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**MAINE PROBATE LAW REVISION COMMISSION**

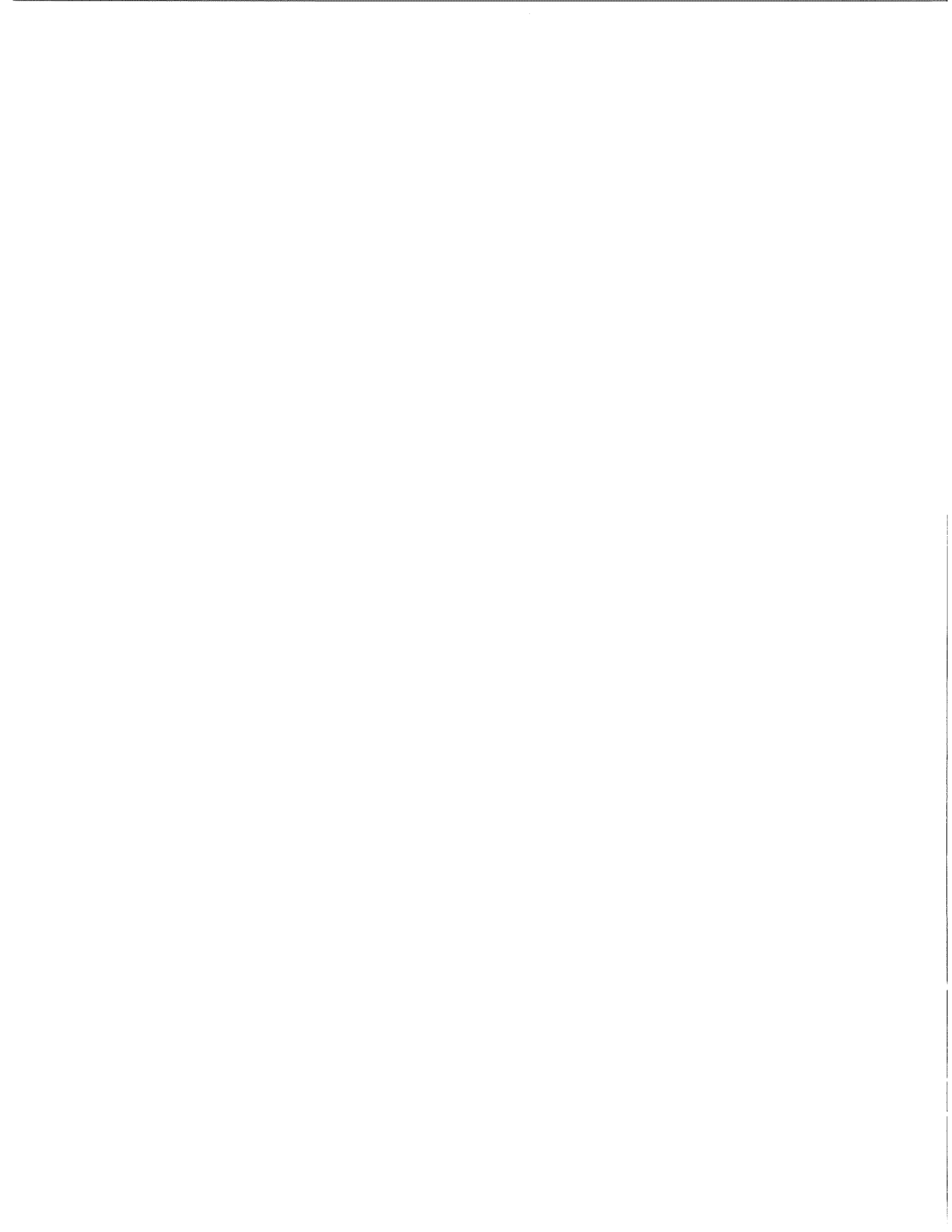
**REPORT**

**of the**

**COMMISSION'S STUDY AND RECOMMENDATIONS**

**CONCERNING MAINE PROBATE LAW**

**October 1978**



MAINE PROBATE LAW REVISION COMMISSION

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Foreword

The following Report to the Legislature of the Maine Probate Law Revision Commission's study and recommendations is intended to supplement the Commission's Report and Summary which was transmitted to the Legislative Council by a letter of transmittal dated September 29, 1978.

The legislation which set up the Maine Probate Law Revision Commission, P.&S.L. 1973, ch. 126. directed the Commission to make a comprehensive study of Maine probate law. Such a study of an entire major area of the law seemed to require a more extensive report than is possible in the fifty page summary that was previously transmitted. The more extensive report, therefore, was deemed necessary in order to fulfil the responsibility of explaining more fully to the citizens of Maine, and to the Legislature, the nature of the Commission's study and recommendations.

It is hoped that this report will serve as a helpful reference for Legislators and interested citizens to the various areas covered by the Commission's work and its proposed Maine Probate Code.

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APPENDIX: Proposed Rules of Probate Procedure

## Chapter 1

### WILLS AND INTESTATE SUCCESSION

#### A. Intestate Succession.

##### 1. The Present Maine System of Inheritance

Unlike the Uniform Probate Code, present Title 18 is marked by substantial differences in treatment between real and personal property in decedents' estates. Spouses' and children's allowances come entirely out of personal property. In intestate estates, §851 calls for application of personal property first to the payment of debts, funeral charges and "charges of settlement" before any distribution to heirs. Although real property can be reached for payment of decedent's debts and legacies (18 M.R.S.A. §§1854, 205.1), the system requires special action for that purpose (18 M.R.S.A. §2059).

If decedent leaves no widow with whom he was living at his death or if he is survived by issue, then the rest of decedent's personal estate, after payment of debts and charges, descends according to the same rules as his real estate (i.e., according to 18 M.R.S.A. §1001). But if the decedent "and the surviving widow" were living together at the time of his death and if he left no issue (defined in 1 M.R.S.A. §72.9), the widow gets up to \$10,000 of the residue of the personal estate (after allowances, debts and charges) plus 1/2 the remaining personal property (18 M.R.S.A. §851); the 1/2 goes to the next of kin of equal degree, not beyond "kin in the second degree" (defined as by civil law rules in 18 M.R.S.A. §1002);

if there is no such kindred, such widow takes all the remaining personalty. There is a provision (§851.2) to make up the first \$10,000 out of decedent's real estate not otherwise passing to the widow. A final provision gives a widower "the same share" in his dead wife's personal property. Presumably this means that the probate court will have to find, in any case where no issue survive, that the spouses were "living together" at the time of the wife's death. Under 18 M.R.S.A. §851 property rights that may be of great value thus depend upon whether the judge finds that the spouses "were living together" at the death of one of them. Though most probate courts would doubtless apply the condition generously to the surviving spouse, the requirement could obviously be applied harshly and unfairly.

Section 852 calls for an evaluation of the estate by the court where the deceased dies intestate leaving a widow and no issue.

Section 853, applicable only when a life insurance policy on the life of a decedent is payable to or otherwise becomes an asset of the estate, protects the proceeds from claims of creditors, except that the amount of premiums paid for the insurance within three years, with interest, is excluded from such protected proceeds. Such proceeds from a policy on the life of an intestate decedent descend 1/3 to the widow or widower and 2/3 to the issue; if no issue, the whole to the widow or widower, and if no widow or widower, the whole to the

issue. Such life insurance proceeds may be disposed of by will, but if the estate is insolvent then such disposition by will is given effect only to the extent that the proceeds are bequeathed to the widow or widower or issue. The Law Court has held that this section applies only when the policy is payable to or otherwise becomes an asset of the estate. Cragin v. Cragin, 66 Me. 517 (1876). Moreover, even though the policy is payable to the estate, the proceeds will pass by the decedent's will only when some provision explicitly bequeathing them is made in the will. Hathaway v. Sherman, 61 Me. 466 (1872). The obscure language of §853 has led to considerable litigation.

Under the Uniform Probate Code, life insurance proceeds payable to an individual would not be part of the probate estate, although proceeds payable to the spouse would be includable in the 'augmented estate' defined in UPC 2-202 for purposes of determining the spouse's elective share under UPC 2-201. Any life insurance proceeds payable to an intestate decedent's estate would, of course, descend by intestate succession as provided for in Part 1 of Article 2 of the Uniform Probate Code. With respect to all non-probate transfers finally operative at death, including insurance, the Code expressly leaves open to creditors their rights under other laws of the state. UPC 6-201(b). These would include the right to set aside a fraudulent conveyance.

Section 853 conflicts with UPC 2-101 which provides that

any part of the estate of a decedent not disposed of by his will passes to his heirs as prescribed in the Code. Under §853, insurance proceeds on the life of an intestate decedent payable to his estate would not descend by intestacy, but would descend according to the specific provisions of §853. There would be problems of interpretation as to whether such proceeds would be included in computing the surviving spouse's intestate share under UPC 2-102, if this section were retained, and in computing the "augmented estate" under UPC 2-202.

There do not seem to be any strong policy reasons for retaining §853. Its repeal would cause life insurance proceeds payable to a decedent's estate to be treated like any other property in the probate estate and would be available for allowances, expenses, and creditor's claims to the same extent as other assets of the estate. Such a result seems fair enough. If a decedent wishes his spouse and issue to take insurance proceeds on his life free and clear from all debts, he may achieve this result simply by naming them as beneficiaries under the policy. Under the Insurance Code, specifically 24-A M.R.S.A. §2428, such beneficiaries take the insurance proceeds free from the claims of the decedent's creditors. Even if the proceeds were made payable to the estate, under the Code they would not be reached for creditor's claims to the extent that they were actually used to satisfy the allowances for spouse and children provided for in Part 4 of Uniform Probate Code Article 2.

Under present law, a dangerous trap is created by the rule that the proceeds of insurance payable to the estate pass by intestate succession unless specifically disposed of in the will. An unwary draftsman might suppose that such proceeds pass under a general residuary clause, as one would logically expect, but the Law Court has held that they do not. Hathaway v. Sherman, 61 Me. 466 (1872).

For these reasons, 18 M.R.S.A. §853 is not retained in the Commissions's bill.

Under the Code, life insurance proceeds payable to an individual are not part of the probate estate but proceeds payable to the spouse are includable in the "augmented estate" defined in UPC 2-202 for purposes of determining the spouse's elective share under UPC 2-201. With respect to all non-probate transfers finally operative at death, including insurance, the Code expressly leaves open to creditors their rights under other laws of the state. UPC 6-201(b). These would include the right to set aside a fraudulent conveyance.

Under 18 M.R.S.A. §1001, the real property of an intestate descends, normally, as follows:

1. If widow and issue survive, 1/3 to the widow. Under subsection 2, the remaining 2/3 go to the issue. If decedent leaves no issue, then 1/2 to the widow; if the court finds that the widow and the deceased were living together at his death, then if the residue of the estate, real and personal,



at date of death, over and above the value of  $1/3$  the real estate plus the amount needed to pay debts, funeral and administration charges, and widow's allowance, comes to \$10,000 or less (see M.R.S.A. §852), then the widow takes all the real estate; if that same residue is more than \$10,000, the widow takes  $2/3$  and the next of kin of equal degree (not beyond kin in the 2d degree) take  $1/3$ . If no kin are within the 2d degree, the widow takes all. "There shall likewise descend to the widow or widower the same share in all such real estate of which the deceased was seized during coverture, and which has not been barred or released as herein provided."

2. If issue survive but no widow or widower, the issue take all the remainder of which he died seized, the lawful issue of a dead child taking by right of representation, equally if all are of the same degree of kindred; if not, "according to right of representation."

3. If no issue and no widow survive, then  $1/2$  to each parent, and, if only one parent is alive,  $1/2$  to brothers and sisters and their descendants; if both parents are dead, all goes to brothers and sisters or their children or grandchildren by representation. However, this rule is probably subject to a special rule for parentelic inheritance from unmarried minors. See 5, below.

4. If no issue, spouse, parents, or brothers or sisters survive, the property goes to the next of kin in equal degree; when they claim through different ancestors, those claiming

through a nearer ancestor are preferred to those claiming through an ancestor more remote.

5. If decedent is an unmarried minor at his death, leaving property inherited from either of his parents, it descends to the other children of the same parent and the issue of those deceased; in equal shares if all are of the same degree of kindred; otherwise, according to right of representation. This particular provision raises a problem of consistency with 18 M.R.S.A. §1002, and is discussed below in connection with that section.

6. If the intestate leaves no widow or widower or kindred the property escheats. Maine has no limit, however, on the degree of kinship that will satisfy the statute of descent.

The scope of 18 M.R.S.A. §1001 is made somewhat uncertain by the peculiar exception, in the preamble, of "wild lands conveyed by him [the deceased], though afterwards cleared." The purpose of this antiquated exception is not clarified by any case law.

Besides eliminating the distinctions in treatment between real and personal property, the Code simplifies the rules of intestate succession and brings those rules more nearly into accord with what most intestate decedents would want--including greater clarification. UPC 2-102 would give the surviving spouse (1) everything if there are no parents or issue surviving, (2) \$50,000 plus 1/2 the rest if there are issue surviving all of whom are issue of the surviving spouse also, and

(3) one-half the estate if there are issue one or more of whom are not issue of the surviving spouse also.

Comparison of these provisions for the spouse with those outlined above, in 18 M.R.S.A. §§851 and 1001, reveals that the Code would greatly increase the share of the surviving spouse. For example, in the common case where spouse and issue survive, instead of getting only 1/3 of the estate the spouse would get \$50,000 plus 1/2 the rest (if all the children were of the surviving spouse also).

If there is no surviving spouse, the Code provisions for succession (UPC 2-103) are not strikingly different from those of Title 18 except that the Code draws the line for inheritance by remote relatives at grandparents and persons descended from grandparents. UPC 2-103(4). This limitation simplifies proof of heirship and eliminates will contests by remote relatives. Certainly, in any case where it is particularly desirable to provide for such distant relatives beyond that provided by the Code, it is because of a closeness to the decedent other than that of biological kinship. In such cases, of course, one would expect provisions in a will, especially when there are no closer relatives.

The Maine statute adopts the civil law rules for determining degrees of kinship. This section also provides that kindred of the half blood inherit equally with those of the whole blood in the same degree.

The Maine or civil law rule calls for counting degrees by

ascending from the intestate to a common ancestor and descending from that ancestor to the claimant, reckoning one degree each generation both up and down the lines. The Code, in UPC 2-102 and 2-103 avoids using "degree of kinship" except with reference to issue, either of the decedent (UPC 2-103-1) or of the decedent's grandparents (UPC 2-103(4)); in each case, where the issue are of the same degree of kinship to the decedent they take equally, and where they are of unequal degree those of more remote degree take by representation, as defined in UPC 2-106. This is an easier and probably fairer scheme to apply than distribution under 18 M.R.S.A. §1001, though the two systems will usually yield similar results with successors less remote than second cousins. Thus, a niece is of the third degree under Maine law, as is an uncle, but the niece would take ahead of the uncle because of the provision of 18 M.R.S.A. §1001.6: "...when they claim through different ancestors, to those claiming through a nearer ancestor in preference to those claiming through an ancestor more remote." Of course, the niece would take ahead of the uncle under the Code. UPC 2-103(3). In a way, the Code extends the Maine statutory concept of taking by representation where all issue of a common ancestor are not of equal degrees of kinship to the testator, an idea expressed in 18 M.R.S.A. §1001.2 and .4. The present Maine statute does not carry through with that principle in a consistent way, however. 18 M.R.S.A. §1001.6 would on its face prefer a niece or nephew to the

total exclusion of a child of a dead niece or nephew even though, if at least one brother or sister survived, a grand-niece or grandnephew might represent a dead brother or sister by the express language of §1001.4. Although this strange result would probably be regarded by most persons as unjust, it was thought to be required in Quinby v. Higgins, 14 Me. 309 (1837), under slightly different statutory language. The same rule presumably continues to govern us more than 140 years later. The Code would clearly permit the child of a dead niece or nephew to share by representation where there is no spouse, issue, parents, brother or sister, and where one or more other nieces and nephews survive, UPC 2-103(3) and 2-106, as would the proposed Maine code, which redefines the system of representation even further, as discussed in Part A.3. of this chapter.

The provision of 18 M.R.S.A. §1002, that kindred of the half blood inherit equally with those of the whole blood in the same degree, would not be changed by the Code. UPC 2-107.

One change that the adoption of the Code would make would be the disappearance of the provision of §1001.7, that where an unmarried minor dies leaving property inherited from either of his or her parents, it descends to the other children of the same parent and the issue of those deceased. The provision is actually inconsistent with equal treatment of half bloods under §1002 since it cuts off half-brothers and half-sisters from taking property inherited from decedent's parent who is

not their own. Such a rule not only violates the purported equal treatment of half bloods, but also raises serious problems of identification, especially where cash or securities were the property which was inherited by the minor and which must now pass in this special way. Its only apparent justification, the possible preservation of family heirlooms and other unique chattels, would rarely be operative, and would no doubt be provided for by will in any case when that was really meaningful to the decedent.

Aside from the basic Uniform Probate Code reforms of increasing the spousal share of an intestate estate and greatly simplifying the intestacy rules over those now existant in Maine, the approach of the Code is to treat real and personal property alike for purposes of succession on death. Thus, the rules of Article 2 of the Code, on inheritance (Part 1), spousal forced shares (Part 2), omitted spouse and children (Part 3), and wills and their construction (Parts 5 and 6), draw no lines based upon distinctions between real and personal property. Even the homestead and exempt property allowances under Code Article 2, Part 4, are prescribed in terms of dollar value and the right to them is made not to depend upon whether there is actually homestead or exempt property in the decedent's estate. The rules for marshaling estate assets for payment of claims and bequests are presented in a way that ignores the distinction between real and personal property. UPC 3-902.

The one place where the Uniform Probate Code appears to draw a distinction between real and personal property is, logically, in provisions for recording. For example, UPC 5-421, authorizing letters of conservatorship and orders terminating conservatorships to be recorded in the land records, recognizes the need for preserving the reliability of the land recording system.

Real property is treated differently from personal property in a decedent's estate under present Maine law: the surviving spouse's intestate share is different in realty and personalty (18 M.R.S.A. §§851, 1001); the widow's and the children's allowances are made up out of personal property only (18 M.R.S.A. §§801-806); personal assets of the estate not specifically bequeathed are marshaled ahead of realty for payment of debts and legacies (18 M.R.S.A. §1852); property exemptions are permitted only for specified kinds of personal property actually to be found in the estate at death, and a homestead exemption is available only where decedent actually owned a homestead at death (18 M.R.S.A. §1858; 14 M.R.S.A. §§4401, 4551).

Distinctions between real and personal property were important two centuries ago when a widow was entitled to dower in her husband's real property and when real property formed a much larger proportion of a decedent's wealth than it does now. As a general proposition, the perpetuation of such distinctions no longer serves a useful economic or social pur-

pose in the rules governing transfer of property at death.

2. The Uniform Probate Code System of Inheritance

The provisions of the Uniform Probate Code for intestate succession were discussed to some extent in the preceding section. They will be elaborated in somewhat more detail here.

Widow, no issue, no parent. Under the Uniform Probate Code, in a case where there are no issue and no parents, the intestate share of the surviving spouse is the entire estate. That provision would both enlarge and simplify the rights of surviving spouses compared to what they are presently entitled to under Maine law. As pointed out earlier, under 18 M.R.S.A. §851 and §1001, on these facts (i.e., no issue and no parent) a surviving spouse living with the deceased at his death would take the first \$10,000 worth and one-half the remaining personal property--the other half going to decedent's next of kin, not beyond kin in the second degree (i.e., not beyond grandparents or brothers and sisters of the dead spouse); the surviving spouse in such case would take two-thirds of the real property and the next of kin of equal degree, not beyond the second degree, would share the remaining one-third of the realty. If no such kin within the first or second degree survived, the spouse would take all, on these facts.

