his spouse. If both parents are dead, an effective appointment by the parent who died later has priority unless it is terminated by the denial of probate in formal proceedings.

(b) The spouse of a married incapacitated person may by will appoint a guardian of the incapacitated person. The appointment becomes effective when, after having given 7 days prior written notice of his intention to do so to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is informally or formally probated. An effective appoint-

ment by a spouse has priority over an appointment by a parent unless it is terminated by the denial of probate in formal proceedings.

(c) This state shall recognize a testamentary appointment effected by filing acceptance under a will probated at the testator's domicile in another state.

(d) On the filing with the court in which the will was probated of written objection to the appointment by the person for whom a testamentary appointment of guardian has been made, the appointment is terminated. An objection does not prevent appointment by the court in a proper proceeding of the testamentary nominee or any other suitable person upon an adjudication of incapacity in proceedings under the succeeding sections of this Part.

UNIFORM PROBATE CODE COMMENT

This section, modelled after Section 5-205, is designed to give the surviving parent, or the spouse, of an incapacitated person, the ability to confer the authority of a guardian on a person designated by will. This opportunity may be most useful in cases where, during their lifetime, have arranged an informal or voluntary commitment of an incompetent child, and are anxious to designate another who can maintain contact with the patient and act on his behalf without the necessity of a sanity hearing. The person designated by will must act by filing acceptance of the appointment. This provides a check against will directions which might prove to be unwise or unnecessary after the parents' death. Moreover, the testamentary designee will have the risk of the possibility that the ward is not in fact incapacitated to prevent him from using the authority conferred to restrain the liberty of the ward. In cases of doubt, the testamentary appointee should petition for a Court appointment under Section 5-303.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version of subsection (a) was changed to clarify the priority of the spouse's care and custody over the testamentary appointment by the parents insofar as the effectiveness of such testamentary appointment is covered by that subsection, and thus to conform the treatment of spousal custody and parental appointment to the priority given by subsection (b) to the spousal appointment over a parental appointment.

§ 5-302. Venue

The venue for guardianship proceedings for an incapacitated person is in the place where the incapacitated person resides or is present. If the incapacitated person is admitted to an institution pursuant to order of a court of competent jurisdiction, venue is also in the county in which that court sits.

UNIFORM PROBATE CODE COMMENT

Venue in guardianship proceedings lies in the county where the incapacitated person is present, as well as where he resides. Thus, if the person is temporarily away from his county of usual abode, the Court of the county

where he happens to be may handle requests for guardianship proceedings relating to him. In protective proceedings, venue is normally in the county of residence. See Section 5-403. See Section 1-303 for disposition when venue is in two counties, and for transfer of venue.

§ 5-303. Procedure for court appointment of a guardian of an incapacitated person

(a) The incapacitated person or any person interested in his welfare may petition for a finding of incapacity and appointment of a guardian.

(b) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his own choice, it may appoint an appropriate official or attorney to represent him in the proceeding, who shall have the powers and duties of a guardian ad litem. The person alleged to be incapacitated shall be examined by a physician acceptable to the court who shall submit his report in writing to the court. The court may appoint a visitor who shall interview the allegedly incapacitated person and the person who is seeking appointment as guardian, and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made, and submit his report in writing to the court. The person alleged to be incapacitated is entitled to be present at the hearing in person, and to see and hear all evidence bearing upon his condition. He is entitled to be represented by counsel, to present evidence, to cross-examine witnesses, including the physician and the visitor. The issue may be determined at a closed hearing if the person alleged to be incapacitated or his counsel so requests.

UNIFORM PROBATE CODE COMMENT

The procedure here is similar to, but not precisely the same as, protective proceedings for certain disabled persons. It is not required that the visitor be a lawyer. In urban areas, the visitor may be a social worker capable of determining the needs of the person for whom the appointment is sought. By brackets, the National Conference indicates that enacting states should decide whether it is appropriate to create a right to jury trial.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version of subsection (b) was changed to provide for discretionary rather than mandatory appointment of a visitor and a representative for the allegedly incapacitated person, and to require that the examining physician be "acceptable to" the court rather than "appointed by" the court.

§ 5-304. Findings; order of appointment

The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person. Alternatively, the court may dismiss the proceeding or enter any other appropriate order.

UNIFORM PROBATE CODE COMMENT

The purpose of guardianship is to provide for the care of a person who is unable to care for himself. There is no reason to seek a guardian in those situations where the problems to be dealt with center around the property of a disabled person. In that event, a protective proceeding under Part 4 may be in order.

It is assumed that the standards suggested by the definition in Section 5-101 for the "incapacitated" person are different from those which will determine when a person may be committed as mentally ill. For example, involuntary commitment proceedings may well be inappropriate unless it is determined that the patient is or probably will become dangerous to himself or the person or property of others. As indicated in 5-101, the meaning of "incapacitated" turns on whether the subject lacks "understanding or capacity to make or communicate responsible decisions concerning his person." There is overlap between the two sets of standards, but they are different. Hence, a finding that a person is "incapacitated" does not amount to a finding that he is mentally ill or can be committed. In the reverse situation, if a person has been committed to institutional care and custody because of mental illness, it may be unnecessary to appoint a guardian for him. Nonetheless, it may be desirable to have a personal guardian for one who is or may be committed or who will be cared for by an institution. For one thing, a guardian, having custody, might arrange for a voluntary care arrangement like that which a parent for a minor and incapacitated child could establish. Moreover, the limited authority of a guardian over property of his ward may be appropriate in cases where the ward is committed. Because of the relationship between existing guardianship legislation and the handling of committed persons appears to vary considerably from state to state, the Code was deliberately left rather general on points relevant to the relationship. Section 5-312 qualifies the power of a guardian to determine the place of residence of a ward who has been committed.

§ 5-305. Acceptance of appointment; consent to jurisdiction

By accepting appointment, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of any proceeding shall be delivered to the guardian or mailed to him by ordinary mail at his address as listed in the court records and to his address as then known to the petitioner.

UNIFORM PROBATE CODE COMMENT

The proceedings under Article V are flexible. The Court should not appoint a guardian unless one is necessary or desirable for the care of the person. If it develops that the needs of the person who is alleged to be incapacitated are not those which would call for a guardian, the Court may adjust the proceeding accordingly. By acceptance of the appointment, the guardian submits to the Court's jurisdiction in much the same way as a personal representative. Cf. Sec. 3-602.

§ 5-306. Termination of guardianship for incapacitated person

The authority and responsibility of a guardian for an incapacitated person

terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation as provided in section 5-307. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect his liability for prior acts nor his obligation to account for funds and assets of his ward.

UNIFORM PROBATE CODE COMMENT

In 1975, the Joint Editorial Board recommended the addition of the last sentence. The addition makes explicit that termination of a guardian's authority, like termination of the authority of a personal representative as described by Section 3-608, has no effect on the guardian's liability for prior acts or on his liability to account.

§ 5-307. Removal or resignation of guardian; termination of incapacity

(a) On petition of the ward or any person interested in his welfare, the court may remove a guardian and appoint a successor if in the best interests of the ward. On petition of the guardian, the court may accept his resignation and make any other order which may be appropriate.

(b) An order adjudicating incapacity may specify a minimum period, not exceeding one year, during which no petition for an adjudication that the ward is no longer incapacitated may be filed without special leave. Subject to this restriction, the ward or any person interested in his welfare may petition for an order that he is no longer incapacitated, and for removal or resignation of the guardian. A request for this order may be made by informal letter to the court or judge and any person who knowingly interferes with transmission of this kind of request to the court or judge may be adjudged guilty of contempt of court.

(c) Before removing a guardian, accepting the resignation of a guardian, or ordering that a ward's incapacity has terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian, may send a visitor to the residence of the present guardian and to the place where the ward resides or is detained, to observe conditions and report in writing to the court.

UNIFORM PROBATE CODE COMMENT

The ward's incapacity is a question that may usually be reviewed at any time. However, provision is made for a discretionary restriction on review. In all review proceedings, the welfare of the ward is paramount.

§ 5-308. Visitor in guardianship proceedings

A visitor is, with respect to guardianship proceedings, a person who is trained in law, nursing, social work, or has other significant qualifications that make him suitable to perform the function, and is an officer, employee or special appointee of the court with no personal interest in the proceedings.

UNIFORM PROBATE CODE COMMENT

The visitor should have professional training and should not have a personal interest in the outcome of the guardianship proceedings.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version was changed by adding the phrase "or has other significant qualifications that make him suitable to perform the function."

§ 5-309. Notices in guardianship proceedings

(a) In a proceeding for the appointment or removal of a guardian of an incapacitated person other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of hearing shall be given to each of the following:

(1) The ward or the person alleged to be incapacitated and his spouse, parents and adult children;

(2) Any person who is serving as his guardian, conservator or who has his care and custody; and

(3) In case no other person is notified under paragraph (1), at least one of his closest adult relatives, if any can be found.

(b) Notice shall be served personally on the alleged incapacitated person, and, if they can be found within the State, on the spouse of the alleged incapacitated person, or on an adult child of the alleged incapacitated person if no spouse can be found within the State, or on a parent of the incapacitated person if no spouse or adult child can be found within the State. Notice to the spouse, adult child, or parent, if they cannot be found within the State, shall be given as provided by court rule under section 1-401. Waiver of notice by the person alleged to be incapacitated is not effective unless he attends the hearing or his waiver of notice is confirmed in an interview with the visitor. Representation of the alleged incapacitated person by a guardian ad litem is not mandatory.

UNIFORM PROBATE CODE COMMENT

The persons entitled to notice in guardianship proceeding are usually fewer in number than those in a protective proceeding. Cf. Sec. 5-405. Required notice shall be given in accordance with the general notice provision of the Code. See Section 1-401.

MAINE COMMENT

General. The provision in the last sentence that representation is not mandatory is not intended to decrease the discretion or duty of the court to appoint a guardian ad litem under section 1-403, paragraph (4) or section 5-303, subsection (b), but is intended only to make clear that a guardian ad litem is not required in every guardianship proceeding as a matter of course, thus leaving such appointment within the sound discretion of the judge.

Maine changes from Uniform Probate Code. The Uniform Probate Code version of subsection (b) was changed to provide for personal notice to an adult child as well as spouse and parents, and to require personal notice of only one person from those categories in the same order of priority as reflected in

section 5-311. The last word of the section was changed from "necessary" to "mandatory."

§ 5-310. Temporary guardians

If an incapacitated person has no guardian and an emergency exists, the court may exercise the power of a guardian pending notice and hearing. If an appointed guardian is not effectively performing his duties and the court further finds that the welfare of the incapacitated person requires immediate action, it may, with or without notice, appoint a temporary guardian for the incapacitated person for a specified period not to exceed 6 months. A temporary guardian is entitled to the care and custody of the ward and the authority of any permanent guardian previously appointed by the court is suspended so long as a temporary guardian has authority. A temporary guardian may be removed at any time. A temporary guardian shall make any report the court requires. In other respects the provisions of this code concerning guardians apply to temporary guardians.

UNIFORM PROBATE CODE COMMENT

The temporary guardian is analogous to a special administrator under Sections 3-614 through 3-618. His appointment would be obtained in emergency situations or as a protective device against default by a guardian. The temporary guardian has all the powers of a guardian, except as the order appointing him may provide otherwise.

§ 5-311. Who may be guardian; priorities

(a) Any competent person or a suitable institution may be appointed guardian of an incapacitated person.

(b) Subject to a determination by the court of the best interests of the incapacitated person, persons who are not disqualified have priority for appointment as guardian in the following order:

(1) The spouse of the incapacitated person;

(2) An adult child of the incapacitated person;

(3) A perent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;

(4) Any relative of the incapacitated person with whom he has resided for more than 6 months prior to the filing of the petition;

(5) A person nominated by the person who is caring for him or paying benefits to him.

MAINE COMMENT

Maine change from Uniform Probate Code. The first clause of the Uniform Probate Code version of subsection (b) was changed to provide for judicial discretion to override the suggested priorities in order to provide for the best interests of the incapacitated person.

§ 5-312. General powers and duties of guardian

(a) A guardian of an incapacitated person has the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child, except that a guardian is not legally obligated to provide from his own funds for the ward and is not liable to 3rd persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the court:

(1) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of abode within or without this State, and may place the ward in any hospital or other institution for care in the same manner as otherwise provided by law.

(2) If entitled to custody of his ward he shall make provision for the care, comfort and maintenance of his ward and, whenever appropriate, arrange for his training and education. Without regard to custodial rights of the ward's person, he shall take reasonable care of his ward's clothing, furniture, vehicles and other personal effects and commence protective proceedings if other property of his ward is in need of protection.

(3) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment or service.

(4) If no conservator for the estate of the ward has been appointed, he may:

(i) Institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform his duty;

(ii) Receive money and tangible property deliverable to the ward and apply the money and property for support, care and education of the ward; but, he may not use funds from his ward's estate for room and board which he, his spouse, parent, or child have furnished the ward unless a charge for the service is approved by order of the court made upon notice to at least one of the next of kin of the ward, if notice is possible. He must exercise care to conserve any excess for the ward's needs.

(5) A guardian is required to report the condition of his ward and of the estate which has been subject to his possession or control, as required by the court or court rule.

(6) If a conservator has been appointed, all of the ward's estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in this code, and the guardian must account to the conservator for funds expended.

(b) Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward, and is entitled to receive reasonable sums for his services and for room and board furnished to the ward as agreed upon between him and the conservator, provided the amounts agreed upon are reasonable under the circumstances. The guardian may request the conservator to expend the ward's estate by payment to 3rd persons or institutions for the ward's care and maintenance.

UNIFORM PROBATE CODE COMMENT

The guardian is responsible for the care of the person of his ward. This section gives him the powers necessary to carry out this responsibility. Where there are no protective proceedings, the guardian also has limited authority over the property of the ward. Where the ward has substantial property, it may be desirable to have protective proceedings to handle his property problems. The same person, of course, may serve as guardian and conservator. Section 5-408 authorizes the Court to make preliminary orders protecting the estate once a petition for appointment of a conservator is filed.

MAINE COMMENT

General. The exemptions of the guardian from financial responsibility and liability contained in the first clauses of subsection (a) apply only to such responsibilities and liabilities as might otherwise arise solely from the guardianship status, and do not negate such responsibilities or liabilities that might exist because of other relationships between the guardian and ward.

Maine changes from Uniform Probate Code. The Uniform Probate Code version was changed by adding an exemption from responsibility to provide for the ward from the guardian's own funds similar to that provided in section 5-209 in the case of guardians for minors, and by addition of the last clause of subsection (a), paragraph (1) to make clear that the guardianship itself does not authorize the guardian to provide for involuntary commitment of the ward to any institution in any way other than the manner prescribed by the law generally.

§ 5-313. Proceedings subsequent to appointment; venue

(a) The court where the ward resides has concurrent jurisdiction with the court which appointed the guardian, or in which acceptance of a testamentary appointment was filed, over resignation, removal, accounting and other proceedings relating to the guardianship.

(b) If the court located where the ward resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other court, in this or another state, and after consultation with that court determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever may be in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed.

PART 4

PROTECTION OF PROPERTY OF PERSONS UNDER DISABILITY AND MINORS

§ 5-401. Protective proceedings

Upon petition and after notice and hearing in accordance with the provisions of this Part, the court may appoint a conservator or make other protective order for cause as follows:

(1) Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that a minor owns money or property that requires management or protection which cannot otherwise be provided, has or may have business affairs which may be jeopardized or prevented by his minority, or that funds are needed for his support and education and that protection is necessary or desirable to obtain or provide funds.

(2) Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that (i) the person is unable to manage his property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and (ii) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by him and that protection is necessary or desirable to obtain or provide funds.

UNIFORM PROBATE CODE COMMENT

This is the basic section of this part providing for protective proceedings for minors and disabled persons. "Protective proceedings" is a generic term used to describe proceedings to establish conservatorships and obtain protective orders. Persons who may be subjected to the proceedings described here include a broad category of persons who, for a variety of different reasons, may be unable to manage their own property.

Since the problems of property management are generally the same for minors and disabled persons, it was thought undesirable to treat these problems in two separate parts. Where there are differences, these have been separately treated in specific sections.

The Comment to Section 5-304, **supra**, points up the different meanings of **incapacity** (warranting guardianship), and **disability**.

§ 5-402. Protective proceedings; jurisdiction of affairs of protected persons

After the service of notice in a proceeding seeking the appointment of a conservator or other protective order and until termination of the proceeding, the court in which the petition is filed has:

(1) Exclusive jurisdiction to determine the need for a conservator or other protective order until the proceedings are terminated;

(2) Exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this State shall be managed, expended or distributed to or for the use of the protected person or any of his dependents;

(3) Concurrent jurisdiction to determine the validity of claims against the person or estate of the protected person and his title to any property or claim.

UNIFORM PROBATE CODE COMMENT

While the bulk of all judicial proceedings involving the conservator will be in the court supervising the conservatorship third parties may bring suit against the conservator or the protected person on some matters in other courts. Claims against the conservator after his appointment are dealt with by Section 5-428.

§ 5-403. Venue

Venue for proceedings under this Part is:

(1) In the place in this State where the person to be protected resides whether or not a guardian has been appointed in another place; or

(2) If the person to be protected does not reside in this State, in any place where he has property.

UNIFORM PROBATE CODE COMMENT

Venue for protective proceedings lies in the county of residence (rather than domicile) or, in the case of the non-resident, where his property is located. Unitary management of the property is obtainable through easy transfer of proceedings (Section 1-303(b) and easy collection of assets by foreign conservators (Section 5-431).

§ 5-404. Original petition for appointment or protective order

(a) The person to be protected, any person who is interested in his estate, affairs or welfare including his parent, guardian, or custodian, or any person who would be adversely affected by lack of effective management of his property and affairs may petition for the appointment of a conservator or for other appropriate protective order.

(b) The petition shall contain such information and be in such form as the Supreme Judicial Court shall by rule provide.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version of subsection (b) was changed to provide that the form and contents of the petition shall be a matter for judicial rulemaking.

§ 5-405. Notice

(a) On a petition for appointment of a conservator or other protective order, the person to be protected and his spouse or, if none, an adult child of the person, or if no spouse or adult child of the person, the person's parents,

must be served personally with notice of the proceeding at least 14 days before the date of the hearing if they can be found within the State, or, if they cannot be found within the State, they must be given notice as prescribed by court rule under section 1-401. Waiver by the person to be protected is not effective unless he attends the hearing or, unless minority is the reason for the proceeding, waiver is confirmed in an interview with the visitor.

(b) Notice of a petition for appointment of a conservator or other initial protective order, and of any subsequent hearing, must be given to any person who has filed a request for notice under section 5-406 and to interested persons and other persons as the court may direct. Except as otherwise provided in subsection (a), notice shall be given as prescribed by court rule under section 1-401.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version of subsection (a) was changed to include an adult child among the categories of persons who must receive personal notice in the same order of priority as reflected in section 5-410.

§ 5-406. Protective proceedings; request for notice; interested person

Any interested person who desires to receive notice of any filing, hearing or order in a protective proceeding may file a demand for notice with the court, shall thereupon have notice of such demand given to any conservator who has been appointed, and shall thereafter receive notice 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. Any governmental agency paying or planning to pay benefits to the person to be protected is an interested person in protective proceedings.

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.

§ 5-407. Procedure concerning hearing and order on original petition

(a) Upon receipt of a petition for appointment of a conservator or other protective order because of minority, the court shall set a date for hearing on the matters alleged in the petition. If, at any time in the proceeding, the court determines that the interests of the minor are or may be adequately represented, it may appoint an attorney to represent the minor, giving consideration to the choice of the minor if 14 years of age or older. A lawyer appointed by the court to represent a minor has the powers and duties of a guardian ad litem.

