

# MAINE STATE LEGISLATURE

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STATE OF MAINE

ONE HUNDRED AND EIGHTH LEGISLATURE

COMMITTEE ON JUDICIARY

October 2, 1978

Dear Sir,

Enclosed is a copy of a bill to establish the Maine Probate Code that will be considered during the First Regular Session of the 109th Legislature. This bill has been prepared by the Maine Probate Law Revision Commission, a special commission formed in 1973 to revise Maine's probate laws. The bill has been submitted to the Legislature for its consideration.

Also enclosed is a Summary Report by the Commission explaining the Code and the Commission's actions. The complete narrative report may be obtained by writing the Office of Legislative Assistants, Probate Report Request, Room 427, State House, Augusta, Maine 04333 or calling 289-2486. The complete narrative report will also be on file at these libraries: each county law library, Colby College Library, Portland Public Library, Maine Maritime Academy Library, Maine State Library, Nason College Library, University of Maine at Orono Library, University of Maine Law School Library, Bates College Library, Bangor Public Library, Bowdoin College Library and the Law and Legislative Reference Library in the State House.

Public hearings on the bill and report will be held this fall by members of the Judiciary Committee and the Probate Law Revision Commission at these locations.

Lewiston. Wednesday, November 29th  
Chase Hall, Main Lounge  
Bates College  
7:30 P.M.

Orono. Tuesday, December 5th  
102 Murray Hall  
University of Maine at Orono  
2:00 P.M.

Portland. Wednesday, December 13th  
Moot Court Room  
Law School  
7:30 P.M.

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Probate Law & Practice

HOUSE

Memorandum

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SWIFT TARBELL, III, BANGOR

Members and staff of the Judiciary Committee and the Probate Law Revision Commission will be present at these hearings to explain the basic premises, hear your comments, and answer questions about the proposed Probate Code. If you would care to make written comments, they should be sent to either Professor Merle Loper, University of Maine Law School, 246 Deering Ave., Portland, Me., 04102 or to the Office of Legislative Assistants, Attn: Jonathan Hull, Room 427, State House, Augusta, Maine 04333. They will be forwarded to the Committee and Commission.

MAINE PROBATE LAW REVISION COMMISSION

September 29, 1978

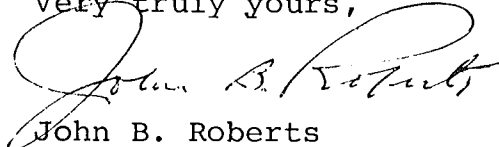
The Honorable John L. Martin  
Chairman  
Legislative Council  
State House  
Augusta, Maine 04333

Dear Representative Martin:

It is my pleasure, as chairman of the Maine Probate Law Revision Commission, to transmit to you the Commission's Report to the Legislature on its study of Maine probate law, along with its accompanying recommendations in proposed bill form, pursuant to P. & S.L. 1973, c. 126, P.L. 1975, c. 147, and P.L. 1977, c. 712.

This enclosed Report and bill will be followed with a more extensive report on the Commission's study and recommendations, which will be transmitted as soon as its printing is completed.

Very truly yours,

A handwritten signature in cursive script, reading "John B. Roberts".

John B. Roberts  
Chairman

MAINE PROBATE LAW REVISION COMMISSION

REPORT TO THE

109th MAINE LEGISLATURE

and

Summary of the Commission's Study

and Recommendations

Concerning Maine Probate Law

September 1978

MAINE PROBATE LAW REVISION COMMISSION

REPORT TO THE LEGISLATURE

and

Summary of the Commission's Study

and Recommendations

Concerning Maine Probate Law

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MAINE PROBATE LAW REVISION COMMISSION

REPORT TO THE LEGISLATURE

and

Summary of the Commission's Study  
and Recommendations

I. Background of the Commission's Work

In 1973 the Legislature of the State of Maine created a Commission "to Prepare a Revision of the Probate Laws and the Administration Thereof."<sup>1</sup>/ The Commission was to prepare a Probate Code for the State of Maine and was to include "such necessary repealers, amendments and modifications of existing laws as, in the judgment of such commission, are necessary and appropriate to accomplish such purposes." The end result of the Commission's work, as mandated by the Legislature, was "to present to the Maine Legislature a fully modern, integrated and consistent Probate Code."

The Legislature designated that the membership of the Commission should consist of a cross-section of various segments of the public who are particularly interested and experienced in the area of probate law and administration: two lawyers, a representative of the Corporate Fiduciaries Association, one chartered life underwriter, two members of the Senate, three members of the House, one representative of labor, and two members to be appointed by the Governor to represent the public at large. In addition, three probate judges were to be designated to work on the Commission in the official capacity of consultants.

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1. P. & S. L. ch. 126, 1973.

This Commission was created and began its work in late 1973. Although it was originally charged with reporting the results of its study and recommendations to the Legislature at the special session of the 106th Legislature or the regular session of the 107th Legislature, the task turned out to be far more momentous than anyone had previously foreseen, and the Commission's time for its work was extended by the Legislature so that it could be carefully and responsibly completed.

No doubt the thoroughness with which the Commission has attempted to approach its task was due in large part to the work of Edward S. Godfrey, Professor of Law and former Dean of the University of Maine School of Law, who was the chief consultant to the Commission until his appointment as a Justice of the Supreme Judicial Court in September 1976. Upon Justice Godfrey's appointment to the bench, his work was taken over and carried on by Merle W. Loper, Professor of Law at the University of Maine School of Law, who completed, in a thoroughly exhaustive and equally competent fashion, the research effort which remained to be done. In addition, the Commission engaged the expert services of L. Kinvin Wroth, Professor of Law and now Acting Dean of the University of Maine School of Law, as a special consultant on issues of procedure and jurisdiction, with the particular goal of formulating rules of probate procedure which would integrate probate court procedural rules with the general rules of civil procedure to the extent appropriate and which would fit into the Commission's proposed revisions of probate law and administration.



Now, five years later, the Commission is presenting to the Legislature a proposed Maine Probate Code which it believes fulfills the mandate with which it was charged by the Legislature in 1973. The proposed Code is "modern, integrated and consistent," and is built upon the accumulated work, not only of its own study, but of the work and efforts of those engaged in the national movement for probate reform that spans the past three or four decades. The proposed Code is comprehensive--designed to replace an entire Title of the Maine Revised Statutes; but it is also carefully considered and drafted to try to make sure that desirable provisions of present Maine law are not repealed, and that the proposed new law is coordinated with other statutes and judicial precedent in areas of law that intersect with the law of probate.

This latter point--coordinating the proposed changes with intersecting areas of Maine law--was a particularly important one to the Commission. As a result, much time and emphasis was given to it. Special studies were made on its impact on inheritance tax law, domestic relations law, and the law of evidence. Special attention was given to certain aspects of the banking code, the Uniform Commercial Code, provisions relating to civil actions and procedural law, actions for specific performance of land sale contracts, judicial separation, and a variety of other areas whose intersection with probate law is apparent. During the hearings to be held on the Commission's proposed Maine Probate Code, and during the time between its enactment and its proposed effective date of January 1, 1981, any remaining areas of intersection can be identified and dealt with.

## II. The Uniform Probate Code.

No doubt the catalyst that led to the creation of the Commission was the introduction in 1973, by Mr. Harold Bragdon, who was then a member of the House of Representatives and is presently a member of this Commission, of a bill to enact the Uniform Probate Code. Indeed, the Commission was specifically charged with a mandate to give consideration to the Uniform Probate Code in its work. Also, no doubt, one of the reasons for creating the Commission, rather than directly acting upon the bill introduced in 1973, was to assure coordination between present Maine law and the Uniform Probate Code if it were to be enacted.