In other words, subject to minor qualifications, under the Code the spouse would not have to share with grandparents or



brothers or sisters of the decedent, although under present Maine law, he or she would have to share in this way to the extent of one-half the personal property and one-third the real property--subject to a right in the widow to the first \$10,000 worth of the estate, real or personal.

As if the present Maine scheme were not complex enough, 18 M.R.S.A. §852 introduces another complicating factor. That section provides, among other things, for the valuation of an estate where decedent leaves a widow and no issue. Under §852, the court is to find the value of the "residue" of the estate, real and personal, at date of death, over and above the value of one-third the real estate, plus the amount of debts, charges, administrative expenses and widow's allowance, if any. The value of the residue so found is used in applying §§851 and 1001 to determine the widow's share where she survives but no issue survive. Why the "residue" is required to be calculated as it is under §852 is not apparent; probably the original idea was that the widow had an inchoate interest in one-third of her husband's inheritable lands (as had been the case under the old regime of dower) and that upon his death her inchoate interest became consummate so that she took one-third of his real estate by the maturing of her own inchoate right and not by inheritance. The strange language of the last two sentences of 18 M.R.S.A. §1001.1 bears out this hypothesis in part since it talks about the one-third descending "free from payment of debts." Whatever their gene-

sis, the arrangements of 18 M.R.S.A §1001 are thoroughly muddled, and the muddle serves no discernible, to say nothing about any useful, purpose. The complex muddle that constitutes Maine's present inheritance law in a case where no issue survive, is hard to overemphasize, and can be thoroughly appreciated only by reading the statute. The size of that share seems to depend among other things on (1) whether the widow was living with decedent at his death, (2) the size of the estate, and (3) whether real or personal property is involved.

Widow, parent(s), no issue. The Uniform Probate Code agrees with present Maine law that if no issue survive but a spouse and one or more parents of the decedent survive, the spouse and parent will share. However, the Code would give the spouse a greater share than present Maine law in those cases to which the intestacy law is likely to apply. Under the Code, the spouse would take the first \$50,000 plus half the balance. Under 18 M.R.S.A §§851 and 1001, the spouse would take different shares of real and personal property under the complex formulae, discussed above, providing for the spouse where no issue survive but kin within the second degree also survive. Usually the spouse would be better off under the Code, but where the estate exceeds \$50,000 and contains much real property, the spouse could be better off under present Maine law. Of course, it is in such larger estates that there is more likely to be a will, and in which

the law of intestacy is therefore far more likely to be inapplicable.

Widow and issue. Under the Code, if the surviving issue of decedent were all issue of the surviving spouse as well, the spouse would take \$50,000 plus half the balance. If decedent leaves issue by some spouse other than the surviving spouse, then the surviving spouse would take half the entire estate. Again, the Code rules would enlarge the share of the surviving spouse. The effect of 18 M.R.S.A. §§851 and 1001 is to give the surviving spouse merely one-third of the estate where issue also survive. The remaining two-thirds, of course, go to such surviving issue.

General Conclusions. The preferability of the Uniform Probate Code provisions over those of Maine law seem self-evident. But even without setting them against such an outmoded and unnecessarily complex system as Maine presently has, the Uniform Probate Code intestacy provisions have definite merits.

Particularly in leaving a larger share to the surviving spouse, the Code no doubt reflects the common desires of most people. It provides greater financial security for the spouse. It indirectly provides security for minor children without the need of guardianship or other protective measures, and in a way that comports with most people's perceptions of how a family should be provided for--through the remaining parent. In addition, where surviving children are not also the children

of the surviving spouse, the Code provides a somewhat larger, and more certain, share to those children in order to provide them more independent means where the surviving spouse might presumably be less inclined to their interest than in the case of his or her own children. UPC 2-102(4).

Share of heirs other than surviving spouse. Under the Code, that part of the intestate estate not passing to the surviving spouse goes entirely to the decedent's issue, if any; if no issue, then to parent or parents, and if no parent, then to issue of parents (i.e., normally, brothers and sisters of decedent) by representation; if no spouse, issue, parent, or issue of parent, then to grandparents and their issue by representation.

### 3. Representation.

One of the reforms of the Code is the manner of using "representation," defined in UPC 2-106. Three methods have been traditionally developed for distributing property to descendants of predeceased heirs, and for determining the proportional division of the shares among them.

Per stirpes distribution divides the "stocks" of heirs at the nearest level of kinship to the decedent whether or not anyone within that level is still alive. Each stock is given an equal share, and the descendants within that "stock" take their respective shares at each generation, divided in the same manner, so long as there is a lineal descendant alive within each new "stock" determined on down the line.

Per capita distribution divides the shares at the closest level of kinship in which there are living members, among those living members, and gives the entire amount equally to those living members. Thus, where one of the decedent's three children predeceased him, leaving a child (grandchild of the decedent), the two surviving children would each take 1/2 and the grandchild would take nothing.

Per capita with representation distribution,<sup>1/</sup> combines these two concepts by dividing the shares at the closest level of kinship in which there are living members (unlike in per stirpes) but allows representation (unlike pure per capita).

The pure per stirpes system is generally considered unsatisfactory because it is likely to result in unequal shares among members of the same degree of relationship to the decedent in many cases, and in equal or even greater shares for more distant descendants than for descendants more closely related to the decedent in other situations. For example, when a predeceased child of a predeceased child of the decedent has one surviving child (great-grandchild of the decedent) and a second child of the decedent is predeceased with two surviving children (grandchildren of the decedent), the surviving great-grandchild will take twice as much as each of the two grandchildren. Per capita distribution is generally

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1. Or perhaps more accurately called per capita with per stirpes representation. Waggoner, "A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants," 66 Northwestern University Law Review, at 630 (1971).

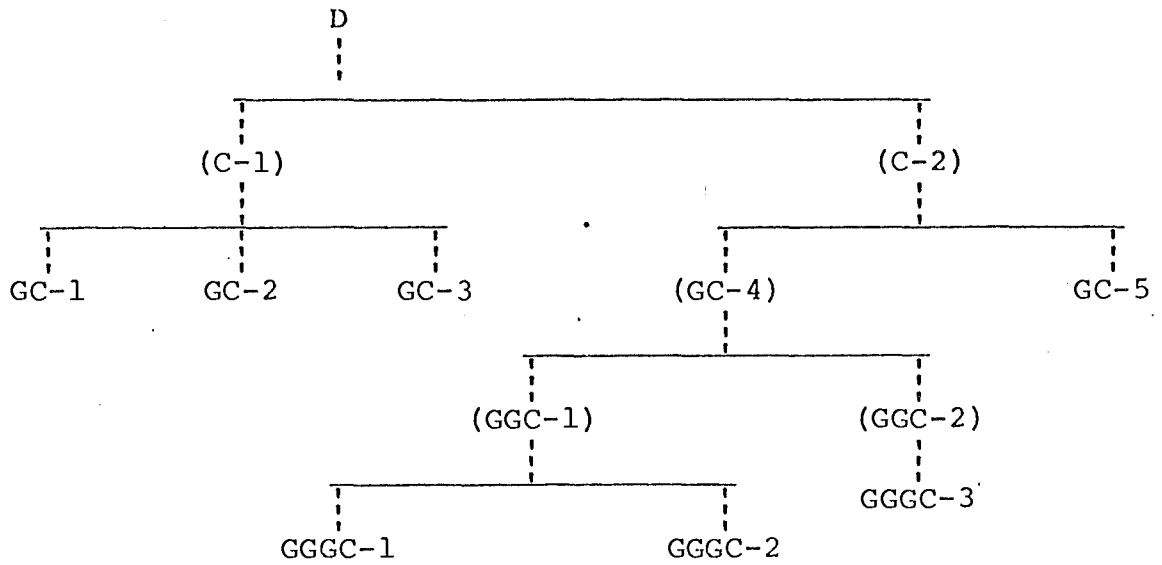
considered unsatisfactory because, although there is equality among all living members of the same degree of lineal relationship, all issue of predeceased members of that same degree are totally excluded; i.e., an entire family line with living descendants may be entirely cut out.

The system of per capita with representation eliminates these inequities to a large extent, but not entirely. The definition of representation in UPC 2-106, however, goes even further to assure equal shares to those of equal relationships.

The following table illustrates the different consequences among the three traditional systems of distribution and the Uniform Probate Code system of representation:<sup>2/</sup>

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2. The form of this table is taken from the Waggoner article referred to in Footnote 1.



D = Decedent  
 () = Persons predeceasing the decedent

	<u>Per Stirpes</u>	<u>Per Capita</u>	<u>Per Capita with Repr.</u>	<u>UPC</u>
GC-1	1/6	1/4	1/5	1/5
GC-2	1/6	1/4	1/5	1/5
GC-3	1/6	1/4	1/5	1/5
GC-5	1/4	1/4	1/5	1/5
GGGC-1	1/16	none	1/20	1/15
GGGC-2	1/16	none	1/20	1/15
GGGC-3	1/8	none	1/10	1/15

The system of representation in the proposed Maine code, which is refined beyond that of the Uniform Probate Code, would yield the same satisfactory results as does the Uniform Probate Code in the above illustration.

Maine provides in 18 M.R.S.A. §1002 for the definition of degrees of kindred, as discussed earlier. Under the Maine statutes, chiefly 18 M.R.S.A. §§851 (personal property) and 1001 (real property), descent to decedent's own issue is per capita with representation. "If no child is living at the time of his death, to all his lineal descendants; equally, if all are of the same degree of kindred; if not, according to the right of representation." 18 M.R.S.A. §1001.2.

However, when decedent leaves no issue, the descent of half the estate to brothers and sisters and their issue under subsections 1001.4 and .5 is not per capita with representation, as a careful perusal of subsections 4 and 5 will reveal. If no brother or sister survives at all, none of their issue take under those subsections if a parent of a decedent has survived. If a parent survives, nieces and nephews and their descendants may take only by representation and only when at least one of decedent's brothers or sisters survived him.

Under subsection 1001.6, descent is essentially per capita without representation, there being no provision for representation. Thus nieces and nephews take to the exclusion of grandnieces and grandnephews. It has been so held in Appeal of Hall, 117 Me. 100, 102 A. 977 (1918). The second clause of subsection 1001.6 also defeats some claims of more remote



relatives in favor of persons claiming through less remote relatives, but it remains possible in Maine for second or more remote cousins to inherit under certain circumstances.

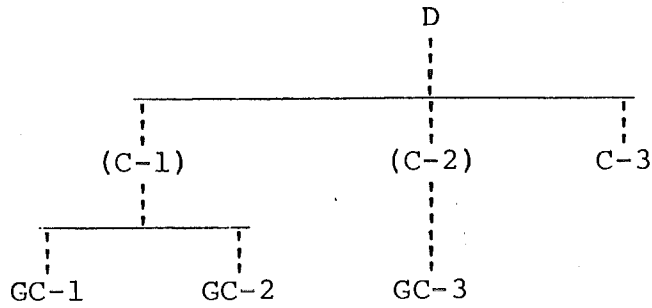
As discussed previously, the effect of subsection 1001.7, on ancestral estate inheritance from unmarried minors, would not be consistent with UPC 2-103 or with the representation system of the proposed Maine code. It is even now inconsistent with equal treatment of half-bloods called for by 18 M.R.S.A. §1002. The provisions of §1002 are subject to the specific provision of subsection 1001.7, but subsection 1001.7 will be given literal application and not extended. Decoster v. Wing, 76 Me. 450, 453 (1884).

A further, and even more satisfactory refinement of all of these systems of representation, however, has been formulated, and is included in the Commission's proposed Maine Probate Code. As the official Uniform Probate Code Comment to UPC 2-103 indicates, the 1975 revisors of the Uniform Probate Code considered an alternative proposal to the kind of representation provided in UPC 2-103 and 2-106. Although it was not accepted as a change in the UPC language, the Comment indicates that most thought it was an improvement over the already improved Uniform Probate Code version and therefore included it in the Comment for consideration of states contemplating adoption of the Uniform Probate Code. The basic affect of the favored but rejected proposal would be to assure that heirs who take by representation would take in equal

proportions with all other heirs who are issue of the ancestor and who are of equal degree of relationship to the decedent. The proposal is contained in an article by Professor Waggoner, referred to in Footnote 1.

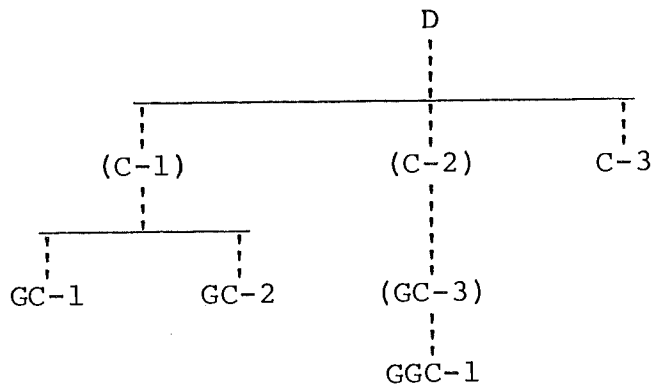
The system adopted by the Commission for the proposed Maine code divides the estate into shares according to the number of heirs living in the closest level of relationship to the decedent, including predeceased members of that level who have surviving issue, as in the case of per stirpes. It differs from other systems of representation by then going to the next level of relationship with living members and redividing the remaining part of the estate equally at that level, and so on, so that the living members of each level of relationship, i.e., at each generation, take equal shares. It is thus referred to as per capita distribution at each generation, and resolves all problems of unequal shares among those of equal kinship and all problems of disproportionately equal or greater shares for those who are more distantly related.

The following two tables, taken again from the Waggoner article, illustrate how this refinement yields results that are more equitable and more in line with what are presumably the desires of most persons planning the distribution of their estates in generic terms:



	<u>Per Capita with Repr.</u>	<u>UPC</u>	<u>MPC</u>
C-3	1/3	1/3	1/3
GC-1	1/6	1/6	2/9
GC-2	1/6	1/6	2/9
GC-3	1/3	1/3	2/9

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	<u>Per Capita with Repr.</u>	<u>UPC</u>	<u>MPC</u>
C-3	1/3	1/3	1/3
GC-1	1/6	1/6	2/9
GC-2	1/6	1/6	2/9
GGC-1	1/3	1/3	2/9

In the first of the two immediately preceding tables it will be seen that the per capita with representation and Uniform Probate Code systems result in unequal shares among the grandchildren, and the second table shows how these two systems can also result in a larger share for the great-grandchildren than for either of the two grandchildren. These results will occur more often under per capita with representation than under the Uniform Probate Code, as shown in the first table, presented on page 20. Under the Waggoner system, adopted in the proposed Maine code, neither of these two problems could ever occur.

The results would seem fairer to the vast majority of people. It is the judgment particularly of those members of the Commission with long and substantial experience in the practice of probate law and estate planning that the overwhelming number of clients presented with the situation would definitely prefer equality of treatment within each generation when thinking in generic terms. If a person wanted to give special consideration to a particular grandchild or great-grandchild, that particular person would no doubt be provided for individually in a will.

#### 4. Advancements and Debts Owed Decedents

Under chapter 115 of Title 18, advancements in Maine are recognized in either real or personal property, but they must be made to a child or grandchild of the decedent.

18 M.R.S.A. §1151. The Code section on advancements, UPC 2-110,

applies also to an advancement to a collateral heir of the decedent. Both statutes contemplate total intestacy. Both the Code and present Maine law require a contemporaneous writing by the donor or written acknowledgment by the heir that the gift is an advancement. Although the Maine statute is not clear that the donor's contemporaneous expression must be in writing, the Law Court has said that it must be. Porter v. Porter, 51 Me. 376 (1862).

The time of valuation is or may be different. 18 M.R.S.A. §1152 takes the value as set by the donor; otherwise as of the time of the gift. The Code in Uniform Probate Code 2-110 provides that the property is to be valued as of the time the heir came into possession or as of the date of death of the decedent, whichever is earlier.

The Code would reverse the rule of 18 M.R.S.A. §1153, which charges the issue of a donee of an advancement with the amount of the advancement in any case where the donee dies before the decedent and the donee's issue become the heirs of the decedent. The Code lets such issue take free of the advancement unless the decedent's declaration or donee's acknowledgment provides otherwise. UPC 2-110.

UPC 2-111 provides for charging a debt to an intestate estate against only the debtor himself, thus leaving one who takes by representation free of any such charge against his ancestor. This provision and the somewhat similar treatment of advancements seems to be based on the more modern view that

it is more fair or realistic to treat one who takes by representation as taking independently, rather than "through" the predeceased ancestor.

Maine has no statute directly in point, although 18 M.R.S.A. §1901 does provide for a high-priority lien or right of set-off against the legacy or distributive share of a successor to the estate to cover his indebtedness. See also 18 M.R.S.A. §1903. No Maine case has been found deciding whether the lien persists against the issue or other heirs of a debtor who dies before the decedent. As usual, the American cases divide on the question, and UPC 2-111 seems to codify the prevailing rule, and would thus fill a minor gap in this area of the law in a way that comports more with the law of other states. See Atkinson, Wills §141 (2d ed. 1953); 26A C.J.S. Descent & Distribution §71, at nc. 66 (1956).

#### 5. Survival Requirement

UPC 2-104 requires an intestate taker to survive the decedent by 120 hours (five days) or be treated as if he had predeceased the decedent. Section 2-601 is the counterpart of this general approach as applied to a devisee in a testate situation. The Maine statutes contain no language similar to these sections.

Some question may be raised about these sections because of possible adverse tax consequence for estate plans that do not provide otherwise (i.e., which do not reverse this 120 hour survival requirement) and thus would risk the possible

loss of the marital deduction under §2056 of the Internal Revenue Code.

For example, property passing to a decedent's surviving spouse which gives that spouse more than a "terminable" interest is eligible for the marital deduction for estate tax purposes. If §2-601 or 2-104 apply to such a surviving spouse, the property passing to her will not be deemed a terminable interest and thus not eligible for the marital deduction if in fact she does not survive by at least 120 hours. See I.R.C. §2056(b)(3). If the spouse does survive the decedent by 120 hours or more, no loss of the marital deduction will occur if the surviving spouse's interest is otherwise eligible for that deduction. Thus, the tax consequences would apply only in situations where the spouse, in fact, survived the decedent and in fact dies within five days thereafter. It is, in other words, a possibility to guard against.

The language of UPC 2-601 expressly provides for contrary provisions in a will, and the Uniform Probate Code Comment to UPC 2-104 notes the problem and points out that, under that section, "to assure a marital deduction in cases where one spouse fails to survive the other by the required period, the decedent must leave a will" in order to make express provisions that will eliminate the applicability of UPC 2-104 and supersede the same language of UPC 2-601. Any adequate estate plan for an estate where the marital deduction is important will

take care of the problem.

The theory behind the Uniform Probate Code position is that (1) in the vast majority of intestate estates the marital deduction is not important, and (2) in any estate where the marital deduction is important there will be a will which will contain express provisions eliminating the rule of UPC 2-601. In situations where the marital deduction is not important, which constitute the great majority of estates, the rule of UPC 2-104 and 2-601 is desirable.

The Uniform Probate Code position seems both right in its weighing of the likely desires of persons in the situations to which these sections would apply, and sound in its view of the estate planning practices that would most certainly avoid any tax problems for persons whose interest in protecting the marital deduction is greater than their interest in avoiding possible multiple administration, or the distribution of their estates to unintended and unwanted beneficiaries.

As perhaps an excess of caution the Commission has included a Maine Comment to MPC 2-104 and 2-601 to point out the problem specifically in relation to those sections, and in addition, inserted bracketed language in the last paragraph



of the Uniform Probate Code Comment to UPC 2-104 in order to clarify its meaning.

B. Persons Who May be Successors.

1. Illegitimates

Section 1003 of Title 18 legitimates and gives full rights of succession in Maine to a child born out of wedlock whose parents intermarry; or whose father adopts it "into his family" or acknowledges it formally in writing as his child. Under this section any illegitimate inherits from or through the mother as if legitimate. Where the child inherits from a parent it may inherit from the lineal and collateral kindred of the parent, and they from the child.