(b) Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for hearing. Unless the person to be protected has counsel of his own choice,

the court may appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem. If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court may direct that the person to be protected be examined by a physician acceptable to the court, preferably a physician who is not connected with any institution in which the person is a patient or is detained. The court may send a visitor to interview the person to be protected. The visitor may be a guardian ad litem or an officer or employee of the court.

(c) After hearing, upon finding that a basis for the appointment of a conservator or other protective order has been established, the court shall make an appointment or other appropriate protective order.

UNIFORM PROBATE CODE COMMENT

The section establishes a framework within which professionals, including the judge, attorney and physician, if any, may be expected to exercise good judgment in regard to the minor or disabled person who is the subject of the proceeding. The National Conference accepts that it is desirable to rely on professionals rather than to attempt to draft detailed standards or conditions for appointment.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version of subsection (b) was changed to provide that the court "may" rather than "must" appoint a lawyer to represent the person to be protected.

§ 5-408. Permissible court orders

The court has the following powers which may be exercised directly or through a conservator in respect to the estate and affairs of protected persons;

(1) While a petition for appointment of a conservator or other protective order is pending and after preliminary hearing and without notice to others, the court has power to preserve and apply the property of the person to be protected as may be required for his benefit or the benefit of his dependents.

(2) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court has all those powers over the estate and affairs of the minor which are or might be necessary for the best interests of the minor, his family and members of his household.

(3) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the court has, for the benefit of the person and members of his household, all the powers over his estate and affairs which he could exercise if present and not under disability, except the power to make a will. These powers include, but are not limited to power to make gifts, to convey or release his contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy by

the entirety, to exercise or release his powers as trustee, personal representative, custodian for minors, conservator, or donee of a power of appointment, to enter into contracts, to create revocable or irrevocable trusts of property of the estate which may extend beyond his disability or life, to exercise options of the disabled person to purchase securities or other property, to exercise his rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value, to exercise his right to an elective share in the estate of his deceased spouse and to renounce any interest by testate or intestate succession or by inter vivos transfer.

(4) The court may exercise or direct the exercise of, its authority to exercise or release powers of appointment of which the protected person is donee, to renounce interests, to make gifts in trust or otherwise exceeding 20% of any year's income of the estate or to change beneficiaries under insurance and annuity policies, only if satisfied, after notice and hearing, that it is in the best interests of the protected person, and that he either is incapable of consenting or has consented to the proposed exercise of power.

(5) An order made pursuant to this section determining that a basis for appointment of a conservator or other protective order exists, has no effect on the capacity of the protected person.

UNIFORM PROBATE CODE COMMENT

The Court, which is supervising a conservatorship, is given all the powers which the individual would have if he were of full capacity. These powers are given to the Court that is managing the protected person's property since the exercise of these powers have important consequences with respect to the protected person's property.

§ 5-409. Protective arrangements and single transactions authorized

(a) If it is established in a proper proceeding that a basis exists as described in section 5-401 for affecting the property and affairs of a person the court, without appointing a conservator, may authorize, direct or ratify any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person. Protective arrangements include, but are not limited to, payment, delivery, deposit or retention of funds or property, sale, mortgage, lease or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust.

(b) When it has been established in a proper proceeding that a basis exists as described in section 5-401 for affecting the property and affairs of a person the court, without appointing a conservator, may authorize, direct or ratify any contract, trust or other transaction relating to the protected person's financial affairs or involving his estate if the court determines that transaction is in the best interests of the protected person.

(c) Before approving a protective arrangement or other transaction under

this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of his disability, whether the protected person needs the continuing protection of a conservator. The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters done pursuant to the order of appointment.

UNIFORM PROBATE CODE COMMENT

It is important that the provision be made for the approval of single transactions or the establishment of protective arrangements as alternatives to full conservatorship. Under present law, a guardianship often must be established simply to make possible a valid transfer of land or securities. This section eliminates the necessity of the establishment of long-term arrangements in this situation.

§ 5-410. Who may be appointed conservator; priorities

(a) The court may appoint an individual, or a corporation with general power to serve as trustee, as conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed:

(1) A conservator, guardian of property or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;

(2) An individual or corporation nominated by the protected person if he is 14 or more years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice;

(3) The spouse of the protected person;

(4) An adult child of the protected person;

(5) A parent of the protected person, or a person nominated by the will of a deceased parent;

(6) Any relative of the protected person with whom he has resided for more than 6 months prior to the filing of the petition;

(7) A person nominated by the person who is caring for him or paying benefits to him.

(b) A person in subsection (a), paragraphs (1), (3), (4), (5), or (6) may nominate in writing a person to serve in his stead. With respect to persons having equal priority, the court is to select the one who is best qualified of those willing to serve. The court, for good cause, may pass over a person having priority and appoint a person having less priority or no priority.

UNIFORM PROBATE CODE COMMENT

A flexible system of priorities for appointment as conservator has been pro-

vided. A parent may name a conservator for his minor children in his will if he deems this desirable.

§ 5-411. Bond

The court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the trust according to law, with sureties as it shall specify. Unless otherwise directed, the bond shall be in the amount of the aggregate capital value of the property of the estate in his control plus one year's estimated income minus the value of securities deposited under arrangements requiring an order of the court for their removal and the value of any land which the fiduciary, by express limitation of power, lacks power to sell or convey without court authorization. The court in lieu of sureties on a bond, may accept other security for the performance of the bond, including a pledge of securities or a mortgage of land.

UNIFORM PROBATE CODE COMMENT

The bond requirements for conservators are somewhat more strict than the requirements for personal representatives. Cf. Section 3-603.

§ 5-412. Terms and requirements of bonds

(a) The following requirements and provisions apply to any bond required under section 5-411:

(1) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the conservator and with each other;

(2) By executing an approved bond of a conservator, the surety consents to the jurisdiction of the court which issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the conservator and naming the surety as a party defendant. Notice of any proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the court where the bond is filed and to his address as then known to the petitioner;

(3) On petition of a successor conservator or any interested person, a proceeding may be initiated against a surety for breach of the obligation of the bond of the conservator;

(4) The bond of the conservator is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(b) No proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

§ 5-413. Acceptance of appointment; consent to jurisdiction

By accepting appointment, a conservator submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be

instituted by any interested person. Notice of any proceeding shall be delivered to the conservator, or mailed to him by registered or certified mail at his address as listed in the petition for appointment or as thereafter reported to the court and to his address as then known to the petitioner.

§ 5-414. Compensation and expenses

If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate. The factors set forth in section 3-721, subsection (b) should be considered as guides in determining the reasonableness of compensation under this section.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by adding the last sentence.

§ 5-415. Death, resignation or removal of conservator

The court may remove a conservator for good cause, upon notice and hearing, or accept the resignation of a conservator. After his death, resignation or removal, the court may appoint another conservator. A conservator so appointed succeeds to the title and powers of his predecessor.

§ 5-416. Petitions for orders subsequent to appointment

(a) Any person interested in the welfare of a person for whom a conservator has been appointed may file a petition in the appointing court for an order (1) requiring bond or security or additional bond or security, or reducing bond, (2) requiring an accounting for the administration of the trust, (3) directing distribution, (4) removing the conservator and appointing a temporary or successor conservator, or (5) granting other appropriate relief.

(b) A conservator may petition the appointing court for instructions concerning his fiduciary responsibility.

(c) Upon notice and hearing, the court may give appropriate instructions or make any appropriate order.

UNIFORM PROBATE CODE COMMENT

Once a conservator has been appointed, the Court supervising the trust acts only upon the request of some moving party.

§ 5-417. General duty of conservator

In the exercise of his powers, a conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees as described by section 7-302.

§ 5-418. Inventory and records

Within 90 days after his appointment, every conservator shall prepare and file with the appointing court a complete inventory of the estate of the protected person together with his oath or affirmation that it is complete and

accurate so far as he is informed. The conservator shall provide a copy thereof to the protected person if he can be located, has attained the age of 14 years, and has sufficient mental capacity to understand these matters, and to any parent or guardian with whom the protected person resides. The conservator shall keep suitable records of his administration and exhibit the same on request of any interested person.

§ 5-419. Accounts

Every conservator must account to the court for his administration of the trust upon his resignation or removal, and at other times as the court may direct. On termination of the protected person's minority or disability, a conservator may account to the court, or he may account to the former protected person or his personal representative. Subject to appeal or vacation within the time permitted, an order, made upon notice and hearing, allowing an intermediate account of a conservator, adjudicates as to his liabilities concerning the matters considered in connection therewith; and an order, made upon notice and hearing, allowing a final account adjudicates as to all previously unsettled liabilities of the conservator to the protected person or his successors relating to the conservatorship. In connection with any account, the court may require a conservator to submit to a physical check of the estate in his control, to be made in any manner the court may specify.

UNIFORM PROBATE CODE COMMENT

The persons who are to receive notice of intermediate and final accounts will be identified by Court order as provided in Section 5-405(b). Notice is given as described in 1-401. In other respects, procedures applicable to accountings will be as provided in court rule.

§ 5-420. Conservators; title by appointment

The appointment of a conservator vests in him title as trustee to all property of the protected person, presently held or thereafter acquired, including title to any property theretofore held for the protected person by custodians or attorneys in fact. The appointment of a conservator is not a transfer or alienation within the meaning of general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will or trust instrument, imposing restrictions upon or penalties for transfer or alienation by the protected person of his rights or interest, but this section does not restrict the ability of persons to make specific provision by contract or dispositive instrument relating to a conservator.

UNIFORM PROBATE CODE COMMENT

This section permits independent administration of the property of protected persons once the appointment of a conservator had been obtained. Any interested person may require the conservator to account in accordance with Section 5-419. As a trustee, a conservator holds title to the property of the protected person. The appointment of a conservator is a serious matter and the Court must select him with great care. Once appointed, he is free to carry on his fiduciary responsibilities. If he should default in these in any way, he may be made to account to the Court.

Unlike a situation involving appointment of a guardian, the appointment of a conservator has no bearing on the capacity of the disabled person to contract or engage in other transactions.

§ 5-421. Recording of conservator's letters

Letters of conservatorship are evidence of transfer of all assets of a protected person to the conservator. An order terminating a conservatorship is evidence of transfer of all assets of the estate from the conservator to the protected person, or his successors. Subject to the requirements of general statutes governing the filing or recordation of documents of title to land or other property, letters of conservatorship, and orders terminating conservatorships, may be filed or recorded to give record notice of title as between the conservator and the protected person.

§ 5-422. Sale, encumbrance or transaction involving conflict of interest; voidable; exceptions

Any sale or encumbrance to a conservator, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest is voidable unless the transaction is approved by the court after notice to interested persons and others as directed by the court.

§ 5-423. Persons dealing with conservators; protection

A person who in good faith either assists a conservator or deals with him for value in any transaction other than those requiring a court order as provided in section 5-408, is protected as if the conservator properly exercised the power. The fact that a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, except that restrictions on powers of conservators which are endorsed on letters as provided in section 5-426 are effective as to third persons. A person is not bound to see to the proper application of estate assets paid or delivered to a conservator. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

§ 5-424. Powers of conservator in administration

(a) A conservator has all of the powers conferred herein and any additional powers conferred by law on trustees in this state. In addition, a conservator of the estate of an unmarried minor, as to whom no one has parental rights, has the duties and powers of a guardian of a minor described in section 5-209 until the minor attains the age of 18 or marries, but the parental rights so conferred on a conservator do not preclude appointment of aguardian as provided by Part 2.

(b) A conservator has power without court authorization or confirmation, to invest and reinvest funds of the estate as would a trustee.

(c) A conservator, acting reasonably in efforts to accomplish the purpose for which he was appointed, may act without court authorization or confirmation, to

(1) Collect, hold and retain assets of the estate including land in another state, until, in his judgment, disposition of the assets should be made, and the assets may be retained even though they include an asset in which he is personally interested;

(2) Receive additions to the estate;

(3) Continue or participate in the operation of any business or other enterprise;

(4) Acquire an undivided interest in an estate asset in which the conservator, in any fiduciary capacity, holds an undivided interest;

(5) Invest and reinvest estate assets in accordance with subsection (b);

(6) Deposit estate funds in a bank including a bank operated by the conservator;

(7) Acquire or dispose of an estate asset including land in another state for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;

(8) Make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;

(9) Subdivide, develop, or dedicate land to public use; to make or obtain the vacation of plats and adjust boundaries; to adjust differences in valuation on exchange or to partition by giving or receiving considerations; and to dedicate easements to public use without consideration;

(10) Enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the conservatorship;

(11) Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(12) Grant an option involving disposition of an estate asset, to take an option for the acquisition of any asset;

(13) Vote a security, in person or by general or limited proxy;

(14) Pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(15) Sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, con-

solidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(16) Hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery, but the conservator is liable for any act of the nominee in connection with the stock so held;

(17) Insure the assets of the estate against damage or loss, and the conservator against liability with respect to third persons;

(18) Borrow money to be repaid from estate assets or otherwise; to advance money for the protection of the estate or the protected person, and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any estate assets and the conservator has a lien on the estate as against the protected person for advances so made;

(19) Pay or contest any claim; to settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible;

(20) Pay taxes, assessments, compensation of the conservator, and other expenses incurred in the collection, care, administration and protection of the estate;

(21) Allocate items of income or expense to either estate income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(22) Pay any sum distributable to a protected person or his dependent without liability to the conservator, by paying the sum to the distributee or by paying the sum for the use of the distributee either to his guardian or if none, to a relative or other person with custody of his person;

(23) Employ persons, including attorneys, auditors, investment advisors, or agents, even though they are associated with the conservator to advise or assist him in the performance of his administrative duties; to act upon their recommendation without independent investigation; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(24) Prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties; and

(25) Execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the conservator.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code

version of subsection (a) was changed by deleting the phrase "under the age of 18 years" in the 2nd sentence in order to conform the section to the age of majority in Maine.

§ 5-425. Distributive duties and powers of conservator

(a) A conservator may expend or distribute income or principal of the estate without court authorization or confirmation for the support, education, care or benefit of the protected person and his dependents in accordance with the following principles:

(1) The conservator is to consider recommendations relating to the appropriate standard of support, education and benefit for the protected person made by a parent or guardian, if any. He may not be surcharged for sums paid to persons or organizations actually furnishing support, education or care to the protected person pursuant to the recommendations of a parent or guardian of the protected person unless he knows that the parent or guardian is deriving personal financial benefit therefrom, including relief from any personal duty of support, or unless the recommendations are clearly not in the best interests of the protected person.

(2) The conservator is to expend or distribute sums reasonably necessary for the support, education, care or benefit of the protected person with due regard to (i) the size of the estate, the probable duration of the conservatorship and the likelihood that the protected person, at some future time, may be fully able to manage his affairs and the estate which has been conserved for him; (ii) the accustomed standard of living of the protected person and members of his household; (iii) other funds or sources used for the support of the protected person.

(3) The conservator may expend funds of the estate for the support of persons legally dependent on the protected person and others who are members of the protected person's household who are unable to support themselves, and who are in need of support.

(4) Funds expended under this subsection may be paid by the conservator to any person, including the protected person to reimburse for expenditures which the conservator might have made, or in advance for services to be rendered to the protected person when it is reasonable to expect that they will be performed and where advance payments are customary or reasonably necessary under the circumstances.

(b) If the estate is ample to provide for the purposes implicit in the distributions authorized by the preceding subsections, a conservator for a protected person other than a minor has power to make gifts to charity and other objects as the protected person might have been expected to make, in amounts which do not exceed in total for any year 20% of the income from the estate.

(c) When a minor who has not been adjudged disabled under section 5-401, paragraph (2) attains his majority, his conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

(d) When the conservator is satisfied that a protected person's disability, other than minority, has ceased, the conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

(e) If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the deceased protected person which may have come into his possession, inform the executor or a beneficiary named therein that he has done so, and retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto. If after 40 days from the death of the protected person no other person has been appointed personal representative and no application or petition for appointment is before the court, the conservator may apply to exercise the powers and duties of a personal representative so that he may proceed to administer and distribute the decedent's estate without additional or further appointment. Upon application for an order granting the powers of a personal representative to a conservator, after notice to any person demanding notice under section 3-204 and to any person nominated executor in any will of which the applicant is aware, the court may order the conferral of the power upon determining that there is no objection, and endorse the letters of the conservator to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative. The making and entry of an order under this section shall have the effect of an order of appointment of a personal representative as provided in section 3-308 and Parts 6 through 10 of Article III except that estate in the name of the conservator, after administration, may be distributed to the decedent's successors without prior retransfer to the conservator as personal representative.

UNIFORM PROBATE CODE COMMENT

This section sets out those situations wherein the conservator may distribute property or disburse funds during the continuance of or on termination of the trust. Section 5-416(b) makes it clear that a conservator may seek instructions from the Court on questions arising under this section. Subsection (e) is derived in part from § 11.80.150 Revised Code of Washington [RCWA 11.80.150].

§ 5-426. Enlargement or limitation of powers of conservator

Subject to the restrictions in section 5-408, paragraph (4), the court may confer on a conservator at the time of appointment or later, in addition to the powers conferred on him by sections 5-424 and 5-425, any power which the court itself could exercise under sections 5-408, paragraph (2) and 5-408, paragraph (3). The court may, at the time of appointment or later, limit the powers of a conservator otherwise conferred by sections 5-424 and 5-425, or previously conferred by the court, and may at any time relieve him of any limitation. If the court limits any power conferred on the conservator by section 5-424 or section 5-425, the limitation shall be endorsed upon his letters of appointment.

UNIFORM PROBATE CODE COMMENT

This section makes it possible to appoint a fiduciary whose powers are limited to part of the estate or who may conduct important transactions, such as sales and mortgages of land, only with special Court authorization. In the latter case, a conservator would be in much the position of a guardian of property under the law currently in force in most states, except that he would have title to the property. The purpose of giving conservators title as trustees is to ensure that the provisions for protection of third parties have full effect. The Veterans Administration may insist that, when it is paying benefits to a minor or disabled, the letters of conservatorship limit powers to those of a guardian under the Uniform Veteran's Guardianship Act and require the conservator to file annual accounts.

The Court may not only limit the powers of the conservator but may expand his powers so as to make it possible for him to act as the Court itself might act.

§ 5-427. Preservation of estate plan

In investing the estate, and in selecting assets of the estate for distribution under section 5-425, subsections (a) and (b), in utilizing powers of revocation or withdrawal available for the support of the protected person, and exercisable by the conservator or the court, the conservator and the court should take into account any known estate plan of the protected person, including his will, any revocable trust of which he is settlor, and any contract, transfer or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his death to another or others which he may have originated. The conservator may examine the will of the protected person.

§ 5-428. Claims against protected person; enforcement

(a) A conservator must pay from the estate all just claims against the estate and against the protected person arising before or after the conservatorship upon their presentation and allowance. A claim may be presented by either of the following methods: (1) the claimant may deliver or mail to the conservator a written statement of the claim indicating its basis, the name and address of the claimant and the amount claimed; (2) the claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of court and deliver or mail a copy of the statement to the conservator. A claim is deemed presented on the first to occur of receipt of the written statement of claim by the conservator, or the filing of the claim with the court. A presented claim is allowed if it is not disallowed by written statement mailed by the conservator to the claimant within 60 days after its presentation. The presentation of a claim tolls any statute of limitation relating to the claim until thirty days after its disallowance.