The Uniform Probate Code can fairly be described as the culmination of national probate reform efforts spanning several decades, resulting first in the Model Probate Code in 1946 and, ultimately, in the Uniform Probate Code promulgated by the Commissioners on Uniform State Laws in 1969. The work on the Uniform Probate Code itself originated in the Real Property, Probate and Trust Law Section, of the American Bar Association in 1962, in conjunction with the Uniform Law Commissioners. During the succeeding seven years it was worked on and formulated by leading probate practitioners. As described by Richard V. Wellman, the present Educational Director for the Joint Editorial Board for the Uniform Probate Code:

Nine reporters, all law teachers with considerable practice experience were supervised in the drafting effort by a joint committee of about 25 lawyers who voted on every policy and on many issues of language. . . . The product was given repeated line-by-line readings in the National Conference of Commissioners on Uniform State Laws,

an organization where practitioners outnumber law teachers by a considerable margin. The drafting and discussion process was aided also by comments from outside groups that studied the emerging recommendations and sent criticisms and suggestions to the draftsmen. By this process, the views of bankers, title companies, Internal Revenue Service, some state and local bar associations, and others were included. 2 /

The Commission created by the Legislature of the State of Maine was also heavily made up of persons with extensive experience in probate law. Eleven of the fifteen current members are lawyers who are actively practicing or otherwise working in the probate area, including the Chairman, Vice-chairman and Secretary-Treasurer. In addition to the three active Probate Judges designated as consultants to the Commission, and who actively participated in the Commission's study and proceedings, three other members have also served as Probate Judges in this State. Thus, six of the fifteen current members of the Commission have had experience as Maine Probate Judges. The interest of ordinary working men and women and the public at large was also well represented among the Commissioners. The working memoranda of the Commission--well over 1,000 pages--were made available over the course of the study to a special committee set up by the Maine State Bar Association to follow the work of the Commission, so that that committee could be fully informed of the work of the Commission throughout.

Given the extensive probate law experience of the great majority of the Commission members, one of the more instructive developments over the course of the Commission's study was a perceptible change in attitude of the Commissioners from one of early skepticism about the

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2. Wellman, "Lawyers and the Uniform Probate Code," 26 Oklahoma Law Review 548, at page 551 (1973).

Uniform Probate Code to one of acceptance and enthusiastic endorsement. The Commission's proposed Maine Probate Code is based overwhelmingly, after countless hours of consideration and comparison, on the Uniform Probate Code. Once the selection of the membership of the Commission had been completed and its work was underway, two things became apparent: (1) the Commission members were very much aware of the need for probate reform and were anxious to accomplish it, but they were also equally determined to accomplish it in a deliberately thorough manner even if it meant that the original time schedule established by the Legislature would need to be extended, and (2) the probate reform experience of the past three or four decades, culminating in the Uniform Probate Code, offered the best means of achieving that reform and producing a comprehensive and workable set of probate laws responsive to modern needs and perceptions, logically organized and located essentially within one Title of the Maine Revised Statutes -- a result which could not be well achieved by approaching the task by amendments made here and there throughout the various parts of the present Maine law of probate. To this end, over the past four years, the Commission has held 18 working meetings, in addition to numerous meetings by various sub-committees of the Commission assigned to give consideration to particular areas preliminary to consideration and action by the full Commission.

One thing that became clear to the Commission in the course of its study is the importance of avoiding "tinkering" with the language of the uniform version of the Uniform Probate Code, or changing sections here and there, or adding new provisions, without very careful consideration of the impact of such changes on both (a) the

operation of the Code as a whole and (b) the desirability of uniformity of law and statutory language from state to state. The Commission has attempted to be true to a consideration of these factors in the various modifications that it has made, and would stress the importance of this point for the consideration of any amendments that may be proposed for the Commission's bill. Uniformity and integrated comprehensiveness of the proposed Code should not preclude the making of policy choices for this State, but choices that depart from certain aspects of the Code should be made only with a full understanding of their impact and consequences throughout the rest of the Code.

The Commission believes that what changes it has made in the Uniform Probate Code do not in any way undercut any of the important policies of that Code, or interfere in any significant way with the interstate uniformity which that Code attempts to further in the areas of probate law and administration where such uniformity can be so important or desirable.

The Commission's bill, in addition to the text of the proposed Maine Probate Code includes after each section the text of any official Comment to the Uniform Probate Code. Many sections are also followed by a Maine Comment formulated by the Commission. The Maine Comment identifies any change in the proposed Maine Code from the original text of the Uniform Probate Code. The Maine Comment also gives any further explanation of the section thought desirable by the Commission and, in Article II, notes (under the heading "Prior Maine Law") what the present Maine law is to the extent that the proposed section might change the present law.

Thus, every departure from the uniform version is clearly noted for each section. The reasons for any such departures are also described in the following sections of this Report and discussed more extensively in the Report of the Commission's Study and Recommendations Concerning Maine Probate Law.

Some parts of the proposed Maine Probate Code that do not appear in the Uniform Probate Code are simply sections preserved from present Maine law which are not covered by, and are not inconsistent with, the uniform version. Such parts are not, in fact, changes from the uniform version, but are merely supplemental to its operation and, in some instances, have been modified to fit into the Uniform Probate Code system. 3 /

Other modifications of the uniform version in the proposed Maine Probate Code are merely the incorporation of other non-conflicting aspects or rules of present Maine law which the Commission viewed as desirable. For instance, MPC §3-903 includes all of the uniform version's provisions for a right to retain the value of a

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3. Those parts of the proposed Maine Probate Code that fall into this general category include: §1-109 (married women's disabilities abolished); Article I, Part 5 (Registers of Probate); Article I, Part 6 (costs and fees); §2-804 (wrongful death); §2-805 (simultaneous death); §3-110 (discovery of property); §3-619 (public administrators); §3-817 (survival of actions); §3-818 (damage limitation); §3-1205 (social security benefits payments); §5-105 (limited guardianships); Article V, Part 6 (public guardians); §7-407 (trustees' powers in charitable trusts); Article VII, Part 5 (common trust funds); Article VII, Part 6 (bank and trust company nominees); Article VIII, Part 1 (missing persons' receiverships); Article VIII, Part 2 (principal and income allocation provisions); Article VIII, Part 3 (procedures governing bonds). Article VII, Part 4 (§§7-401 through 7-406) includes provisions of the Uniform Trustees' Powers Act, which are included in the proposed Maine Probate Code as the means of providing comprehensive trustees' powers legislation that is contemplated, but not expressly provided, in this particular part of the Uniform Probate Code.

successor's non-contingent indebtedness to the decedent from the distribution to that successor, but adds a sentence preserving the present Maine law's lien on any distribution to secure such an indebtedness. Also, in MPC §2-901, the present Maine provisions for sealing a deposited will and for endorsing the name of the person to whom it is to be delivered are incorporated into the uniform version's provisions for the deposit of wills with the court for safe-keeping. Another example is MPC §3-914, covering the disposition of unclaimed assets, which incorporates the present Maine provisions for holding the unclaimed property in the county where they are located in order to facilitate their reclamation during the period before they would otherwise ultimately escheat, rather than paying them to the state treasurer during that period as in the uniform version.

Some modifications that have been made are to fill what the Commission saw as a need for more express clarification of the uniform version's policy. In MPC §2-604, for example, a sentence was added to make clear not only that a will should be construed to pass all of the testator's property, as in the uniform version, but also to pass the testator's entire interest in a particular piece of property in the absence of some different indication. In the same spirit, the personal notice provisions for guardians and conservators in MCP §§5-309 and 5-405 were modified to more clearly delineate to whom personal service must be made and to conform the description of such persons to the priorities of interest expressed by the Uniform Probate Code in §§5-311 and 5-410. The few changes of this kind are

really attempts to improve upon the language of the Uniform Probate Code in a way that will help to better assure the full implementation of its policies, and were made only after careful consideration.

Other changes from the original uniform version which were made in order to directly modify the intent of the particular sections of the Uniform Probate Code are identified and discussed in the following sections of this Report and in the more extensive Report of the Commission's Study and Recommendations Concerning Maine Probate Law.

### III. Purposes of the Proposed Maine Probate Code.

The proposed Maine Probate Code covers the law of wills and intestate succession, probate administration, trust administration, non-probate transfers of property intended to become effective upon the transferor's death but made within his or her lifetime, and the protection of the persons and property of those who are minors or disabled.