The Code itself would make only minor changes in these rules of succession. All the inheritance rights the illegitimate child has under present Maine law would be preserved under the Code. In addition, UPC 2-109 would treat the illegitimate as a "child" for purposes of intestate succession if the parents participated in a marriage ceremony before or after birth of the child even though the attempted marriage is void, and the illegitimate would be treated like a legitimate child of the father if paternity were established by an adjudication before death of the father or were established thereafter by "clear and convincing" proof. UPC 2-109(2)(ii). In these last cases, however, the father or his kindred would not inherit from or through the child unless the father had openly

treated the child as his and had not refused to support the child. This arrangement would either create a mild incentive for paternal recognition of illegitimates, or prevent "unjustified" advantage from being gained by a father or his heirs from a child that the father did not recognize and support during the child's lifetime.

The Maine Statute, 18 M.R.S.A. §1003, does not purport to cover the meaning of the word "child" when used in a will. The Code defines "child" for Code purposes to include anyone entitled to take as a child by intestate succession from the parent whose relationship is involved. UPC 1-201(3); see also UPC 1-201(28) (defining "parent"). Hence the rules for succession by, from or through illegitimates in UPC 2-109 would be pervasive through the entire law of decedents' estates under the Code except for the fact that UPC 2-611 provides that in construing class gift terminology in wills "a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father." The thought is, presumably, that an unrecognized illegitimate is unlikely to be an object of the bounty of any testator making a class gift to "the children of" the putative father. That language of UPC 2-611 is expanded somewhat to more nearly comport to the intent of a testator, as discussed in Part G.6 of this chapter.

The general reaction of writers on the Code is that the Code provisions on inheritance rights of illegitimates mark a

humane advance over existing American laws on the subject, although it is substantially similar in this respect to present Maine law. The most significant change that UPC 2-109(2) would make in Maine law is to make it possible to establish paternity for inheritance purposes by an adjudication of paternity before or after death of the father. The Commission thought it desirable to modify §2-109 somewhat in order to expressly preserve the provisions of Maine law for acknowledgment by affidavit and adoption into the family of the father. These changes are certainly in keeping with the enlightened policy of the Code and would make clear that no rights were being lost to illegitimates by virtue of the proposed probate law revisions.

The present Maine provision for legitimizing a child for inheritance through adoption into the father's family was incorporated as a new subparagraph (ii) to §2-109(2). The provision for acknowledgment by affidavit was incorporated into subparagraph (iii) of §2-109(2)--which is numbered subparagraph (ii) in the Uniform Probate Code version--so that it would be subject to the Uniform Probate Code limitation on inheritance from or through such a child by the father or his heirs if the father has refused to support the child. Without such a limitation, it is arguable that a father could avoid the possibility of the child's inheritance from the father during the child's lifetime, and then establish paternity of the child by affidavit in order to gain inheritance

from or through the child after the child's death.

Some question might be raised about the constitutionality of UPC 2-611 or even UPC 2-109(2) in view of Levy v. Louisiana, 391 U.S. 68 (1967) and some of its progeny. While the law on the matter is not totally certain, it seems likely that requiring "clear and convincing" evidence of paternity to be ad-duced by one asserting the status of child after the putative father's death, would be regarded as justifiable, even though the quantum of proof for a legitimate child would be only a fair preponderance. The well-known difficulty of proving or disproving paternity of an illegitimate would probably save the distinction in treatment from any charge of violating the Equal Protection Clause of the Fourteenth Amendment. Labine v. Vincent, 401 U.S. 532 (1970), upholds some distinction in treatment between legitimates and illegitimates in their inheritance rights.

Two more recent cases make the constitutional problem appear even less significant. In Mathews v. Lucas, 427 U.S. 495 (1976), the Supreme Court upheld a federal Social Security Act provision making it harder for certain illegitimates to establish dependency as a prerequisite to receiving benefits, justifying the distinction on differences in the likelihood of dependency for certain illegitimates. In Trimble v. Gordon, 430 U.S. 762 (1977), the Court struck down, by a 5-4 decision, an Illinois statute that precluded inheritance by illegitimates from their fathers, but expressly recognized

that "[t]he more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally." Id., at 770. Illinois, however, had "failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity." Id., at 770-771. It is just that apparently permissive ground that the Uniform Probate Code would seem to be enacting in these sections.

One problem that does arise from replacing 18 M.R.S.A. §1003 with the modified version of UPC 2-109(2) is that, unlike §1003, the Code contains no provision actually legitimating the child born out of wedlock. The Code sections relate only to the succession to property by, from or through such a child. It may or may not be desired to have the child legitimated in every case where the child is permitted to inherit. However, even in formulating a way to preserve this aspect of Maine law, it is apparent that the present Maine statute has problems of its own. Even under 18 M.R.S.A §1003 the child does not seem to be characterized as the legitimate child of the mother by adoption into her family even though the child is characterized as a legitimate child when the father adopts it into his family. The reason for legitimating the child in one case but not the other is not clear.

As pointed out in the Commission's Report to the Legislature and Summary of the Commissions Study and Recommendations, part IV. P., the Commission's bill would create a new section 220 of Title 19 in order to preserve the general legitimation provisions now contained in 18 M.R.S.A. §1003. In order to deal with the problems that those provisions present, the Commission would also would study them further with the intent of supplementing its Report to the Legislature with recommendations to resolve them at that time.

2. Adopted Children

The principle guiding the Uniform Probate Code treatment of adopted children is the view that they are received fully and lovingly into the adopting family on the same basis as children biologically born into that family. The consequence of such complete integration is to substitute the adopting family in the eyes of the law in place of the biological parents, with no discrimination in regard to adopted children and no rights of inheritance by intestacy between the adopted child and his biological parents and relatives.

UPC 2-109(1), concerning adopted persons, is not entirely in accord with the present Maine statute, 19 M.R.S.A. §535, relating to the effect of adoption on the inheritance rights of the adopted child, the natural parents and the adoptive parents. Under §535, adopted children inherit from their adoptive parents unless otherwise provided in the decree of adoption, and they do not lose their right to inherit from their natural parents or kindred by reason of adoption. Under the Code, for purposes of intestate succession, an adopted child would be the child of the adopting parent and would not be treated as the child of the natural parent, except that adoption by the spouse of a natural parent would not affect the relationship between the child and either natural parent. UPC 2-109(1).

Moreover, the Code's rules of construction include adopted children in class gift terminology of a will; that is, presumably, as members of the class of "children" or "issue" or "descendants" of the adopting parent or parents where the will makes a gift to such "children" or "issue" or "descendants." UPC 2-611. Under 19 M.R.S.A. §535, cases on class gift terminology have gone for or against the adopted child or his successor according to the court's view of the particular testator's manifested purposes. Compare Fiduciary Trust Co. v. Silsbee, 159 Me. 6, 187 A. 2d 396 (1963) ("issue deemed not to include adopted children) with New England Trust Co. v. Sanger, 151 Me. 295, 118 A. 2d 760 (1955) ("heirs at law"

deemed to include adopted children). In general, the Maine court has followed the view that where the testator is the adopting parent it is reasonable to presume that the adopted child is within his intended bounty in making a class gift, but not where the testator is a stranger to the adoption. The Code would abolish that distinction, although it would not preclude a finding that an adopted child was not included in the class as a matter of construing a particular will. UPC 2-611 and 2-603.

Unlike 19 M.R.S.A. §535, the Code provision would not allow the decree of adoption itself to deprive the adopted child of its right to inherit from the adopting parents. It is hard to reconcile such a provision as contained in §535 with the philosophy of the adoption statutes that an adopted child is to be received fully and lovingly into the adopting parents' family without invidious distinctions in treatment from other children of those parents. The same objection may be made to that section's provision that an adopted child shall not inherit property expressly limited to the heirs of the body of the adopters or property from their collateral kindred by right of representation: the adopted child is thus discriminated against in a way that is impossible to reconcile with his total reception into the adopting family. A clearer statement of testator's intent to exclude the adopted child should be required than the use of the antique language "heirs of the body," which suffices under 19 M.R.S.A. §535.



On the other hand the provision of 19 M.R.S.A. §535 per-  
mitting the adopted child to inherit from its natural parents  
creates a conflict with §534 of Title 19 which provides that  
records of adoption are to be kept confidential and separate  
from other records. Oftentimes, in fact, one or both of the  
natural parents may not know who the adopting parents are.  
Years after an adoption, any survivors who once knew about the  
adoption may have forgotten that the child is an heir of his  
natural family. All of this raises a specter of unsettling  
results for estate closings.

The same observations apply to the last sentence of §535  
dealing with the case where the adopted person dies intestate.  
It says that his property acquired from his natural parents  
or kindred shall pass as if no adoption had taken place. This  
is a refinement that is pleasant to contemplate in theory but  
that is unlikely to arise in practice. Compliance with the  
provision could lead to bitter quarreling between the natural  
and adopting parents over the source of the adopted child's  
various items of property.

For these reasons the Code plan of making the adopted child  
wholly the child of the adopting parents seems basically pre-  
ferable to the provisions of §535, except in limited instances  
to be discussed next.

In order to accommodate unusual but appealing situations  
where it could be desirable to provide for inheritance from  
the biological parents, the Commission did modify §2-109(1)

by providing for such inheritance "if the adoption decree so provides." This leaves such non-inheritance as the general rule in pursuance of the policies discussed above, but allows such inheritance in situations to be controlled by the judge decreeing the adoption. The Maine Comment makes clear that the usual rule ought to prevail except in unusual situations where confidentiality is not important, and particularly in a case of the adoption by close friends or relatives of deceased natural parents.

The uniform version of the Code works well in the most common kind of adoption situation, where babies or very small children are adopted, the natural and adoptive parents do not know one another's identity, and where confidentiality is desired. The uniform version of UPC 2-109(1) supports the policy of confidentiality, avoids estate closing problems, and provides for a clean-cut change in the child's status, at the time of adoption. On the other hand, when an older child or adult is the subject of adoption, confidentiality makes little sense, by the same token, the chances of raising estate closing problems is diminished. The child and everyone else know or can easily find out who the natural parents are. There is also more reason to consider the child as being more than just biologically related to his natural parents.

The Commission believes that the most workable way to achieve this accommodation is to allow the judge discretion to consider these factors in individual cases, but to make

clear that the usual rule is full substitution of the parental relationship by placing the forces of inertia on the side of the general rule. Therefore, the language of the proposed exception is as follows: "...except that an adopted child will also inherit from the natural parents and their respective kin if the adoption decree so provides..." If the policy of substitution of the parental relationship is to be served, the exceptional case should be made the one where inheritance from natural parents and kin can be specially permitted by the judge in the adoption decree, leaving as the normal case the one in which there are no inheritance rights between adopted child and natural parents.

There would be an obvious objection, of course, to letting the natural parents or their kin inherit from the adopted child, in competition with adoptive parents and their kin; hence inheritance rights should not normally be made reciprocal between adopted children and their natural parents where adoptive parents and their kin may inherit from the adopted child. That is the reason for the absence of any provision for reciprocity between adopted child and natural kin.

A second issue arises under UPC 2-109(1): the case of a child adopted by its stepparent. The adopted child is the child of the adopting parent, but the adoption in this case has no effect on the relationship between the child and either natural parent. In the official Uniform Probate Code Comment to 2-109(1), it is said that the word 'either' is used so that

children would not be detached from any natural relatives for inheritance purposes because of adoption by the spouse of one of its natural parents. With respect to inheritance by such an adopted child from or through his parents, §2-109(1) quite clearly implies that a child adopted by the new spouse of a natural parent becomes the 'child' of that adopting parent for inheritance purposes and also remains the 'child' of both natural parents; in other words, such a child inherits from both his natural parents and from his adoptive parent. This conclusion is supported by the Code's general policy of treating an adopted child as the child of his adopting parents and by the history of §2-109(1).

UPC 2-109(1) does not spell out the intended result in the unusual case where the child dies before his elders and the child's heirs are to inherit from the child. There may be three sets of heirs of a child adopted by a stepparent. Apparently, the architects of the Code contemplate that any question of who takes in this rare kind of case will be resolved by the courts in an equitable manner. For example, suppose H-1 and W have a child, C-1. H-1 and W are divorced and W marries H-2, who then adopts C-1. While H-1, W, and H-2 are still living, C-1 dies unmarried, childless and intestate. Under 2-103(2) the whole of his estate goes to his 'parent' or 'parents' equally. Section 2-109(1) does not state whether H-1, W, and H-2 are intended to share equally in the child's estate. There appears to be no unfairness, however, in letting

the natural father, natural mother, and adoptive father share equally; at least in this particular kind of situation an equitable result is rather easily reached.

The third sentence of §535 provides that an out-of-state adoption shall have the same effect in Maine "as to inheritance and all other rights and duties" as if the adoption had been duly made in Maine. If the Code were adopted, this sentence would create no conflict with UPC 1-301, relating to the territorial application of the Code, provided §535 were amended to eliminate conflicts with Code provisions on inheritance by, from or through adopted children.

Section 535 would therefore be amended by the Commission's bill to read as follows:

By such decree the natural parents are divested of all legal rights in respect such child and he is freed from all legal obligations of obedience 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 as provided in Title 18-A, paragraph (1) of §2-109. The adoption of a child made in any other state, according to the laws of that state, shall have the same form 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.

Section 538 of Title 19 provides for a petition to annul a decree of adoption for good cause shown after notice and hearing. The section does not outline the consequences of such an annulment of an adoption. The Code does not provide for annulment of an adoption.

Hence, no direct inconsistency is presented between §538 and the Code, although the provision seems out of step with the idea that an adopted child is accepted fully into the family of the adopter and seems to create a second-class status for adopted children. Since this problem seems somewhat beyond the scope of the Commission's area of responsibility, the repeal or modification of this section is not included within the Commission's bill. It seems clear, however, no decree of annulment of an adoption can affect rights which were acquired by, from or through the adopted person under the Probate Code prior to the annulment.

3. Persons Related Through Two Lines

Under UPC 2-114, a person who is related to a decedent through two lines of relationship is entitled to only a single intestate share based on the relationship which would entitle him to the larger share. Section 2-114 was added in the 1975 revision of the Uniform Probate Code because of the increased prospects of a double inheritance by a person under the amended UPC 2-109(1). One situation where this could occur, for example, is that in which a deceased person's brother or sister marries the surviving spouse of the decedent and adopts a child of the former marriage thereby making the child both a natural and adopted grandchild of its grandparents. Section 2-114 is intended to apply to such a situation so as to prevent an adopted person from taking two shares; he may take only a single share based on the relationship which would give him

the larger share. Without this section an adopted person might be better off than the intestate's natural children in some situations--a result that most persons would regard as inequitable.

However, two problems remain. A situation may arise where an adopted person is related to an intestate decedent through two lines and the shares he would take under both lines would be equal, in which case some method should exist to determine under which relationship the adopted person takes, now that there is no larger share which he must take. There is also a problem of disposition of any share which the adopted person does not take because of UPC 2-114.

In order to provide a determination of the first problem, and a means of resolving the second problem, the Commission has added the following two sentences to §2-114 of the proposed Maine code:

In cases where such an heir would take equal shares, he shall be entitled to the equivalent of a single share. The Court shall equitably apportion the amount equivalent in value to the share denied such heir by the provisions of this section.

Under these added provisions, where an heir would have taken two equal shares he will now be given the equivalent in amount of a single share instead of actually taking one share through one line or the other. The Court will equitably apportion the amount of the share that is denied him. This addition seems desirable in order to eliminate the possibility that the heir

could bargain between two sets of heirs over which line he would take through. The added language assures some ratable distribution to other heirs of the benefit created by limiting the multiple heir to one share.

4. Afterborn heirs

Maine has no statute governing the succession rights of children born after the death of an intestate decedent. Posthumous children are given certain rights to share in property passing by the will of their parent where such children have been pretermitted in the will, 18 M.R.S.A. §1004, but neither statute nor judicial decision seems to have dealt with the question of rights of posthumous children on intestacy.

The general rule seems to be that such a posthumous child will inherit as if it had been out and alive when decedent died if it is born within the normal gestation period from the time of the father's death, if it is issue of the decedent himself (i.e., not issue of a collateral), and if it is finally born alive with normal prospect of survival. 26A C.J.S. Descent and Distribution §29 (1956); 23 Am. Jur. 2d Descent and Distribution §89 (1965). No Maine case applying the rule has been found.

By qualifying posthumous children of collaterals to take as heirs in appropriate cases, the Code section UPC 2-108 would thus fill this gap in Maine law and perhaps broaden the inheritance rights of posthumous children beyond what they might enjoy here in the absence of statute. This seems to be



the fair way to do it. Problems of proof of parentage are not seen as raising any significant problem.

5. Aliens.

UPC 2-122 is consistent with 33 M.R.S.A. §451, authorizing an alien to take, hold, convey and devise real estate or any interest therein, and 18 M.R.S.A. §2351 providing that alienage is no bar to receiving property as an heir. However, while §2351 purports to cover all intestate property, 33 M.R.S.A. §451 relates on its face to real property only. UPC 2-122 makes it clear that alienage does not disqualify a person from inheriting any kind of property. The state of Maine places no barriers to the succession by aliens to any kind of property, so UPC 2-112 would not change present Maine law.

Of course, under the supremacy clause of the federal constitution, the provisions of UPC 2-112, as well as 33 M.R.S.A. §451, yield to any valid regulations of the Treasury Department or State Department in conflict therewith.

6. Kindred of the Half Blood

UPC 2-107 provides equal treatment in inheritance for relatives of the half blood. Maine, too, permits inheritance by half bloods, 18 M.R.S.A. §1002, second sentence, although that provision of Maine law is undercut in some cases by the rule of ancestral estate inheritance set forth in 18 M.R.S.A. §1001.7 for the rare case of an unmarried minor with brothers and sisters who has inherited property from a dead parent. See Decoster v. Wing, 76 Me. 450, 453 (1884).

7. Effects of Homicide

UPC 2-803 attempts to deal comprehensively with the property consequences of an intentional killing where the killer would otherwise stand to gain by the death of the victim through inheritance, devise, succession to joint property, or succession as a beneficiary under a life insurance policy. Notable features of the section are as follows:

(1) Intent to kill would be a requisite. Mere negligent homicide would not bring the section into play. The motive for the killing is immaterial; i.e., the killing does not have to have been done for the purpose of getting the property.

(2) The estate of the victim would pass as if the killer had predeceased the decedent. The Code rejects the alternative of imposing a constructive trust on the killer for the benefit of someone else. In the case of joint property, the killing would sever the joint tenancy. An insurance policy would become payable as if the killer had died before the decedent.

(3) A final judgment of conviction for an offense which included the requisite intent would settle the succession issue against the alleged killer. Absent such a judgment, the court must apply the section in a civil suit. The alleged killer might be found not guilty in the criminal trial, but then in a civil trial lose his property rights as a successor. The only reasonable meaning of UPC 2-803(e) is that a party seeking to take away the alleged killer's succession rights would have the burden of proof by a preponderance of the evi-

dence.

In Maine, no statute addresses itself to the question of succession rights by one who intentionally kills the decedent. In Dutill v. Dana, 148 Me. 541, 113 A. 2d 499 (1955), where a son was alleged to have killed his intestate mother and committed suicide a few days later, it was held that he took the estate by force of the inheritance statutes but that he held the proceeds in constructive trust for the next heir who would have succeeded to his mother's estate had he himself not been qualified to inherit. Hence the killer-son's executor was held as a constructive trustee of the proceeds for the benefit of the person who would have been the mother's heir if the son had died before the mother. The Law Court thought that the statutes of descent admitted no exception in case of homicide but considered sufficient justice done by use of the constructive trust.