(b) A claimant whose claim has not been paid may petition the court for determination of his claim at any time before it is barred by the applicable statute of limitation, and, upon due proof, procure an order for its allowance and payment from the estate. If a proceeding is pending against a protected

person at the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party must give notice of the proceeding to the conservator if the outcome is to constitute a claim against the estate.

(c) If it appears that the estate in conservatorship is likely to be exhausted before all existing claims are paid, preference is to be given to prior claims for the care, maintenance and education of the protected person or his dependents and existing claims for expenses of administration.

UNIFORM PROBATE CODE COMMENT

In 1975, the Joint Editorial Board recommended the addition of the third sentence in (a) in order to provide a definition of the time when a claim is deemed presented.

§ 5-529. Individual liability of conservator

(a) Unless otherwise provided in the contract, a conservator is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.

(b) The conservator is individually liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(c) Claims based on contracts entered into by a conservator in his fiduciary capacity, on obligations arising from ownership or control of the estate, or on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in his fiduciary capacity, whether or not the conservator is individually liable therefor.

(d) Any question of liability between the estate and the conservator individually may be determined in a proceeding for accounting, surcharge, or indemnification, or other appropriate proceeding or action.

§ 5-430. Termination of proceeding

The protected person, his personal representative, the conservator or any other interested person may petition the court to terminate the conservatorship. A protected person seeking termination is entitled to the same rights and procedures as in an original proceeding for a protective order. The court, upon determining after notice and hearing that the minority or disability of the protected person has ceased, may terminate the conservatorship. Upon termination, title to assets of the estate passes to the former protected person or to his successors subject to provision in the order for expenses of administration or to conveyances from the conservator to the former protected persons or his successors, to evidence the transfer.

UNIFORM PROBATE CODE COMMENT

The persons entitled to notice of a petition to terminate a conservatorship are identified by Section 5-405.

Any interested person may seek the termination of a conservatorship when there is some question as to whether the trust is still needed. In some situations (e. g., the individual who returns after being missing) it may be perfectly clear that he is no longer in need of a conservatorship.

An order terminating a conservatorship may be recorded as evidence of the transfer of title from the estate. See 5-421.

§ 5-431. Payment of debt and delivery of property to foreign conservator without local proceedings

Any person indebted to a protected person, or having possession of property or of an instrument evidencing a debt, stock, or chose in action belonging to a protected person may pay or deliver to a conservator, guardian of the estate or other like fiduciary appointed by a court of the state of residence of the protected person, upon being presented with proof of his appointment and an affidavit made by him or on his behalf stating:

(1) That no protective proceeding relating to the protected person is pending in this State; and

(2) That the foreign conservator is entitled to payment or to receive delivery.

If the person to whom the affidavit is presented is not aware of any protective proceeding pending in this State, payment or delivery in response to the demand and affidavit discharges the debtor or possessor.

UNIFORM PROBATE CODE COMMENT

Section 5-410(a) (1) gives a foreign conservator or guardian of property, appointed by the state where the disabled person resides, first priority for appointment as conservator in this state. A foreign conservator may easily obtain any property in this state and take it to the residence of the protected person for management.

§ 5-432. Foreign conservator; proof of authority; bond; powers

If no local conservator has been appointed and no petition in a protective proceeding is pending in this State, a domiciliary foreign conservator may file with a court in this State in a county in which property belonging to the protected person is located, authenticated copies of his appointment and of any official bond he has given. Thereafter, he may exercise as to assets in this State all powers of a local conservator and may maintain actions and proceedings in this State subject to any conditions imposed upon nonresident parties generally.

UNIFORM PROBATE CODE COMMENT

This section, approved following recommendation in 1975 of the Joint Editorial Board, extends concepts described in Article IV, Part 2 for personal representatives, to conservators. The recommendation was suggested by an addition to the Idaho Probate Code at the time of its enactment in 1971.

PART 5

POWERS OF ATTORNEY

§ 5-501. When power of attorney not affected by disability

Whenever a principal designates another his attorney in fact or agent by a power of attorney in writing and the writing contains the words "This power of attorney shall not be affected by disability of the principal," or "This power of attorney shall become effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability, the authority of the attorney in fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney in fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees and personal representative as if the principal were alive, competent and not disabled. If a conservator thereafter is appointed for the principal, the attorney in fact or agent, during the continuance of the appointment, shall account to the conservator rather than the principal. The conservator has the same power the principal would have had if he were not disabled or incompetent to revoke, suspend, or terminate all or any part of the power of attorney or agency.

UNIFORM PROBATE CODE COMMENT

This section permits a person who is sui juris to execute a power of attorney which will become or remain effective in the event he should later become disabled. If the Court should subsequently appoint a conservator, the latter may either permit the attorney in fact to continue to act or revoke the power of attorney. The section is based in part on Code of Va. (1950), Sec. 11-9.1.

§ 5-502. Other powers of attorney not revoked until notice of death or disability

(a) The death, disability, or incompetence of any principal who has executed a power of attorney in writing other than a power as described by section 5-501, does not revoke or terminate the agency as to the attorney in fact, agent or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his heirs, devisees, and personal representatives.

(b) An affidavit, executed by the attorney in fact or agent stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability or incompetence, is, in the absence of fraud, conclusive proof of the nonrevocation or nontermination of the pwer at that time. If the exercise of the power requires execution and delivery of any instrument which

is recordable, the affidavit when authenticated for record is likewise recordable.

(c) This section shall not be construed to alter or affect any provision for revocation or termination contained in the power of attorney.

UNIFORM PROBATE CODE COMMENT

This section adopts the civil law rule that powers of attorney are not revoked on death or disability until the attorney in fact has actual knowledge of the death or disability. Provision is made for proving lack of knowledge by affidavit and the recordation of the affidavit to protect transactions that might otherwise be invalidated at common law. The section is based on Code of Va. (1950), Sec. 11-9-2.

PART 6

PUBLIC GUARDIAN AND CONSERVATOR

MAINE PROBATE CODE GENERAL COMMENT

Part 6 was enacted to incorporate preexisting provisions for the appointment of a public guardian of the person and estate of mentally retarded persons and incapacitated adults in need of protective services, and to integrate that system of public guardianship into the overall system of guardianships and conservatorships as governed by the other Parts of this Article.

§ 5-601. **Public guardians and conservators; general**

(a) In any case in which a guardian or conservator may be appointed by the court under this Article, the court may appoint a public guardian or conservator as provided in this Part for persons who are mentally retarded and for incapacitated persons as defined in section 5-101, paragraph (1), who are in need of protective services.

(b) The Bureau of Mental Retardation shall act as the public guardian or conservator for mentally retarded persons, and the Department of Human Services shall act as the public guardian or conservator for other incapacitated persons in need of protective services.

(c) Except as otherwise provided in this Part, the appointment, termination, rights and duties, and other provisions for guardians and conservators in this Article shall apply to public guardians and conservators.

§ 5-602. Priority of private guardian or conservator

No public guardian or conservator shall be appointed if the court determines that a suitable private guardian or conservator is available and willing to assume responsibilities for such service.

§ 5-603. Exclusiveness of public guardian or conservator

When the court has appointed a public guardian or conservator under this Part, no other guardian or conservator, as the case may be, shall be appointed for the same ward or protected person during the continuation of the public guardianship or public conservatorship.

§ 5-604. Nomination of public guardian or conservator

(a) Any person who is eligible to petition for appointment of a guardian under section 5-303, subsection (a), including the commissioner of any state department, the head of any state institution, the overseers of the poor, and the welfare director or health officer of any municipality may nominate the public guardian.

(b) Any person who is eligible to petition for appointment of a conservator under section 5-404, subsection (a), including the commissioner of any state department, the head of any state institution, the overseer of the poor, and the welfare director or health officer of any municipality may nominate the public conservator.

(c) Except as supplemented by section 5-605, the proceedings for determining the appointment of a public guardian or conservator shall be governed by the provisions of this Article for the appointment of guardians and conservators generally.

§ 5-605. Acceptance by public guardian or conservator; plan

Prior to the appointment of a public guardian or conservator, the appropriate agency nominated shall accept or reject the nomination in writing within 30 days of its receipt of notification that it has been nominated, and if the nomination is accepted shall file a detailed plan which, where relevant, shall include but not be limited to the type of proposed living arrangement for the ward, how the ward's financial needs will be met, how the ward's medical and other remedial needs will be met, how the ward's social needs will be met, and a plan for the ward's continuing contact with relatives and friends, as well as a plan for the management of the ward's or protected person's estate in the case of a public conservatorship.

§ 5-606. Officials authorized to act as public guardian or conservator

(a) When the Bureau of Mental Retardation is appointed public guardian or conservator of a mentally retarded person, the authority of the public guardian or conservator shall be exercised by the Director of the Bureau of Mental Retardation, whose office is established by Title 34, section 2612, and by any persons duly delegated by him to exercise such authority.

(b) When the Department of Human Services is appointed public guardian or conservator of an incapacitated person, the authority of the public guardian or conservator shall be exercised by the Commissioner of Human Services and by any persons duly delegated by him to exercise such authority.

(c) Persons duly delegated by the officials authorized to act under subsections (a) and (b) may include a staff of competent social workers, or competent social workers assigned to the public guardian or conservator by the Department of Mental Health and Corrections. In the event that the delegation is to an individual, such individual shall be qualified therefor by reason of education or experience, or both, in administering to the needs of the individual or individuals over whom he is to exercise adminstrative or supervisory authority under the public guardian.

§ 5-607. Duties and powers of a public guardian or conservator

A public guardian or conservator has the same powers, rights and duties respecting his ward or the protected person as provided for guardians and conservators by the other parts of this Article except as otherwise specifically provided in this Part, including the following particular provisions:

(1) If a public guardian places his ward in any facility described in Title 22, sections 5 and 1811, such placement shall be made oniy if the facility is duly licensed. In the event that the license of any such facility is suspended or revoked, the public guardian having any ward place therein shall remove such ward and effect an appropriate placement of the ward as soon as practicable after knowledge of the suspension or revocation of the license.

(2) The public guardian or conservator at least annually, and at any time when ordered by the court, shall review the case of every person for whom the public guardian or conservator is acting under this Part. A report of each review shall be filed with the court. Each review shall contain an examination and evaluation of the plan for the ward or protected person and recommendations for a modification thereof, as deemed appropriate or necessary.

(3) The public guardian or conservator shall keep books of account or other records showing separately the principal amount received, increments thereto and disbursements therefrom for the benefit of the ward or protected person, and such other records as are appropriate for the particular situation, together with the name of the ward or protected person, the source from which the money was received and the purpose for which the money was expended.

(4) The public guardian, in the absence of available next of kin, may authorize the performance of an autopsy upon the body of the deceased ward. The public guardian, in the absence of available next of kin, or in the event that next of kin refuses to assume responsibility therefor, shall cause any deceased ward to be suitably buried and shall have authority to expend funds of the ward for that purpose, and in the event the ward is without funds at the time of death, the public guardian shall cause him to be suitably buried at public expense, as in the case of the burial of any other deceased indigent person.

§ 5-608. Determination of need for guardianship of mentally retarded persons in institutions and residence facilities

Whenever a mentally retarded minor has been admitted to the Pineland Center or to any other state-operated institution or residence facility for the mentally retarded, and has not been discharged therefrom, the head thereof shall, within 6 months prior to the 18th birthday of such mentally retarded person, cause him to be examined to ascertain whether such person will, by reason of mental retardation, be in need of guardianship on attainment of his majority. If, in the opinion of the examiner such need will exist, the institutional or residence facility head may advise in writing the parent, next of kin, or guardian of such minor of the need to institute proceedings for appoint-

ment of a guardian. In the event no guardian has been appointed, or no guardianship proceedings are pending when such minor has attained age 18, or the institutional or residence facility head shall have determined that nomination of the public guardian is advisable in lieu of petition for guardianship by any such persons, such institutional or residence facility head shall nominate the public guardian to serve as guardian of such mentally retarded person.

Prior to release of any mentally retarded person from the Pineland Center, or from any other state-operated institution or residence facility for the mentally retarded, the head thereof shall cause such person to be examined to ascertain whether such person will, by reason of mental retardation, be in need of guardianship upon release from such institution or residence facility, and if in the opinion of such examiner such need will exist upon release, the institutional or residence facility head may advise in writing the parent or next of kin of such mentally retarded person of the need to institute proceedings for appointment of a guardian. If neither the parent nor next of kin is willing to institute proceedings for the appointment of a guardian for such mentally retarded person, or the institutional or residence facility head shall have determined that nomination of the public guardian is advisable in lieu of petition for guardianship by any of such persons, the institutional or residence facility head shall, prior to the release of such mentally retarded person, nominate the public guardian.

§ 5-609. No change in rights to services

The appointment of a public guardian or conservator in no way enlarges or diminishes the ward's or protected person's right to services made available to all mentally retarded or incapacitated persons in the State except for the provision of guardianship or conservatorship services as provided under this Article.

§ 5-610. No change in powers and duties of agency heads and trustees

Nothing in this Article shall abrogate any other powers or duties vested by law in the head of any public institution, or vested by the settlor of a trust in the trustee thereof, for the benefit of any ward or protected person for whom the public guardian or conservator is appointed.

§ 5-611. Bond

The public guardian or conservator shall not be required to file bonds in individual guardianships or conservatorships, but shall give a surety bond for the joint benefit of the wards or protected persons placed under the responsibility of the public guardian or conservator and the State of Maine, with a surety company or companies authorized to do business within the State, in an amount not less than the total value of all assets held by the public guardian or conservator, which amount shall be computed at the end of each state fiscal year and approved by the judge of the probate court for Kennebec County. At no time shall the bond of each of the public guardians or conservators be less than $500 respectively.

§ 5-612. Compensation

(a) The public guardian or conservator of a mentally retarded person shall receive such reasonable amounts for its expenses as guardian or conservator as the probate court may allow. The amounts so allowed shall be allocated to a trust account from which may be drawn expenses for filing fees, bond premiums, court costs and other expenses required in the administration of the functions of the public guardian or conservator. No amounts thus received shall inure to the benefit of any employee of the public guardian or conservator. Any balance in the trust account at the end of a fiscal year shall not lapse but shall be carried forward from year to year and used for the purposes provided for in this subsection.

(b) The public guardian or conservator of an incapacitated person in need of protective services shall not receive any compensation, profit or benefit from a ward or protected person or from any other source for service as public guardian or conservator. Any personal expenditure made on the ward's or protected person's behalf by the public guardian or conservator shall, when properly evidenced, be reimbursed out of the ward's or protected person's estate. Claims for services rendered by state agencies shall be submitted to the probate judge for approval before payment.

§ 5-613. Incapacitated persons; guardian ad litem costs

Whenever a guardian ad litem is appointed under the provisions of this Code, for an allegedly incapacitated person in need of protective services for whom appointment of the public guardian or conservator is sought under this Part, the cost of the guardian ad litem shall be paid by the Department of Human Services.

§ 5-614. Limited public guardianships

The provisions of section 5-105 apply to the appointment of public guardians.

ARTICLE VI

NONPROBATE TRANSFERS

PART 1

MULTIPLE-PARTY ACCOUNTS

§ 6-101. Definitions

In this Part, unless the context otherwise requires:

(1) "Account" means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account and other like arrangement;

(2) "Beneficiary" means a person named in a trust account as one for whom a party to the account is named as trustee;

(3) "Financial institution" means any organization authorized to do busi-

ness under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations, and credit unions;

(4) "Joint account" means an account payable on request to one or more of 2 or more parties whether or not mention is made of any right of survivorship;

(5) A "multiple-party account" is any of the following types of account: (i) a joint account, (ii) a P.O.D. account, or (iii) a trust account. It does not include accounts established for deposit of funds of a partnership, joint venture, or other association for business purposes, or accounts controlled by one or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization or a regular fiduciary or trust account where the relationship is established other than by deposit agreement;

(6) "Net contribution" of a party to a joint account as of any given time is the sum of all deposits thereto made by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance. The term includes, in addition, any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question;

(7) "Party" means a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account. A P.O.D. payee or beneficiary of a trust account is a party only after the account becomes payable to him by reason of his surviving the original payee or trustee. Unless the context otherwise requires, it includes a guardian, conservator, personal representative, or assignee, including an attaching creditor, of a party. It also includes a person identified as a trustee of an account for another whether or not a beneficiary is named, but it does not include any named beneficiary unless he has a present right of withdrawal;

(8) "Payment" of sums on deposit includes withdrawal, payment on check or other directive of a party, and any pledge of sums on deposit by a party and any set-off, or reduction or other disposition of all or part of an account pursuant to a pledge;

(9) "Proof of death" includes a death certificate or record or report which is prima facie proof of death under section 1-107;

(10) "P.O.D. account" ["payable on death account"] means an account payable on request to one person during lifetime and on his death to one or more P.O.D. payees, or to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees;

(11) "P.O.D. payee" ["payable on death payee"] means a person designated on a P.O.D. account as one to whom the account is payable on request after the death of one or more persons;

(12) "Request" means a proper request for withdrawal, or a check or order for payment, which complies with all conditions of the account, including special requirements concerning necessary signatures and regulations of the financial institution; but if the financial institution conditions withdrawal or payment on advance notice, for purposes of this Part the request for withdrawal or payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for withdrawal;

(13) "Sums on deposit" means the balance payable on a multiple-party account including interest, dividends, and in addition any deposit life insurance proceeds added to the account by reason of the death of a party;

(14) "Trust account" means an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account; it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relation such as attorney-client;

(15) "Withdrawal" includes payment to a 3rd party pursuant to check or other directive of a party.

UNIFORM PROBATE CODE COMMENT

This and the sections which follow are designed to reduce certain questions concerning many forms of joint accounts and the so-called Totten trust account. An account "payable on death" is also authorized.

As may be seen from examination of the sections that follow, "net contribution" as defined by subsection (f) has no application to the financial institution-depositor relationship. Rather, it is relevant only to controversies that may arise between parties to a multiple-party account.

Various signature requirements may be involved in order to meet the withdrawal requirements of the account. A "request" involves compliance with these requirements. A "party" is one to whom an account is presently payable without regard for whose signature may be required for a "request."

§ 6-102. Ownership as between parties, and others; protection of financial institutions

The provisions of sections 6-103 to 6-105 concerning beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, are relevant only to controversies between these persons and their creditors and other successors, and have no bearing on the power of withdrawal of these persons as determined by the terms of account contracts. The provisions of sections 6-108 to 6-113 govern the liability of financial institutions who make payments pursuant thereto, and their set-off rights.

UNIFORM PROBATE CODE COMMENT

This section organizes the sections which follow into those dealing with the relationship between parties to multiple-party accounts, on the one hand, and those relating to the financial institution-depositor (or party) relationship, on the other. By keeping these relationships separate, it is possible to achieve the degree of definiteness that financial institutions must have in order to be induced to offer multiple-party accounts for use by their customers, while preserving the opportunity for individuals involved in multiple-party accounts to show various intentions that may have attended the original deposit, or any unusual transactions affecting the account thereafter. The separation thus permits individuals using accounts of the type dealt with by these sections to avoid unconsidered and unwanted definiteness in regard to their relationship with each other. In a sense, the approach is to implement a layman's wish to "trust" a co-depositor by leaving questions that may arise between them essentially unaffected by the form of the account.

§ 6-103. **Ownership during lifetime**

(a) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contribution by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(b) A P.O.D. account belongs to the original payee during his lifetime and not to the P.O.D. payee or payees; if 2 or more parties are named as original payees, during their lifetimes rights as between them are governed by subsection (a) of this section.