The basic purposes of the Code are to provide for a more informal system of probating wills and administering estates where such procedures are appropriate by eliminating much of the unnecessary and routine proceedings presently required, to provide options for flexibility in tailoring administration of the estates of deceased and protected persons to meet the particular problems or situations that may exist in particular cases, to conform the law of intestacy, the construction of wills and the administration of estates more closely to the likely intent of most testators and of people generally in



considering the disposition of their property at death, and to eliminate outdated anachronisms and nonfunctional distinctions in the law when the only reason for their existence seems to be their historical origins rather than the current needs of society. Another basic purpose is to achieve these goals by the enactment of a comprehensive, consistently integrated, and logically organized Code that will deal comprehensively with these matters in one location within the statutes.

The basic reforms in simplifying the administration of probate estates should have a substantial effect on the time and expenses of probate administration. While many delays in probate, and the necessity of some of the expenses of administering especially larger estates, are the result of estate and inheritance tax requirements, the savings of time and money that can be achieved outside the taxation requirements should be realizable under the proposed probate code. What data has been available to the Commission concerning the experience of other states that have adopted the Uniform Probate Code supports these logical expectations.<sup>4</sup> / The savings in time for administration, and the resulting savings in costs, are of obvious benefit to the parties to any probate administration. The decrease in unnecessary routine work will help to conserve the judicial resources of both the judges and the registers of probate. While the work that may need to be done by the personal representatives, attorneys, and others employed in the process of administration will be reduced, thus reducing the costs of

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4. A study of Idaho's experience with attorneys' fees and the commissions for personal representatives shows significant savings after one year of the Code's operation, especially in light of the increase in the average and median values of the gross estates. The

those services, the Code provides for the fair and reasonable compensation for all such work

While the above two paragraphs describe somewhat broadly the basic policies underlying the most important features of the proposed Maine Probate Code, there are numerous individual features which entail additional particular purposes. The discussion of the various provisions of the Code, along with their policies is included in the following summary of the recommended Code.

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(Footnote #4, continued from page 11)

study by North Dakota attorney Robert W. Kinsey, based on his examination of the more than 9,000 inheritance tax files for 1971 and 1973, shows the following results:

	1971	1973
Attorneys' Fees		
Average	\$ 1,441.33	\$ 1,130.13
Median	\$ 750.00	\$ 500.00
Ave. % of Gross Estate	3.5382%	1.8017%
Med. % of Gross Estate	3.1510%	2.3319%
Personal Representatives		
Average	\$ 1,849.52	\$ 1,161.23
Median	\$ 860.34	\$ 800.00
Average Gross Estate	\$39,748.39	\$62,723.29
Median Gross Estate	\$27,707.60	\$28,788.63

The study is reported in Kinsey, "A Contrast of Trends in the Administrative Costs in Decedents' Estates in a Uniform Probate Code State (Idaho) and a non-Uniform Code State (North Dakota)," 50 North Dakota Law Review 523, at pages 526-527 (1974).

The statistics of Mr. Kinsey's study are consistent with the impressions of Idaho attorneys responding to a mail survey as reported in Crapo, "The Uniform Probate Code--Does It Really Work?", 1976 Brigham Young Law Review 395, at page 404, and with the impressions of most Colorado attorneys in interviews reported in Von Hoene, "Attorneys' Fees Under the Colorado Probate Code." UPC Notes, December 1976.

#### IV. Summary of the Proposed Code and Recommendations

##### A. Probate Administration

Some of the most basic reforms of the proposed Maine Probate Code occur in the area of probate administration. It is here-- in the probating of wills or determination of intestacy, and the management and distribution of estates--that the time-saving devices of the Code operate.

Several separate devices are provided for probating wills, securing the appointment of the personal representative (executor or administrator), and determining the degree of judicial supervision for the particular estate. For the probating of wills, the determination of intestacy, the appointment of a personal representative, or the closing of the estate, the Code affords the options of proceeding by an informal application to the register of probate or, in the case of closing the administration, by the filing of a closing statement with the register and accounting to the interested persons, or all of these transactions may be handled formally with notice and hearing before the judge.

Each device can be used separately according to the needs of the individual estate, and at the option of the parties involved. For example, a will could be probated informally if there is no controversy about its validity, while the appointment of the personal representative could be done through formal proceedings if one of the interested persons desired because of, for instance, a dispute about who should be appointed to that position. The closing of the estate, likewise, could be done either through an informal closing statement or by judicial order after notice and

hearing, regardless of how the preceding issues were handled.

In this way, the parties are free to proceed as efficiently and informally as they desire, using formal proceedings only for those issues where any of the parties perceive a need for them. Uncontested and non-controversial matters would move routinely without the intervention of the court except as called upon by someone with an interest in the estate. Notice from the personal representative would be required upon the beginning of any administration of the estate, whether the personal representative was appointed informally or formally, so that heirs and distributees will know that the administration is beginning and can take any action that they think is necessary to protect their own interests. If any interested person desires the formal probate of a will or determination of intestacy, or the formal appointment of a personal representative, or the probate of a different will, he or she may use formal proceedings, and any formal probate or testacy determination or appointment will supersede a prior informal appointment or determination of testacy status. The Code provides ready access to the court in case of any problem or dissatisfaction arises with the conduct of the administration. The personal representative, of course, is legally liable for any unauthorized actions or for other breaches of fiduciary duty to any of the persons interested in the estate.

Thus, to summarize, the procedural options include: (1) informal probate; (2) formal probate; (3) informal appointment; (4) formal appointment. Each is a separate option and the choice among these options is left largely to the parties interested in the estate. The closing of the administration can also be done either formally or informally, at the option of the personal representative.

A personal representative closing by means of an informal closing statement must, however, so notify the parties and account to them, and any party dissatisfied with that accounting may object in formal proceedings.

Aside from the provisions for informal proceedings already discussed, the Code would provide special devices for the collection of estate assets by affidavit of the successors in the absence of administration (MPC §§3-1201 through 3-1202) or by the foreign domiciliary personal representative in the absence of local administration (MPC §§4-201 through 4-203), summary administration in estates whose assets do not exceed the value of available exemptions and allowances (MPC §§3-1202 and 3-1204), and would retain the present Maine provisions for facilitating the payment of social security benefits (MPC §3-1205). These devices are designed to further facilitate the ease of administration in practical ways and especially in the cases of small or modest sized estates.

As part of the system for avoiding unnecessary delay and expense, the Code also provides the personal representative with sufficient powers to manage the estate and distribute the assets to the proper successors without judicial supervision on any supposedly continuous basis. Once again, if any interested party desires more supervision of the personal representative, he or she may petition the court for "supervised administration," under which the personal representative is under the continuing authority of the court and is precluded from making any distribution to the successors without a formal court order of distribution. The court, upon the request of the interested parties,

may also prescribe specific limitations upon the power of the personal representative under supervised administration, as deemed appropriate in the particular case. In other respects a supervised administrator has all of the other powers of any other personal representative.

The general management and distribution powers of a personal representative are, in effect, the same as those that are possessed by a trustee of a living trust. Access is provided for all parties to obtain judicial review of the personal representative's conduct or anticipated conduct at any time, with express provision for restraining orders. As mentioned earlier, the personal representative must give notice to the parties at the commencement of his appointment, must also make and provide them with an inventory of the estate within three months of appointment (basically the same time limitation as under present law) and must account to them at the end of the administration. The personal representative could be required to furnish an accounting upon reasonable request at any intermediate stages of administration.

By clothing the personal representative with powers analogous to those of trustees of intervivos trusts, the Code's concept of independent administration would eliminate certain present aspects of Maine law. The personal representative would have the authority to employ appraisers for the estate and settle claims against the estate, thus eliminating the judicial appointment of appraisers and commissioners. Judicial licenses for the sale of real estate would not be necessary. In the absence of supervised administration, no order of distribution would be required before the

distribution of the estate assets to the decedent's successors. Any of these powers of the personal representative could, of course, be limited by specific provision noted on the letters of administration in the case of a supervised administrator, or by specific separate court orders in formal proceedings brought by any party interested in the estate. As a general matter, in the view of the Commission, most persons involved in probate would prefer to allow the personal representative--who will usually be the person closest in relationship to the decedent and the person with the largest interest in the estate--to proceed without the bothersome, time-consuming and expense-producing routine of going to court to handle these matters. Where the parties feel otherwise, the Code provides for the more formal and more supervised options.