To the extent that UPC 2-803 rejects the constructive trust approach and simply treats the killer as if he had died before the decedent, it would change Maine law. The result in the Dutill case itself, however, would not be different. The Code approach is much easier to apply than a constructive trust in cases where the killer is a devisee or insurance beneficiary, rather than an intestate successor. Where a will or insurance policy is involved, it may not be clear who the beneficiaries of a constructive trust ought to be. The Code section would handle the job cleanly in the cases of inheritance, de-

wise, or insurance by treating the killer as if he had pre-deceased the decedent.

Under present Maine law, if the primary beneficiary of a life insurance policy murders the decedent and there is a contingency beneficiary, the proceeds pass to the contingent beneficiary. Metropolitan Life Insurance Company v. Wenckus, 244 A. 2d 424 (Me. 1968). This result would be reached also under UPC 2-803. In the Wenckus case, a wife pleaded guilty to voluntary manslaughter of her husband. The question before the court was whether by elimination of the widow's right to take as beneficiary under the policy the proceeds went to the estate of the insured or to the contingent beneficiary named in the policy. The court decided in favor of the contingent beneficiary. If there had been no contingent beneficiary, it seems that the insurance proceeds would have descended as part of the decedent's estate. See Wenckus, id., at 425. Presumably the widow would have held her share in constructive trust for the issue under the rationale of the Dutill case. Under UPC 2-803 the result would be the same as in Wenckus, but by application of a different and more direct line of reasoning.

No Maine cases have been found passing on succession rights of a killer who would take under a will or by survivorship in jointly owned property. No Maine case has treated the problem of the quantum of evidence needed to establish guilt in the civil actions of the kind in question, and no Maine case has

even commented on the question of the extent to which judgment in the criminal case is conclusive in the civil action.

C. Protection of the Family.

1. Allowances and Exemptions

Allowances. Under the Uniform Probate Code, Article 2, part 4, a surviving domiciliary spouse, regardless of sex and regardless of solvency of the decedent's estate, would get a homestead allowance of \$5,000; he or she would get also up to \$3,500 in value of certain exempt property (car, furnishings, appliances, personal effects). The spouse, if any, and minor children whom the decedent supported or should have supported would also be entitled to a family allowance, ordinarily not to exceed \$6,000 in lump sum or \$500 per month for the period of administration, which may not exceed one year if the estate is inadequate to discharge allowed claims. If there is no surviving spouse, the minor children and dependent children of the decedent would share the \$5,000 homestead allowance while all his children, even adults, would share the \$3,500 value of the exempt property. These rights would be in addition to benefits passing by decedent's will unless otherwise provided in the will, by intestate succession or by way of elective share. Waiver, election and renunciation are expressly provided for (UPC 2-204, 2-206).

If the estate were "sufficient," specifically devised property would not be used to satisfy homestead and exempt property rights. The selection of property to satisfy those

rights would be made by the spouse, any guardians of minor children, and any adult children; if they could not agree or if there were no guardians of minor children, the personal representative (i.e., administrator or executor) would make the selections; anyone aggrieved could petition the court for redress. The personal representative would determine the amount of family allowance up to \$6,000 or \$500 per month for one year, and could disburse funds of the estate in payment of the family allowance and any part of the homestead allowance in cash. The probate court would come into action only if disputes arose (UPC 2-404).

The present Maine law provides for an allowance to a widow out of personal property but not out of realty, the amount to be determined by the probate judge in accordance with the family's station in life. 18 M.R.S.A. §801. The Maine statute seems to permit the allowance to the widow only where there is no will or where a testate estate is "insolvent" or where the widow is not provided for in the will or when she waives testamentary provisions made for her. The Code provisions would apply to testate or intestate estates, irrespective of solvency, and could reach real property.

18 M.R.S.A. §806 permits the judge to make an allowance to a widower out of personal property where the wife's estate is solvent (sic) "in the same manner as to a widow from the estate of her husband." Whether this allowance is limited to intestate estates or estates in which no testamentary provision is

made for the widower or estates where he waives such a provision, is not clear. The precise purpose of all these limitations on the widow's or widower's allowance in Title 18 is also not clear. They perhaps had more meaning in the days before a spouse was made an intestate successor.

Under 18 M.R.S.A. §805, the judge may make a similar allowance in an insolvent estate to children below age 14 or to sick children from 14 to 18, or in a solvent estate to children below age 12 "when the income from their distributive shares will be insufficient for their support and education." Like the widow's or widower's allowance, this allowance to certain kinds of minor children must be made out of personal estate.

18 M.R.S.A. §801 permits the judge to award the widow any one meeting house pew of which decedent died seized; the Code contains no similar provision.

Though the Maine statute provides that a testate estate wherein the widow is provided for be "insolvent" as one possible condition for a widow's allowance, §801 proceeds, rather anomalously, to add that if the supposedly insolvent estate turns out to be solvent the judge may award the widow more than he originally gave her.

The present Maine allowance is made by the judge; under the Code, the spouse and adult children would make the family allowance themselves, or the personal representative would make it for them up to \$6,000 or \$500 per month for the period of administration. Only disputes would go to the probate

judge under the Code. A family allowance of more than \$6,000 would require an order by the probate judge.

From the welter of allowance rules in 18 M.R.S.A. §§801-806, one thing seems clear: where provision is made for the widow in decedent's will, which provision the widow does not "waive" or renounce, the widow will not have a right to an initial allowance under §801 unless the estate is insolvent. On the other hand, under §806, a widower seems to get an allowance only if his wife's estate is solvent. Under §805, minor children of different ages become entitled to an allowance depending upon the solvency or insolvency of the estate. There is no limit on the amounts that may be allowed, in which respect the allowances under 18 M.R.S.A. §§801, 803, 805 and 806 resemble distantly the family allowances under UPC 2-403 and 2-404. The Court, under the Code, is not bound, as is the personal representative, by the \$6,000 or \$500-per-month limitation on the family allowance.

Title 18 contains no homestead allowance specifically for the benefit of the surviving spouse or children, but §804 gives a widow "her reasonable sustenance" out of her husband's estate for 90 days after his death, plus free occupancy of his house for that period. No similar privilege is accorded to a widower or to children. Presumably the probate judge passes upon the reasonableness of the widow's "sustenance" though the statute does not say so.

Until recently the Maine statutes did not explicitly



create any exempt property allowance except possibly to the extent that the widow or widower was allowed her or his "ornaments and wearing apparel" when the estate is one falling within §801 or 806. The meeting house pew may be regarded as in the same category. The mortgage assignment provision in §802 is merely procedural.

In 1973, however, a new §1858 was added to Title 18 to make it clear that any part of decedent's estate that would have been exempt from attachment and execution under Title 14, §§4401 and 4552 (sic) at the time he died, shall not be liable or subject to sale for payment of debts or claims against the estate. The reference in the statute to §4552 must be erroneous since that section provides for exceptions to the exemptions provided for in §4551. Surely the purpose was to refer to §4551.

Exempt Property. The kinds of personal property described as exempt from execution in 14 M.R.S.A. §4401 are roughly similar to the kinds of property described under the exempt property provision of the Code in UPC 2-402. However, §4401 also expressly includes certain farm produce and trade tools, professional musical instruments, livestock and other kinds of items that would not seem to fall within the scope of UPC 2-402 and hence would not be picked up by that section of the Code. The dollar limitations on exemptions under 14 M.R.S.A. §4401 are given in the statute.

The specific statutory dollar limits expressly imposed in

14 M.R.S.A. §4401 add up to \$3,830. Of course, other kinds of items having limits of quantity, age, size or weight,<sup>3/</sup> must be taken into account when one thinks about the total value of the exempt property under 18 M.R.S.A. §1858, as amended. In a particular case the exempt property of a decedent under present Maine law could theoretically amount to considerably more than the \$3,500 limit on value of exempt property set by the Code. However, §4401 contains no provisions, like those of UPC 2-402, whereby the spouse or children would be entitled to other assets of the estate, if any, to the extent necessary to make up \$3,830--or any other stated dollar amount of exempt property, which becomes particularly significant in the light of the particularized listing of kinds of property exempt under §4401.

18 M.R.S.A. §1858, through which §4401 operates in a decedent situation, does not state who is ultimately to get the financial advantage of the exemption, whereas UPC 2-402 would explicitly give it to the surviving spouse or, if no spouse survived, the exempt property allowance would not be available. The exemption provided by 18 M.R.S.A. §1858 and 14 M.R.S.A. §4401 is available to the estate whether or not the decedent was survived by a spouse or children. Since the exempt property is unavailable to creditors or other claimants

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3. E.g., one bed and bedding for every two children in the immediate family; Bibles, portraits and school books in use; stoves, charcoal, wood and coal (limits stated in quantities); enough hay for two working cattle or mules or horses for one season; etc.

(18 M.R.S.A. §1858), the benefit under present law will ultimately pass in some form to heirs or devisees of the estate. On the other hand, as noted above, even though the estate contained no exempt property, the Code would permit the exemption allowance for widow or children to be made up out of other assets of the estate, a result that would not be permissible under present Maine law.

If the reference to §4401 of Title 14 in 18 M.R.S.A. §1858 were to be omitted in the proposed code--leaving the Code to take care of the most important case where the property exemption is needed; namely, where a spouse or children survive--the result would be to reduce their protection in any case where exempt property falling within 14 M.R.S.A. §4401 exceeds in value the \$3,500 limit stated in UPC 2-402. Where the estate is a farm or small business operated by the decedent as an individual, the effect of 18 M.R.S.A. §1858 with 14 M.R.S.A. §4401 is to tend to preserve that farm or business as a going concern, presumably to the benefit of the family and the community. If §1858 were changed as described, this social value would be impaired. Even where the distributees of the estate do not include the spouse or children, this advantage of exemption under §1858 may be realized: for example, where a bachelor dies leaving his subsistence farm or small fishing business to his brother or sister, the successor is helped in maintaining the farm or business as a going concern by the exemptions afforded in 14 M.R.S.A. §4401.

Rather than reducing the role of the §4401 exemptions, but without foregoing the probably more generally significant exemption provisions of the Uniform Probate Code, the Commission modified the first sentence of UPC 2-402 to read as follows:

In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding \$3,500 in excess of any security interests therein in property exempt under Title 14, §4401 on the date of death of the decedent.

No changes in the other provisions of UPC 2-402 were made.

The results of this change would be as follows:

(1) The estate would keep all property exemptions it is entitled to now under 18 M.R.S.A. §1858.

(2) In a domiciliary's estate, the spouse (or children if there were no surviving spouse) would get the \$3,500 worth of exemptions or cash substitute therefor under UPC 2-402.

(3) After the domiciliary spouse (or children) took \$3,500 worth of exemptions under UPC 2-402, the benefit of any additional (unused) exemptions would ultimately go to the estate since the exempt property could not be reached by creditors under 18 M.R.S.A. §1858, which is preserved in the Commission's bill as §2-405 insofar as it relates to the exempt property under 14 M.R.S.A. §4401.

(4) The total quantity of property exempt from creditors' claims would not be reduced. The only change would be to make the first \$3,500 in value of exemptions available to the spouse or children as under the Code. Under the Code, that amount of

exemptions would be available regardless of whether the particular kinds of exempt property existed in the estate.

(5) If there were no spouse or children, the exemptions would be available to the estate exactly as they are now.

Homestead Exemption. As amended in 1973, 14 M.R.S.A. §4551 exempts a homestead from attachment, execution or forced sale under court process; "provided that only so much of such property as does not exceed \$3,000 in value is exempt." Section 4552 excepts from the foregoing section claims secured by mortgages on or security interests in the homestead and claims of lien creditors under the mechanics lien statutes. "Homestead" is defined in §4551. Section 4553 provides for a forced sale of the householder's interest in his homestead to the extent that it exceeds \$3,000 in value. Section 4554 preserves the exemption for the householder's estate after his death; this section thus reiterates the rule of 18 M.R.S.A. §1858 so far as §1858 preserves the homestead exemption after death of the householder.

The Code provides in UPC 2-401 for a homestead allowance of \$5,000 to a surviving spouse or to minor or dependent children where the decedent was domiciled in the state. This allowance would be exempt from all claims against the estate.

The homestead exemption under 18 M.R.S.A. §1858 (or 14 M.R.S.A. §4554) and the homestead allowance under UPC 2-401 are not the same. The present exemption is available to the estate against creditors and, since it results in \$3,000 worth

of exempt assets for the estate, normally creates a benefit to the intestate takers or the residuary devisees whoever they may be. The Code homestead allowance would benefit, in the amount of \$5,000, only a spouse or minor or dependent children. If there were no spouse or child, there would be no homestead allowance under the Code. The Code homestead allowance would be available only to the spouse or minor children of a decedent who died domiciled in the state. The Code allowance would be available even though the decedent owned no homestead property worth \$5,000 at the time of death.

If the reference to 14 M.R.S.A. §4551 (erroneously referred to as §4552 in the statutes) that appears in 14 M.R.S.A. §1858 were repealed, and 14 M.R.S.A. §4554, were amended to provide for the termination of the homestead exemption at the debtor's death, the Code (UPC 2-401 would do the job of providing a homestead allowance where the householder dies, which would then be \$5,000, available only to the surviving spouse, if any, or, if none, to the minor or dependent children of a domiciliary decedent. If no such spouse or children survived, no homestead allowance would be available under the Uniform Probate Code. The homestead exemption of \$3,000 provided in 14 M.R.S.A. §§4551-53 would continue while the person is living, but terminate on the death of the householder, to be replaced at that point by UPC 2-401.

The homestead exemption under present law is somewhat of an anomaly: it represents a compromise between the ultimate

need of creditors to be able to resort to the debtor's property for payment of his debts and a legislative tenderness for the family of the debtor--be he dead or alive--in their need for a place to live. The anomaly lies in the fact that the compromise is so arranged that the second objective is certainly not met on today's housing market. The exemption is not only partial but relatively small, and a determined creditor can enforce payment by having the actual homestead sold on execution sale. The debtor is then given the amount of the homestead exemption (\$3,000) out of the proceeds of the execution sale (18 M.R.S.A. §4553)--a benefit which falls far short of assuring a home for him and his family. Thus, about all that the exemption achieves is to assure the householder a little cash when his house is sold on execution, enabling him perhaps, with the exempt personal property allowed him under 14 M.R.S.A. §4401, to make a fresh start.

To be sure, in the typical case of a mortgaged home, the exemption will not be available as against the mortgage. 14 M.R.S.A. §4552. Since the mortgagee of the homestead is in most cases the principal creditor of the householder, the homestead exemption is a less valuable privilege for most householders, practically speaking, than one might at first suppose.

One virtue of the Code provision from the point of view of a surviving spouse or minor child is that the allowance will be made up out of assets in the decedent's estate regard-

less of whether the decedent owned any homestead in fact. Like the other Code allowances, the homestead allowance reflects a judgment of overriding concern for the surviving spouse. Under the Code, it would not matter whether the decedent owned the family home. For these reasons, the Commission's bill adopts the Uniform Probate Code provisions for the homestead allowance upon the death of the householder. The proposed Maine code, and its accompanying amendments of present Maine sections would:

- (1) adopt UPC 2-401 as it stands, and
- (2) repeal the reference to §4551 (erroneously "4552" in the statute) in the present 18 M.R.S.A. §1858, leaving the Code to take care of the most important case where the homestead exemption is needed (where a spouse or children survive);
- (3) amend 14 M.R.S.A. §4554 to read, "Upon the death of the householder the exemption provided by §4551 shall terminate; provided, however, that nothing herein shall be deemed to affect the homestead allowance provided by Title 18-A, §2-401"; and
- (4) relocate the amended 18 M.R.S.A. §1858 as §2-405 of the Maine Probate Code.

Comparison of Allowances Generally. Except for the possibility of certain exempt property allowances discussed above, the allowance provisions of the Code are more extensive than those in existing Maine law, both in the amount permitted to be allowed and in the applicability of the statutes involved



to all kinds of estates--testate or intestate, solvent or insolvent, and composed of real property or personal property. Any homestead allowance or family allowance that could be made under present Maine law could be made under the Code--even to the meeting house pew under §801 and the mortgage assignment under §802.

Under present Maine law, the widow's allowance out of personal estate may have priority in an intestate estate over other expenses of and charges against the estate (18 M.R.S.A. §851), although 18 M.R.S.A. §3051 seems to put funeral and administrative expenses ahead of allowances. The Code ranks the homestead allowance, exempt property allowance and family allowance in priority among themselves (UPC 2-402, 2-403), puts them ahead of all other claims (UPC 2-403) and explicitly states that the allowance rights are in addition to any benefit or share of the spouse or children except where a will provides otherwise (UPC 2-401, 2-402, 2-403). The Maine allowance statutes do not expressly state that the allowances under 18 M.R.S.A. ch. 101 are in addition to other benefits or shares of spouses or children, but it can be inferred that they are from 18 M.R.S.A. §3051 (priority of claims and payment in an insolvent estate). That same section (§3051) implies that funeral and administration expenses rank ahead of allowances (18 M.R.S.A. §851 is seemingly contra) though it is hard to see how, as a practical matter, the allowances, which may be badly needed, can be paid promptly in an estate

of doubtful solvency when they are not given priority over administration expenses. It must not be forgotten, also, that allowances may be made only out of personal estate under present Maine law.

Summary of Proposed Maine Code Provisions. During a person's lifetime, a homestead allowance is provided under 14 M.R.S.A. §§4451-4553, and property exempt from attachment is defined by 14 M.R.S.A. §4401. Under the proposed Maine code the intervivos homestead exemption would end upon the person's death and §2-401 would apply (see amended 14 M.R.S.A. §4554); the same definition of exempt property would apply after the debtor's death that applied to him during his lifetime (see §2-402's reference to 18 M.R.S.A. §4401), but would be specifically directed in favor of the spouse or children to the amount allowed in §2-402, with any remaining exempt property directed in favor of the estate (see MPC 2-405).

Thus, (1) the present intervivos homestead exemption applies during the debtor's lifetime, (2) the UPC homestead provision takes over at the debtor's death, (3) the present definitions of other exempt property are maintained, but (d) those other exemptions are directed specifically to the surviving spouse or children in conformity with the Uniform Probate Code while (5) any balance of other exempt property is preserved to the estate itself.

It should be noted that the proposed §2-405 is an additional section to replace, in amended form, the present

18 M.R.S.A. §1858 in order to capture for the decedent's estate the full amount of property that is currently exempt under Maine law.

The family allowance provision of §2-403 adopts intact the Uniform Probate Code version and would replace the present Maine law (explained in the Maine Comment to the section), which is both more ambiguous and more detailed.

Allowance to Adopted Child. Under §537 of Title 19, the judge of probate, "on the death of either of said adopters," may make a reasonable allowance to an adopted child from the personal estate of the deceased if circumstances warrant it.

This section is unnecessary under the proposed Maine Probate Code, since §2-403 provides for a family allowance to surviving spouse and children (including an adopted child by definition, of course). The Code section contains certain limits in application that are not apparent on the face of §537: (1) under the Code, the allowance would be made only where the decedent was a Maine domiciliary; (2) the allowance would be limited to one year if the estate were inadequate to discharge allowed claims; (3) the allowance would normally be paid to the surviving spouse for the use of that spouse and the appropriate children. A judge of probate is likely to exercise his discretion within similar limits even under the broad wording of §537.

## 2. The Elective Share

A traditional, and still fairly well engrained, feature of

property law has been to try to provide a surviving spouse some assurance against disinheritance by virtue of the other spouse's testamentary dispositions and intervivos transfers of his property. The problems in any such attempt are inherent. Any scheme to achieve this objective must compete with, and accommodate itself to, the need for stability in land titles and the ability to transfer property, and the freedom to control one's own property. Any such system should also take into account a concept of what is a fair share of what property for the surviving spouse, and attempt to implement that definition.