(c) Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime, and if 2 or more parties are named as trustee on the account, during their lifetimes beneficial rights as between them are governed by subsection (a) of this section. If there is an irrevocable trust, the account belongs beneficially to the beneficiary.

UNIFORM PROBATE CODE COMMENT

This section reflects the assumption that a person who deposits funds in a multiple-party account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, he usually intends no present change of beneficial ownership. The assumption may be disproved by proof that a gift was intended. Read with Section 6-101(6) which defines "net contributions," the section permits parties to certain kinds of multiple-party accounts to be as definite, or as indefinite, as they wish in respect to the matter of how beneficial ownership should be apportioned between them. It is important to note that the section is limited to describe ownership of an account while original parties are alive. Section 6-104 prescribes what happens to beneficial ownership on the death of a party. The section does not undertake to describe the situation between parties if one withdraws more than he is then entitled to as against the other party. Sections 6-108 and 6-112 protect a financial institution in such circumstances

without reference to whether a withdrawing party may be entitled to less than he withdraws as against another party. Presumably, overwithdrawal leaves the party making excessive withdrawal liable to the beneficial owner as a debtor or trustee. Of course, evidence of intention by one to make a gift to the other of any sums withdrawn by the other in excess of his ownership should be effective.

The final Code contains no provision dealing with division of the account when the parties fail to prove net contributions. The omission is deliberate. Undoubtedly a court would divide the account equally among the parties to the extent that net contributions cannot be proven; but a statutory section explicitly embodying the rule might undisirably narrow the possibility of proof of partial contributions and might suggest that gift tax consequences applicable to creation of a joint tenancy should attach to a joint account. The theory of these sections is that the basic relationship of the parties is that of individual ownership of values attributable to their respective deposits and withdrawals; the right of survivorship which attaches unless negated by the form of the account really is a right to the values theretofore owned by another which the survivor receives for the first time at the death of the owner. That is to say, the account operates as a valid disposition at death rather than as a present joint tenancy.

§ 6-104. Right of survivorship

(a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. If there are 2 or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under section 6-103 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his death; and the right of survivorship continues between the surviving parties.

(b) If the account is a P.O.D. account:

(1) On death of one of 2 or more original payees the rights to any sums remaining on deposit are governed by subsection (a);

(2) On death of the sole original payee or of the survivor of 2 or more original payees, any sums remaining on deposit belong to the P.O.D. payee or payees in equal and undivided shares if surviving, or to the survivor of them if one or more die before the original payee; if 2 or more P.O.D. payees survive, there is no right of survivorship in the event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(c) If the account is a trust account:

(1) On death of one of 2 or more trustees, the rights to any sums remaining on deposit are governed by subsection (a);

(2) On the death of the sole trustee or the survivor of 2 or more trustees,

any sums remaining on deposit belong to the person or persons named as beneficiaries in equal and undivided shares, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a contrary intent; if 2 or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(d) In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of his estate.

(e) A right of survivorship arising from the express terms of the account or under this section, a beneficiary designation in a trust account, or a P.O.D. payee designation, cannot be changed by will.

UNIFORM PROBATE CODE COMMENT

The effect of (a) of this section, when read with the definition of "joint account" in 6-101(4), is to make an account payable to one or more of two or more parties a survivorship arrangement unless "clear and convincing evidence of a different contention" is offered.

The underlying assumption is that most persons who use joint accounts want the survivor or survivors to have all balances remaining at death. This assumption may be questioned in states like Michigan where existing statutes and decisions do not provide any safe and wholly practical method of establishing a joint account which is not survivorship. See Leib v. Genesee Merchants Bank, 371 Mich. 89, 123 N.W.(2d) 140 (1962). But, use of a form negating survivorship would make (d) of this section applicable. Still, the financial institution which paid after the death of a party would be protected by 6-108 and 6-109. Thus, a safe nonsurvivorship account form is provided. Consequently, the presumption stated by this section should become increasingly defensible.

The section also is designed to apply to various forms of multiple-party accounts which may be in use at the effective date of the legislation. The risk that it may turn nonsurvivorship accounts into unwanted survivorship arrangements is meliorated by various considerations. First of all, there is doubt that many persons using any form of multiple name account would not want survivorship rights to attach. Secondly, the survivorship incidents described by this section may be shown to have been against the intention of the parties. Finally, it would be wholly consistent with the purpose of the legislation to provide for a delayed effective date so that financial institutions could get notices to customers advising them that review of their accounts may be desirable because of the legislation.

Subsection (c) accepts the New York view that an account opened by "A" in his name as "trustee for B" usually is intended by A to be an informal will of any balance remaining on deposit at his death. The section is framed so that accounts with more than one "trustee," or more than one "beneficiary" can be accommodated. Section 6-103(c) would apply to such an account dur-

ing the lifetimes of "all parties." "Party" is defined by 6-101 (7) so as to exclude a beneficiary who is not described by the account as having a present right of withdrawal.

In the case of a trust account for two or more beneficiaries, the section prescribes a presumption that all beneficiaries who survive the last "trustee" to die own equal and undivided interests in the account. This dovetails with Sections 6-111 and 6-112 which give the financial institution protection only if it pays to all beneficiaries who show a right to withdraw by presenting appropriate proof of death. No further survivorship between surviving beneficiaries of a trust account is presumed because these persons probably have had no control over the form of the account prior to the death of the trustee. The situation concerning further survivorship between two or more surviving parties to a joint account is different.

In 1975, the Joint Editorial Board recommended expansion of subsections (b) and (c) so that the subsections now deal explicitly with cases involving multiple original payees in P.O.D. accounts, and multiple trustees in trust accounts. These changes were conceived to clarify, rather than to change, the text.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by insertion of the language "in equal and undivided shares" in subsection (b), paragraph (2) and subsection (c), paragraph (2) to more clearly express the intent of the section as reflected in the Uniform Probate Code comment to this section.

§ 6-105. Effect of written notice to financial institution

The provisions of section 6-104 as to rights of survivorship are determined by the form of the account at the death of a party. This form may be altered by written order given by a party to the financial institution to change the form of the account or to stop or vary payment under the terms of the account. The order or request must be signed by a party, received by the financial institution during the party's lifetime, and not countermanded by other written order of the same party during his lifetime.

UNIFORM PROBATE CODE COMMENT

It is to be noted that only a "party" may issue an order blocking the provisions of Section 6-104. "Party" is defined by Section 6-101(7). Thus if there is a trust account in the name of A or B in trust for C, C cannot change the right of survivorship because he has no present right of withdrawal and hence is not a party.

§ 6-106. Accounts and transfers nontestamentary

Any transfers resulting from the application of section 6-104 are effective by reason of the account contracts involved and this statute and are not to be considered as testamentary or subject to Articles I through IV, except as provided in sections 2-201 through 2-207, and except as a consequence of, and to the extent directed by, section 6-107.

UNIFORM PROBATE CODE COMMENT

The purpose of classifying the transactions contemplated by Article VI as nontestamentary is to bolster the explicit statement that their validity as effective modes of transfers at death is not to be determined by the requirements for wills. The section is consistent with Part 2 of Article VI.

The closing reference to Article II, Part 2, and to 6-107 was added in 1975 at the recommendation of the Joint Editorial Board to clarify the intention of the original text.

§ 6-107. Rights of creditors

No multiple-party account will be effective against an estate of a deceased party to transfer to a survivor sums needed to pay debts, taxes, and expenses of administration, including statutory allowances to the surviving spouse, minor children and dependent children, if other assets of the estate are insufficient. A surviving party, P.O.D. payee, or beneficiary who receives payment from a multiple-party account after the death of a deceased party shall be liable to account to his personal representative for amounts the decedent owed beneficially immediately before his death to the extent necessary to discharge the claims and charges mentioned above remaining unpaid after application of the decedent's estate. No proceeding to assert this liability shall be commenced unless the personal representative has received a written demand by a surviving spouse, a creditor or one acting for a minor or dependent child of the decedent, and no proceeding shall be commenced later than 2 years following the death of the decedent. Sums recovered by the personal representative shall be administered as part of the decedent's estate. This section shall not affect the right of a financial institution to make payment on multiple-party accounts according to the terms thereof, or make it liable to the estate of a deceased party unless before payment the institution has been served with process in a proceeding by the personal representative.

UNIFORM PROBATE CODE COMMENT

The sections of this Article authorize transfers at death which reduce the estate to which the surviving spouse, creditors and minor children normally must look for protection against a decedent's gifts by will. Accordingly, it seemed desirable to provide a remedy to these classes of persons which should assure them that multiple-party accounts cannot be used to reduce the essential protection they would be entitled to if such accounts were deemed a special form of specific devise. Under this Section a surviving spouse is automatically assured of some protection against a multiple-party account if the probate estate is insolvent; rights are limited, however, to sums needed for statutory allowances. The phrase "statutory allowances" includes the homestead allowance under Section 2-401, the family allowance under Section 2-403, and any allowance needed to make up the deficiency in exempt property under Section 2-402. In any case (including a solvent estate) the surviving spouse could proceed under Section 2-201 et seq. to claim an elective share in the account if the deposits by the decedent satisfy the requirements of Section 2-202 so that the account falls within the augmented net estate con-

cept. In the latter situation the spouse is not proceeding as a creditor under this section.

MAINE COMMENT

General. The "written demand" referred to in this section means a specific written request that the personal representative pursue multiple-party account assets.

§ 6-108. Financial institution protection; payment on signature of one party

Financial institutions may enter into multiple-party accounts to the same extent that they may enter into single-party accounts. Any multiple-party account may be paid, on request, to any one or more of the parties. A financial institution shall not be required to inquire as to the source of funds received for deposit to a multiple-party account, or to inquire as to the proposed application of any sum withdrawn from an account, for purposes of establishing net contributions.

§ 6-109. Financial institution protection; payment after death or disability; joint account

Any sums in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded; but payment may not be made to the personal representative or heirs of a deceased party unless proofs of death are presented to the financial institution showing that the decedent was the last surviving party or unless there is no right of survivorship under section 6-104.

§ 6-110. Financial institution protection; payment of P.O.D. account

Any P.O.D. account may be paid, on request, to any original party to the account. Payment may be made, on request, to the P.O.D. payee or to the personal representative or heirs of a deceased P.O.D. payee upon presentation to the financial institution of proof of death showing that the P.O.D. payee survived all persons named as original payees. Payment may be made to the personal representative or heirs of a deceased original payee if proof of death is presented to the financial institution showing that his decedent was the survivor of all other persons named on the account either as an original payee or as P.O.D payee.

§ 6-111. Financial institution protection; payment of trust account

Any trust account may be paid, on request, to any trustee. Unless the financial institution has received written notice that the beneficiary has a vested interest not dependent upon his surviving the trustee, payment may be made to the personal representative or heirs of a deceased trustee if proof of death is presented to the financial institution showing that his decedent was the survivor of all other persons named on the account either as trustee or beneficiary. Payment may be made, on request, to the beneficiary upon presentation to the financial institution of proof of death showing that the beneficiary or beneficiaries survived all persons named as trustees.

§ 6-112. Financial institution protection; discharge

Payment made pursuant to Sections 6-108, 6-109, 6-110 or 6-111 discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership of the account as between parties, P.O.D. payees, or beneficiaries, or their successors. The protection here given does not extend to payments made after a financial institution has received written notice from any party able to request present payment to the effect that withdrawals in accordance with the terms of the account should not be permitted. Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in any demand for withdrawal if the financial institution is to be protected under this section. No other notice or any other information shown to have been available to a financial institution shall affect its right to the protection provided here. The protection here provided shall have no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts.

§ 6-113. Financial institution protection; set-off

Without qualifying any other statutory right to set-off or lien and subject to any contractual provision, if a party to a multiple-party account is indebted to a financial institution, the financial institution has a right to set-off against the account in which the party has or had immediately before his death a present right of withdrawal. The amount of the account subject to set-off is that proportion to which the debtor is, or was immediately before his death, beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal.

MAINE COMMENT

General. The set-off provisions of this section are subject to the provisions of Article IV of the Uniform Commercial Code as enacted in Maine, Title 11, sections 4-101 et seq.

PART 2

PROVISIONS RELATING TO EFFECT OF DEATH

§ 6-201. Provisions for payment or transfer at death

(a) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance or any other written instrument effective as a contract, gift, conveyance, or trust is deemed to be nontestamentary, and this Code does not invalidate the instrument or any provision:

(1) That money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently;

(2) That any money due or to become due under the instrument shall

cease to be payable in event of the death of the promises or the promissor before payment or demand; or

(3) That any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

(b) Nothing in this section limits the rights of creditors under other laws of this State.

UNIFORM PROBATE CODE COMMENT

This section authorizes a variety of contractual arrangements which have in the past been treated as testamentary. For example most courts treat as testamentary a provision in a promissory note that if the payee dies before payment is made the note shall be paid to another named person, or a provision in a land contract that if the seller dies before payment is completed the balance shall be cancelled and the property shall belong to the vendee. These provisions often occur in family arrangements. The result of holding the provisions testamentary is usually to invalidate them because not executed in accordance with the statute of wills. On the other hand the same courts have for years upheld beneficiary designations in life insurance contracts. Similar kinds of problems are arising in regard to beneficiary designations in pension funds and under annuity contracts. The analogy of the power of appointment provides some historical base for solving some of these problems aside from a validating statute. However, there appear to be no policy reasons for continuing to treat these varied arrangements as testamentary. The revocable living trust and the multiple-party bank accounts, as well as the experience with United States government bonds payable on death to named beneficiaries, have demonstrated that the evils envisioned if the statute of wills is not rigidly enforced simply do not materialize. The fact that these provisions often are part of a business transaction and in any event are evidenced by a writing tends to eliminate the danger of "fraud."

Because the types of provisions described in the statute are characterized as nontestamentary, the instrument does not have to be executed in compliance with Section 2-502; nor does it have to be probated, nor does the personal representative have any power or duty with respect to the assets involved.

The sole purpose of this section is to eliminate the testamentary characterization from the arrangements falling within the terms of the section. It does not invalidate other arrangements by negative implication. Thus it is not intended by this section to embrace oral trusts to hold property at death for named persons; such arrangements are already generally enforceable under trust law.

ARTICLE VII

TRUST ADMINISTRATION

UNIFORM PROBATE CODE GENERAL COMMENT

Several considerations explain the presence in the Uniform Probate Code

of procedures applicable to inter vivos and testamentary trusts. The most important is that the Court assumed by the Code is a full power court which appropriately may receive jurisdiction over trustees. Another is that personal representatives under Articles III and IV and conservators under Article V, have the status of trustees. It follows naturally that these fiduciaries and regular trustees should bear a similar relationship to the Court. Also, the general move of the Code away from the concept of supervisory jurisdiction over any fiduciary is compatible with the kinds of procedural provisions which are believed to be desirable for trustees.

The relevance of trust procedures to those relating to settlement of decedents' estates is apparent in many situations. Many trusts are created by will. In a substantial number of states, statutes now extend probate court control over decedents' estates to testamentary trustees, but the same procedures rarely apply to inter vivos trusts. For example, eleven states appear to require testamentary trustees to qualify and account in much the same manner as executors, though quite different requirements relate to trustees of inter vivos trusts in these same states. Twenty-four states impose some form of mandatory court accountings on testamentary trustees, while only three seem to have comparable requirements for inter vivos trustees.

From an estate planning viewpoint, probate court supervision of testamentary trustees causes many problems. In some states, testamentary trusts cannot be released to be administered in another state. This requires complicated planning if inconvenience to interested persons is to be avoided when the beneficiaries move elsewhere. Also, some states preclude foreign trust companies from serving as trustees of local testamentary trusts without complying with onerous or prohibitive qualification requirements. Regular accountings in court have proved to be more expensive than useful in relation to the vast majority of trusts and sometimes have led to the ill-advised use of legal life estates to avoid these burdens.

The various restrictions applicable to testamentary trusts have caused many planners to recommend use of revocable inter vivos trusts. The widely adopted Uniform Testamentary Addition to Trusts Act has accelerated this tendency by permitting testators to devise estates to trustees of previously established receptacle trusts which have and retain the characteristics of inter vivos trusts for purpose of procedural requirements.

The popularity of this legislation and the widespread use of pour-over wills indicates rather vividly the obsolescence and irrelevance of statutes contemplating supervisory jurisdiction.

One of the problems with inter vivos and receptacle trusts at the present time, however, is that persons interested in these arrangements as trustees or beneficiaries frequently discover that there are no simple and efficient statutory or judicial remedies available to them to meet the special needs of the trust relationship. Proceedings in equity before courts of general jurisdiction are possible, of course, but the difficulties of obtaining jurisdiction over all interested persons on each accasion when a judicial order may be necessary or desirable are commonly formidable. A few states offer simplified

procedures on a voluntary basis for inter vivos as well as testamentary trusts. In some of these, however, the legislation forces inter vivos trusts into unpopular patterns involving supervisory control. Nevertheless, it remains true of the legislation in most states that there is too little for inter vivos trusts and too much for trusts created by will.

Other developments suggest that enactment of useful, uniform legislation on trust procedures is a matter of considerable social importance. For one thing, accelerating mobility of persons and estates is steadily increasing the pressure on locally oriented property institutions. The drafting and technical problems created by lack of uniformity of trust procedures in the several states are quite serious. If people cannot obtain official trust service to preserve and direct wealth because of state property rules, they will turn in time to national arrangements that eliminate property law problems. A general shift away from local management of trusteed wealth and increased reliance on various contractual claims against national funds seems the most likely consequence if the local law of trusts remains nonuniform and provincial.

Modestly endowed persons who are turning to inter vivos trusts to avoid probate are of more immediate concern. Lawyers in all parts of the country are aware of the trend toward reliance on revocable trusts as total substitutes for wills which recent controversies about probate procedures have stimulated. There would be little need for concern about this development if it could be assumed also that the people involved are seeking and getting competent advice and fiduciary assistance. But there are indications that many people are neither seeking nor receiving adequate information about trusts they are using. Moreover, professional fiduciaries are often not available as trustees for small estates. Consequently, neither settlors nor trustees of "do-it-yourself" trusts have much idea of what they are getting into. As a result, there are corresponding dangers to beneficiaries who are frequently uninformed or baffled by formidable difficulties in obtaining relief or information.

Enactment of clear statutory procedures creating simple remedies for persons involved in trust problems will not prevent disappointment for many of these persons but should help minimize their losses.

Several objectives of the Code are suggested by the preceding discussion. They may be summarized as follows:

1. To eliminate procedural distinctions between testamentary and inter vivos trusts.

2. To strengthen the ability of owners to select trustees by eliminating formal qualification of trustees and restrictions on the place of administration.

3. To locate nonmandatory judicial proceedings for trustees and beneficiaries in a convenient court fully competent to handle all problems that may arise.

4. To facilitate judicial proceedings concerning trusts by comprehensive provisions for obtaining jurisdiction over interested persons by notice.

5. To protect beneficiaries by having trustees file written statements of acceptance of trusts with suitable courts, thereby acknowledging jurisdiction and providing some evidence of the trust's existence for future beneficiaries.

6. To eliminate routinely required court accountings, substituting clear remedies and statutory duties to inform beneficiaries.