The most important objectives of these devices within the proposed Code are to eliminate the unnecessary expenses, effort and time often involved in the administration of probate estates, and to furnish a system of alternative procedures that would allow those who are interested in the estate to tailor the kind of administration and the extent of judicial supervision to what they think is needed for that particular estate and their own particular interests. While informal procedures are provided for probating the will and for appointing the personal representative, and while the personal representative is given the necessary authority to administer the estate and deliver its assets to the decedent's successors in a manner analogous to the powers of a private trustee, without judicial supervision, the parties to the

administration are free to require formal procedures and supervised administration. In fact, the powers of the personal representative can be limited and defined in whatever way the parties and the probate court think is desirable in the individual case.

Many of the benefits of this flexible system of administration will be realized in the small or modest sized estates where there are no particular tax problems and no controversies--the kind of estates that make up the vast majority of probate administrations. Unless the successors or creditors themselves want it otherwise, these estates can be handled much more expeditiously and inexpensively. Less time will be required of the attorneys and of the courts and registers in performing much of the routine paperwork and court appearances that are now performed with little or no meaning in terms of its supposed protection of the decedent's successors and creditors. In this sense, the bill is a measure to benefit the consumers of probate services, the attorneys who work in the area, and the courts and court officials by helping to conserve our judicial resources.

The Code proceeds on the assumption that the parties to a probate administration are as capable of performing their duties and looking after their own interests as are the trustees and beneficiaries of intervivos trusts. In most areas, the law allows and requires persons to do these things without a theoretical, continuous judicial proceeding requiring routine court appearances and adjudications in order to supposedly watch over the interests of the persons involved and to constantly guard against possible abuse or disregard of legal duties. This is certainly true in the areas of contract enforcement and the law of trusts. Such a burdensome



system in the variety of areas where it might be imposed with as much justification as in probate administration would be intolerably cumbersome and wasteful. So it is today in probate administration.

Under the proposed Code, judicial remedy, enforcement and supervision are not only available, but are especially facilitated. But in the majority of estates where it is not needed, it is not imposed upon the parties. Official probate of the will is still required in all but certain limited hardship situations, but the procedure for probate is made simpler for the great majority of cases where probate involves no contest and is a routine matter. The same is true for the appointment of a personal representative, which is also required for administration except in certain limited situations.

These same policies of facilitating administration by allowing informal procedures while providing necessary protections and access to formal proceedings as required by the situation is extended by Article IV of the Code to the problems of administration in more than one state, and play an important role in Article V's provisions for appointing guardians and conservators and in other ways dealing with the protection of the property of minors and disabled persons.

#### B. Evidence of Title

One of the salutary effects of the proposed Code would be to facilitate the searching of titles and enhance the stability of titles to real estate when they pass through a decedent's estate.

Under present law, title to personal property of a decedent passes theoretically to the executor or administrator for use in satisfying claims and expenses of administration, while title to the realty passes to the successor directly, although it, too, may be used to satisfy claims and expenses. This distinction is based on historical antecedents that have no real relevance to current circumstances where the difference between real and personal property has little meaning (except in assuring the stability of real estate titles) and where most wealth is as likely to be held in personal property as in real estate. Under the proposed Code, this distinction is eliminated for purposes of determining the theoretical succession of title: title to both realty and personalty descends directly to the successors. Record of the title is provided for, however, by a deed of distribution given by the personal representative to the distributee, and which is conclusive proof of the distributee's succession to that part of the decedent's estate, except that in the case of improper distribution of the asset the personal representative can get it back in order to make the proper distribution. Purchasers from a distributee with a deed of distribution, however, are protected. Thus, the recording of a deed of distribution would conclusively establish that link in a chain of title insofar as subsequent purchasers are concerned.

By making a deed of distribution conclusive evidence of the distributee's succession against all except the personal representative, the Code channels all litigation concerning the propriety of the distributions through the personal representatives and thus provides for greater coordination of such disputes and pro-

protects distributees from multiple claims and litigation. This centralization of administrative responsibility is an important part of the Code's reforms.

### C. Compensation

As is evident from the previous discussion of the informal and independent administration options, and as mentioned in part III of this Report, the elimination of unnecessary formalities and court proceedings under the proposed Code can be expected to reduce the expenses of administering probate estates.

The proposed Maine Probate Code adopts the basic Uniform Probate Code provisions for compensating personal representatives, attorneys, appraisers, accountants, and others employed in the administration of the estate for the reasonable value of their services. M.P.C. §§3-720 through 3-721; see also the provisions for compensating conservators, M.P.C. §5-414, and trustees, M.P.C. §7-205. The amount of compensation, or even the appropriateness of the employment itself, is expressly made reviewable by the court upon the petition of any interested person. Anyone who is found to have been paid more than is justified is liable to return the excess to the estate.

The proposed Maine Probate Code, following the action of Colorado's adoption of the Uniform Probate Code, goes beyond the uniform version by expressly including a listing of the kinds of factors that should go into a determination of the reasonable value of the services and compensation of the persons employed. See M.P.C. §§3-721(b), 5-414 and 7-205.

To the extent that the procedures of the Code's informal and flexible system of administration are used, the elimination of much of the unnecessary time and court appearances will themselves reduce the expenses of administration. On the other hand, where services are legitimately performed, the persons performing them will be compensated in a fair and reasonable way. That is the basis of the Code's provisions.

#### D. Bonding

After an exhaustive study of the need and desirability of bonding as a routine matter where it is not excused by a will, the Commission concluded that the bonding provisions of the Uniform Probate Code should be followed. Thus, in line with the almost universal practice in drafting wills, bond would not be required automatically and routinely in all the estates where no will exists to waive the bond requirement. Bonding would be automatically required upon the request of any person interested in the estate to the extent of at least \$1,000, or where it is expressly required by a provision in the will. Ultimately, the requirement of a bond is a matter for judicial determination upon the request of interested parties.

The presence of a routine requirement for bond in those cases where it has not been excused, which would include all estates passing by intestacy, would significantly undercut the operation of the informal processes for appointment of personal representatives in those kinds of small estates which typify intestacy situations, unless the personal representative and those interested in the estate are satisfied with having to

post bond. The very fact that bond is waived in almost every case where a will exists, and thus in almost every case where there is an occasion to provide for such waiver, indicates both (a) that most persons who consider the question choose against such a requirement, and (b) that it must be deemed important to such persons or it would not be included in the will.

Although the Commission was well aware of the arguable utility of bonding as a means of fidelity insurance, it was not felt appropriate to impose such a compulsory insurance requirement on persons who would have every opportunity under the Code to choose freely for themselves whether such insurance, through bonding, was desirable. This compulsory insurance principle seems especially inappropriate in the face of the almost universal waiver of bond requirements in wills, and in light of the very fortuitous impact of such a requirement--testate estates would generally not be affected because of waiver provisions while intestate estates would universally have the requirement imposed upon them.

Adequate protections and opportunity exists under the Code for immediate and automatic bonding upon the demand of a sufficiently interested person. The personal representative is most likely to be the successor with the greatest interest in the estate, so that most bonds would be primarily a protection of the personal representative against himself. It should also be noted that under the Code's provisions for determining the priority of appointment of the personal representative, that

person will most likely be the person most closely related to the testator or testatrix. In families where harmony exists, the decedent and his successors will probably be no more desirous of bonding than in those cases where the decedent has nominated an executor in a will which waives bond. In families which are not so harmonious, or where the prospect of succession itself creates disharmony, or in any case where the creditors feel insecure about the competence or honesty of the personal representative, immediate and automatic bonding may be required upon demand.

It is the feeling of the Commission that these provisions comport with the intent of most persons and their potential successors, help make the informal appointment procedures more meaningful, and provide fully adequate opportunity to require bond when a sufficiently interested person feels that bond would be desirable.