One of the most original and striking features of the Uniform Probate is its treatment of the surviving spouse's right to an elective share. In light of the above considerations, that treatment attempts seriously (1) to provide fair and meaningful protection to the surviving spouse by including certain intervivos transfers in the definition of the amount of property to be considered, (2) to limit its effect on land titles and transferability by concentrating on the kinds of intervivos transfers that are usually considered to be "will substitutes", (3) to avoid the possibility of over-protecting the surviving spouse in a way that is unfair to the deceased spouse by including in the property from which the share is to be taken, the property already transferred intervivos or by will to the surviving spouse, and to count such property toward the satisfaction of the share, (4) to protect per-

fectly legitimate estate plans from such unfair disruption in the same manner as described in item (3) above, and (5) to protect bona fide purchasers from transferees of the elective property from the obligation of contribution to the elective share.

Before going into the Uniform Probate Code approach in more detail, however, it is instructive to look first at Maine's present system of rights of descent, continued primarily in §§1051-1061 or Title 18.

Section 1051 abolishes dower and curtesy. The rest of the section is obsolete, merely saving such rights as a surviving spouse married before May 1, 1895, had in the estate of a spouse who died before January 1, 1897.

Section 1052 permits a spouse of any age to "bar his or her right and interest by descent in an estate conveyed by the other" by joining in a deed or giving a sole deed. The section says that he or she "shall not be deprived of such right or interest by levy or sale of the real estate on execution."

Curiously, the present "rights of descent" are nowhere explicitly spelled out in Maine's statutes. 18 M.R.S.A. §§1852-1854, fortified by 19 M.R.S.A. §161, clearly imply that a spouse has some sort of inchoate interest in the real estate owned in fee by the other spouse during coverture, and that the inchoate interest cannot be eliminated by the owning spouse except by consent of the nonowning spouse. Where the husband owns the fee, the wife's consent may be given by a jointure she consents to in accordance with §1053 or by pecuniary pro-

vision for her benefit under §1054. Those two sections seem to apply in terms only to the interest of the wife in her husband's lands, not to a husband's interest in his wife's lands, although §§1056-1058 refer to a widower's elective share.

The special effectiveness of premarital settlement is reiterated in 19 M.R.S.A. §168, giving a jointure, executed "by husband and wife" before marriage (sic) before two witnesses, determinative effect to bar rights of each in the estate of the other completely.

§1055 gives the widow an election to waive "a jointure or provision" made before marriage "without her consent," or one made after marriage. If she makes such an election to waive within six months of her husband's death and files it in writing in the registry of probate, she is entitled to her right and interest by descent in her husband's lands. Releases of dower or curtesy in conveyances or mortgages by husbands or wives are to be construed as including all rights by descent (18 M.R.S.A. §1059).

Section 1060 gives a wife a right or interest by descent in mortgaged lands even where she has heretofore released her "right of dower," but she has that right or interest only as against others than the mortgagee and his successors. She is also entitled to participate, in effect, in a redemption of real estate from a mortgage where heirs of the mortgagor have redeemed the property.

Section 1061 is obsolete, relating to transactions before January 1, 1897.

Sections 1056, 1057 and 1058 establish the right of a widow or widower to elect whether to take under the provisions of a will or to take her or his intestate share of the estate.

The following features of the present Maine law should be noted:

1. No difference appears in treatment between widows and widowers with respect to the right of election.

2. Except as may be clear otherwise from the will, the survivor may not have both the will provisions and the intestate share.

3. A "mentally ill" surviving spouse makes an election by a guardian or guardian ad litem. (See §§1056, 1057)

4. Elaborate provisions deal with the time by which election must be made (§1056).

5. If the surviving spouse elects against the will, he or she takes the same share of real and of personal property as on intestacy except that if the dead spouse left no kindred, the electing spouse takes as if there were kindred. Life insurance proceeds are not part of the decedent's estate except to the extent of three years' premiums. Berman v. Beaudry, 118 Me. 248, 107 Atl. 708 (1919).

6. Notice of the election is filed in the registry of deeds of any county where the realty lies. (§1058)

The Uniform Probate Code contains a provision that would

abolish the estates of dower and curtesy, UPC 2-113, and would therefore assure the continued death of those doctrines despite the repeal of 18 M.R.S.A. §1051.

The Code (UPC 2-201) gives a surviving domiciliary spouse a right to take an elective share of one-third of the "augmented estate" defined in UPC 2-202. The augmented estate is the regular probate estate less funeral and administrative expenses, the various allowances, and enforceable claims; plus the value of property owned by the survivor at decedent's death and derived from decedent not for full consideration; plus the value of property given by the surviving spouse during the marriage to someone other than decedent where it would have been otherwise includible in the augmented estate of the surviving spouse if the survivor had died first.

The two major purposes of this complex-appearing system are set forth in the Comment to UPC 2-202. Briefly, the system is designed, on the one hand, to discourage schemes to disinherit the spouse and, on the other, to discourage the surviving spouse from electing against the will and upsetting estate plans where substantial provision has been made for that spouse by insurance, joint tenancy, living trusts and gifts. The Maine Law Court has not had occasion to treat the problem of the decedent who transfers property in contemplation of death in order to reduce the size of his spouse's intestate share. The Code provisions would settle these issues in perhaps the fairest manner yet devised.



In the case of a protected person, the Code requires a court order to elect against the will after a finding that the election is necessary for adequate support for the protected person during probable life expectancy (UPC 2-203); present law permits election by the guardian or guardian ad litem (18 M.R.S.A. §§1056, 1057).

The Code provides for waiver of the right to elect, wholly or in part, before or after marriage (UPC 2-204). Under 18 M.R.S.A. §§1053-1055, it is not clear that a wife may permanently bar her own right to elect by any agreement she makes after marriage. Since the Maine statutes are silent about the effect of a husband's agreement not to elect, it may be that he is bound by it if the agreement is not vitiated by duress or mistake. The Code §2-204 is clearly applicable to both husband and wife.

Section 2-205 of the Code outlines the procedure for the surviving spouse's pursuit of the elective share. The petition for it must be filed within 9 months after the death of the decedent or within 6 months after the probate of the decedent's will, whichever limitation last expires. This period is to be compared with 6 months after probate of the will under 18 M.R.S.A. 1056, 1057.

The Code is careful to provide for notice to persons who may be affected by a decision to take an elective share. UPC 2-205(b). Under the concept of an "augmented estate," the surviving spouse may conceivably be entitled to contribution

from donees of portions of the augmented net estate who acquired their property from the decedent by non-testamentary transactions. UPC 2-205(d), 2-207. This fact makes notice to persons who may have such a duty of contribution important. The proceeding for contribution may be maintained, however, against fewer than all persons against whom relief could be sought. UPC 2-205(d).

By contrast with present Maine law (18 M.R.S.A. §§1056, 1057), the Code permits, in fact encourages, the electing spouse to take under one or more provisions of the will. The total benefits are not thereby reversed, however, since the benefits passing to the spouse under the will are then charged against the elective share. UPC 2-207 (a). The surviving spouse is not compelled to accept the benefits devised by the decedent, but if these benefits are rejected the value of the rejected benefits is charged to the electing spouse as if the devises had been accepted, so that there is obviously very little incentive not to follow the original testamentary plan to the extent that it goes toward satisfying the elective share. UPC 2-207 (a), and Uniform Probate Code Comment thereto. The purpose of this provision is to protect as effectively as possible the decedent's overall scheme of distribution. Under the Code, the surviving spouse would also have the homestead, exempt property and family allowances whether or not he or she elected to take the elective share (UPC 2-206, as amended in 1975), except that if it is clear from the will that benefits under the will are to be in lieu of allowance rights the survivor may not take the allowances without renouncing the beneficial provisions of the will. UPC 2-401, 2-402, 2-403. See Uniform Probate Code Comment to §2-206. The whole tenor of these provisions of UPC 2-206 and 2-207 is to make election against the will less attractive to

a spouse who is actually well taken care of in the testator's total estate plan.

Finally, special attention should be drawn to UPC 2-301, which provides for the case where a testator becomes married after executing a will but fails to change the will with the result that the spouse is omitted. While such a spouse, if a domiciliary, could take an elective share under UPC 2-201, the special section, 2-301, gives an omitted spouse the alternative right to take an intestate share. The devise in the will would abate in accordance with UPC 3-902. The omitted spouse does not have this right if it appears that the omission was intentional or if the testator provided for the spouse by transfer outside the will and it can be shown that testator intended that the transfer be in lieu of a testamentary provision.

Professor Richard W. Effland of Arizona State University Law School, reporter for the Uniform Probate Code project in Arizona, prepared an analysis of the Code elective share provisions that is remarkably clear and helpful. It is set forth in its entirety, as follows:

THE ELECTIVE SHARE  
Richard W. Effland

A. BASIC PREMISES OF THE CODE PROVISIONS

1. The surviving spouse should receive protection against intentional disinheritance. Although an argument against any protection can be made, almost all states have some form of protection, based historically on the dower-curtesy concepts but extended by statute to a share in personalty. Although most husbands and wives make ample testamentary provision for the surviving spouse, a rare testator disinherits the spouse unfairly; to attack such a will on the grounds of lack of capacity is difficult as a legal solution and often psychologically unacceptable.
2. The protection should be in the form of a fixed share rather than based on a flexible amount geared to need. The share adopted is one-third (patterned on the existing statutory share in most states). An amount based on need would require judicial discretion and render election uncertain. (Recognition of need is found in the Code provisions relating to the family allowance, but is limited in scope.)
3. The surviving husband should have an elective right, just as the surviving widow has. While American tradition treats the widow as the one needing protection, the shift in wealth ownership patterns may reverse the situation. Thus, if a husband puts his wealth during marriage in

his wife's name, or if she is the principal earner and invests in her own name with the husband's income used for family support, the husband needs protection against a will of the wife disinheriting him.

4. The protection should be meaningful. To do this it must take account of wealth passing outside the probate process and not be measured just by the probate estate. Inchoate dower of the wife and the marital interest of the husband afforded complete protection in a landholding society. But an elective share in real and personal property passing through probate is unrealistic if property arrangements can be made during lifetime to avoid probate (joint tenancy, revocable trusts, contractual obligations payable on death to named beneficiaries). Moreover, an elective share in the probate estate alone often works unfairly in favor of the surviving spouse who has received most of the decedent's wealth by nonprobate methods of succession. To accomplish a fair share a new concept, that of the "augmented estate," was developed as the base for computing the share.

5. Estate planning should be facilitated, so that the testators can frame an estate plan free from disruption in appropriate cases. Hence, marital agreements, waivers, etc., should be recognized as ways of barring election.

6. The elective share should disrupt the estate plan as little as possible. Therefore testamentary and other provisions for the spouse, even though limited to a life estate, should be counted against the elective share.

7. It is undesirable to gear the right of election to an issue of whether the surviving spouse deserves any share of the marital wealth. If one spouse violates the marriage vows, the only answer is for the other to seek divorce during lifetime. The Probate Court should not be turned into a court to try post-mortem divorce issues.

B. COMPUTING THE ELECTIVE SHARE

1. The elective share is one-third of the "augmented estate." §2-201.
2. The augmented estate is arrived at by adding together the following:
  - a. the probate estate minus funeral and administration expenses, allowances and exemptions, and enforceable claims; plus
  - b. the value of property transferred gratuitously during marriage to persons other than the surviving spouse by transfers of the type specified in §2-202 (1); plus
  - c. the value of property owned by the surviving spouse at decedent's death traceable to gratuitous transfers from the decedent. (If the surviving spouse has derived property from decedent and in turn transferred it gratuitously to others by a transfer of the type specified in §2-202 (1) this would also be included.) [§2-202(2)].

The principal differences between property transferred to others under b. above, and the property chargeable to the spouse under c. lie in the following: a transfer to a third person is not included if made before marriage whereas property given to the spouse before marriage is included; life insurance payable to third persons is not included but life insurance payable to the spouse is; irrevocable transfers as to which decedent retained neither a life estate nor power to revoke or invade, made more than two years before death, are not included if in favor of third persons but all gifts to the surviving spouse must be accounted for.

3. The surviving spouse has the burden of proof as to source of his or her wealth. [§2-202(2) (iii)].
4. Election does not affect the share the surviving spouse takes under the will or by intestate succession, but this has to be credited against the elective share. [§2-207(a)]. However, the spouse may renounce the

will provision if desired (as where it is a life estate). [However, if the surviving spouse renounces benefits passing under the will, the amount of his or her elective share is decreased by the value of the renounced benefits. §2-207(a)].

5. Liability for the balance of the elective share is equitably apportioned among the recipients of the augmented estate. §2-207(b).

6. The surviving spouse receives the homestead allowance, exempt property, and any family allowance in addition to the elective share. [§2-206].

7. Examples: Decedent leaves a net probate estate of \$60,000. His will devises \$5,000 to his widow and the residue in trust for his children. During marriage he set up a revocable trust for children by a prior marriage, valued at \$100,000 and put real estate valued at \$80,000 in joint tenancy with them; he had life insurance valued at \$10,000 payable to the wife and a \$25,000 policy payable to a brother; the wife owns stock valued at \$20,000 given her by the decedent as a wedding present. The augmented estate would include all of the items except the \$25,000 policy payable to the brother. The elective share would be \$90,000 (1/3 of \$270,000). The wife would have to credit against this the \$20,000 stock, the \$10,000 life insurance, and the \$5,000 provision under decedent's will. She would be entitled to \$55,000 contributed by the testamentary trustee, the children who take the realty as surviving joint tenants, and the trustee of the living trust, in proportion to the value of their interests. The widow would also receive the homestead allowance under §2-401, exempt property under §2-402, and a family allowance under §2-403; note these were deducted before arriving at the \$60,000 figure for the net probate estate.



C. PROCEDURE AND RELATED MATTERS

1. The right to elect is personal. If the surviving spouse dies, her personal representative does not have a right to elect. If the surviving spouse is or becomes incompetent, the right of election can be exercised only by an order of court (not by the conservator) in which protective proceedings are pending, after a finding of necessity. §2-203.

2. The period for election is [9] months after [the date of death, or within 6 months after probate of the decedent's will, whichever limitation last expires], but be extended by court order. [§2-205(a)].

3. The probate court determines the amount of the elective share and fixed liability for contribution. §2-205(d).

D. PLANNING TO AVOID ELECTION

1. Transfers may be made before marriage. Thus, if client is contemplating a second marriage, he can set up a revocable, amendable trust before marriage. This would not be included under §2-202(1) because only transfers during marriage are included.

2. Consent of the spouse to transfers during marriage excludes the transferred property from the augmented estate. The consent should be written. [§2-202(1)].

3. A prenuptial or postnuptial agreement will bar a right of election. A unilateral waiver will also prevent election. Client must make a fair disclosure of assets and the legal effect of the document. §2-204.

4. In cases of serious marital disharmony, a complete property settlement entered into after or in anticipation of separation or divorce is a bar. §2-204. Special pro-

visions of the Code may also operate to bar a person from claiming as surviving spouse if there has been an invalid divorce, regardless of a property settlement. §2-802(b).

Although the principal criticism of the Code provisions by those first approaching them is that they are complex, they are less complex than the statutes on the subject now in effect in Maine, and far more explicit.

It is provided in 18 M.R.S.A. §1057 that the elective share of the spouse shall be the same as the intestate share except that if testator dies leaving no kindred, the spouse shall take the share he or she would have taken had kindred survived as well as the spouse. In the most common case, where children survive, the spouse in Maine now takes on intestacy one-third the real estate and \$10,000 plus one-half the remaining personal estate subject to all the conditions, qualifications and exceptions discussed in parts A.1. and 2. of this chapter.

Where no issue survive but kindred within two degrees survive, the intestate share of the spouse in Maine now is, subject to the usual qualifications, \$10,000 plus half the remaining personalty plus two-thirds of the real property. In the absence of issue this would be the spouse's elective share, whether or not kindred also survive decedent. A set of facts can be easily devised in which the surviving widow would acquire more under existing law, electing against the will pursuant to

18 M.R.S.A. §§1056-57, than under the Code electing one-third the augmented estate pursuant to UPC 2-201 and 2-202. However, the situation in which the spouse is not likely to want to elect against the will is the one in which the testator has made large transfers out of the estate during his lifetime, and while the Code picks up these transfers in the augmented estate present Maine law seems to leave them beyond the surviving spouse's reach. On balance, the Code would give the surviving spouse more in the type of case where more is needed. The Code has the added desirable feature of protecting the probate estate against the occasional greedy spouse who has already been well provided for by trusts, insurance, joint property, and other non-testamentary arrangements but wants to elect against the will.

The Code philosophy of sustaining fair waivers and agreements between spouses before, during, or near the end of marriage is not new to Maine where such waivers and agreements are now sustained in certain circumstances under 18 M.R.S.A. §§1051-1055. Those particular Maine statutes apply in terms, however, only to barring the spouse's interest by descent in real property conveyed by the other spouse. They do not in terms cover the relinquishment of the spouse's complete elective share. The two sections, 18 M.R.S.A. §§1056 and 1057, creating the spouse's right to take her elective share against the will and establishing the amount of that share, contain no provisions expressly validating an agreement to waive

that share. If such agreements are upheld, it is by application of the general provision of 19 M.R.S.A. §164 validating a wife's contracts with her husband.

In the heyday of dower and curtesy, though antenuptial agreements ("jointures") were upheld by courts of equity in the absence of fraud, promises in a settlement by a married woman to her husband to give up her dower rights were not enforced against the widow's wishes even though the settlement complied with the requirements of a legal jointure except for the coverture of the parties to it: after the husband died, the widow could still elect whether to "accept" the settlement or take her dower. It was so provided in the Statute of Uses, 27 Hen. VIII, c.10, §6 (1536), and Maine, like other American jurisdictions, received and perpetuated the rule. 1 American Law of Property §5.40 (Casner ed. 1952). The Maine version of this rule still stands, as M.R.S.A. §1055, despite the so-called "abolition" of dower. The rule was simply made applicable to the wife's "right and interest by descent," even though that right involved not only real property but also personal property where dower law once held no sway. One of the merits of these provisions of the Code would be to validate fair postnuptial agreements under which spousal elective rights could be relinquished, perhaps as part of an estate plan. Because of 18 M.R.S.A. §1055, such agreements are now unreliable to bar rights of a widow accruing under 18 M.R.S.A. §§1056 and 1057. 19

M.R.S.A. §168 is no help since it refers only to antenuptial agreements.

Whether 18 M.R.S.A. §1055 applies to widowers as well as widows is doubtful: equating of the sexes in 18 M.R.S.A. ch. 111 is incomplete at several points, and the Statute of Uses provision from which 18 M.R.S.A. §1055 is ultimately derived had no application to the husband's interests in real property.

Present Maine law accords with the premise of the Code that either surviving spouse should have some sort of forced share of the capital amount of the other's estate. 18 M.R.S.A. §1056. But while the Code in UPC 2-202 adds certain property given away during decedent's lifetime to the property remaining in the probate estate, one old opinion of the Law Court indicates that if a spouse fully divests himself or herself of certain property, even for the purpose of frustrating the surviving spouse, that property is no longer available for the elective share. Wright v. Holmes, 100 Me. 62 Atl. 507 (1905) (dictum).

Maine's arrangement for the widow's allowance, provided in 18 M.R.S.A. ch. 101, has been described as "flexible," even though the allowance must come out of personal property only. Laufer, Flexible Restraints on Testamentary Freedom -- A Report on Decedents' Family Maintenance Legislation, 69 Harvard Law Review 277, 282, (1955). Perhaps the availability of the

allowance explains why there has been only one case in Maine dealing with the effect of lifetime transfers by the decedent that ultimately reduce the size of the spouse's elective share.

The following similarities and differences are noted between the system of spousal elective share provided by the Code and that provided by present Maine law (mostly 18 M.R.S.A. §§1051-1061).

CODE

Surviving spouse could elect against the will. In case of intestacy, surviving spouse could still elect to take elective share. Elective share would be one-third of the augmented estate. UPC 2-201

The "augmented estate" would be calculated by adding to the probate estate property that had been the subject of certain types of donative transaction by decedent or the surviving spouse. UPC 2-202. The concept of the augmented estate would be used only for calculation of the amount of the elective share.