PART 1

TRUST REGISTRATION

UNIFORM PROBATE CODE GENERAL COMMENT

Registration of trusts is a new concept and differs importantly from common arrangements for retained supervisory jurisdiction of courts of probate over testamentary trusts. It applies alike to inter vivos and testamentary trusts, and is available to foreign-created trusts as well as those locally created. The place of registration is related not to the place where the trust was created, which may lose its significance to the parties concerned, but is related to the place where the trust is primarily administered, which in turn is required (Section 7-305) to be at a location appropriate to the purposes of the trust and the interests of its beneficiaries. Section 7-102 and 7-305 provide for transfer of registration. The procedure is more flexible than the typical retained jurisdiction in that it permits registration or submission to other appropriate procedures at another place, even in another state, in order to accommodate relocation of the trust at a place which becomes more convenient for its administration. (Cf. 20 [Purdon's] Pa.Stat. § 2080.309.) In addition, the registration acknowledges that a particular court will be accessible to the parties on a permissive basis without subjecting the trust to compulsory, continuing supervision by the court.

The process of registration requires no judicial action or determination but is accomplished routinely by simple acts on the part of the trustee which will place certain information on file with the court (Section 7-102). Although proceedings involving a registered trust will not be continuous but will be separate each time an interested party initiates a proceeding, it is contemplated that a court will maintain a single file for each registered trust as a record available to interested persons. Proceedings are facilitated by the broad jurisdiction of the court (Section 7-201) and the Code's representation and notice provisions (Section 1-403).

Section 7-201 provides complete jurisdiction over trust proceedings in the court of registration. Section 7-103 above provides for jurisdiction over parties. Section 7-104 should facilitate use of trusts involving assets in several states by providing for a single principal place of administration and reducing concern about qualification of foreign trust companies.

§ 7-101. Registration of trusts

The trustee of a trust having its principal place of administration in this State may register the trust in the court of this State at the principal place of administration. Unless otherwise designated in the trust instrument, the principal place of administration of a trust is the trustee's usual place of busi-

ness where the records pertaining to the trust are kept, or at the trustee's residence if he has no such place of business. In the case of cotrustees, the principal place of administration, if not otherwise designated in the trust instrument, is (1) the usual place of business of the corporate trustee if there is but one corporate cotrustee, or (2) the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate cotrustee, and otherwise (3) the usual place of business or residence of any of the cotrustees as agreed upon by them. The right to register under this Part does not apply to the trustee of a trust if registration would be inconsistent with the retained jurisdiction of a foreign court from which the trustee cannot obtain release.

UNIFORM PROBATE CODE COMMENT

This section rests on the assumption that a central "filing office" will be designated in each county where the Court may sit in more than one place.

The scope of this section and of Article VII is tied to the definition of "trustee" in section 1-201. It was suggested that the definition should be expanded to include "land trusts." It was concluded, however, that the inclusion of this term which has special meaning principally in Illinois, should be left for decision by enacting states. Under the definition of "trust" in this Code, custodial arrangements are contemplated by legislation dealing with gifts to minors, are excluded, as are "trust accounts" as defined in Article VI.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed to make trust registration permissive rather than mandatory.

§ 7-102. Registration procedures

Registration shall be accomplished by filing a statement indicating the name and address of the trustee in which it acknowledges the trusteeship. The statement shall indicate whether the trust has been registered elsewhere. The statement shall identify the trust: (1) in the case of a testamentary trust, by the name of the testator and the date and place of dimiciliary probate; (2) in the case of a written inter vivos trust, by the name of each settlor and the original trustee and the date of the trust instrument; or (3) in the case of an oral trust, by information identifying the settlor or other source of funds and describing the time and manner of the trust's creation and the terms of the trust, including the subject matter, beneficiaries and time of performance. If a trust has been registered elsewhere, registration in this State is ineffective until the earlier registration is released by order of the court where prior registration occurred, or an instrument executed by the trustee and all beneficiaries, filed with the registration in this State.

UNIFORM PROBATE CODE COMMENT

Additional duties of the clerk of the Court are provided in Section 1-305. The duty to register trusts is stated in Section 7-101.

§ 7-103. Effect of registration

(a) By registering a trust, or accepting the trusteeship of a registered trust, the trustee submits personally to the jurisdiction of the court in any proceeding under section 7-201 relating to the trust that may be initiated by any interested person while the trust remains registered. Notice of any proceeding shall be delivered to the trustee, or mailed to him by ordinary first class mail at his address as listed in the registration or as thereafter reported to the court and to his address as then known to the petitioner.

(b) All beneficiaries of a trust properly registered in this State are subject to the jurisdiction of the court of registration to the fullest extent permitted by the United States Constitution for purposes of proceedings under section 7-201, provided notice is given pursuant to the rules promulgated by the Supreme Judicial Court under section 1-401.

UNIFORM PROBATE CODE COMMENT

This section provides for jurisdiction over the parties. Subject matter jurisdiction for proceedings involving trusts is described in Section 7-201 and 7-202. the basic jurisdictional concept in Section 7-103 is that reflected in widely adopted long-arm statutes, that a state may properly entertain proceedings when it is a reasonable forum under all the circumstances, provided adequate notice is given. Clearly the trustee can be deemed to consent to jurisdiction by virtue of registration. This basis for consent jurisdiction is in addition to and not in lieu of other bases of jurisdiction, during or after registration. Also, incident to an order releasing registration under Section 7-305, the Court could condition the release on registration of the trust in another state or court. It also seems reasonable to require beneficiaries to go to the seat of the trust when litigation has been initiated there concerning a trust in which they claim beneficial interests, much as the rights of shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by his selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered. Although most cases will fit within traditional concepts of jurisdiction, this section goes beyond established doctrines of in personam or quasi in rem jurisdiction as regards a nonresident beneficiary's interests in foreign land of chattels, but the National Conference believes the section affords due process and represents a worthwhile step forward in trust proceedings.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version of subsection (b) was changed to provide for jurisdiction to the extent constitutionally permissible.

§ 7-104. Principal place of administration; jurisdiction

(a) By accepting the trusteeship of a trust of which the principal place of administration is in this State, or by moving the principal place of administration of a trust to this State, the trustee submits personally to the jurisdiction of the court in any proceeding under section 7-201 relating to the trust

that may be initiated by any interested person while the principal place of administration is located in this State.

(b) All beneficiaries of a trust of which the principal place of administration is in this State are subject to the jurisdiction of the court to the fullest extent permitted by the United States Constitution for purposes of proceedings under section 7-201, provided notice is given pursuant to the rules promulgated by the Supreme Judicial Court under section 1-401.

MAINE COMMENT

Maine change from Uniform Probate Code. Because of the adoption of permissive, rather than mandatory, trust registration under section 7-101, the Uniform Probate Code version of this section governing the effects of a failure to register was omitted, and the present section 7-104 was substituted to provide for jurisdiction over trustees and beneficiaries of unregistered trusts.

§ 7-105. Registration, qualification of foreign trustee

A foreign corporate trustee is required to qualify as a foreign corporation doing business in this State if it maintains the principal place of administration of any trust within the State. A foreign cotrustee is not required to qualify in this State solely because its cotrustee maintains the principal place of administration in this State. Unless otherwise doing business in this State, local qualification by a foreign trustee, corporate or individual, is not required in order for the trustee to receive distribution from a local estate or to hold, invest in, manage or acquire property located in this State, or maintain litigation. Nothing in this section affects a determination of what other acts require qualification as doing business in this State.

UNIFORM PROBATE CODE COMMENT

Section 7-105 deals with nonresident trustees in a fashion which should correct a widespread deficiency in present regulation of trust activity. Provisions limiting business of foreign corporate trustees constitute an unnecessary limitation on the ability of a trustee to function away from its principal place of business. These restrictions properly relate more to continuous pursuit of general trust business by foreign corporations than to isolated instances of litigation and management of the assets of a particular trust. The ease of avoiding foreign corporation qualification statutes by the common use of local nominees or subtrustees, and the acceptance of these practices, are evidence of the futility and undesirability of more restrictive legislation of the sort commonly existing today. The position embodied in this section has been recommended by important segments of the banking and trust industry through a proposed model statute, and the failure to adopt this reform has been characterized as unfortunate by a leading trust authority. See 5 Scott on Trusts § 558 (3rd ed. 1967).

PART 2

JURISDICTION OF COURT CONCERNING TRUSTS

§ 7-201. Court; jurisdiction over trusts

(a) The court has jurisdiction concurrent with the Superior Court of

proceedings initiated by interested parties concerning the internal affairs of trusts. Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts. These include, but are not limited to, proceedings to:

(1) Appoint or remove a trustee including a successor trustee, and to vest property held in trust by a trustee in a successor trustee;

(2) Review trustees' fees and to review and settle interim or final accounts;

(3) Ascertain beneficiaries, determine any question arising in the administration or distribution of any trust including questions of construction of trust instruments, to instruct trustees, and determine the existence or nonexistence of any immunity, power, privilege, duty or right; and

(4) Release registration of a trust.

(b) Neither registration of a trust nor a proceeding under this section result in continuing supervisory proceedings. The management and distribution of a trust estate, submission of accounts and reports to beneficiaries, payment of trustee's fees and other obligations of a trust, acceptance and change of trusteeship, and other aspects of the administration of a trust shall proceed expeditiously consistent with the terms of the trust, free of judicial intervention and without order, approval or other action of any court, subject to the jurisdiction of the court as invoked by interested parties or as otherwise exercised as provided by law.

UNIFORM PROBATE CODE COMMENT

Derived in small part from Florida Statutes 1965, Chapters 737 and 87, and Title 20, Penna. Statutes, (Purdon) 32080.101 et seq.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version was changed by providing for concurrent jurisdiction over proceedings concerning internal trust matters with the Superior Court, and by the added language in subsection (a), paragraph (1) making clear the authority of the court to appoint a successor trustee and vest title to the trust property in him.

§ 7-202. Trust proceedings; venue

Venue for proceedings under section 7-201 involving registered trusts is in the place of registration. Venue for proceedings under section 7-201 involving trusts not registered in this State is in any place where the trust properly could have been registered, and otherwise by the rules of civil procedure.

§ 7-203. Trust proceedings; dismissal of matters relating to foreign trusts

The court will not, over the objection of a party, entertain proceedings under section 7-201 involving a trust registered or having its principal place of administration in another state, unless (1) when all appropriate parties

could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration or (2) when the interests of justice otherwise would seriously be impaired. The court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust is registered or has its principal place of business, or the court may grant a continuance or enter any other appropriate order.

UNIFORM PROBATE CODE COMMENT

While recognizing that trusts which are essentially foreign can be the subject of proceedings in this state, this section employs the concept of forum non conveniens to center litigation involving the trustee and beneficiaries at the principal place of administration of the trust but leaves open the possibility of suit elsewhere when necessary in the interests of justice. It is assumed that under this section a court would refuse to entertain litigation involving the foreign registered trust unless for jurisdictional or other reasons, such as the nature and location of the property or unusual interests of the parties, it is manifest that substantial injustice would result if the parties were referred to the court of registration. As regards litigation involving third parties, the trustee may sue and be sued as any owner and manager of property under the usually applicable rules of civil procedure and also as provided in Section 7-203.

The concepts of res judicata and full faith and credit applicable to any managing owner of property have generally been applicable to trustees. Consequently, litigation by trustees has not involved the artificial problems historically found when personal representatives maintain litigation away from the state of their appointment, and a prior adjudication for or against a trustee rendered in a foreign court having jurisdiction is viewed as conclusive and entitled to full faith and credit. Because of this, provisions changing the law, analogous to those relating to personal representatives in Section 4-401 do not appear necessary. See also Section 3-408. In light of the foregoing, the issue is essentially only one of forum non conveniens in having litigation proceed in the most appropriate forum. This is the function of this section.

§ 7-204. Court; concurrent jurisdiction of litigation involving trusts and 3rd parties

The court of the place in which the trust is registered has concurrent jurisdiction with other courts of this state of actions and proceedings to determine the existence or nonexistence of trusts created other than by will, of actions by or against creditors or debtors of trusts, and of other actions and proceedings involving trustees and 3rd parties. Venue is determined by the rules generally applicable to civil actions.

§ 7-205. Proceedings for review of employment of agents and review of compensation of trustee and employees of trust

On petition of an interested person, after notice to all interested persons, the court may review the propriety of employment of any person by a trustee including any attorney, auditor, investment advisor or other specialized agent or assistant, and the reasonableness of the compensation of any person

so employed, and the reasonableness of the compensation determined by the trustee for his own services. Any person who has received excessive compensation from a trust may be ordered to make appropriate refunds. The factors set forth in section 3-721, subsection (b) should be considered as guides in determining the reasonableness of fees under this section.

UNIFORM PROBATE CODE COMMENT

In view of the broad jurisdiction conferred on the probate court, description of the special proceeding authorized by this section might be unnecessary. But the Code's theory that trustees may fix their own fees and those of their attorneys marks an important departure from much existing practice under which fees are determined by the Court in the first instance. Hence, it seems wise to emphasize that any interested person can get judicial review of fees if he desires it. Also, if excessive fees have been paid, this section provides a quick and efficient remedy. This review would meet in part the criticism of the broad powers given in the Uniform Trustees' Powers Act.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version was changed by adding the last sentence.

§ 7-206. Trust proceedings; initiation by notice; necessary parties

Proceedings under section 7-201 are initiated by filing a petition in the court and giving notice pursuant to section 1-401 to interested parties. The court may order notification of additional persons. A decree is valid as to all who are given notice of the proceeding though fewer than all interested parties are notified.

PART 3

DUTIES AND LIABILITIES OF TRUSTEES

§ 7-301. General duties not limited

Except as specifically provided, the general duty of the trustee to administer a trust expeditiously for the benefit of the beneficiaries is not altered by this Code.

§ 7-302. Trustee's standard of care and performance; fiduciary investments authorized

(a) Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust, assets that would be observed by a prudent person dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

(b) Within the limitation of the standard set forth in subsection (a), and subject to the provisions of any instrument under which a trustee holds his office, a trustee may retain property properly acquired, without limitation

as to time and without regard to its suitability for original purchase, and is authorized to acquire and retain any kind of property or investment which would be acquired or retained by a prudent person under the standard set forth in subsection (a). The terms "legal investment" or "authorized investment" or words of similar import used in any instrument under which a trustee holds his office, shall be construed to mean any investment which is permitted by the terms of this section, unless otherwise more specifically defined within the instrument.

UNIFORM PROBATE CODE COMMENT

This is a new general provision designed to make clear the standard of skill expected from trustees both individual and corporate, nonprofessional and professional. It differs somewhat from the standard stated in § 174 of the Restatement of Trusts, Second, which is as follows:

"The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a reasonable man of ordinary prudence, he is under a duty to exercise such skill."

By making the basic standard align to that observed by a prudent man in dealing with the property of another, the section accepts a standard as it has been articulated in some decisions regarding the duty of a trustee concerning investments. See Estate of Cook, (Del.Chanc.1934) 20Del.Ch. 123, 171 A, 730. Also, the duty as described by the above section more clearly conveys the idea that a trustee must comply with an external, rather than with a personal, standard of care.

MAINE COMMENT

Maine changes from Uniform Probate Code. The Uniform Probate Code version was changed by substituting the word "person" instead of "man" in subsection (a), and by adding subsection (b) to retain Maine's prudent person investment rule.

§ 7-303. **Duty to inform and account to beneficiaries**

The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. In addition:

(a) Within 30 days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible, one or more persons who under section 1-403 may represent beneficiaries with future interests, of the court, if any, in which the trust is registered and of his name and address; except that this subsection shall not apply to the trustee of any receptacle trust until such time as it becomes more than minimally funded.

(b) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest

and with relevant information about the assets of the trust and the particulars relating to the administration.

(c) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

UNIFORM PROBATE CODE COMMENT

Analogous provisions are found in Section 3-705.

This provision does not require regular accounting to the Court nor are copies of statements furnished benficiaries required to be filed with the Court. The parties are expected to assume the usual ownership responsibility for their interests including their own record keeping. Under Section 1-108, the holder of a general power of appointment or of revocation can negate the trustee's duties to any other person.

This section requires that a reasonable selection of beneficiaries is entitled to information so that the interests of the future beneficiaries may adequately be protected. After mandatory notification of registration by the trustee to the beneficiaries, further information may be obtained by the beneficiary upon request. This is to avoid extensive mandatory formal accounts and yet provide the beneficiary with adequate protection and sources of information. In most instances, the trustee will provide beneficiaries with copies of annual tax returns or tax statements that must be filed. Usually this will be accompanied by a narrative explanation by the trustee. In the case of the charitable trust, notice need be given only to the attorney general or other state officer supervising charitable trusts and in the event that the charitable trust has, as its primary beneficiary, a charitable corporation or institution, notice should be given to that charitable corporation or institution. It is not contemplated that all of the individuals who may receive some benefit as a result of a charitable trust be informed.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was changed by the insertion of "if any" in subsection (a) to accommodate Maine's system of permissive registration, and by adding the receptacle trust exclusion in subsection (a).

§ 7-304. Duty to provide bond

A trustee need not provide bond to secure performance of his duties unless required by the terms of the trust, reasonably requested by a beneficiary or found by the court to be necessary to protect the interests of the beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented. On petition of the trustee or other interested person the court may excuse a requirement of bond, change the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties. If bond is required, it shall be filed in the court of registration or other appropriate court in amounts and with sureties and liabilities

as provided in sections 3-604 and 3-606 relating to bonds of personal representatives.

UNIFORM PROBATE CODE COMMENT

See Sections 3-603 and 3-604; 60 Okla.Stats.1961, § 175.24 [60 Okl.St.Ann. § 175.24]; Pa.Fid.Act, 1949, § 390.911(b) [20 Purdon's Pa.Stat. § 390.911 (b)]; cf. Tenn. Code Ann. § 35-113.

MAINE COMMENT

Maine change from Uniform Probate Code. The Uniform Probate Code version was modified by substituting the word "change" for "reduce" in the 2nd sentence.

§ 7-305. Trustee's duties; appropriate place of administration; deviation

A trustee is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management. If the principal place of administration becomes inappropriate for any reason, the court may enter any order furthering efficient administration and the interests of beneficiaries, including, if appropriate, release of registration, removal of the trustee and appointment of a trustee in another state. Trust contrary to efficient administration or the purposes of the trust. Views of provisions relating to the place of administration and to changes in the place of administration or of trustee control unless compliance would be adult beneficiaries shall be given weight in determining the suitability of the trustee and the place of administration.

UNIFORM PROBATE CODE COMMENT

This section and 7-102 are related. The latter section makes it clear that registration may be released without Court order if the trustee and beneficiaries can agree on the matter. Section 1-108 may be relevant, also.

The primary thrust of Article VII is to relate trust administration to the jurisdiction of courts, rather than to deal with substantive matters of trust law. An aspect of deviation, however, is touched here.

§ 7-306. Personal liability of trustee to 3rd parties

(a) Unless otherwise provided in the contract, a trustee is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust estate unless he fails to reveal his representative capacity and identify the trust estate in the contract.

(b) A trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he is personally at fault.

(c) Claims based on contracts entered into by a trustee in his fiduciary capacity, on obligations arising from ownership or control of the trust estate, or on torts committed in the course of trust administration may be asserted

against the trust estate by proceeding against the trustee in his fiduciary capacity, whether or not the trustee is personally liable therefor.

(d) The question of liability as between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding.

UNIFORM PROBATE CODE COMMENT

The purpose of this section is to make the liability of the trust and trustee the same as that of the decedent's estate and personal representative.