#### E. Distinctions Between Real and Personal Property

In the area of administration, as well as generally in the substantive law of succession, the proposed Maine Probate Code would eliminate many of the distinctions that now exist between the handling of real and personal property. Both are equally liable for the payment of debts and administration expenses. Realty, as well as personalty, may be sold by the personal representative or testamentary trustee within the proper course of his fiduciary duties without the need for prior judicial license, although, as with other questions, the personal representative may seek judicial direction in case he has any doubt,

and any party who objects to such a sale may seek an expeditious judicial order restraining it. See M.P.C. §§3-704 and 3-607. Personalty and realty abate on an equal basis. The title to personalty, as well as realty, descends directly to the decedent's successor under a will or by intestacy, although both kinds of property are subject to the personal representative's control for purposes of administering and properly distributing the estate. As discussed in part IV. B. of this Report, the unique problems of assuring reliable evidence of land titles are handled by the use of deeds of distribution from the personal representative and the statutory protection of purchasers from successors who have such instruments.

At a time when the feudal importance of land in the system of descent is no longer viable, and when most wealth in an estate is as likely to be personal property as to be real estate, the centuries old distinction is more bothersome than functional.

#### F. Procedures Governing Bonds

While the proposed Maine Probate Code adopts the Uniform Probate Code provisions concerning bonding requirements and procedures (M.P.C. §§3-603 through 3-606), the proposed Code also retains many of the procedural provisions of present Maine law. This retention seems necessary in order to supplement the Uniform Probate Code provisions with some of the present practices that are not inconsistent with the provisions of the new Code in the area of probate and trust administration and conservatorship. It is also necessary to retain other provisions of present Maine bonding procedures since they are often incorporated by reference

in bonding situations not covered by the proposed Code or by the present Title 18. Therefore, the present provisions were modified to conform to the proposed Code where applicable, and retained to supplement that Code and to furnish the procedures for other kinds of bonds that presently depend upon the procedures now specified for probate bonds.

In modifying and preserving the basic procedures for an action on the bond, the proposed Code provides that the action be brought in the name of the real party in interest, rather than in the name of the present nominal party, the probate judge. This procedure conforms with the practice under the present Rules of Civil Procedure, Rule 17(a).<sup>5</sup>/ The effect of the judgment, however, would be the same as under present law, and would be "recovered by the judge in trust for all parties interested in the penalty of the bond."<sup>6</sup>/

All of these provisions are located in Part 3 of Article VIII of the proposed Maine Probate Code.

#### G. Rules of Probate Procedure

In order to assign to statutory law those questions of basic substantive policy and assign to judicial rulemaking those questions involving purely procedural details, the proposed Maine Probate Code in §1-304 expressly gives the rulemaking power for probate court rules of procedure and evidence to the Supreme Judicial Court. M.P.C. §1-107 provides that the general rules

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5. M.P.C. §8-309.

6. M.P.C. §8-315.



of evidence apply in the probate courts except as modified by the Supreme Judicial Court under §1-304. Those sections which in the uniform version deal with the details and form of procedures that are ordinarily covered by court rule in this and other states have therefore been modified to fit into the basic general approach to rulemaking embodied in M.P.C. §1-304.

This change from the uniform version conforms the proposed Code to the basic legal approach toward judicial rulemaking that is embodied in most other provisions of Maine law, and enables the bench and the bar, through the Supreme Judicial Court and an advisory committee or other structure created by it, to take advantage of the experience of the courts in dealing with issues of procedural detail, and to make whatever modifications in such rules which may be deemed desirable from time to time. This has been a process that has worked well in the past in other areas, and which contributes to the refining and streamlining of court procedures as the need arises and under the supervision of the State's highest court.

The modification of the Uniform Probate Code in this respect would not change the deliberately chosen procedures for probate administration which are among the most important aspects of the proposed Code, and which, although in one sense procedural, are in fact major points of substantive policy. These procedures are by no means deleted from the Commission's bill. Even those sections setting forth what might be considered procedural detail relating to the basic operation of the substantive devices for informal or formal probate or appointment of personal represen-

tatives were left intact in the Maine Probate Code as part of those basic and essential reforms.<sup>7/</sup> In addition, M.P.C. §1-304 expressly provides that any such rules promulgated by the Supreme Judicial Court "shall be consistent with the provisions of this Code" and that in the event of any inconsistency between the Code and such rules "the Code provisions shall prevail."

This kind of judicial rulemaking power is itself already contained within the original uniform version of the Code in §§1-107 and 1-304, which expressly provide for the applicability of the state's general rules of evidence and civil procedure unless inconsistent with provisions of the statute. Both of these sets of rules are presently within the rulemaking power of the Supreme Judicial Court. It was the view of the Commission that it would be better to focus the rulemaking specifically on the needs of the probate courts, while integrating the general rules of civil procedure to the fullest extent appropriate, and to keep matters of procedural detail within the established rule-making process.

It is the Commission's expectation that the procedural details that are left to the rulemaking process would most likely be identical to the comparable provisions in the Uniform Probate Code. To that end, the Commission's special consultant on procedure, L. Kinvin Wroth, was engaged to draft a proposed set of

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7. M.P.C. §§3-301 and 3-402. The procedural provisions of the Uniform Probate Code sections are fully included in these Maine sections, along with express provisions for supplemental rule-making power as to the form and further content of the applications filed under these sections.

Rules of Probate Procedure which appears as an Appendix to the Report of the Commission's Study and Recommendations. Those proposed rules incorporate the procedural provisions of the Uniform Probate Code, supplement them with necessary special provisions, and integrate them into the general provisions of the Rules of Civil Procedure that are now applicable to actions in the Superior Court. Such integrations would help to make more uniform the practice in the various courts within this State while still being consistent with the Uniform Probate Code and accommodating any special situations involved in probate practice. Although these proposed Rules are not part of the Commission's proposed legislative package, they may be helpful as a future starting point for Rules to be promulgated by the Supreme Judicial Court, or for consideration by any rules advisory committee created by that Court upon enactment of the proposed Maine Probate Code. They also serve as an illustration of the nature and workability of such an integrated set of rules under the present or an alternative probate court structure.

#### H. Court Structure, Jurisdiction and Appeals

The Commission's recommendations at this time do not fully address the issue of possible basic changes in the structure of the present probate court system. However, in order to provide for the more efficient and integrated handling of probate matters within the probate court, and in order to eliminate what seems generally to be perceived as a wasteful anachronism in the probate appellate process, two basic changes are included in the Commission's bill: (1) the probate court is given concurrent

jurisdiction with the Superior Court over actions concerning the probate estate<sup>8/</sup> or an estate involved in protective proceedings,<sup>9/</sup> and in actions involving the existence of trusts, and controversies involving the internal affairs of trusts;<sup>10/</sup> and (2) the elimination of the present de novo appeal from the probate to the Superior Court, so that appeals from probate court decrees would be made directly to the Law Court in the same manner as in other actions.<sup>11/</sup>

The proposed Maine Probate Code also provides for removal of matters to the Superior Court when they are within the area of the probate court's concurrent jurisdiction, and preserves the present provisions for the lack of a jury in the probate courts. In addition, §1-305 expressly provides for supervision of the register by the judge of the court in which the register serves.

The particular structure of the probate court system is not expressly covered in the Uniform Probate Code, except that the Code contemplates a probate court with full power to deal with disputes involving those matters affecting estates within the probate jurisdiction of the court. Thus, while the overall court structure need not be changed to accommodate enactment of the

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8. §3-105.

9. §5-402.

10. §§7-204 and 7-201(a).

11. M.P.C. §1-308 and §§2 and 7-B of the Commission's Bill.

Uniform Probate Code, it is important to assure the probate courts full power to deal with matters affecting their probate jurisdiction. Such a structure is achieved, as a minimum, by providing the concurrent jurisdiction over probate-related and protective proceeding-related matters and over matters relating to intervivos, as well as testamentary, trusts in light of the policy of treating testamentary and intervivos trusts in the same manner.

The proposed Maine Probate Code differs from the uniform version of §7-201(a) by providing for concurrent jurisdiction over actions involving internal trust matters, rather than the exclusive jurisdiction that is provided in the uniform version. It was felt that the present system, in which the Superior Court shares jurisdiction over such matters with the probate courts, should be preserved in the absence of any apparent reason to eliminate the jurisdiction of the Superior Court in such situations.