If decedent was not domiciled in Maine at his death, his spouse's election would be governed by the law of decedent's domicile at death. UPC 2-201 (b).

PRESENT MAINE LAW

Surviving spouse may elect against the will. Elective share is always intestate share except where kindred survive but issue do not. 18 M.R.S.A. §1057.

Elective share is calculated on basis of probate estate only. See Wright v. Holmes, 100 Me. 508, 62 Atl. 507 (1905).

No Maine statute or case on point has been found. Ordinarily, absent statute, the forced share interest of a surviving spouse is determined by the law that would be applied by the courts of the situs. Restatement

CODE

PRESENT MAINE LAW

(Second) of Conflict of Laws §202 (1971). Those courts would usually apply their own local law in determining such questions. Ibid. However, the idea behind the augmented estate is to consider all the property together, wherever located, in determining the amount that the spouse can insist upon getting, and merely for that purpose it makes little sense to treat realty and personalty differently in different states. The architects of the Code thought it more just to settle the election question once for all in the court of the domicile of the decedent and in accordance with the local law of that domiciliary state. Provided appropriate moves are made to protect the reliability of the land records in the state of the situs of any real property that is part of decedent's estate, the Code solution makes sense.

In the case of a protected person, the right of election would be exercisable only by order of the court in which protective proceedings as to his property are pending.  
UPC 2-203.

Elective rights and allowance rights are fully waivable by a spouse, before or after marriage by signed written agreement or waiver after fair disclosure.  
UPC 2-204.

In the case of a "mentally ill" widow or widower, the notice of election is filed by a guardian or guardian ad litem appointed for the purpose.  
18 M.R.S.A. §§1056, 1057.

The unreliability of a postnuptial property agreement between spouses as a bar to the elective share has been discussed. 18 M.R.S.A. §1055.

CODE

The spouse must elect to take the elective share by filing a petition for the elective share within 9 months after the date of death of the decedant or within 6 months after the probate of the decedent's will, whichever limitation last expires.

Where the spouse petitions for an elective share, the Code would require notice and hearing for the benefit of persons interested in the estate and for distributees and recipients of portions of the augmented net estate whose interests will be adversely affected by the taking of the elective share. UPC 2-205.

Unless the surviving spouse renounces the provisions of the will, her choice of the elective share would not affect her share under the will or by intestate succession. Property passing to her by the will would be charged against her elective share. UPC 2-207(a). If she renounces benefits under the will, the property she would otherwise have received would be treated as if she had predeceased testator and the value of the benefits rejected would be charged against the elective share. UPC 2-207(a).

PRESENT MAINE LAW

Normally the spouse may elect to take the elective share by filing in the registry of probate written notice of a claim to such share within 6 months after probate of the will. 18 M.R.S.A. §§1056, 1057. No case has been found indicating whether the decision to elect is irrevocable.

No statutory provision or probate court rule directly applies. Probate Court Rule 24 would authorize the probate judge to order notice on all petitions and other matters presented to his court. Presumably, the judge would order notice of a demand for the elective share where interests of other devisees would be affected.

Under present Maine law, unless the will says otherwise, the spouse cannot take under the will if she elects to take her intestate (*i.e.*, elective) share. Davis v. McKown, 131 Me. 203, 160 Atl. 458 (1932). In such a case her election is, in effect, a renunciation of any provisions for her in the will. The court must do the best it can to carry out the purposes of the testator with the amount of elective share taken out of the estate. United States Trust Co. v. Douglass, 143 Me. 150, 56 A. 2d 633 (1948); Adams v. Legroo, 111 Me. 302, 89 Atl. 63 (1913).



CODE

Under the concept of the augmented estate, if decedent dies intestate a surviving spouse may choose to take her elective share rather than her intestate share. The elective share might be substantially greater than the intestate share in a case where decedent gave away most of his property to persons other than his spouse as he neared the end.

After the amounts chargeable to the spouse are accounted for, pursuant to UPC 2-202 and 2-207, the burden of making up the remaining amount of the spouse's share of the augmented estate would be equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests.

Only the original transferees (or appointees) of the decedent, and their donees to the extent that the donees have the property or its proceeds, are subject to contribution to make up the elective share. In other words, purchasers for value of any of such donated property would be protected from any duty of contribution to the spouse's elective share.

PRESENT MAINE LAW

Under present Maine law, the elective share is the intestate share except where no kindred within two degrees and no issue survive. In that one type of case, the intestate share would be greater than the elective share. If a will is made in that situation and the surviving spouse elects against the will, she gets the elective share; if no will is made, she takes the intestate share (i.e., the whole estate).

This problem does not arise under present Maine law. It resembles distantly the problem of equitable apportionment of taxes where a spouse elects against the will. See Old Colony Trust Co. v. McGowan, 156 Me. 138, 163 A. 2d 538 (1960).

Not presently a problem.

3. Omitted Persons

Omitted spouse. Section 2-301 of the Uniform Probate Code applies only to a surviving spouse who married the decedent after decedent executed his will and who is not provided for in the will. Except as provided otherwise in the section, such a spouse may take her intestate share. This is merely an alternative to the spouse's elective share, one-third of the augmented estate, which the spouse could still insist upon in this situation under 2-201 instead of the intestate share under 2-301.

Under present Maine law, the surviving spouse may take her elective share if she has been omitted from the will. 18 M.R.S.A. §1057. Her elective share is the same as her share would be in the intestate estate of a spouse who dies leaving kindred. 18 M.R.S.A. §1057.

The Code calls for abatement of devises in the will to satisfy the omitted spouse's share under this section. Section 2-301 (b) refers to UPC 3-902 as controlling the marshaling of assets for abatement. Under that section, unless the will said otherwise, if the spouse took her inheritance under UPC 2-301 (a), shares of distributees would abate in the following order: (1) intestate property, (2) residuary devises, (3) general devises, (4) specific devises. Real and personal property would be treated alike.

Present Maine law has no express provision governing abatement where a spouse takes her elective share. Where omitted children demand shares under 18 M.R.S.A. §§1004 or 1005, abatement of other devises is made under the obscure language of 18 M.R.S.A. §§1003 and 1007. Abatement of devises in order to pay debts is controlled by 18 M.R.S.A. §§1853-55. Real property receives favored treatment. These provisions are all unclear on the precise order of abatement, a problem discussed on part H of this chapter. None of them is made expressly applicable to the situation where abatement is needed because a spouse takes her elective share.

Pretermitted Children. Section 1004 of Title 18 gives a posthumous child of the testator who is unprovided for in the will the same share the child would have received had the father died intestate. Provision is made in the section for proportional abatement of other devises.

The Code provision on pretermitted children (UPC 2-302 (a)) applies not merely to posthumous children but to all cases where children are born to or adopted by the testator after execution of the will. Normally, under the Code, the pretermitted child would take a share equal in value to his share had there been no will, but UPC 2-302 also recognizes three kinds of exceptional case; namely, (1) where the omission appears to be intentional, (2) where testator left substantially everything to the other parent of the pretermitted child even though there were other

children, and (3) where testator provided for the child by transfer outside the will and it can be shown that the transfer was in lieu of a testamentary provision. In those three types of case, the normal rule does not apply.

The Code provides generally for the abatement of devises in UPC 3-902; the order in which estate assets would be appropriated is spelled out in more detail under that Code section than in 18 M.R.S.A. §1004 though the results would be similar in most situations in which a share had to be made up for a pretermitted child. Under both statutes the chief guide is the testamentary plan or the express or implied purpose of the particular devises -- referred to in 18 M.R.S.A. §1004 as "the intention of the testator."

Whereas 18 M.R.S.A. §1004 deals with the case of the omitted child born after death of testator, §1005 purports to cover the case where a living child of the testator (or the living issue of a deceased child) is not given any devise in the will. The section provides that in such case the child takes his intestate share "unless it appears that the omission was intentional, or was not occasioned by mistake, or that such child or issue had a due proportion of the estate" during testator's life. A sentence added in 1965 states that the absence of a devise to a child (or the issue of a deceased child) named in the will, is conclusive that the omission was intentional. The section thus creates a rebuttable presumption

that the omission was unintentional unless the child (or issue of a deceased child) is somewhere named in the will, whereupon it must be concluded that the omission was intended. Palmer v. Lincoln Audubon Society, 251 F. Supp. 736 (D.C. Me. 1966). The nature of the "mistake" referred to in the statute has not been litigated. The common law was strict about revising wills on the ground of mistake in the inducement. See in re. Ingraham, 118 Me. 67, 69, 105 Atl. 812 (1919).

Under the Code section on pretermitted children, UPC 2-302, the following changes would occur: (1) Only a child of the testator could enjoy the benefits of UPC 2-302; "issue of a deceased child" would have no rights under that section. (2) Only a child born or adopted after execution of the will could enforce a share under subsection (a) of UPC 2-302, and subsection (b) would give the same right to a child alive when the will is executed only where testator omits the child because testator believes the child to be dead. (3) Subsection (c) calls for abatement of devises according to UPC 3-902 to satisfy a forced share where either subsection (a) or (b) is given effect; the Maine statute calls for ratable contribution among "all the other devisees, legatees and heirs." 18 M.R.S.A. §1006.

Unless the provision for omission "occasioned by mistake" in 18 M.R.S.A. §1005 should be given a broader interpretation under the statute than the classical doctrine of reformation

for mistake would have permitted, the Code has picked the one type of mistake (viz., mistaken belief that the child is dead) that courts might be persuaded to regard sympathetically as proper justification for not following the terms of the will. 1 Page, Wills (Bowe-Parker ed. 1960) §§13.11, 13.12. Hence, it is arguable that the Code would not, in practice, narrow the possibilities for the omitted child who claims that testator omitted him because of some mistake other than a belief that he or she had died. The courts, aware of the ease of making allegations about senile delusion on the part of the testator, will be reluctant to expand remedies for mistake in wills.

A common sort of will is one in which a spouse leaves everything to the other spouse even though there are children of the marriage alive when the will is made. In this situation, 18 M.R.S.A. §1005 can be a trap for the unwary since unless the children are "named" in the will, the statute does not state by what means the spouse can rebut the presumption that they were omitted unintentionally. This kind of case has yet to be decided by the Law Court. The more conservative position on mistake, taken by the Code in UPC 2-302 (a) and (b), seems sound.

Where "issue of a deceased child" (to use the language of 18 M.R.S.A. §1005) is not mentioned in the will, such issue is treated like an omitted child under 18 M.R.S.A. §1005. While

a case can be imagined in which that statute would give such issue a forced share, the far more common case will be one in which the testator makes one or more devises to his children either individually or as a class but dies without changing the will after one of those children dies. In this type of case, the anti-lapse statute, 18 M.R.S.A. §1008, should operate, causing the issue to take their ancestor's devise under the will rather than a forced intestate share under §1005. The same would hold true under the anti-lapse provision of the Code, UPC 2-605. In short, the omitted issue of a deceased child will normally be protected by the anti-lapse statute under either the existing law or the Code. "Issue of a deceased child" would not be entitled to a forced intestate share under the Code. A grandchild is not a "child" under the Code (UPC 1-201) and UPC 2-302 gives grandchildren of the testator no rights of forced heirship.

D. Execution of Wills.

One of the salutary purposes of Part 5 of Article II of the Uniform Probate Code is to make the law of will executions more modern and realistic, and to avoid unnecessary legalistic requirements which may serve as traps for the unwary and thus needlessly defeat a would-be testator's intent. Also, in providing for the self-proved will, and in otherwise facilitating the usually routine process of proving the execution, it helps to simplify the proof of wills in those cases where that job should be simplified. The Commission's study of these provisions of the Uniform Probate Code have led it to conclude that the attempt has been successful, as well as contributing to a highly desirable need for uniformity in the laws from state to state in this particular area.

UPC 2-501, 2-502, and 2-505 state the requirements for testamentary capacity and for effective execution of non-holographic wills. The most notable changes would be the reduction from 3 to 2 witnesses (2-502) and the validation of a devise to an interested witness beyond his intestate share (UPC 2-505 (b) ). The provisions for the competency of interested attesting witnesses is discussed in Chapter 6. G.4 of this study.

Even though a will did not meet the attestation requirements for a will, it might be effective as a holographic will under UPC 2-503 of the Code if the signature and the material provisions were in the testator's handwriting. Since Maine does not now recognize holographic wills, UPC 2-503 would effect an



important change by validating such wills.

The provision for a self-proved will in UPC 2-504 would be new in Maine. Such a will would have to be "proved" and probated under UPC 3-303, 3-405 or 3-406, but it would enjoy a procedural advantage insofar as establishing the execution without the formality of calling the witnesses in cases where there is no serious controversy about the execution itself. The provisions for a self-proved will are more fully discussed in Chapter 6.G.3. of this study.

The provisions of 18 M.R.S.A. §§51-54 validating oral wills under certain conditions and providing for their probate, have no counterparts in the Code, and would not be retained in the Commission's bill. The Code has relaxed somewhat the formal requirements for execution of a will, and validates unattested holographic wills provided the signature and all material provisions are in testator's own handwriting, thus eliminating much of the need for oral wills -- by far the most unreliable form of safely and accurately providing for the transfer of property at death. The Maine courts have sometimes permitted their probate under the present statutes, but have expressed concern about the danger of fraud. See Parsons v. Parsons, 2 Me. 298, 300(1823).

Oral wills were more defensible in days when formalities for executing wills were more stringent, when sudden fatal disease was more common, and, so far as soldiers and sailors were concerned, when the armed forces did not extend the personal

affairs services they now make available to officers and enlisted persons.

The Code requires that a witness be "generally competent to be a witness" (UPC 2-505 (a) ), not that he be "credible," as per 18 M.R.S.A. §1. However, "credible" has been construed to mean "competent," Warren v. Baxter, 48 Me. 193 (1859); so there would be no real change on this point.

The Code provision on choice of law as to execution of wills, UPC 2-506, would effect some extension of 18 M.R.S.A. §151, under which any will executed in another state or country according to its laws may be probated in Maine. The Code goes farther by validating a written will even when it has not been executed according to the laws of the state where execution took place, as long as its execution complied at least with the law of the place where testator was or became domiciled, had a place of abode, or was a national, either at time of execution or at time of death. Thus, under UPC 2-506, testator might execute a will invalid in the state where made, which is valid in the state of testator's domicile at the time of execution or valid in the state where he ultimately dies. Such a written will would be regarded as validly executed under UPC 2-506.

The Code does not require that witnesses subscribe in the testator's presence; they need only sign, and they need witness only either the signing of the will or the testator's acknowledgment of the signature of the will. UPC 2-502. The Code, in permitting someone other than the testator to sign the testator's

name in his presence and by his direction, would not change present Maine law. 18 M.R.S.A. §1.

E. Revocation and Revival of Wills.

1. Deliberate Revocation; Revival.

The Code would make no substantial change in the prescribed methods of wholly revoking a will intentionally. UPC 2-507 does specifically provide for partial revocation. Although 18 M.R.S.A. §8 does not expressly mention revocation of only a part of a will, the Maine court has permitted partial revocation by obliteration. Swan v. Swan, 154 Me. 276, 147, A. 2d 140 (1958). The Code would take care of this rather substantial uncertainty.

The Code sections also treat the subject more thoroughly than 18 M.R.S.A. §8 does and resolve some issues that are left open under the existing statute and decisions.

Maine has no statute on the revival of revoked wills comparable to UPC 2-509. No Maine case is reported indicating the position of the Law Court on the issues settled by UPC 2-509.

2. Revocation by Change of Circumstance Generally.

The Code provides for revocation by divorce or annulment but adds that no other change of circumstance revokes a will. UPC 2-508. Maine law on the point is scanty. 18 M.R.S.A. §8 contemplates revocation "by operation of law from subsequent changes in the condition and circumstances of the maker." But

a will was held not revoked by change of condition where testator married three years later and had two children.

Appeal of de Mendoza, 141 Me. 299, 43 A. 2d 816 (1945).

The court said that the widow and pretermitted children had other statutory protections in that situation. Divorce and property settlement revoke any provisions of the will for the spouse. Caswell v. Kent, 158 Me. 493, 186 A. 2d 581 (1962).

Certainly the thrust of 18 M.R.S.A. §8 is more receptive to revocation by change of circumstances than the Code provision. But any advantage that may be thought to arise from that fact is outweighed by the uncertainty it creates and the invitation to litigation that it poses. On that basis, and in light of the relatively minor utility of leaving such possibilities open, the more restrictive language of the Uniform Probate Code seems preferable.

As pointed out above, no Maine statute deals with the difficult problem of revival of testamentary provisions by restoration of marital relations. (See UPC 2-508, third sentence; 2-509.) No decisional law in Maine bearing on such revival has been found, though one Maine case has applied the doctrine of dependent relative revocation. In Appeal of Thompson, 114 Me. 338, 96 A. 238 (1915), it was held that where a will was destroyed on the premise that another valid will was being executed, the first will was valid when the later one was held void for undue influence. The first will was also held provable from a copy.

3. Effect of Separation on Marital Rights.

Present Maine law recognizes divorce combined with a property settlement as an event of legal revocation, and provides that divorce or judicial separation will terminate rights of descent and distribution including rights of election. Although present Maine law does not address the point specifically, it apparently does not now give a divorce alone, or a judicial separation, the effect of revoking a will, although 18 M.R.S.A. §8 provides generally for revocation "from subsequent changes in the condition and circumstances of the maker." The Uniform Probate Code provides specifically that judicial separation will not either revoke a will or terminate inheritance rights, although under UPC 2-204 both consequences may occur in the event of a complete property settlement in connection with a separation.

The Uniform Probate Code version is partially consistent with present Maine law in not viewing judicial separation alone as a revoking event, but differs from Maine law in that it also does not give judicial separation the effect of terminating inheritance rights in the absence of a property settlement, and possibly as it concerns the effect of divorce on revocation (by not requiring a property settlement with divorce in order to operate as a revocation of a will.)

The Commission's proposed bill (1) adopts the Uniform Probate Code position on these effects of divorce, annulment and separation, (2) amends 19 M.R.S.A. §581 to make it sexually neutral, and reduces the waiting period for separation actions

from 1 year to 1 month, coupled with repeal of the then unnecessary §582, (3) repeals 19 M.R.S.A. §583 as partially unnecessary and partially inconsistent with UPC 2-802, (4) repeals 19 M.R.S.A. §587 since it would be unnecessary to record a separation decree if it had no effect on marital rights, (5) amends 19 M.R.S.A. §584 to conform it to the changes in §§581-583, (6) amends 19 MR.S.A. §585 to refer only to marriage settlements or contracts, (7) amends 19 M.R.S.A. §586 to conform it to the bill's appellate structure, and (8) amends 19 M.R.S.A. §588 to provide that the Superior Court, rather than the Probate Court will have concurred jurisdiction in separation actions in order to conform it to the present way of handling the closely related areas of divorce and annulment.

The problem with giving effect to a judicial separation, particularly, as a termination of inheritance rights, and especially as a will revocation, is mainly the possibility that such an effect may result in a substantial proportion of unintended will revocations or inappropriate disinheritances when it applies to cases in which judicial separation is used to take care of problems involving custody, support, harrassment, or physical abuse rather than as a means of ending a marriage short of actual divorce. It raises problems concerning whether the same effect should be given to foreign judicial separations that would be given to such separations obtained in Maine, and, if not, it raises problems in drafting language that would

distinguish between foreign judicial separations which should have the same effect and those that should not. Finally, it introduces disuniformity in an area in which uniformity of law from state to state is a significant consideration.

The Functions of Judicial Separation. Maine now terminates inheritance rights upon judicial separation, but apparently does not revoke an otherwise valid will on the basis of such a decree. The Uniform Probate Code does not attach either of these consequences to judicial separation, in the absence of a property settlement.