Ultimate liability as between the estate and the fiduciary need not necessarily be determined whenever there is doubt about this question. It should be permissible, and often it will be preferable, for judgment to be entered, for example, against the trustee individually for purposes of determining the claimant's rights without the trustee placing that matter into controversy. The question of his right of reimbursement may be settled informally with beneficiaries or in a separate proceeding in the probate court involving reimbursement. The section does not preclude the possibility, however, that beneficiaries might be permitted to intervene in litigation between the trustee and a claimant and that all questions might be resolved in that action.

§ 7-307. **Limitations on proceedings against trustees after final account**

Unless previously barred by adjudication, consent or limitation, any claim against a trustee for breach of trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within 6 months after receipt of the final account or statement. In any event and notwithstanding lack of full disclosure a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of **the location and availability of records for his examination is protected after** 3 years. **A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if, being a minor or disabled person, it is received by his representative as described in section** 1-403, paragraphs (1) and (2).

UNIFORM PROBATE CODE COMMENT

Final accounts terminating the trustee's obligations to the trust beneficiaries may be formal or informal. Formal judicial accountings may be initiated by the petition of any trustee or beneficiary. Informal accounts may be conclusive by consent or by limitation. This section provides a special limitation supporting informal accounts. With regard to facilitating distribution see Section 5-103.

Section 1-108 makes approval of an informal account or settlement with a trustee by the holder of a presently exercisable general power of appointment binding on all beneficiaries. In addition, the equitable principles of estoppel and laches, as well as general statutes of limitation, will apply in many cases to terminate trust liabilities.

PART 4

POWERS OF TRUSTEES

UNIFORM PROBATE CODE GENERAL COMMENT

There has been considerable interest in recent years in legislation giving trustees extensive powers. The Uniform Trustees' Powers Act, approved by the National Conference in 1964 has been adopted in Idaho, Kansas, Mississippi and Wyoming. New York and New Jersey have adopted similar statutes which differ somewhat from the Uniform Trustees' Powers Act, and Arkansas, California, Colorado, Florida, Iowa, Louisiana, Oklahoma, Pennsylvania, Virginia and Washington have compresensive legislation which differ in variouse respects from other models. The legislation in Connecticut, North Carolina and Tennessee provides lists of powers to be incorporated by reference as draftsmen wish.

Comprehensive legislation dealing with trustees' powers appropriately may be included in the Code package at this point.

§ 7-401. Powers of trustee conferred by trust or by law

(a) The trustee has all powers conferred upon him by the provisions of this Part unless otherwise provided in the trust instrument.

(b) An instrument which is not a trust under section 1-201, paragraph (45) may incorporate any section or subsection of this Part by reference.

§ 7-402. Powers of trustees conferred by this Part

(a) From the time of the creation of the trust until final distribution of the assets of the trust, a trustee has the power to perform, without court authorization, every act which a prudent person would perform for the purposes of the trust including but not limited to the powers specified in subsection (c).

(b) In the exercise of his powers including the powers granted in this Part, a trustee has a duty to act with due regard to his obligation as a fiduciary, according to the standard set forth in section 7-302.

(c) A trustee has the power, subject to subsections (a) and (b):

(1) To collect, hold, and retain trust assets received from a trustor until, in the judgment of the trustee, disposition of the assets should be made; and the assets may be retained even though they include an asset in which the trustee is personally interested;

(2) To receive additions to the assets of the trust;

(3) To continue or participate in the operation of any business or other enterprise, and to effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;

(4) To acquire an undivided interest in a trust asset in which the trustee, in any trust capacity, holds an undivided interest;

(5) To invest and reinvest trust assets in accordance with the provisions of the trust or as provided by law;

(6) To deposit trust funds in a bank, including a bank operated by the trustee;

(7) To acquire or dispose of an asset, for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon a trust asset or any interest therein; and to encumber, mortgage, or pledge a trust asset for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee;

(8) To make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;

(9) To subdivide, develop, or dedicate land to public use; or to make or obtain the vacation of plats and adjust boundaries; or to adjust differences in valuation on exchange or partition by giving or receiving consideration; or to dedicate easements to public use without consideration;

(10) To enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the trust;

(11) To enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(12) To grant an option involving disposition of a trust asset, or to take an option for the acquisition of any asset;

(13) To vote a security, in person or by general or limited proxy;

(14) To pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(15) To sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(16) To hold a security in the name of a nominee or in other form without disclosure of the trust, so that title to the security may pass by delivery, but the trustee is liable for any act of the nominee in connection with the stock so held;

(17) To insure the assets of the trust against damage or loss, and the trustee against liability with respect to 3rd persons;

(18) To borrow money to be repaid from trust assets or otherwise; to advance money for the protection of the trust, and for all expenses, losses, and liabilities sustained in the administration of the trust or because of

the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary;

(19) To pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible;

(20) To pay taxes, assessments, compensation of the trustee, and other expenses incurred in the collection, care, administration, and protection of the trust;

(21) To allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescense, or amortization, or for depletion in mineral or timber properties;

(22) To pay any sum distributable to a beneficiary under legal disability, without liability to the trustee, by paying the sum to the beneficiary or by paying the sum for the use of the beneficiary either to a legal representative appointed by the court, or if none, to a relative;

(23) To effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation;

(24) To employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(25) To prosecute or defend actions, claims, or proceedings for the protection of trust assets and of the trustee in the performance of his duties;

(26) To execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the trustee.

§ 7-403. Trustee's office not transferable

The trustee shall not transfer his office to another or delegate the entire administration of the trust to a cotrustee or another.

§ 7-404. Power of court to permit deviation or to approve transactions involving conflict of interest

(a) This Code does not affect the power of a court of competent jurisdiction for cause shown and upon petition of the trustee or affected beneficiary and upon appropriate notice to the affected parties to relieve a trustee from any restrictions on his power that would otherwise be placed upon him by the trust or by this Code.

(b) If the duty of the trustee and his individual interest or his interest as trustee of another trust, conflict in the exercise of a trust power, the

power may be exercised only by court authorization, except as provided in section 7-402, subsection (c), paragraphs (1), (4), (6), (18) and (24), upon petition of the trustee. Under this section, personal profit or advantage to an affiliated or subsidiary company or association is personal profit to any corporate trustee.

§ 7-405. Powers exercisable by joint trustees; liability

(a) Any power vested in 3 or more trustees may be exercised by a majority, but a trustee who has not joined in exercising a power is not liable to the beneficiaries or to others for the consequences of the exercise; and a dissenting trustee is not liable for the consequences of an act in which he joins at the direction of the majority of the trustees, if he expressed his dissent in writing to any of his cotrustees at or before the time of the joinder.

(b) If 2 or more trustees are appointed to perform a trust, and if any of them is unable or refuses to accept the appointment, or, having accepted, ceases to be a trustee, the surviving or remaining trustees shall perform the trust and succeed to all the powers, duties, and discretionary authority given to the trustees jointly.

(c) This section does not excuse a cotrustee from liability for failure either to participate in the administration of the trust or to attempt to prevent a breach of trust.

§ 7-406. Third persons protected in dealing with trustee

With respect to a 3rd person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust power and their proper exercise by the trustee may be assumed without inquiry. The 3rd person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a 3rd person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise. A 3rd person is not bound to assure the proper application of trust assets paid or delivered to the trustee.

§ 7-407. Prohibitions and requirements applicable to trusts which are private foundations

(a) In the administration of any trust which is a "private foundation" as defined in section 509 of the Internal Revenue Code of 1954, a "charitable trust" as defined in section 4947(a)(1) of the Internal Revenue Code of 1954, or a "split-interest trust" as defined in section 4947(a)(2) of the Internal Revenue Code of 1954, the following acts shall be prohibited:

(1) Engaging in any act of "self-dealing" as defined in section 4941(d) of the Internal Revenue Code of 1954, which would give rise to any liability for the tax imposed by section 4941(a) of the Internal Revenue Code of 1954;

(2) Retaining any "excess business holdings" as defined in section 4943(c) of the Internal Revenue Code of 1954. which would give rise to any liability

for the tax imposed by section 4943(a) of the Internal Revenue Code of 1954;

(3) Making any investments which would jeopardize the carrying out of any of the exempt purposes of the trust, within the meaning of section 4944 of the Internal Revenue Code of 1954, so as to give rise to any liability for the tax imposed by section 4944(a) of the Internal Revenue Code of 1954; and

(4) Making any "taxable expenditures" as defined in section 4945(d) of the Internal Revenue Code of 1954, which would give rise to any liability for the tax imposed by section 4945(a) of the Internal Revenue Code of 1954;

provided that this section shall not apply either to those split-interest trusts or to amounts thereof which are not subject to the prohibitions applicable to private foundations by reason of the provisions of section 4947 of the Internal Revenue Code of 1954.

(b) In the administration of any trust which is a "private foundation" or "charitable trust" as defined in subsection (a), there shall be distributed, for the purposes specified in the trust instrument, for each taxable year, amounts at least sufficient to avoid liability for the tax imposed by section 4942(a) of the Internal Revenue Code of 1954.

(c) Subsections (a) and (b) shall not apply to any trust to the extent that a court of competent jurisdiction shall determine that such application would be contrary to the terms of the instrument governing such trust and that the trust instrument may not properly be changed to conform to such subsections.

(d) Nothing in this section shall impair the rights and powers of the courts or the Attorney General of this State with respect to any trust.

(e) All references to sections of the Internal Revenue Code of 1954 shall include future amendments to such sections and corresponding provisions of future internal revenue laws.

PART 5

COMMON TRUST FUNDS

MAINE GENERAL COMMENTS

This Part was added to the Uniform Probate Code version in order to carry forward and preserve existing Maine law concerning the establishment of common trust funds, and to integrate it into the Maine Probate Code.

§ 7-501. Establishment of common trust funds

Any bank or trust company qualified to act as fiduciary in this State may establish and operate common trust funds for the purpose of furnishing investments to itself as fiduciary or to itself and others, as cofiduciaries; and for the purposes of furnishing investments to affiliated banks, within the

meaning of section 1504 of the Internal Revenue Code, acting for themselves and others as cofiduciaries; and may, as such fiduciary or cofiduciary or acting for affiliated banks alone or with their cofiduciaries; invest funds which are lawfully held for investment in interests in such common trust funds, if such investment is not prohibited by the instrument, judgment, decree or order creating such fiduciary relationship, and if, in the case of cofiduciaries, the bank or trust company or affiliate procures the consent of its cofiduciaries to such investment. Any person acting as a cofiduciary with any such bank or trust company or affiliate is authorized to consent to the investment in such interests.

§ 7-502. Court accountings

Unless ordered by decree of the Superior Court, the bank or trust company operating such common trust funds is not required to render a court accounting with regard to such funds; but it, as accountant, may by petition to the Superior Court or the probate court, in the county where the accountant has its principal place of business, secure approval of such accounting on such conditions as the court may establish. Whenever a petition for the allowance of such an account is presented, the court having jurisdiction thereof shall assign a time and place for hearing and shall cause public notice thereof to be given, meaning thereby notice published 3 weeks successively in a newspaper published in the county whose court has jurisdiction. In addition thereto said court shall, except to such extent as the several instruments creating the trusts participating in such common trust fund provide otherwise, order personal notice upon all known beneficiaries of the participating trust estates who have a place of residence known to the accountant. Personal notice to known beneficiaries having a place of residence known to the service by a written notice deposited in the mails addressed to each such known beneficiary at such known place of residence at least 14 days before the time of hearing, or by a written notice either in hand or left at such known place of residence 14 days at least before the time of hearing. The method of service and the form of such notice shall be as the court shall order. "Place of residence known to the accountant" as used in this section shall include only places of residence actually known to the accountant, and shall not include residences which could be discovered upon investigation but which do not in the due course of business come to the actual knowledge of the accoountant. The allowance of such an account shall be conclusive as to all matters shown therein upon all persons then or thereafter interested in the funds invested in said common trust funds.

§ 7-503. Application of Part

This Part shall apply to fiduciary relationships in existence on September 1, 1951 or thereafter established.

PART 6

BANK AND TRUST COMPANY NOMINEES

MAINE GENERAL COMMENTS

This Part was added to the Uniform Probate Code version in order to carry

forward and preserve existing Maine law concerning the use of nominees by bank and trust company fiduciaries, and to expressly supplement any related provisions in the Maine Probate Code.

§ 7-601. Registration in name of nominees

Any state or national bank or trust company, when acting in this State as a fiduciary or co-fiduciary with others, may with the consent of its co-fiduciary or co-fiduciaries, if any, who are authorized to give such consent, cause any investment held in any such capacity to be registered and held in the name of a nominee or nominees of such bank or trust company. Such bank or trust company shall be liable for the acts of any such nominee with respect to any investment so registered. The term "fiduciary" as used in this section shall include, but not be limited to, personal representatives, guardians, conservators, trustees, agents, custodians and each of them.

§ 7-602. Separate records

The records of such bank or trust company shall at all times show the ownership of any such investment, which investment shall be in the possession and control of such bank or trust company and be kept separate and apart from the assets of such bank or trust company.

§ 7-603. Applicability of provisions

This Part shall govern fiduciaries and cofiduciaries acting under wills, agreements, court orders and other instruments now existing or hereafter made. Nothing contained in this Part shall be construed as authorizing any departure from or variation of the express words or limitations set forth in any will, agreement, court order or other instrument creating or defining the fiduciary's duties and powers.

ARTICLE VIII

MISCELLANEOUS PROVISIONS

PART 1

RECEIVERSHIPS FOR MISSING AND ABSENT PERSONS

MAINE GENERAL COMMENT

This Part was added to the Uniform Probate Code version in order to preserve existing Maine law providing for receiverships for the property of missing or absent persons, and to integrate it into the Maine Probate Code.

§ 8-101. Estates of absentees

If a person entitled to or having an interest in property within the jurisdiction of the State has disappeared or absconded from the place within or without the State where he was last known to be, and has no agent in the State, and it is not known where he is, or if such person, having a spouse or minor child dependent to any extent upon him for support, has thus disappeared or absconded wtihout making sufficient provision for such support, and it is not known where he is, or, if it is known that he is without the State,

anyone who would under the law of the State be entitled to administer upon the estate of such absentee if he were deceased, may file a petition under oath in the probate court for the county where such property is situated or found, stating the name, age, occupation and last known residence or address of such absentee, the date and circumstances of the disappearing or absconding, and the names and residences of other persons, whether members of such absentee's family or otherwise, of whom inquiry may be made, and containing a schedule of the property, real and personal so far as known, and its location within the State, and praying that such property may be taken possession of, and a receiver thereof appointed under this Part.

§ 8-102. Warrant

The court may thereupon issue a warrant, directed to the public administrator in the county where the property or some of it is situated, which may run throughout the State, commanding him to take possession of the property named in said schedule and make return of said warrant as soon as may be with his doings thereon with a schedule of the property so taken. The public administrator shall cause so much of the warrant as relates to land to be recorded in the registry of deeds for the county where the land is located. He shall receive such fees for serving the warrant as the court allows, but not more than those established by law for similar service upon a writ of attachment. Fees and the costs of publishing and serving the notice shall be paid by the petitioner. If a receiver is appointed, said fees shall be repaid by the receiver to the petitioner and allowed the receiver in his account.

§ 8-103. Notice

Upon the return of such warrant, the court may issue a notice reciting the substance of the petition, warrant and return, which shall be addressed to such absentee and to all persons who claim an interest in said property, and to all to whom it may concern, citing them to appear at a time and place named and show cause why a receiver of the property named in the schedule should not be appointed and said property held and disposed of under this Part.

§ 8-104. Publication

The return day of said notice shall be not less than 30 days nor more than 60 days after its date. The court shall order said notice to be published once in each of 3 successive weeks in one or more newspapers within the said county and a copy to be mailed to the last known address of such absentee. The court may order other and further notice to be given within or without the State.

§ 8-105. Hearing

The absentee or any person who claims an interest in any of the property may appear and show cause why the prayer of the petitioner should not be granted. The court may, after hearing, dismiss the petition and order the property in possession of the public administrator to be returned to the person entitled thereto, or it may appoint the person who, under the law of

the State, would be entitled to administer upon the estate of such absentee if he were deceased, or if no such person is known or such person declines to serve, then he may appoint the public administrator for said county as receiver of the property which is in the possession of the public administrator and named in his schedule. If a receiver is appointed, the court shall find and record the date of the disappearance or absconding of the absentee and such receiver shall give bond to the judge of probate and his successors in office in such sum and with such condition as the court orders.

§ 8-106. Possession by receiver

After the approval of such bond, the court may order the public administrator to transfer and deliver to such receiver the possession of the property under the warrant, and the receiver shall file in the registry of probate a schedule of the property received by him.

§ 8-107. Collection of debts

Such receiver shall take possession of any additional property within the State which belongs to such absentee and demand and collect all debts due such absentee from any person within the State and hold the same as if it had been transferred and delivered to him by the public administrator. If he takes any additional real estate, said receiver shall file a certificate describing said real estate with the register of deeds for the county where the real estate is located.

§ 8-108. Appointment

If such absentee has left no corporeal property within the State, but there are debts or obligations due or owing to him from persons within the State, a petition may be filed as provided in section 8-101, stating the nature and amount of such debts and obligations so far as known, and praying that a receiver thereof may be appointed. The court may thereupon issue a notice as provided, without issuing a warrant, and may, upon the return of said notice and after a hearing, dismiss the petition or appoint a receiver and authorize and direct him to demand and collect the debts and obligations of said absentee. Said receiver shall give bond as provided in section 8-105, and shall hold the proceeds of such debts and obligations and all property received by him and distribute the same as provided.

§ 8-109. Perishable goods

The court may make orders for the care, custody, leasing and investing of all property and its proceeds in the possession of the receiver. If any of the said property consists of live animals or is perishable or cannot be kept without great or disproportionate expense, the court may, after the return of the warrant, order such property to be sold at public or private sale. After the appointment of a receiver, upon his petition, the court may order all or part of said property, including the rights of the absentee in land, to be sold at public or private sale to supply money for payments authorized by this subchapter or for reinvestment approved by the court.

§ 8-110. Support of dependents

The court may order said property or its proceeds acquired by mortgage, lease or sale to be applied in payment of charges incurred or that may be incurred in the support and maintenance of the absentee's spouse and dependent children, and to the discharge of such debts and claims for alimony as may be proved against said absentee.

§ 8-111. Arbitration of claims

The court may authorize the receiver to adjust by arbitration or compromise any demand in favor of or against the estate of such absentee.

§ 8-112. Compensation; cessation of duties

The receiver shall be allowed such compensation and disbursements as the court orders, to be paid out of said property or proceeds. If within 8 years after the date of the disappearance and absconding as found and recorded by the court, such absentee appears, or a personal representative, assignee in insolvency or trustee in bankruptcy of said absentee is appointed, such receiver shall account for, deliver and pay over to him the remainder of said property. If said absentee does not appear and claim said property within said 8 years, all his right, title and interest in said property, real or personal, or the proceeds thereof, shall cease, and no action shall be brought by him on account thereof.

§ 8-113. Termination of receivership

If at the expiration of said 8 years said property has not been accounted for, delivery or paid over under section 8-112 the court shall order the distribution of the remainder to the persons to whom, and in the shares and proportions in which, it would have been distributed if said absentee had died intestate within the State on the day 8 years after the date of the disappearance or absconding as found and recorded by the court, except that said receiver shall deduct from the share of each distributee and pay to the State Tax Assessor for the use of the State such amount as said distributee would have paid in an inheritance tax to the State if said distributee had received the property by inheritance from a deceased resident of this State.

§ 8-114. Limitations

If such receiver is not appointed within 7 years after the date found by the court under section 8-105, the time limited to accounting for, or fixed for distributing, said property or its proceeds, or for barring actions relative thereto, shall be one year after the date of the appointment of the receiver instead of the 8 years provided in sections 8-112 and 8-113.