The present designation of the Superior Court as the Supreme Court of Probate for the hearing of de novo appeals from the probate courts does not appear to fulfill any needed function. By lending itself to the unnecessary re-trial of cases already heard by the probate courts, it wastes the time and resources of both the probate and Superior Courts, and oftentimes for the sole purpose of giving whichever party happens to lose in the probate court another chance to have a trial which he has already had. The opportunity to re-try a case in the Superior Court, and the likelihood that such an opportunity will be used in a particular case, may in some cases tend to cause the parties or the probate court to treat the case less seriously within the probate court itself.

Likewise, there appears to be no sufficient reason to interpose any intermediate level of appeal between the probate court and the State's highest court. It is the Commission's view that the issues of probate law should be treated with the same degree of authority as other issues of Maine law, and that the appellate procedures for probate decrees should have the same form and status in line with its position as a court with full power over matters relating to its jurisdiction.

There were few matters on which the probate practitioners on the Commission were in more immediate and unanimous agreement than the elimination of the de novo and intermediate appeal aspects of the system of probate appeals.

The proposed Maine Probate Code's jurisdictional and procedural provisions and the proposed Maine Rules of Probate Procedure are designed to operate within the present probate court structure. The Commission, however, is not to be understood as recommending the continuation of the present system. The Code and proposed Rules are based on that system as a matter of convenience--to permit work on the main provisions of the Code to go forward uninterrupted by the different concerns involved in the question of court structure, and to enable the Commission to present a Code that could be adopted on its merits regardless of any subsequent recommendations or legislation addressed to that question. In fact, in fulfillment of its mandate in that area, the Commission intends to continue its study and prepare a separate set of recommendations covering the subject of probate court structure for presentation to the Legislature as soon as possible.

## I. Intestate Succession

The present Maine law determining the inheritance of real and personal property in the absence of a will is confusing and anachronistic, as the Commission's study described in Chapter 1 of its Report of the Commission's Study and Recommendations illustrates. The proposed Maine Probate Code would help to clarify this part of the law and make it more consistent with the kind of distribution that most people would intend as well as that can be done by general intestacy provisions.

The Code would generally increase the intestate share of the surviving spouse, particularly in small or modest-sized estates. Where there are issue of the decedent, as well as the surviving spouse, the share of the surviving spouse is the first \$50,000 plus one-half of the remainder. The same proportions apply in cases where there is a surviving spouse, surviving parents, and no surviving issue. In the first situation, however, where the decedent's surviving issue are not also issue of the surviving spouse, that spouse's share is simply one-half of the estate.

The proposed Code would also make a significant refinement in its definition of representation--the determination of who takes the shares of predeceased intestate takers, and what proportions such persons take. The proposed §2-106, which goes even further than the Uniform Probate Code in refining this aspect of intestacy law, guarantees that those issue who are of equal relationship to the decedent will always take equal shares among themselves, and that issue of a closer degree will never take a smaller share than would issue more distantly related. Both of these apparent aberrations occur under present law, and,

although made less likely under the Uniform Probate Code, they can also occur under the uniform version of §2-106. Under the proposed Code, however, by adopting the system referred to in both the Uniform and Maine Comments to §2-103, neither abberation would be possible.

This refinement in the system of taking by representation--per capita at each generation--would make the law conform to the intent of most persons who use generic classes of relatives to designate the takers of their property at death.

Under the proposed Code, inheritance rights would terminate upon the termination of the spousal relationship by divorce or annulment, or by an agreement for a complete property settlement that accompanies or is made in anticipation of a divorce or separation, or by an express waiver.

#### J. Protection Against Disinheritance

One of the most striking reforms of the Uniform Probate Code is its handling of the problem of protecting the surviving spouse from disinheritance in a way that is fair, effective and non-disruptive of legitimate estate plans. The Code introduces the concept of the "augmented estate" for the purposes of determining and making up the share of the surviving spouse who elects to take against provisions of a will or against the intestate distribution of what is in the probate estate.

The augmented estate consists essentially of the probate estate plus property transferred by the decedent during his lifetime without full consideration and in the form of "will substitutes" (such as revocable trusts, transfers in which the transferor retained a life estate or a power of revocation, transfers



presumed to be in contemplation of death), plus property transferred by the decedent to the surviving spouse without full consideration during the decedent's lifetime, and benefits to the surviving spouse from the decedent's insurance policies on the decedent's life. The elective share of the surviving spouse is one-third of this "augmented estate."

This augmented estate device has a number of advantages over more traditional attempts at spousal protection. (1) It prevents disinheritance more effectively in the ways that intentional disinheritance is usually achieved, since, in addition to the probate estate, it includes property transferred by inter vivos will-substitutes. (2) It reduces problems of land title stability by excluding from the elective share all bona fide transfers for value as well as transfers not characterizable as will-substitutes. (3) It prevents over-protection of the surviving spouse who has been in fact adequately provided for by the decedent's inter vivos transfers or insurance benefits, by including such amounts in the value from which the share is determined and in the property that is counted toward making up the share to which the surviving spouse is entitled. (4) Finally, the device protects valid estate plans from disruption through election, by eliminating the over-protection referred to above and by using the property devised to a spouse in making up the value of the elective share.

The system thus has advantages for the surviving spouse, the estate planner, the decedent who makes adequate provisions for the surviving spouse in the total estate plan, and for title

attorneys and others who are interested in the stability of land titles.

#### K. The Law of Wills

The proposed Maine Probate Code attempts to modernize the law of wills, to fill gaps in the present law, to facilitate the use of wills in transferring property at death, and to eliminate out-dated technicalities that serve only to frustrate the intent of testators.

In conformity with the laws of most states, only two witnesses would be required to attest the execution of a will. Provision is made for the use of a "self-proved" will which can help to simplify the proof of the will's execution by providing proof of the testator's signature and rebuttable evidence of the other requirements of execution.<sup>12/</sup> An attesting witness who is also a beneficiary under the will would not forfeit his or her share, thus preventing the defeat of the testator's apparent intent that the beneficiary-witness succeed to the designated part of the estate. The present rule relegating such a witness to his or her intestate share is essentially ineffectual to prevent the abuse against which it is aimed, since any person practicing fraud or undue influence in order to obtain benefits under a will would surely take care to avoid attesting the will in light of his knowledge that to do so would deprive him of the very benefits he is seeking. The avoidance of technical obstacles to the recognition of a will that is fully intended by the testator to be effective is also facilitated by the Code's "choice of law" pro-

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12. M.P.C. §§2-504 and 3-406(b).

visions concerning execution requirements: the execution is honored if it would be valid under either the law of this state or the law of the decedent's domicile at his death or the law of the state where the will was executed.

Oral (noncupative) wills would be eliminated as being the least reliable of testamentary devices and as being less necessary in light of the new provisions for facilitating the execution of more reliable kinds of wills and in light of the better provision of services today to assist seamen and servicemen in providing for the disposition of their property in case of death. A holographic will in which the signature and material provisions are in the testator's own handwriting would be recognized, however, as a generally more reliable kind of instrument, and to avoid the defeat of the testamentary intent of a decedent who may be unsophisticated in the requirements of the law and whose last wishes for the disposition of his property would otherwise be frustrated because of the lack of attestation.

Other provisions that would help to facilitate the intent of decedents which would otherwise be frustrated by the technical requirements of the law--"traps for the unwary"--include the express recognition of acts of independent significance, incorporation of a separate existing writing by reference to it in a will, and, within certain necessary limits, the use of separate lists, outside the will but referred to in the will, for the disposition of certain items of tangible personal property (such as family heirlooms or personal items of particular sentimental significance to the decedent).