Whether judicial separation should automatically terminate these rights depends in large part upon the function that judicial separation serves. Judicial separation, however, may have more than one function. It may be used as a substitute for divorce by those who have moral, religious or other personal reasons for not wanting to obtain a divorce, but who view the judicial separation as in fact the end of the marriage. Such a judicial separation would likely be accompanied by many of the usual accoutrements of a divorce such as a property settlement and orders concerning custody and support of minor children. Another function may be to provide protection for a harrassed or physically abused spouse by the restraining orders that are provided in §581, or to supervise or enforce support obligations.

To the extent that judicial separation is used as a divorce substitute accompanied by a property settlement, it may be appropriate to give it the same effect as divorce in revoking a

will or terminating inheritance rights. This is the effect it would be given, under those circumstances, by UPC 2-204. But where it is being used for lesser purposes, and especially where there has been no property settlement, any effect in terminating succession rights may well violate the intentions of the spouses and work injustice. For instance, if the parties to a judicial separation do not view the decree as the effective termination of their marriage, the revocation of will provisions in favor of a surviving but judicially separated spouse by operation of law has little relationship to the intent of the testator. Likewise, where such spouses have obtained a judicial separation without a property settlement, the surviving but judicially separated spouse may be left with nothing if the property was owned by the decedent, and with no legal protection because the judicial separation cut her out of the will and ended her inheritance rights of election. Such events are not likely to occur where there has been a divorce or where there has been a judicial separation which the parties viewed as a divorce substitute. But they are quite likely to occur where the judicial separation has been used for the purposes that one would think it is more likely to be used for.

In the Commission's view, given these other functions of that it may serve, judicial separation may not be as available as it should be. Because of the one-year separation period that is required, it is generally unavailable for dealing with problems of child or spouse abuse, determining custody between



parents who have been separated for a shorter period of time, or for supervising and enforcing support obligations of spouses who may or may not be separated. It may be necessary at times to file for divorce in order to handle such problems even though the parties have no desire or intent to follow through on such proceedings and obtain a divorce. For these reasons the Commission's bill would amend 19 M.R.S.A. §581 to reduce that one-year waiting period to one month, thus making it a more useful device for dealing with the kinds of problems it can best serve.

Especially in the light of this facilitation of the functions of separation aside from the termination of a marriage short of divorce, it seems clearly inappropriate to give judicial separation that effect if the parties who are using judicial separation are not thinking in terms of either formal or informal divorce.

These same problems also occur on a state by state basis, since the functions of judicial separation in other states may not include, or significantly use, it as a divorce substitute. If some states definitely do not view their judicial separation decrees as analogous to divorce, it would seem inappropriate to treat them so in case the parties, or one of them, subsequently moved to Maine and died here with or without a will. Yet the task of drafting statutory language that would satisfactorily distinguish between foreign decrees of separation that should be so treated and those which should not be so

treated would be difficult, to say the least.

Disuniformity and Choice of Law. This issue exists in an area in which national uniformity is significant. The proposed Maine code would apply to "the property of nonresidents located in this state or property coming into the control of a fiduciary who is subject to the laws of this state," UPC 1-301(2), as well as to decedents who are domiciled in this state but who may have property or undivorced spouses in another state.

If a foreign domiciliary died in another state, for example, but owned property in Maine which had been devised to a judicially separated spouse by an unrevoked will, questions could arise as to whether Maine's provisions for revocation by judicial separation would apply to that devise. While it might seem that the answer to such a question would be that Maine's provision would not apply, such a result is far from certain, and the possibility of using up estate assets in litigation on that uncertain point is not remote. UPC 2-506 does not help to resolve the problem, since it applies only to determining whether the will was validly executed under the law of another jurisdiction, and not whether it has remained unrevoked. UPC 2-602 applies only to wills in which the testator has designated that the law of a particular jurisdiction shall apply, and even then its help in clarifying the issue is at least somewhat undercut by its interjection of a new issue--an argument that the revocation by separation provision represents

an important public policy of this state which should prevail over the testator's designation of contrary law. UPC 2-201(b) would be of no help, since it addresses only the determination of which state's law defines the elective share.

A variety of other factual circumstances could further complicate the picture. Where was the surviving separated spouse domiciled? Was the judicial separation granted by Maine or a foreign jurisdiction? Is the function and effect of another state's separation decree the same as in Maine's? What should be done in the case of a Maine decedent whose will was executed elsewhere and whose property in question is in another state? These are the kinds of problems that uniformity is meant to avoid.

While the policy of uniformity should not in itself determine the public policy of Maine, it is a significant factor to be considered. Maine itself has an interest in the policy of uniformity.

The Effect of the Uniform Probate Code and 2-204. A case can be made, as previously noted, that some judicial separations are used as a substitute for divorce and therefore should be treated as a divorce for purposes of revoking a will or terminating inheritance rights. On the other hand, many such separations are not analogous to divorce, and to give them the same effect on wills and intestacy might well leave a surviving spouse without any kind of property or protection. The refusal of the Uniform Probate Code to treat judicial separation as a

revoking or terminating event must be based on the idea that the legal method for terminating the marriage relationship is divorce, and thus puts the burden of express revocation or termination of inheritance rights on those anyone who seek to end their marriage without divorce. Such persons can, of course, expressly revoke their wills and obtain waivers of elective rights from each other under UPC 2-204.

In addition, however, §2-204 provides that in the absence of contrary provisions "a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share" and other rights under Part 2 of Article II, as well as any rights to succession by intestacy or under a will. (emphasis added) Thus, the Uniform Probate Code version without more, would provide automatically for the revocation of will provisions and the termination of inheritance rights in just those kinds of separations in which the parties are equitably provided for, but not give that effect to judicial separations whose function did not go so far.

In light of the problems that the present Maine law raises, and especially in light of the waiver-by-property-settlement provisions of §2-204, the Uniform Probate Code version seems to be the fairest and most sensible way of dealing with the effect of judicial separation on marital succession rights.

Other Changes in the Separation Statutes. The provision of §582 preserving the court's right to incarcerate the husband for nonpayment of child support, alimony or attorney's fees in

violation of a court order to do so, was incorporated into §581 in sexually neutral terms, even though it does not now expressly apply to the wife. It is clear that such applicability could be relevant to the wife, since under present law she can be ordered to pay alimony (19 M.R.S.A. §721) and attorney's fees (19 M.R.S.A. §581), and is legally obligated along with the husband to support her children (17A §552). Despite the absence of any express preservation of a similar nature in the present §581, the court probably does have such power to enforce these obligations against the wife within the scope of its general authority. There would seem to be no reason for such a blanket distinction between husbands and wives in the enforcement of these obligations to the extent that incarceration is used. In fact, any such distinction is no doubt unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 51 L.Ed.2d 574 (1976); Reed v. Reed, 404 U.S. 41, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

In §584 the venue location was changed from "county" to "county or judicial division" since the county alone is insufficient reference under present law by which the District Court possesses concurrent jurisdiction of such actions.

The reference to the rights of issue was deleted from §585. The probate law provisions make clear that issue's rights are not adversely affected. Thus, the reference is unnecessary and, as pointed out in part M of this chapter, it is inaccurate as written.

The Commission's bill would put jurisdiction over separation actions in the District Court with concurrent jurisdiction in the Superior Court, rather than, as now, in the Probate Court. This was done because of the similar present arrangement concerning divorce jurisdiction, with its related issues of custody and support. Under the present structure, at least, it seemed to the Commission that the issues involved in judicial separation were more like those presently handled by the District and Superior Courts than they are like those that are now the Probate Court's primary concern.

F. Special Testamentary Devices Within a Will.

1. Incorporation by Reference

Section 2-510 of the Uniform Probate Code states the classical doctrine of incorporation by reference and is in accord with Maine decisional law. Canal National Bank v. Chapman, 157 Me. 309, 171 A. 2d 919 (1961). See Atkinson, Wills §80 (2d ed. 1953).

2. Acts of Independent Significance

Section 2-512 codifies the so-called "doctrine of independent significance." That doctrine has been expressed by the late Professor Atkinson as follows:

The will may provide for designation of the beneficiary or of the thing or amount given, by reference to an act of the testator, the beneficiary, or a third person, or any of these in combination, provided that the act is one which has ordinarily independent significance. If the act referred to is

palpably specified for the purpose of allowing subsequent control through unattested act and has no other real significance, the gift is invalid. Atkinson, Wills §81, (2d ed. 1953).

Thus a bequest "to such persons as shall be on my payroll at the time of my death" is upheld now and would be upheld under UPC 2-512.

3. Reference to a Separate Writing.

One of the innovations of the Code in this area is §2-513 upholding the use of a reference within a will, to a statement or list, outside the will, of tangible personal property to be disposed of according to the statement or list. Such a writing is not traditionally acceptable as a testamentary disposition, in the absence of a specific statute authorizing it, because it does not comply with the basic statute requiring certain formalities for execution of a will. The Code provision has several safeguards: the type of personal property is limited to chattels, which must be described with reasonable accuracy; the statement or list must be signed by testator or in his handwriting. But the normal requirements for incorporation of a paper by reference (UPC 2-510) or for application of the doctrine of independent significance (UPC 2-512) are expressly made inapplicable where UPC 2-513 is complied with. The idea is to permit aging testators, who may want to change their minds about the final disposition of their heirlooms and keepsakes, to change that disposition from time to time without going through the formalities of making codicils or new wills.

This section is in line with the Uniform Probate Code's desire to make the law of wills comport more with the needs of those who use them, and prevent the needless upsetting of testamentary arrangements that may well involve items whose disposition to particular people was important to the decedent.

4. Pour-Over Trusts.

UPC 2-511, which is essentially the Uniform Testamentary Additions to Trusts Act, is nearly identical in its language to the present 18 M.R.S.A. §7, which was enacted in 1963 as a broad validation of pour-over testamentary trust arrangements.

The primary difference is that the language of the present Maine section permits a devise only to a trust that is already established before the pouring-over will is executed, whereas the Uniform Act and the Uniform Probate Code allow such additions to trusts that are to be established, i.e., that are to be established simultaneously with the execution of the pouring-over will. The language of the Uniform Acts allows such additions when, among other things, the receiving trust's terms are set forth in a written instrument which itself is "executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator. . . ." The receiving trust must also be identified in the pouring-over will.



Thus, the only possible difference between the present Maine law and the Uniform versions is that a testator presently may not be permitted to pour-over into a trust created simultaneously with the execution of the will. A more reasonable interpretation of the present section, however, would certainly allow such an addition in light of the same modifying language referred to above and the construction of the word "established" to include a trust established concurrently with the execution of the will. In any event, any ambiguity on this point would be clarified by enactment of the Uniform Probate Code version in §2-511. The conformity to the language of the Uniform Act, which has been adopted in nearly all American jurisdictions, would also preclude the raising of any question about the meaning of the Maine law that might implicitly arise from this one difference that presently exists in the Maine enactment.

G. Construction of Wills.

1. Extent of Interests Passing.

Section 3 of Title 18, which provides for the testamentary passing of rights of entry and lands of which the testator has been disseized, was originally designed to overcome an offshoot of the old feudal rule against the transfer of choses in action. In feudal law the disseized owner of land did not have an estate in the land of which he had been disseized. He had only a right of entry. After the statute of wills in 1540, doubt existed whether a disseized owner could effectively transfer the

right of entry to a devisee of the lands. Section 3, supposed to eliminate such doubt, was copied from a Massachusetts statute out of excess of caution.

While the section does no harm, it serves no useful purpose. In modern theory, if a disseizee still has title to certain land when he dies, he transfers it effectively by devising the land in his will. If, under the Code, statutory authority should be needed for that proposition, UPC 2-604 would supply it: "A will is construed to pass all property which the testator owns at his death..." "Property" is defined in UPC 1-201 (33) to include both real and personal property or any interest therein.

Section 4 of Title 18, providing for the passing of after-acquired land, would be carried forward, substantially intact, into UPC 2-604. Section 2-604, as a rule of construction, obviously would not pass after-acquired property not included in a will containing only specific devises and no residuary devise. UPC 2-603. Both 18 M.R.S.A. §4 and UPC 2-604 reject old decisional law to the effect that after-acquired personal property would pass under a bequest but after-acquired realty would not. A specific devise now passes after-acquired realty that falls within the scope of the language describing the property. Young v. Mosher, 115 Me. 56, 97 Atl. 215 (1916).

Section 5 of Title 18 has had the important effect of eliminating any need for the word "heirs" to create a fee simple

estate by will in Maine. Before this statute, there was a constructional bias, at least, in favor of a life estate where words of heirship or perpetuity were missing in a devise of land. Since the statute the bias is in favor of the fee's passing. Copeland v. Barron, 72 Me. 206, 210 (1881).

The question is whether the similar Code section, UPC 2-604, accomplishes the same purpose. It is arguable that it does not, though it may have been intended to. 18 M.R.S.A. §5 refers particularly to land and to the estate that passes, whereas UPC 2-604 says only that the will will be construed to pass all the testator's property at death. A devise of Blackacre to A, residuary property to B, would pass a fee in Blackacre to A under present Maine law, there being no additional evidence of intent in the will. See Barry v. Austin, 118 Me. 51, 105 Atl. 806 (1919). Under the language of UPC 2-604, it is clear that that will would pass the whole fee, but it is not so clear that it would pass it all to A. Consistently with UPC 2-604, A could take a life estate and B a remainder in fee. UPC 2-606 gives A no help, either.

Although it is unlikely, a repeal of §5 might be regarded as restoring the pre-statute tendency of will construction in Maine in favor of the life estate rather than the fee where words of heirship, or their equivalent, are omitted. In order to eliminate any such doubt, the proposed Maine Code modifies §2-604 by adding language from the present §5 as a second sentence.

2. Lapse and Failure of a Devise.

The Maine anti-lapse statute provides that when a relative of a testator, having a devise, dies before testator leaving lineal descendants, they take such estate as the deceased relative would have taken had he or she survived testator. The word "relative" in the statute has been held to require family connection by blood, not merely marriage. Elliot v. Fessenden, 83 Me. 197, 22 Atl. 115 (1891). Unless the devisee is related to testator, the devisee's heirs do not take a lapsed legacy on any theory of substitution; they had no such right at common law and the statute does not give it to them. Strout v. Chesley, 125 Me. 171, 132 Atl. 211 (1926).

In at least one Maine case, this statute has been applied to prevent lapse of a gift to a devisee who was already dead when the will was made, Nutter v. Vickery, 64 Me. 490 (1874), even though such a gift was regarded as "void" at common law. It has also been applied to a class gift, Bray v. Pullen, 84 Me. 185, 24 Atl. 811 (1892). The code anti-lapse section (UPC 2-605) would, in effect, limit the curative effect of anti-lapse to cases where the devisee is a grandparent or a lineal descendant of a grandparent of the testator; i.e., to relatives at least as close as first cousins or their descendants. This does not seem to be an undesirable constriction in the scope of an anti-lapse statute and carries out the Code policy of cutting off remote heirs.

The Code would make explicit a result already reached in the Maine cases; that anti-lapse applies to devisees who were already dead at time of execution of the will as well as to those who die afterward but before the testator. UPC 2-605.

The Code does require issue of the dead devisee to survive the testator by 120 hours in order to take under UPC 2-605, in harmony with the general requirement of that amount of survival time throughout the Code. See UPC 2-104 (heir) and UPC 2-601 (devisee). The only exception appears in UPC 2-104 where the 120-hour rule will not be applied if application would result in escheat. This exception does not appear in UPC 2-605 covering lapsed devises.

The last sentence of UPC 2-605 makes the anti-lapse provisions applicable to class gifts in any case where the dead member of the class would have qualified if he had been individually designated as a devisee. As seen above, this result accords with the holdings under 18 M.R.S.A. §1008.

Subsection (a) of UPC 2-606 codifies the general rule that in case of a failure of a provision in a will, a residuary clause normally picks up property that would have passed under a particular devise that has failed. See Atkinson, Wills 786 (2d ed. 1953). On the other hand, subsection (b) of UPC 2-606 would change Maine law by permitting one residuary devisee to participate in the share of another residuary devisee whose devise has failed. Present Maine law, in accord with the majority rule,

has been to the contrary. First Portland Nat'l Bank v. Kaler-Vaill Memorial Home, 155 Me. 50, 151 A. 2d 708 (1959). The philosophy of the old, majority rule -- "no residue of a residue" -- seems to be a rule without a reason, and one that wreaks havoc on tentamentary intent. Surely, a testator who has devised the residue to those who are presumably the foremost objects of his bounty, would prefer the residuary devisees to take the failed share rather than have it pass intestate.

### 3. Ademption and Related Issues.

Ademption by satisfaction. Enactment of UPC 2-612 would mean that where a will has been made and the testator later makes a lifetime gift to a prospective devisee, the gift is not considered to be in satisfaction (total or partial) of the devise unless (1) the will itself says so, or (2) a contemporaneous writing by testator or the devisee declares or acknowledges it to be so. This section would actually operate only in the case of non-specific devises, for if testator gives the devisee the subject matter of a specific devise by an inter vivos gift, the devise is adeemed by extinction because it is not in testator's estate when he dies.

Maine has no statute on satisfaction or ademption and no case has been found in Maine applying the doctrine of satisfaction by lifetime transfer. The basis of ademption by satisfaction is said to be "the same policy against double portions which is

manifested with regard to advancements in case of intestacy." Atkinson, Wills §133 (2d ed. 1953). Advancements must be memorialized in writing in Maine under 18 M.R.S.A. §1151, but there is no similar statute of frauds here for ademption by satisfaction.

Nonademption of specific devises in certain cases. Most courts considering the matter have held that in the absence of any statute to the contrary when the subject matter of a specific devise is sold or given away by the testator during his lifetime, the gift is adeemed, and neither the proceeds, nor similar property purchased therewith, passes to the beneficiary. Atkinson, Wills §134 (2d ed. 1953). Such authority as exists in Maine indicates that Maine would follow the majority rule. See Tolman v. Tolman, 85 Me. 317, 27 Atl. 184 (1893) (carefully considered dictum). Writers have long criticized the implacable rigor with which the courts have applied this "rule" -- which is supposed to be only a rule of construction -- despite signs in many cases that the testator really would have preferred to see the specific devisee get the proceeds of a transfer of the subject matter.

The provisions of UPC 2-608 (a) codify one of the fairly well-established exceptions to the rule. That subsection is derived from §231 of the Model Probate Code (1946), which stated that a guardian's sale of a ward's property should not adeem a specific bequest made by the ward earlier while he was still competent. The Model Probate Code did not include the pro-

vision of a one-year deadline for the testator to do something about the matter after an adjudication is made that his disability has ceased.

Change in securities; accession; nonademption. Maine has no statute affecting the disposition of securities under a specific devise. The Law Court has held that a stock dividend should be added to an original specific bequest of shares of stock where the dividend was declared after execution of the will and before death of the testatrix. Butler v. Dobbins, 142 Me. 383, 53 A. 2d 270 (1947). The court thought that the whole plan of the particular will showed an intention by the testator to give away all his stock in the specified company to three designated legatees, however and whenever the stock might come into his estate.

Most states have not regarded stock dividends declared during testator's lifetime as passing with specifically devised shares unless the will states otherwise. Atkinson, Wills §135 (2d ed. 1953). In UPC 2-607, the Code adopts the minority or Maine position on stock dividends. One cannot assert confidently, however, that the Code makes absolutely no change in Maine law on the point. It must be remembered that UPC 2-607 is subject to UPC 2-603, which gives predominance to the testator's intent as expressed in the will. Butler v. Dobbins relies heavily on the intent of testatrix as manifested in the total situation.

One Maine case strongly supports the view that present Maine



law is in accord with UPC 2-607 (a)(3) with respect to stock issued in exchange as a result of a corporate reorganization. Gorham v. Chadwick, 135 Me. 479, 200 Atl. 500 (1938). In other types of transactions covered by UPC 2-607 (a)(3) and (4), the Code would give clearer guidance by filling gaps in present Maine law in sensible ways.

