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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