These various devices constitute ways in which the use and effectiveness of wills can be facilitated in less formal ways that involve no more significant risks than are inherent in the more traditional requirements for effectuating a will, but which may prove helpful particularly to a person with a small or modest estate or who has clearly expressed his or her testamentary intent but without a sophisticated knowledge of the more technical requirements of the traditional wills acts. These aspects of the proposed Code are focussed on effectuating the intent of persons in the usual situations and avoiding the unnecessary frustration of that intent--on providing adequate safeguards against fraud and abuse without skewing the whole law toward the unusual case by the imposition of technical requirements that are generally ineffectual in preventing anything except the realization of a decedent's last wishes.

Part 6 of Article II of the proposed Code contains statutory rules of construction which are similarly focussed on effectuating the likely intent of most testators under current perceptions. These provisions are generally explained and compared to present Maine law in the Uniform and Maine Comments that accompany those sections in the Commission's bill.

The proposed Code fills some of the gaps in present Maine law concerning wills by making express statutory provision for the revival of previously revoked wills under appropriate circumstances, and for partial revocation.

#### L. Judicial Separation

In the course of its study of the relationship between the Uniform Probate Code and present Maine provisions in the area of

domestic relations, the Commission perceived the need for some modification of the provisions pertaining to judicial separation.

In conformity with the Uniform Probate Code, the proposed Code for Maine would eliminate the automatic cutting off of inheritance rights by virtue of a mere judicial separation without an accompanying property settlement. An agreement for a complete property settlement, as noted in section IV. I. of this Report, would cut off such rights and act as a revocation of a will's provisions in favor of a spouse if the agreement was one that accompanied, or was in anticipation of, a separation or a divorce. Thus, under the proposed Code, revocation of such will provisions or the cutting off of inheritance rights would occur in those situations where the judicial separation was perceived as an effectual termination of the marriage (even though it fell short of legally terminating that relationship completely), but not in those situations where judicial separation was being used for other purposes or where no provision is made for a property settlement for the dependent spouse. This approach seemed to the Commission to be one that was more accurately focussed on the cases where the termination of such rights is appropriate, without arbitrarily imposing such a termination on cases where it is not appropriate or intended.

The Commission also included an amendment to the judicial separation provisions of Title 19 of the Maine Revised Statutes which would reduce the waiting period for bringing an action for judicial separation from one year to one month in order to help make such actions more readily available in cases where judicial separation is needed to determine questions of custody or obtain

protection from harrassment. Sections 581-583 of Title 19, dealing separately with actions by husbands and wives, were redrafted into one section covering actions brought by either spouse. Original jurisdiction over such actions would remain in the District Court, but the Superior Court rather than the probate courts would have concurrent jurisdiction in order to bring judicial separation actions within the same judicial structure that presently handles the closely related areas of divorce and child custody. The provisions for recording a decree of separation would be repealed as unnecessary in light of the elimination of the effect of that decree on the spouses' inheritance rights. Finally, the language in §585 concerning the effect of the separation on the spouses' issue would be repealed as unnecessary and essentially inaccurate.

It was felt that these changes in the present judicial separation provisions would be desirable in order to conform them to the proposed Code and the present judicial structure for handling related domestic relations problems, to make the judicial separation device more functional for important purposes that it could better serve, and to consolidate and clarify this area of the present Maine statutes.

#### M. Renunciation of Property Interests

Section 2-801 of the proposed Maine Probate Code provides procedures by which a person can renounce property interests transferred to him in any way. The corresponding section of the Uniform Probate Code consists of the provisions of the Uniform Disclaimers of Transfers by Will, Intestacy or Appointment Act

of 1973. That Act, and the Uniform Disclaimer of Transfers by Nontestamentary Instruments Act, have both been adopted in Maine, although in somewhat modified versions.<sup>13/</sup>

The proposed §2-801 of the Maine Probate Code is based on recent proposed revisions of the Uniform Disclaimer of Property Interests Act, which is basically an incorporation of the provisions of the other two uniform disclaimer acts so that both testamentary and nontestamentary interests are covered in one act. In drafting the proposed §2-801, however, the uniform version was modified in order to make the provisions of the proposed Code conform more closely to the federal tax definition of a "qualified disclaimer" for federal tax purposes. The resulting coordination between the federal and state disclaimer laws would help to avoid unintentional and potentially disastrous federal tax consequences that could otherwise result from an attempt to disclaim or renounce an interest in a way that is valid under state law but not recognized as a "qualified disclaimer" under federal tax requirements.<sup>14/</sup>

This federal-state conformity seems particularly desirable since disclaimers are used almost exclusively for tax purposes or with tax consequences as a primary consideration. Two aspects of the uniform disclaimer acts which do represent significant policy choices not accommodated by the federal tax law are, however, preserved: (1) extending the time limits for making disclaimers

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13. 18 M.R.S.A. chapters 118 and 119.

14. These problems have been of some recent concern and discussion within the Maine bar. See Dench, "The Use of Disclaimers in Maine After the Tax Reform Act of 1976," 11 Maine Bar Bulletin 161 (September 1977).

until after the disclaimant first becomes aware of the transfer of the interest to him under a nontestamentary instrument; and (2) extending the time limits for disclaiming a future interest until after the future interest has become vested in the disclaimant. In those two circumstances the proposed Code section would allow renunciation for purposes of the state's law, even though federal tax laws would not. In thus allowing these time limit extensions for disclaimers in situations where tax consequences presumably would not be a significant factor, the proposed section is accompanied by a Maine Comment pointing out the need to be aware of the federal tax requirements so that even these two circumstances will not likely be used without full awareness of the possible tax disadvantages.

The other differences between the uniform and federal tax disclaimer requirements seem to be less significant or less deliberate policy choices, and also are the kinds of requirements which might more likely be overlooked by a disclaimant who mistakenly assumes that adherence to the state requirements will satisfy the federal requirements. It is the risk of this kind of inadvertant and unnecessary tax loss that the proposed §2-801 seeks to minimize by increasing state-federal conformity in disclaimer requirements.

While uniformity with the states that have adopted the uniform disclaimer acts, or that will change those acts to conform to the newly proposed revisions of them, was deemed desirable by the Commission, the need for greater conformity to federal tax requirements was deemed to be of greater weight in light of the fact that the use or non-use of disclaimers is almost always con-



trolled by tax considerations.

#### N. Trust Administration

The primary purposes of the proposed Code's reforms in the area of trust administration are to treat the administration of testamentary trusts on a par with the treatment of intervivos trusts, and to facilitate the ability of a settlor or testator to choose the trustee or trustees without arbitrary regard for the location of the trust and compliance with unnecessarily restrictive limitations on the use of trustees from another state. The distinction in the amount of judicial supervision over testamentary and intervivos trusts is the result of historical accident and has no relation to the needs of today. The futility of attempting to assert the traditional probate court supervision over testamentary trusts is shown by the widespread use of legitimate ways around it--the use of pourover trust provisions in wills and the use of revocable intervivos trusts to achieve the same results that can be achieved by the creation of a testamentary trust are chief examples of these devices.

The provisions of the Uniform Trustee's Powers Act are incorporated into the Code as Part 4 of Article VII. The inclusion of this part of the proposed Code would, in the absence of contrary provisions in the trust instrument, give a trustee the kinds of authority that are typically given trustees under the provisions of thoroughly planned and drafted trust instruments. Thus, they would eliminate the need for much boiler-plate in ordinary trust instruments, give trustees under less sophisticated trust instruments the same kinds of authority that are

usually included in the more sophisticated instruments (subject of course to contrary provision), and conform the law of trustees' powers more closely to the form of the Code's provisions for the powers of personal representatives and conservators.

In the area of trust administration, the proposed Maine Probate Code departs from the Uniform Probate Code by substituting a system of permissive registration of trusts for the uniform version's mandatory trust registration. While this modification may appear on the surface as a major departure from the uniform version, the Commission does not believe that it constitutes a real change in the substantive effect on the courts' jurisdiction over trusts. It does, however, help to further another policy of the Uniform Probate Code by protecting the privacy of testamentary and trust arrangements which outweighs the slight benefit that might result from mandatory registration. The actual jurisdiction of a court over a trust is not established by registration itself, but rather by the factual circumstances that are the standards by which the registration requirement is determined under the Uniform Probate Code. Those standards themselves are not changed in the proposed Code for Maine. Thus, the actual jurisdiction of a court over a trust depends upon other factors, whether or not the trust is registered, and so would not be significantly affected by non-registration.