PART 2

ALLOCATION OF PRINCIPAL AND INCOME

MAINE GENERAL COMMENT

This Part was added to the Uniform Probate Code version in order to

preserve and relocate in one place within the Maine Probate Code various provisions of existing Maine law concerning the allocation of principal and income in certain circumstances.

§ 8-201. Bonds and obligations in trust; valuation; amortization

Where any part of the principal of a trust consists of bonds or other obligations for the payment of money, they shall be deemed principal at their inventory value or in default thereof at their market value at the time the principal was established, or at their cost where purchased later, regardless of their par or maturity value. Upon their respective maturities or upon their sale or other disposition any loss or gain realized thereon shall, unless otherwise provided in the instrument creating the trust, fall upon or inure to principal; except that in the case of bonds bearing no stated interest and payable at maturity or at a future time at an amount in excess of their issue price, the amount realized upon their respective maturities or upon their sale or other disposition which is in excess of their inventory value or in default thereof of their market value at the time the principal was established, or of their cost where purchased later, shall, unless otherwise provided in the instrument creating the trust, inure to income when received.

§ 8-202. Income earned during administration

Unless otherwise expressly provided by the will of a testator dying after August 28, 1957, all net income from real and personal property earned during the period of administration of the estate of such testator and not payable to others or otherwise disposed of by the will shall be distributed pro rata to or for the benefit of the immediate income beneficiaries of any trusts created out of the residuary estate of such testator and the other persons entitled to such residuary estate. None of such income shall, after such distribution, be added to the principal of the residuary estate the whole or any part of which is devised in trust or for life or for a term of years, but shall be paid ratably to the income beneficiary of a trust, or to the tenant for life or for a term of years, or to the absolute residuary devisee, as the case may be. Unless otherwise directed in the will, income shall be payable to the life beneficiaries of trusts, or to life tenants from the date of testator's death. Nothing contained in this section shall affect the right of any person to income on any portion of the estate not part of the residuary estate of such testator.

§ 8-203. Income on general devise of personal property in trust, in trust or for a term

Where a general devise of personal property other than of residue is given in trust or for life or for a term of years, that portion of the net income of the estate, except income from assets specifically devised, earned during the period of administration up to the time of distribution of the general devise of personal property, computed as provided in this section, shall be distributed as income to or for the benefit of the immediate income beneficiary of the devise of personal property. Such portion shall be that portion of the net income of the estate earned to the time of distribution of the devise of personal property, except income from assets specifically devised, which the value of such general devise of personal property bears to the total inventory

value of the estate reduced by all debts, expenses and taxes payable out of the residue of the estate; by the amount of any general devise of personal property other than of residue, which is not given in trust or for life or for a term of years; and by the inventory value of assets specifically devised.

§ 8-204. Dividends representing capital gains

Dividends received which represent capital gains realized from the sale of securities owned by any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended, shall for all purposes be considered as principal unless otherwise provided by the will, agreement, court order or other instrument creating or defining the fiduciary's duties and powers.

PART 3

PROCEDURES GOVERNING BONDS

MAINE GENERAL COMMENTS

This Part was added to the Uniform Probate Code version in order to carry forward some of the provisions of existing Maine law governing probate bonds that are not covered in other parts of the Maine Probate Code, to conform these provisions to the rest of the Code particularly as they pertain to decedents' estates, guardians and conservators and trusts, and to preserve other provisions of prior Maine law concerning bonding where they may be generally applicable to, and incorporated by reference by, other areas of Maine statutory law.

§ 8-301. Applicability to proceedings on other bonds

Except as otherwise provided by law, and insofar as the provisions of this Part are applicable, like proceedings, judgment and execution shall be had on the bonds given to any judge by personal representatives, guardians, conservators, trustees, surviving partners, assignees of insolvent debtors and others, in the manner provided in this Part.

§ 8-302. Surety on bond may cite trust officers for accounting

Whenever any surety on any bond has reason to believe that the trust officer has depleted or is wasting or mismanaging the estate, the surety may cite the trust officer before the judge of probate as provided in section 3-110. If upon hearing the judge is satisfied that the estate held in trust by such officer has been depleted, wasted or mismanaged, he may remove the trust officer and appoint another in his stead.

§ 8-303. Agreement with sureties for joint control

It shall be lawful for any party of whom a bond, undertaking or other obligation is required to agree with his surety or sureties for the deposit of any or all moneys and assets for which he and his surety or sureties are or may be held responsible with a national bank, savings banks, safe-deposit or trust company, authorized by law to do business as such in this State, or with other depository approved by the court having jurisdiction over the trust or under-

taking for which the bond is required, or a judge thereof, if such deposit is otherwise proper, for the safekeeping thereof, and in such manner as to prevent the withdrawal of such money or assets or any part thereof, without the written consent of such surety or sureties, or an order of such court or judge thereof, made on such notice to such surety or sureties as such court or judge may direct. Such agreement shall not in any manner release from or change the liability of the principal or sureties as established by the terms of the said bond.

§ 8-304. Approval of bond by judge

Except as otherwise provided by section 3-603 through 3-606, 4-204, 4-207, 5-411, 5-412, 5-432 and 7-304, no bond required to be given to the judge of probate or to be filed in the probate office is sufficient until it has been examined by the judge and his approval written thereon.

§ 8-305. Insufficient sureties

When the sureties in any such bond are insufficient the judge, on petition of any person interested and with notice to the principal, may require a new bond with sureties approved by him.

§ 8-306. Discharge of surety

On application of any surety or principal in such bond, the judge on the due notice to all parties interested may, in his discretion, discharge the surety or sureties from all liability for any subsequent but not for any prior breaches thereof, and may require a new bond of the principal with sureties approved by him.

§ 8-307. New bonds or removal of principal

In either case, if the principal does not give the new bond within the time ordered by the judge, he shall be removed and another appointed.

§ 8-308. Reduction of penal sum where signed by surety company

If a surety company becomes surety on a bond given to a judge of probate, the court may, upon petition of any party in interest and after due notice to all parties interested, reduce the penal sum in which the principal and surety shall be liable for a violation thereafter of the conditions of said bond.

§ 8-309. Actions on bonds

Actions or proceedings on probate bonds of any kind payable to the judge may be commenced by any person interested in the estate or other matter for which the bond was given, either in the probate court in which the bond was filed or in the Superior Court of that county.

MAINE COMMENT

General. The former Title 18, section 401, was changed in this section in order to provide concurrent jurisdiction for the probate and Superior Courts in a manner consistent with the policies expressed in sections 1-302 and 3-105 and probate court jurisdiction specifically provided by section 3-606, subsec-

tion (a); section 5-412, subsection (a) and section 7-304. The former section was also changed by allowing the action or proceedings to be brought in the name of the real parties in interest, thus eliminating the need to name the probate judge as nominal plaintiff and furthering the policy of Maine Rules of Civil Procedure, Rule 17(a).

§ 8-310. Principal made party in action against surety

If the principal in any such bond resides in the State when an action is brought thereon, and is not made a party thereto, or if at the trial thereof, or on proceedings on a judgment against the sureties only, he is in the State, the court, at the request of any such surety, may postpone or continue the action long enough to summon or bring him into court.

§ 8-311. Proceedings and judgment

Such surety may thereupon take out a writ, in the form prescribed by the court, to arrest the principal, if liable to arrest, or to attach his estate and summon him to appear and answer as a defendant in the action. If, after 14 days' previous service of such process, he fails thus to appear at the time appointed and judgment is rendered for the plaintiff, it shall be against him and the other defendants as if he had been originally a party, and any attachment made or bail taken on such process is liable to respond to the judgment as if made or taken in the original action.

§ 8-312. Limitation of actions on bonds

Except in the case of personal representatives provided for under sections 3-1005 and 3-1007, and insofar as applicable under the provisions of section 8-301, an action on a bond must be commenced within 6 years after the principal has been cited by the court to appear to settle his account or, if not so cited, within 6 years from the time of the breach of his bond, unless the breach is fraudulently concealed by the principal or surety from the persons pecuniarily interested and who are parties to the action, and in such case within 3 years from the time such breach is discovered.

MAINE COMMENT

General. The former provision in Title 18, section 404, was changed in order to make clear that other express provisions of the Maine Probate Code govern the limitation of such actions in particular situations, and to preserve the section to cover various probate bonds that do not otherwise have an express statute of limitations provision. The former section was also changed by adding fraudulent concealment by a surety as a basis for extending the time for bringing an action on a bond against the surety.

§ 8-313. Judicial authorization of actions

The judge of probate may expressly authorize or instruct a personal representative or other fiduciary, on the complaint of himself or any interested person, to commence an action on the bond for the benefit of the estate. Nothing herein shall be deemed to limit the power or duty of a successor fiduciary to bring such proceedings as they are authorized to bring without express

court authorization under section 3-606, subsection (a), paragraph (4); section 5-412, subsection (a), paragraph (3); section 7-304 or as otherwise provided by law.

§ 8-314. Forfeiture for failure to account when ordered

When it appears in any action of a bond against a principal that he has been cited to account for such personal property of the estate as he has received, and has not done so, execution shall be awarded against him for the full value thereof, without any allowance for charges of administration or debts paid.

§ 8-315. Judgment in trust for all interested

Every judgment and execution in an action on the bond shall be covered by the judge in trust for all parties interested in the penalty of the bond. The judge shall require the delinquent fiduciary to account for the amount, if still in office, or assign it to his successor to be collected and distributed or otherwise disposed of as assets.

PART 4

EFFECTIVE DATE

§ 8-401. Time of taking effect; provisions for transition

(a) This Code takes effect on January 1, 1981.

(b) Except as provided elsewhere in this Code, on the effective date of this Code:

(1) The Code applies to any wills of decedents dying thereafter;

(2) The Code applies to any proceedings in Court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this Code;

(3) Every personal representative including a person administering an estate of a minor or incompetent holding an appointment on that date, continues to hold the appointment but has only the powers conferred by this Code and is subject to the duties imposed with respect to any act occurring or done thereafter;

(4) An act done before the effective date in any proceeding and any accrued right is not impaired by this Code. If a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions shall remain in force with respect to that right; and

(5) Any rule of construction or presumption provided in this Code applies to instruments executed and multiple party accounts opened before the effective date unless there is a clear indication of a contrary intent.

Sec. 2. 4 MRSA § 57, 1st sentence, as last amended by PL 1967, c. 544, § 2, is amended to read:

The following cases only come before the court as a court of law: Cases on appeal from the Superior Court or a single Justice of the Supreme Judicial Court **or from the probate courts**; questions of law arising on reports of cases, including interlocutory orders or rulings of such importance as to require, in the opinion of the justice, review by the law court before any further proceedings in the action; agreed statement of facts; cases presenting a question of law; all questions arising in cases in which equitable relief is sought; motions to dissolve injunctions issued after notice and hearing or continued after a hearing; questions arising on habeas corpus, mandamus and certiorari and questions of state law certified by the federal courts.

Sec. 3. 4 MRSA § 105, 2nd sentence, is amended to read:

A single Justice of the Supreme Judicial Court shall have and exercise jurisdiction, and have and exercise all of the powers, duties and authority necessary for exercising the same jurisdiction as the Superior Court, to hear and determine, with his consent, any issue in a civil action in the Superior Court as to which the parties have no right to trial by jury or in which the right to trial by jury has been waived, except actions for divorce ~~or~~, annulment **or separation.**

Sec. 4. 4 MRSA § 152, first sentence, as last amended by PL 1977, c. 401, § 1, is further amended to read:

The District Court shall possess the civil jurisdiction exercised by all trial justices and municipal courts in the State on September 16, 1961, and in addition, original jurisdiction, concurrent with that of the Superior Court of all civil actions in which neither damages in excess of $20,000 nor, except as herein provided, equitable relief is demanded, of proceedings under Title 14, sections 6651 to 6658 and of actions for divorce ~~or~~, annulment of marriage **or judicial separation** and of proceedings under Title 19 and ~~original jurisdiction, concurrent with that of the probate court, of actions for separation~~ original jurisdiction, concurrent with that of the Superior Court, of actions to quiet title to real estate under Title 14, sections 6651 through 6658, and in such tion, concurrent with that of the Superior Court, for breach of implied warranty and covenant of habitability under Title 14, section 6021, and in such actions the District Court may grant equitable relief; and original jurisdiction concurrent with that of the Superior Court, of actions to quiet title to real estate under Title 36, section 946, and in such actions the District Court may grant equitable relief and of actions to foreclose mortgages under Title 14, chapter 713, subchapter VI.

Sec. 5. 4 MRSA § 152, first ¶, next to the last sentence, as enacted by PL 1969, c. 587, is amended to read:

Actions for divorce, ~~or~~ annulment **or separation** may be remanded, upon agreement of the parties, from the Superior Court to the District Court in accordance with rules promulgated by the Supreme Judicial Court.

Sec. 6. 4 MRSA § 202, is amended to read:

§ 202. Oaths and acknowledgments

All oaths required to be taken by ~~executors~~, ~~administrators~~ **personal representatives,** trustees ~~or~~, guardians, **conservators,** ~~and all oaths required of commissioners of insolvency~~, ~~appraisers and dividers of estates~~ or of any other persons in relation to any proceeding in the probate court, or to perpetuate the evidence of the publication of any order of notice, ~~or of any notice of the time and place of sale of real estate by license of a judicial or probate court~~ may be administered by the judge or register of probate **or** any justice of the peace or notary public. A certificate thereof, when taken out of court, shall be returned into the registry of probate and there filed. When any person of whom such oath is required, including ~~any person making a affidavit in support of a claim against an estate~~, ~~or~~ any parent acknowledging consent to an adoption, ~~or any child over 14 years of age nominating his guardian~~ resides temporarily or permanently without the State, the oath or acknowledgment may be taken before and ~~said nomination may~~ be certified by a notary public without the State, a commissioner for the State of Maine or a United States Consul.

Sec. 7. 4 MRSA § 253 is amended to read:

§ 253. Jurisdiction in court where proceedings originate

~~When~~ **Subject to Title 18-A, sections 1-303 and 3-201, and except as otherwise provided in Title 18-A, sections 5-211 and 5-313, when** a case is orginally within the jurisdiction of the probate court in 2 or more counties, the one which first commences proceedings therein retains the same exclusively throughout. The jurisdiction assumed in any case, except in cases of fraud, so far as it depends on the residence of any person or the locality or amount of property, shall not be contested in any proceeding whatever, except on an appeal **or removal** from the probate court in the original case or when the want of jurisdiction appears on the same record.

Sec. 7-A. 4 MRSA § 351, as amended by PL 1971, c. 94, §§ 1 and 2, is repealed.

Sec. 7-B. 4 MRSA §§ 401 - 406, as amended, are repealed.

Sec. 8. 9-B MRSA § 427, sub-§ 2, ¶ B, first sentence, as enacted by PL 1975, c. 500, § 1, is amended to read:

Whenever a deposit is made by a person designated on the records of a financial institution as a fiduciary, it shall be conclusively presumed, in all dealings between the institution and the fiduciary or any other persons with respect to such deposit, ~~that a fiduciary relationship in fact exists, and~~ that such fiduciary has power to invest money in the institution, and to withdraw the same or any part thereof, and to transfer his deposit to any other person.

Sec. 9. 9-B MRSA § 427, sub-§ 2, ¶ C, as enacted by PL 1975, c. 500, § 1, is amended to read:

C. ~~Upon~~ **Subject to the provisions of Title 18-A, section 6-111, upon** the death or disability of any fiduciary, the value of such deposit or account may be paid, at the option of the institution, and in the absence of notice of the existence and terms of a trust, either to the executor, administrator, conservator or guardian of such fiduciary, or to any substituted fiduciary, or to the person, if any, who is designated on the records of the institution as the beneficiary of such deposit, if of the age of 15 years or upwards, or to the guardian or parent or person standing in loci parentis to such person if under the age of 15 years. ~~The~~ **Subject to the provisions of Title 18-A, section 6-112, the** receipt or acquittance of any such person shall fully exonerate and discharge the institution from all liability to any person having any interest in such deposit, and the institution shall not be under any duty to see to the proper application of the trust property.

Sec. 10. 9-B MRSA § 427, sub-§ 4, ¶ A, as enacted by PL 1975, c. 500, § 1, is amended to read:

A. To whom paid. When a deposit has been made or shall hereafter be made in any financial institution authorized to do business in this State in the names of 2 or more persons, payable to either, or payable to either or the survivor, such deposit, or any part thereof, or the interest or dividends thereon may be paid to any or either of said persons, whether the other or others be living or not, or to the legal representative of the survivor of said persons ~~and~~ **if proofs of death are presented to the financial institution showing that the decedent was the last surviving party or if there is clear and convincing evidence that no right of survivorship was intended at the time the account was created. Subject to the provisions of Title 18-A, section 6-112,** the receipt or acquittance of the persons to whom said payment is so made shall be a valid and sufficient release and discharge to such financial institution for any payment so made.

Sec. 11. 9-B MRSA § 427, sub-§ 4, ¶ B, as last amended by PL 1975, c. 770, § 51, is further amended to read:

B. Property of survivor. All such deposits or accounts, whenever opened or issued, payable to either or the survivor ~~who are husband and wife~~ including interest and dividends, in the name of the same persons in any financial institution within this State shall, in the absence of fraud or undue influence, upon the death of one of such persons, become the ~~sole and absolute~~ property of the ~~survivor~~ parties as provided in Title 18-A, section 6-104. ~~All such deposits or accounts, whenever opened or issued, payable to either or 2 or more or the survivor of those persons who are not husband and wife up to, but not exceeding an aggregate value of $5,000 including interest and dividends, in the name of the same persons in all financial institutions within this State shall, in the absence of fraud or undue influence, upon the death of any such persons, become the sole and absolute property of the survivor or survivors, even though the intention of all or any one of the parties be in whole or in part testamentary and though a technical joint tenancy be not in law or fact created. The amount which so becomes the sole and absolute property of the survivor or survivors of persons who are not husband and wife shall be exclusive of, and in addition to, any amount~~

~~to which the survivors are entitled under common law as contributors to the deposit or deposits, account or accounts, share or shares~~

Sec. 12. 9-B MRSA § 427, sub-§ 8 as enacted by PL 1975, c. 500, § 1, is repealed and the following enacted in its place:

8. Payment of decedent's deposit or account.

A. Except as provided in paragraph B, if any depositor shall die leaving in a financial institution a deposit or account on which the balance due him shall not exceed $1,000, and no personal representative shall be appointed, the institution may pay the balance of such deposit or account to the surviving spouse, next of kin, funeral director or other preferred creditor or creditors who may appear to be entitled thereto. For any payments so made, the institution shall not be held liable to the decedent's personal representative thereafter appointed unless the payment shall have been made within 6 months after the decedent's death and an action to recover the amount shall have been commenced within one year after the date of payment.

B. Notwithstanding the provisions of paragraph A, upon presentation of an affidavit under Title 18-A, section 3-1201, a financial institution shall pay the balance of any deposit or account left by a deceased depositor to the depositor's successor under the provisions of Title 18-A, sections 3-1201 and 3-1202. Such payments under this paragraph shall take precedence over payments under paragraph A to the extent of the balance of the deposits or accounts of the deceased depositor at the time the affidavit is presented.