The substitution of permissive, rather than mandatory, registration has also been made in other states adopting the Uniform Probate Code.

O. Guardians, Conservators and Protective Proceedings

The Code provisions for guardianship and conservatorship make use of devices for informal guardianship appointment, and flexibility in tailoring protective arrangements that are similar in their objectives to the Code's approach to probate administration. The Code draws a distinction between guardians (who are responsible for the care of the person) and conservators (who are responsible for the care and management of the property of those in need of such protection to the extent of that need). Article V provides a variety of devices short of the appointment of a conservator that may be used in some situations to take care of special property management or transferral situations, so that one need not be subjected to a greater loss of personal freedom and discretion or loss of privacy than is necessary to deal with the problem at hand. Chapter 5 of the Report of the Commission's Study and Recommendations deals with the Code's guardianship and protective proceedings in greater detail.

The present Maine provisions for the use of a public guardian for mentally retarded persons and for incapacitated adults are incorporated into the Maine Probate Code in a way that preserves their essential provisions while fitting them into the Code's more flexible system. The Uniform Veterans' Guardianship Act provisions of present law are repealed in the Commission's bill, since they are superseded by the Uniform Probate Code, and since it is desirable to avoid the unnecessary coexistence of two separate, overlapping systems.

#### P. Other Provisions

While most of the basic provisions and operation of the Maine Probate Code proposed by the Commission are set forth in this Report, a Code covering as large an area as the entire substantive probate law of a state inevitably has many more individual provisions than can be described here. The provisions that have been set forth already, and other individual provisions, are more fully described, and the Commission's reasons for recommending these provisions, are set out much more extensively in the Report of the Commission's Study and Recommendations Concerning Maine Probate Law. While that supplemental Report itself appears massive--extending over 700 pages--it should serve as a workable guide to particular areas of interest that are covered by the proposed Code and its accompanying provisions for the repeal and amendment of various provisions of present Maine law.

In light of that more extensive Report of the Commission's Study, and the ready availability of its table of contents as a reference to the various aspects of the Commission's study, it should be sufficient to note certain other provisions not heretofore covered in this Report and Summary.

The proposed Code contains provisions in Article VI for the passing of property at death by the use of certain non-probate devices. Joint accounts, currently provided for in Maine law, are expressly recognized, and the distinction in the amounts that can be transferred by that device where the co-holders of the joint account are husband and wife and where they are not husband and wife, are eliminated. Tentative or "Totten" trusts, which

are not currently recognized in Maine law, along with a similar device called a P.O.D. (payable on death) account, are also provided for. Provisions are made to assure protection for banks and financial institutions offering such accounts, thus helping to facilitate their use. The present law in the area would be amended by the Commission's bill in order to conform it to the new provisions, thus furthering achievement of greater interstate uniformity.

Provisions for legitimizing children born out of wedlock, for purposes other than inheritance, are removed from Title 18 and relocated in Title 19 as a new §220. While the Commission feels strongly that these general legitimation provisions may be in need of revision, the desire to present the present reform package to the legislature without further delay has prevented the Commission from giving the question the kind of careful consideration that ought to precede any such changes. Therefore, the Commission would like to reserve the opportunity to report back further on this question before the beginning of the first session of the 109th Legislature.

Likewise, in preserving substantially intact the present Maine Wrongful Death Act as §2-804 of the proposed new Title 18-A the Commission did not have time to fully consider any possible changes that might be desirable in those provisions.

The amendments proposed in the Commission's bill concerning the coordination between the proposed Code and Maine's inheritance tax system are fully described and explained in Chapter 7 of the Report of the Commission's Study and Recommendations Concern-

ing Maine Probate Law, and are the result of an extensive study of the relationship between these two sets of provisions.

Section 1-109 of the proposed Code is a general section designed to preserve the abolition of married women's disabilities and related matters that are now found in certain sections at various points in Title 18.

#### V. Conclusion

The present system of probate and its administration has come under particularly heavy attack in recent years. People are being advised, for better or for worse, on various arrangements for the avoidance of probate. These public criticisms, and the increasing attempts by many to try to move away from the need for probate, are symptoms of problems with the present system which can be discovered by a careful and thorough examination of the system even if the public criticisms were not being made.

There is, of course, no panacea for totally easing the transfer of property at death from one generation to another. A variety of problems must be dealt with. Disputes will arise among would-be successors, and any system must be able to deal with those disputes. Creditors, as well as the family members, must be protected and provided for. Land titles must be made marketable. In those estates where death taxes are involved, especially at the federal level, delays in probate administration may be inevitable under any system that could be devised. Where legal problems arise, or where legal principles must be followed, lawyers will be needed.

But the study of the Commission, and the proposed Maine Probate Code, based as it is on the Uniform Probate Code, offers an opportunity to enact a system designed to facilitate the transfer of property at death in as efficient a way as has yet been developed under our legal system, and in a way that is commensurate with the need to deal with the problems that such transfers at death may involve.

The Uniform Probate Code has now been substantially adopted in twelve states. While it has not been in effect in some of these states long enough to generalize about the success of their experience under the Code, the experience of the earlier adopters of the Code has been sufficient for them to see its benefits and demonstrate its workability. The Uniform Probate Code has been in effect in Idaho since 1972, in Alaska since 1973, in Arizona and Colorado since 1974, and in Florida, Minnesota, Montana and North Dakota since 1975. No significant problem in the operation of the Code in those states has come to the attention of the Commission, and the reports of its success have been favorable. In fact, former opponents or skeptics have become supporters. As with the experience of this Commission, greater familiarity with the Uniform Probate Code seems to breed endorsement.

The lengthy and painstaking study of that Code has been completed by the Commission, made up largely of practitioners of probate law in this State. We hope that the enactment of its basic recommendations and the proposed Maine Probate Code can be facilitated by that study without undue extensions of time.

The Commission believes that the proposed Maine Probate Code

expresses the best and most thoroughly considered aspects of several decades of probate law reform efforts. It clarifies and modernizes many issues that are unclear or outmoded in present Maine law. It arranges the law of probate and related areas into a single, logically ordered new Title to the Maine Revised Statutes, and seeks to coordinate those changes with the rest of the body of Maine law in a responsible way.

Finally, and in addition to its previous acknowledgment of the work of its consultants, the Commission would like to acknowledge and express its appreciation for the diligent and competent work of Stephen Collier, Graydon Stevens, Tom Goodwin and David Cullenberg, members of the Maine bar, and to John Mumm and Dennis Levandoski, all of whom served as research assistants while students, to the secretarial staff of the University of Maine School of Law for its countless hours spent in typing, reproducing and mailing the hundreds of pages of the Commission's memoranda and reports, and to the School of Law itself for generously lending the Commission the use of its facilities and assistance so consistently over the course of the past four years.

Respectfully submitted,

Maine Probate Law Revision Commission

September 1978

Members of the Commission

Albert J. Beliveau, Jr.  
Phil Isaacson  
Representatives of the Bar

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765  
.Z99 H. Davison Osgood, Jr., Secretary-Treasurer  
M212 Representative of the Corporate  
1978 Fiduciaries' Association  
c.2

Paul R. Buckley  
Chartered Life Underwriter

Robert W. Clifford  
John B. Roberts, Chairman  
Representatives of the Senate

Harold Bragdon  
Albert Cote  
\*James Henderson  
Representatives of the House

Harold M. Robinson  
Representative of Labor

Atherton Fuller  
\*Richard P. LeBlanc  
Representatives of the Public

Ronald Hart  
Richard E. Whiting  
Allan Woodcock, Jr., Vice-Chairman  
Judges of Probate, Consultants

#### Deceased Members

Rodney E. Ross, Jr.  
Representative of the House

John P. Carey, Former Chairman  
Representative of the Public

\*James Henderson was appointed by the Speaker of the House to fill the vacancy created by the death of Rodney E. Ross, Jr. Richard P. LeBlanc was appointed by the Governor to fill the vacancy created by the death of John P. Carey, former chairman of the Commission.