Sec. 13. 9-B MRSA § 427, sub-§ 10, as enacted by PL 1975, c. 500, § 1, is amended to read:

10. Adverse claim to deposit or account. Except as provided in Title 11, section 4-405, **and in Title 18-A, sections 6-107 and 6-112,** notice to any financial institution authorized to do business in this State of an adverse claim to a deposit or account standing on its books to the credit of any person shall not be effectual to cause said institution to recognize said adverse claimant, unless said adverse claimant shall either procure a restraining order, injunction or other appropriate process against said institution from a court of competent jurisdiction in a civil action to which the person to whose credit the deposit or account stands is made a party, or shall execute to said institution, in form and with sureties acceptable to it, a bond indemnifying said institution from any and all liability, loss, damage, costs and expenses for and on account of the payment of such adverse claim or the dishonor of checks or other orders of the person to whose credit the deposit or account stands on the books of said institution.

Sec. 14. 11 MRSA § 8-401, sub-§ (1), ¶ (e) is amended to read:

(e) The transfer is in fact rightful or is to a bona fide purchaser; or

Sec. 15. 11 MRSA § 8-401, sub-§ (1) ¶ (f) is enacted to read:

(f) The transfer is to the successor of a deceased owner where the suc-

cessor is proceeding under the provisions of Title 18-A, sections 3-1201 and 3-1202, in which case the issuer or his transfer agent is subject to the provisions and protections of Title 18-A, section 3-1202.

Sec. 16. 13-A MRSA § 1201, sub-§ 3, ¶ K is enacted to read:

K. Engaging as a trustee in those actions defined by Title 18-A, section 7-105 as not in themselves requiring local qualification of a foreign corporate trustee.

Sec. 17. 14 MRSA § 856 is repealed.

Sec. 17-A. 14 MRSA § 1605 is enacted to read:

§ 1605. Settlements to be approved by court

No settlement of any action brought in behalf of an infant by next friend or defended on his behalf by guardian or guardian ad litem shall be valid unless approved by the court in which the action is pending, or affirmed by an entry of judgment. If no action has been commenced, an infant by next friend may apply to any court in which an action based on the claim of the infant could have been commenced for an order approving the settlement of any such claim. An order approving such a settlement shall have the effect of a judgment. The court may make all necessary orders for protecting the interests of the infant and may require the guardian ad litem or next friend to give bond to truly account for all money received in behalf of the infant.

Sec. 18. 14 MRSA § 1953 is repealed.

Sec. 19. 14 MRSA § 4554, as repealed and replaced by PL 1973, c. 512, § 5, is repealed and the following enacted in its place:

§ 4554. Death of householder

Upon the death of the householder the exemption provided by section 4551 shall terminate; provided, however, that nothing herein shall be deemed to affect the homestead allowance provided by Title 18-A, section 2-401.

Sec. 20. 14 MRSA § 4657 is repealed.

Sec. 21. 14 MRSA c. 703 is repealed.

Sec. 22. 14 MRSA § 5902 is amended to read:

§ 5902. Demands due from deceased persons

Demands against a person belonging to a defendant at the time of death of such person may be asserted by counterclaim against claims prosecuted by his ~~executor or administrator~~ **personal representative.** If a balance is found due to the defendant, judgment shall be in like form and of like effect as if he had commenced an action therefor. ~~If the estate is insolvent, it must be presented to the commissioners or added to the list of claims like other judgments~~

Sec. 23. 14 **MRSA** § 6302 is repealed.

Sec. 24. 14 **MRSA** § 6303 is amended to read:

§ 6303. **Death of mortgagor or successor**

If a person entitled to redeem a mortgaged estate or an equity of redemption which has been sold on execution, or the right to redeem such right, or the right to redeem lands set off on execution, dies without having made a tender for that purpose, a tender may be made and an action for redemption commenced and prosecuted by his ~~executor or administrator~~ **personal representative, or by his** heirs or devisees **subject to the authority of the personal representative over the administration of the estate under Title 18-A, sections 3-709 and 3-711.** If the plaintiff in such action dies pending the action, it may be prosecuted to final judgment by his **personal representative, or by his** heirs **or** devisees **subject to the same authority of the personal representatives** ~~or his executor or administrator~~. When a mortgagor resides out of the State, any person may, in his behalf, tender to the holder of the mortgage the amount due thereon. The tender shall be as effectual as if made by the mortgagor.

Sec. 24-A. 16 **MRSA** § 54 is repealed.

Sec. 24-B. 16 **MRSA** § 651 is amended to read:

§ 651. **Rules of evidence**

The rules of evidence in special proceedings of a civil nature, such as before referees, auditors **and** county commissioners ~~and courts of probate~~, are the same as provided for civil actions. **The rules of evidence in courts of probate are as provided in Title 18-A, section 1-107.**

Sec. 24-C. 18 **MRSA** as amended, is repealed.

Sec. 25. 19 **MRSA** § 161, as amended by PL 1975, c. 701, § 8, is further amended to read:

§ 161. **Holding and disposing of property**

A married person, widow or widower of any age may own in his or her own right real and personal estate acquired by descent, gift or purchase ~~and may manage, sell mortgage, convey and devise the same by will without the joinder or assent of husband or wife, but such conveyance without the joinder or assent of the husband or wife shall not bar his or her right and interest by descent in the estate so conveyed. Real estate directly conveyed to a person by his or her spouse cannot be conveyed by that person without the joinder of his or her spouse, except real estate conveyed to him or her as security or in payment of a bona fide debt actually due him or her from that spouse. When payment was made for property conveyed to a spouse from the property of the conveying spouse or it was conveyed by a spouse to his or her spouse without a valuable consideration, it may be taken as the property of the conveying spouse to pay his or her debts contracted before such purchase~~.

Sec. 26. 19 **MRSA** § 168 is repealed.

Sec. 27. 19 **MRSA** § 216 as last amended by PL 1975, c. 47, is repealed.

Sec. 27-A. 19 **MRSA** § 220 is enacted to read:

§ 220. Legitimation

A child born out of wedlock is the legitimate child of his parents who intermarry. If the father of a child born out of wedlock adopts him or her into his family or in writing acknowldges before some justice of the peace or notary public that he is the father, such child is the legitimate child of his father. The rights of such a child as an heir are provided for in Title 18-A, section 2-109.

Sec. 28. 19 **MRSA** § 535 is amended to read:

§ 535. Legal effect; descent of property

By such decree the natural parents are divested of all legal rights in respect to such child and he is freed from all legal obligations of obediience and maintenance in respect to them. He is, for the custody of the person and right of obedience and maintenance, to all intents and purposes the child of his adopters, with right of inheritance ~~when not otherwise expressly provided in the decree of adoption, the same as if born to them in lawful wedlock, except that he shall not inherit property expressly limited to the heirs of the body of the adopters nor property from their collateral kindred by right of representation, and he shall stand in regard to lineal descendants of his adopters in the same position as if born to them in lawful wedlock, but he shall not by reason of adoption lose his right to inherit from his natural parents or kindred~~ as provided in Title 18-A, section 2-109, paragraph (1). The adoption of a child made in any other state, according to the laws of that state, shall have the same force and effect in this State, as to inheritance and all other rights and duties as if said adoption had been made in this State according to the laws of this State. ~~If the person adopted died intestate, his property acquired by himself or by devise, bequest, gift or otherwise before or after such adoption from his adopting parents or from the kindred of said adopting parents shall be distributed according to Title 18, the same as if born to said adopting parents in lawful wedlock; and property received by devise, bequest, gift or otherwise from his natural parents or kindred shall be distributed according to Title 18, as if no act of adoption had taken place~~

Sec. 29. 19 **MRSA** § 537 is repealed.

Sec. 30. 19 **MRSA** § 581, as amended by PL 1977, c. 118, §§ 1 and 2, is repealed and the following enacted in its place:

§ 581. Spouse deserted or living apart

If a married person, without just cause, deserts his spouse or if his spouse, for just cause, is actually living apart from him, and if such desertion or living apart has continued for a period of at least one month next prior to the filing of the petition hereinafter referred to, the court may, upon the spouse's petition, or if he is mentally ill, upon the petition of his guardian or next

friend, enter a decree that such spouse is so deserted or is so living apart and may prohibit the other spouse from imposing any restraint on the petitioner's personal liberty during such time as the court shall by order direct. Upon the petition of either spouse, or of the guardian or next friend of either who may be mentally ill, the court may make further orders relative to the care, custody and support of the minor children of the parties, may determine with which of their parents such children or any of them shall remain, may order either spouse to pay to the court for the other spouse sufficient money for the prosecution of such petition, and may from time to time, upon a similar petition, revise or alter any such order and make a new order in lieu thereof, as the circumstances of the parties or such minor children or any of them may require, and may enforce obedience by appropriate process. An order for child support under this section may include an order for the payment of part or all of the medical expenses, hospital expenses and other health care expenses of the children or an order to provide a policy or contract for coverage of such expenses. Availability of public welfare benefits to the family shall not affect the decision of the court as to the responsibility of a parent to provide child support. Nothing in this section shall preclude the court from incarcerating a spouse for nonpayment of child support, alimony or attorney's fees in violation of a court order to do so.

Sec. 31. 19 MRSA § 582, as repealed and replaced by PL 1975, c. 701, § 9, is repealed.

Sec. 32. 19 MRSA § 583 is repealed.

Sec. 33. 19 MRSA § 584, as last amended by PL 1973, c. 479, § 3, is repealed and the following enacted in its place:

§ 584. Petition; notice

The petition under section 581 may be brought and determined in the county or judicial division in which either of the parties lived, except that if the petitioner has left the county or judicial division in which the parties lived together and the respondent still lives therein, the petition shall be brought in that county or judicial division, and such notice shall be given thereon as the rules of the court may provide. The fee for filing such petition shall be $5.

The right to bring such petition shall not be denied any person for failure to meet any residency requirement if such person is a member of the Armed Forces of the United States on active duty stationed in Maine or a dependent or spouse of such member. Such member shall be deemed to be a resident either of the county or judicial division in which the military installation or installations or other place at which he has been stationed is located or of the county or judicial division in which he has sojourned.

Sec. 34. 19 MRSA § 585 is repealed and the following enacted in its place:

§ 585. Marriage settlement or contract not affected

Any action under section 581 shall not be deemed to invalidate any marriage settlement or contract between the parties.

Sec. 35. 19 MRSA § 586 is amended to read:

§ 586. Appeals

Any party aggrieved by any order or decree provided for in ~~sections~~ **section** 581 ~~to 585~~ may take an appeal in the same manner as provided for ~~probate appeals~~ **in other civil actions.**

Sec. 36. 19 MRSA § 587 is repealed.

Sec. 37. 19 MRSA § 588 is amended to read:

§ 588. Jurisdiction

The District Court shall possess original jurisdiction, concurrent with the ~~probate court~~ **Superior Court**, of actions for judicial separation under this chapter.

Sec. 38. 19 MRSA § 724 is amended to read:

§ 724. Issue inherit despite divorce

A divorce does not bar the issue of the marriage from inheriting ~~nor affect their rights~~.

Sec. 39. 33 MRSA § 2 is amended to read:

§ 2. Specific performance after death of seller

If a person, who has contracted in writing to convey real estate, dies before making the conveyance, the other party may file a complaint in the Superior Court to enforce specific performance thereof against ~~his heirs, devisees, executors or administrators~~, ~~if~~ **the personal representative, the successors to the decedent's property which is subject to the contract if no administration has occurred, or to the distributees of that property, if the action is** commenced within 3 years from the ~~grant of administration~~ **first appointment of a personal representative** or from the time when he is entitled to such conveyance, but not exceeding 4 years after the ~~grant of administration~~ **first appointment of a personal representative**, provided written notice of the existence of the contract is given to the ~~executor or administrator~~ **personal representative** within one year after the ~~grant of administration~~ **first appointment of a personal representative.**

Sec. 40. 33 MRSA § 3 is amended to read:

§ 3. —decree

If it appears that the plaintiff is entitled to a conveyance, the court may ~~authorize and~~ require the ~~executor or administrator~~ **personal representative, successor or distributee** to convey the estate as the deceased ought to have done. ~~If any of the heirs or devisees are in the State and competent to act, the court may direct them, instead of the executor or administrator, to convey the estate or join with either in such conveyance~~ The conveyance shall pass the estate as fully as if made by the contractor.

Sec. 41. 33 MRSA § 5 is amended to read:

§ 5. Specific performance after death of purchaser

If the person entitled to such conveyance dies before bringing his action, or before the conveyance is completed or such seizin and possession are obtained, his ~~heir~~, ~~devisee or other person entitled to the estate under him~~ **personal representative, or the successor to the property if there is no administration** may bring and prosecute such action, and shall be entitled to the conveyance or seizin and possession in like manner as the obligee.

Sec. 42. 33 MRSA §§ 6, 7, 8 and 9 are repealed.

Sec. 42-A. 36 MRSA § 559, first ¶, is amended to read:

Until notice is given to the assessors of the division of the estate and the name of the several heirs or devisees, the undivided real estate of a deceased person may be taxed to his heirs or devisees, or may be taxed to his ~~executor or administrator~~ **personal representative.**

Sec. 42-B. 36 MRSA § 559, sub-§ 2 is amended to read:

2. Personal representative. A tax to the ~~executor or administrator~~ **personal representative** shall be collected of him the same as a tax assessed against him in his private capacity. Such tax shall be a charge against the estate and shall be allowed by the judge of probate; but when the ~~executor or administrator~~ **personal representative** notifies the assessors that he has no funds of the estate to pay such tax and gives them the names of the heirs or devisees, and the proportions of their interests in the real estate to the best of his knowledge, the real estate shall no longer be taxed to him.

Sec. 43. 36 MRSA § 605 is amended to read:

§ 605. Deceased persons

The personal property of a deceased person shall be assessed to the ~~executive or administrator~~ **personal representative** in the place where the deceased last resided, and such assessment shall continue until the ~~executive or administrator~~ **personal representative** gives notice to the assessors that such property has been distributed. If the deceased at the time of his death did not reside in the State, such personal property shall be assessed to the ~~executor or administrator~~ **personal representative** in the place where such property is situated. Before the appointment of ~~an executor or administrator~~ **a personal representative**, the personal property of a deceased person shall be assessed to the estate of the deceased in the place where he last resided, if in the State, otherwise in the place where such property is situated, and the ~~executor or administrator~~ **personal representative** subsequently appointed shall be liable for the tax.

Sec. 44. 36 MRSA § 606 is amended to read:

§ 606. Tax priority; deceased's personal property

If a personal property tax has been assessed upon the estate of a deceased person, or if a person assessed for a personal property tax has died, the ~~execu-~~

~~tor or administrator~~ **personal representative**, after he has ~~paid the funeral expenses, the reasonable expense of administration, and satisfied the first 3 priorities set forth in Title 18, section 3051~~ **satisfied the first 4 priorities set for in Title 18-A, section 3-805**, shall, from any ~~money~~ **estate** which has come to his hands in such capacity, if such ~~money~~ **estate** is sufficient therefor, pay the personal property tax so assessed **to him under Title 18-A, section 3-709.** In default of such payment the ~~executor or administrator~~ **personal representative** shall be personally liable for the tax to the extent of the ~~money which~~ **estate that** passed through his hands **which was not used to satisfy claims or expenses with a higher priority. To the extent that the personal representative is not assessed, the successors to the decedent's taxed property shall pay the tax assessed.**

Sec. 45. 36 MRSA § 3404, first sentence, is amended to read:

Property subject to taxes as aforesaid, in whatever form of investment it may happen to be, shall be charged with a lien for all taxes and interest thereon which are or may become due on such property; but said lien shall not attach to any **real or** personal property after the same has been sold or disposed of for value by the ~~executor, administrator~~ **personal representative** or trustee ~~or to real estate after it has been conveyed by the executor, administrator or trustee under license of the probate court~~.

Sec. 46. 36 MRSA § 3469 is amended to read:

§ 3469. Bequests to executors of trustees

Whenever a testator gives, bequeaths or devises to his executors or trustees any property otherwise liable to the tax imposed by chapters 551 to 567, in lieu of their compensation, the value thereof in excess of reasonable compensation ~~as determined by the probate court having jurisdiction of their accounts~~ shall be subject to the tax imposed by chapters 551 to 567.

Sec. 47. 36 MRSA § 3526, last ¶, is amended to read:

Any **judge of probate and any** Justice of the Superior Court upon application of the State Tax Assessor may compel the attendance of witnesses and the giving of testimony before the State Tax Assessor in the same manner, to the same extent and subject to the same penalties as if before said court.

Sec. 48. 36 MRSA § 3581 is amended to read:

§ 3581. Inventory of estate

Every ~~executor, administrator~~ **personal representative** or trustee, **in addition to any inventory otherwise required,** shall within 3 months of the date of his appointment ~~in addition to the inventory returned into the probate court~~ **or acceptance of the trust** file with the State Tax Assessor on blanks to be furnished by the State Tax Assessor, an inventory upon oath containing a complete list of all the property of the estate or trust within his knowledge except that the State Tax Assessor may, for cause, extend the time for filing ~~said~~ **the** inventory. If he neglects or refuses to file said inventory, he shall be liable to a penalty of not more than $500, and, on complaint of the State Tax Assessor, the judge of probate may remove him from his said trust.

Sec. 49. 36 MRSA § 3582 is amended to read:

§ 3582. Tax deducted before delivery

~~An executor, administrator~~ **A personal representative** or trustee holding property subject to the tax imposed by chapters 551 to 567 shall deduct the tax therefrom or collect it from the legatee or person entitled to said property; and he shall not deliver property or a specific legacy subject to said tax until he has collected the tax thereon. ~~An executor or administrator~~ **A personal representative** shall collect inheritance taxes due upon real property passing by inheritance or will, which is subject to said tax from the heirs or devisees entitled thereto, and he may ~~be authorized to~~ sell said real property ~~in the manner prescribed by section 3687~~ if they refuse or neglect to pay said tax. ~~An executor or administrator~~ **A personal representative** or trustee upon payment of any tax assessed under section 3634 or compromised under section 3635 shall, unless otherwise provided in the instrument creating the taxable interests, deduct the tax so paid from the whole property devised, bequeathed or given.

Sec. 50. 36 MRSA § 3686 is amended to read:

§ 3686. Civil action by State; bond

A civil action may be maintained in the name of the State against ~~an administrator, executor~~ **a personal representative**, trustee, grantee or donee for the recovery of all taxes imposed by chapters 551 - 567, with interest thereon. ~~Administrators and executors~~ **Personal representatives** shall be liable to the State on their administration bonds for all taxes assessable under said chapters and interest thereon. Whenever ~~an~~ **no** administration bond is ~~waived by testamentary provision or by the assent of interested parties~~ **otherwise required**, the judge of probate, notwithstanding ~~such waiver, before granting letters testamentary or of administration~~ **any provisions of Title 18-A, sections 3-603 through 3-606**, may, and unless he shall find that any inheritance or estate tax due and to become due the State is reasonably secured by the lien upon real estate hereinbefore provided, shall require a bond payable to him or his successor sufficient to secure the payment of all inheritance taxes and interest conditioned in substance to pay all inheritance and estate taxes due to the State from the estate of the deceased with interest thereon. An action for the recovery of inheritance and estate taxes and interest shall lie on either of said bonds ~~without the authority of the judge of probate~~.

Sec. 51. 36 MRSA § 3687 is repealed.

Sec. 52. 37 MRSA c. 7 is repealed.

Sec. 53. Effective date. This Act shall become effective January 1, 1981, except as otherwise provided.

STATEMENT OF FACT

The intent of this Act has been set forth by the Probate Law Revision Commission and due to its voluminous nature will be filed as a separate report to the Legislature. The contents of the Act itself are outlined as follows:

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