There is, however, one ambiguity in the language of UPC 2-607, since if the testator owned more of the same kind of securities when he made the will than what he specifically bequeathed, a question could arise as to which additions to the securities should go with the specific bequest. This ambiguity is resolved in the proposed Maine Code by inserting language to indicate that only those additions which arise from the specifically devised securities are included in the specific devise (bequest). The Maine Comment points out that this is a matter of clarification, not a change in the substantive meaning of UPC 2-607(a).

#### 4. Exoneration

In most states, in the absence of any statute or will provision on the point, a specific devise of real property that is subject to a security interest, such as a mortgage, gives the devisee the title and a right to call upon the executor to pay the outstanding debt, thereby exonerating the property from the security interest. This rule is applied on the theory of carrying out the testator's presumed intent. Atkinson, Wills

§137 (2d ed. 1953). The rule has been repeatedly condemned by writers. See Note, Exoneration of Specific Property from Encumbrances Existing at the Death of the Testator or Ancestor, 40 Harvard Law Review 630 (1927). Section 189 of the Model Probate Code (1946) was drafted to abolish it.

Maine followed the majority rule in Eaton v. MacDonald, 154 Me. 227, 145A. 2d 369 (1958), and has never enacted a statute reversing or modifying the rule. Section 2-609 of the Uniform Probate Code would reverse Maine law on this point and bring it into line with more modern perceptions of what a testator would fairly have intended. The non-exoneration rule is, of course, subject to any contrary provision made in the will.

##### 5. Exercise of a Power

UPC 2-610 expresses the prevailing American judicial view that a general residuary clause does not, by itself, effectively exercise a power of appointment where the will makes no reference whatever to the power. 5 American Law of Property §23.40 (Casner ed. 1952). The decisional law of Massachusetts has been to the contrary, holding that the power is normally exercised by such a residuary devise or by a devise of all testator's property or estate. The Maine Law Court has held that the Massachusetts rule should be followed where the circumstances show that the donee or possessor of the power is aware that he or she had it. In Bar Harbor Banking & Trust Co. v. Preachers' Aid Soc'y, 244 A. 2d 558 (Me. 1968), a general testamentary

power was held exercised by the residuary clause in a will, even though the will made no mention of the power. A circumstance tending to show an intent to exercise the power in the Bar Harbor case was the fact that the testatrix' estate other than appointive property amounted to less than \$17,000 while the appointive property was worth more than \$200,000, thus arguably bringing the actual decision within the provision of UPC 2-610 that allows finding an exercise where there is "some other indication of intention to include the property subject to the power."

As the Uniform Probate Code Comment to §2-610 points out, most powers of appointment are created in marital deduction trusts where the donor (and probably also any donee who has not expressly exercised the power) does not want or expect the power to be exercised. To find such an exercise on the basis of no expression of such an intent other than the existence of a will with a residuary clause is an unreasonable way to upset the donor's and donee's estate plan.

The Code provision does leave room for finding an exercise of the power if there is "some other indication of intention to include the property subject to the power." Thus the Code provision follows the general rule most in keeping with the expectations of those who make most use of the device, while not foreclosing the finding of an exercise of the power in those cases where a reasonable construction of the donee's will support the showing of such an intention.

6. Construction of Generic Terms of Relationship

Under UPC 2-611, halfbloods, adopted persons, and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationship for purposes of intestate succession, except that one born out of wedlock is not treated as the child of the father unless openly and notoriously treated by the father as his child. See UPC 2-109 and 1-201 (3), (21) and (28).

There is a slight difference in treatment of persons born out of wedlock accorded by this section and by UPC 2-109, defining "child" for the purpose of intestate succession. Behind the requirement in UPC 2-611 that the father have treated the child openly and notoriously as his own is the assumption that a testator, in leaving property to a man's children as a class would not ordinarily want to include someone who is not treated openly by the man as his own child. The idea is that such a person would not come within the testator's intent in making a class gift where the members of the class must all bear a child-parent relationship with a particular man.

The proposed Maine Probate Code would modify this position somewhat by taking its underlying premise of testamentary intent a little farther. The end of the last sentence of this section in the proposed Maine Code has been changed so that a class gift to persons defined by relationship to someone will

include illegitimate members of that class (e.g., "children" or "nephews and nieces" of the testator, or "children" of the testator's brothers and sisters) if they were so recognized as within the class by the testator or settlor himself, as well as if they were so recognized by the person by whom their relationship is defined. This was thought desirable so that an illegitimate who was recognized by the testator or settlor as the child of a brother, for instance, would be included in the generic term even if the person was not so recognized by the brother. Since the gift is from the testator or settlor, and not necessarily from the person by whom the relationship is defined, the construction should be ultimately governed by the perception of the testator or settlor. This change was designed to permit that construction.

Most American courts have held or recognized that the term "child" or "children" in a testamentary gift normally means legitimate child or children. Cases are collected and analyzed in Note, "Right of illegitimate child to take under testamentary gift to 'children,'" 34 ALR 2d 4, 19(1954). Maine has followed the majority rule. See Bolton v. Bolton, 73 Me. 290 (1882). The rule has been applied harshly to exclude a recognized and acknowledged illegitimate son of a brother from a class gift to "nephews" of the testator. Lyon v. Lyon, 88 Me. 395, 34 Atl. 180 (1896). While the general rule is one of construction and yields to sufficient manifestation of an opposite intention in the will, the provisions of UPC 2-611 would probably represent

a change in Maine law in cases where the illegitimate is openly and notoriously treated by the father as his child, or so recognized by the testor or settlor.

The Commission also changed the Uniform Probate Code version of this section so that the section applies to terms of a trust as well as to terms in a will. Since the Uniform Probate Code does not focus on the substantive law of trusts, the Uniform Probate Code section here does not address that issue. Yet, it seems only logical that the same constructional rules should apply in order to avoid different constructions of the same terms merely because one estate plan, or even one part of the same decedent's estate plan, was in a trust and the other plan or part of a plan was in a will. This is especially important in view of the fact that this section would change the Maine law on the construction of such terms.

#### H. Abatement and Contribution

Section 1006 of Title 18 seems to call for contribution by devisees and heirs as provided in 18 M.R.S.A. §1853, to make up a forced share of an omitted child or deceased child's issue under §1004 or 1005; §1007 says, among other things, that if anyone under a duty to contribute in such a case dies without having paid, the obligation remains a debt of his estate. Certainly the Code would carry forward the idea of a duty to contribute from devisees to make up a forced share. UPC 3-902. However, UPC 3-902 is explicit that, unless otherwise provided

in the will, abatement occurs in the following order (real and personal property being treated alike): (1) intestate property, (2) residuary property, (3) general devises, (4) specific devises. Abatement within each classification would be apportioned to the amounts of property each beneficiary would have received except for the abatement. Aside from the similar treatment of real and personal property this scheme is not notably different from what seems to be the abatement system under the Maine statutes, although, from their wording, it is hard to be sure just what the Maine law is.

18 M.R.S.A. §1006 contains an initial peculiarity in providing that when a share of a testator's estate descends "as provided in §§1004 and 1005," the person taking it is liable to contribute, and may claim contribution, as provided in §1853. The difficulty is in seeing why the person taking the forced share would ever be "liable to contribute." He would be the beneficiary of the contributions of others, presumably devisees. Obviously, his share would have to contribute, with others, to the payment of debts, but that is not what §1006 is referring to.

Section 1853 calls for contribution to a devisee from whom property is taken "by execution" or by court order to pay debts; all other devisees and heirs are to pay him "so as to make the loss fall equally on all," according to the value of the property received by each from the testator "except as provided in §1854."

On the face of it, that language would seem to disregard classifications of bequests or devises into residuary, general or specific, and would seem to require pro rata contribution from all. However, §1854 seems to suggest that specific bequests, at least, would stand on a higher footing than general bequests, though the section does not provide exactly the order in which contributions under §1853 should be made. Except for favored treatment of real property (18 M.R.S.A. §1855), the court decisions under §§1853 and 1854 suggest a system closely resembling the one that would be adopted under the Code. See Eaton v. MacDonald, 154 Me, 227, 145 A. 2d 369 (1958); Cantillon v. Walker, 146 Me. 168, 78A, 2d 785 (1951); Emery v. Batchelder, 78 Me. 233, 3 Atl. 733 (1886). If abatement is required for payment of debts, however, under §1855 even undeviseed real property would normally not be taken until all personal estate had been used. The Code calls for marshaling real and personal property without any preference or priority as between real and personal. UPC 3-902 (a).

In effect, the Code would abandon the distinction between real and personal property in marshaling estate assets for purposes of abatement. Instead it would set up, in UPC 3-902, a clear set of priorities for abatement depending upon whether property was undeviseed or, if deviseed, was residuary, general or specific. Just as present law does, the Code would give effect to any statement of priorities in the will.



The Code system of abatement seems one that follows the most likely preferences of most testators, including the elimination of the favored treatment of real over personal property. Its clarity would itself be a welcome change from the present statutes on the subject.

I. Assuring Delivery of the Will

The present Maine statutes on deposit of wills in the registry of probate, on the duties of the custodians of wills and on the liability of a person who suppresses, secretes, or defaces or destroys a will are contained in 18 M.R.S.A. §§2, 9 and 10. The comparable provisions in the Uniform Probate Code are §§2-901 and 2-902. The changes that the Code would make, while not trivial, would not affect present arrangements drastically.

18 M.R.S.A. §2 closely resembles UPC 2-901. The main differences are as follows:

1. The Code would permit deposit of a will with any court under rules of the court. 18 M.R.S.A. §2 limits official deposit to the registry of probate in testator's home county.

2. During testator's lifetime, the Code would permit the register to release the will to a person bearing a written order signed by the testator; 18 M.R.S.A. §2 requires such signature to be attested by one witness.

3. UPC 2-901 has a provision permitting examination of the deposited will by a conservator of a protected testator in

order to preserve any estate plan. See also UPC 5-427. 18 M.R.S.A. §2 has no such provision.

Other differences appear to be inconsequential. UPC 2-901 explicitly calls for rules of court to govern the procedures of custody and release; 18 M.R.S.A. §2 is silent about such rules but does not exclude the possibility of their adoption.

Although the language is different, UPC 2-902 accomplishes essentially the same purposes as 18 M.R.S.A. §9.

Section 10, making it a crime to suppress, secrete, deface or destroy a will of a dead person, with intent to injure or defraud any interested person, has no counterpart in the Code. UPC 2-902 subjects refusal to deliver a will after an order by the court to penalties for contempt of court. Both UPC 2-902 and 18 M.R.S.A. §9 impose tort liability on any damaged person.

The contempt sanction seems better than the criminal sanction for bringing about the surrender of the will to the appropriate officials. It does not seem to serve a useful purpose in view of the possibility of a contempt order.

The proposed Maine Code adds language to UPC 2-901 requiring the wrapping of the will and endorsement on the wrapper in order to incorporate those express provisions from present Maine law. It also adds language to UPC 2-902 to make that section applicable for protection against willful defacement or destruction of the will as well as non-delivery, and deletes language to make clear that the duty to deliver a will exists with or without a request

by an interested person. These changes from the Uniform Probate Code are explained in the Maine Comments following each of the proposed sections in the Commission's bill.

J. Renunciation of Property Interests

Maine has adopted somewhat altered versions of the two Uniform Acts covering disclaimers of transfers by will or intestacy and disclaimers of transfers under nontestamentary instruments. Chapters 118 and 119 of Title 18. The Uniform Probate Code, in §2-801, has adopted the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, and so closely, but not exactly, resembles the present Maine Chapter 119 of Title 18.

There has recently been some discussion within the Maine bar of the issues involving disclaimers. Dench, "The Use of Disclaimers in Maine After the Tax Reform Act of 1976," 11 Maine Bar Bulletin 161 (Sept. 1977). Much of that interest centers around (1) consolidating the provisions of the two acts into one, perhaps by adoption of the Uniform Disclaimer of Property Interests Act, which does exactly that, and (2) amending the state law on disclaimers to achieve greater, or total, conformity between state disclaimer requirements and federal tax law disclaimer requirements.

The more important of these two objectives, and the one that is more difficult of achievement, is the conformity between state and federal requirements. The requirements for a "qual-

ified disclaimer" under federal tax law are contained in IRC section 2518 (b), and as follows:

(b) Qualified Disclaimer Defined - For purposes of subsection "qualified disclaimer" means an irrevocable unqualified refusal by a person to accept an interest in property but only if -

(1) such refusal is in writing  
(2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of -

(A) the date on which the transfer creating the interest in such person is made or  
(B) The day on which such person attains age 21,

(3) such person has not accepted the interest or any of its benefits, and

(4) as a result of such refusal, the interest passes to a person other than the person making the disclaimer (without any direction on the part of the person making the disclaimer).

(c) Other Rules - For purposes of subsection (a) -

(1) Disclaimer of Undivided Portion of Interest - A disclaimer with respect to an undivided portion of an interest which meets the requirements of the preceding sentence shall be treated as a qualified disclaimer of such portion of the interest.

(2) Powers - A power with respect to property shall be treated as an interest in such property.

In comparing the federal tax requirements with both the present Maine law and the Uniform Acts, the major disparities between the two sets of requirements seem to be as follows.

1. state acts require only "delivery" while the federal law requires receipt by the deliverer;

2. state acts allow delivery of the disclaimer to persons who would take the property in the event of disclaimer, while the federal requirement does not;
3. state acts extend the time for making disclaimer of future interests to the time of ascertainment and vesting, while the federal requirements do not;
4. state acts extend the time for disclaimer in cases where the disclaimant lacked knowledge of his interest in nontestamentary situations, while the federal law does not;
5. some state acts allow only 6 months, while the federal law allows 9 months;
6. state laws have no special time extension for persons under 21, while the federal law does.

The general goal of seeking conformity between the state and federal requirements seems desirable, at least so long as state interests in defining a disclaimer are not unduly sacrificed. In fact, given the almost totally tax-oriented reasons for using disclaimers, conformity to federal tax requirements would seem to be far more significant than uniformity from state to state, although interstate uniformity is also desirable and should be adhered to as much as feasible.

Such conformity to the federal tax requirements helps to assure that a state disclaimer will be effective federally, so that possibly disastrous gift tax consequences do not occur. On the other hand, such conformity in all respects is not a necessity, since any person who is disclaiming for tax reasons will surely be looking a lot harder at the federal tax law than at the state statutes. It seems unimaginable that a lawyer in

such a situation would not know the federal requirements and assure that they were abided by.

The proposed Maine Code, in §2-801, seeks to achieve these objectives by: (1) substantial conformity to federal tax law standards; (2) adherence to typical state differences where they seem particularly important or equitable, and (3) attempting to approach inter-state uniformity as much as possible within these parameters by being modeled on the Uniform Disclaimer of Property Interests Act, as tentatively approved as amended by the Commissioners on Uniform State Laws in August, 1977.

The proposed §2-801 departs from that act in several places in order to try to achieve a fuller integration of the state and federal requirements where it seemed appropriate, and in order to accommodate it to the Uniform Probate Code format and contain it in one section as is done with the original UPC 2-801. It includes disclaimer provisions for interests devolving under nontestamentary instruments as well as by will or intestacy, and would thus incorporate chapter 118 of Title 18 as well.

The section conforms the state law to the federal requirements insofar as (1) requiring that the deliverer receive the disclaimer, (2) including as allowable recipients only those persons recognized by the federal requirements, and (3) making the basic time period 9 months instead of 6 months. The proposed

code retains the nonconforming state allowance of extra time in the case of future interests and in the case of a potential disclaimant's lack of knowledge of his interest within the ordinarily applicable time limits. This means, of course, that once the ordinary time limits run under federal law, no federal tax purposes can be achieved by a disclaimer. These particular extensions, however, seem to be reasonable exceptions to the ordinary time limits that should not be denied to anyone who wants to disclaim an interest previously unknown to them, or as to which it was just ascertained that they were entitled, if there are no tax reasons for making or not making a disclaimer.

As to the item (6) mentioned earlier, the proposed section would allow anyone who complied with the federal definition of disclaimer to take advantage of the special time extension for persons under 21 by virtue of subsection (j) of §2-801. Powers of appointment are expressly referred to in the section to more expressly conform the section's terminology to federal tax law (see I.R.C. §2518(c)(2)) and the intent of the original Uniform Probate Code version. The term "renunciation" is also used instead of "disclaimer" in order to conform with the Uniform Probate Code terminology (see UPC Comment to UPC 2-801, page 80 of the 1975 Official Text).

The Maine Comment which follows the section gives appropriate warning to any attorney using the section that he or she must separately consider federal tax requirements.

The section is designed to be a reasonable approach to bring testamentary and nontestamentary transfers into one section, stay reasonably close to the uniform language of the other acts in this area, incorporate this area into the probate code, and achieve reasonably greater conformity between state and federal requirements without sacrificing the reasonable state time extensions in the case of future interests and lack of knowledge of transfers by nontestamentary instruments.

K. Contracts Relating to Succession

Section 2-701 of the Uniform Probate Code is a statute of frauds, requiring an appropriate sort of writing, signed by the promisor, as a basis for enforcing a promise to make a will, or devise, or not to revoke a will or devise, or to die intestate. Execution of a joint or mutual will would not create a presumption of a contract not to revoke the will or wills.

Maine's statute of frauds, 33 M.R.S.A. §51, contains a subsection 7, stating that no action shall be maintained upon any agreement to give any property by will unless the agreement, or some memorandum or note thereof, is in writing and signed by the party to be charged or his authorized agent.

There is no statute or case in Maine settling the question whether execution of joint or mutual wills creates a presumption of a contract not to revoke the will or wills. It has been



generally held that the mere making of mutual separate wills or of a joint will is not sufficient evidence of a contract not to revoke. Atkinson, Wills §49, at 225 (2d ed. 1953). If adopted, UPC 2-701 would settle this question in conformity to that general rule.

Section 51 of 33 M.R.S.A. does not in terms purport to cover a promise not to revoke a will or a promise to die intestate. No case in Maine has ruled on whether such promises fall within the scope of §51. The Code would settle that question in the affirmative.

The decisions under the Maine statute have been erratic on the issue of the effectiveness of part performance by the promisee to take the case out of the statute. In two cases, the Law Court has permitted a constructive trust to be imposed upon the property passing by devise in breach of an oral promise by testator to give property by will in exchange for lifetime services; in at least one similar case the Court has denied relief. Compare Brickley v. Leonard, 129 Me. 94, 149 Atl. 833 (1930) and Emery v. Wheeler, 129 Me. 428, 152 Atl. 624 (1931) with Lutick v. Sileika, 137 Me. 30, 14A. 2d 706 (1940). The effect of so-called "part performance" would be unaffected by the enactment of UPC 2-701. Under UPC 1-103, the principles of law and equity supplement the provisions of the Code unless expressly displaced. Hence it may be assumed that the doctrine of part performance would be as applicable under the Code as it is now to cases arising

under the statute of frauds. UPC 1-103 would also preserve other general principles concerning exceptions or construction of the effect of UPC 2-701 and allow the courts the same flexibility in dealing with individual cases as they traditionally do under statutes of frauds.

There appears to be no inconsistency between UPC 2-701 and 33 M.R.S.A. §51, although the Uniform Probate Code resolves more issues than does the law as it now stands.

L. Simultaneous Death

Maine's version of the Uniform Simultaneous Death Act is contained in 18 M.R.S.A. §§1101-1108. These sections are preserved virtually intact in the Commission's bill as §2-805.

M. Related Provisions of Maine Law Concerning Domestic Relations

19 M.R.S.A. ch. 1. Marriage.

Certain sections of title 19 of the Maine statutes declare types of marriages to be void: §32 states that no "mentally ill" or feeble-minded person or idiot is "capable" of contracting marriage; §33 pronounces polygamous marriages "void," and §91 provides likewise where residents of Maine go outside the state to evade certain Maine prohibitions against marriages of persons having close family relationships. However, §122 provides that a marriage is not invalidated by lack of authority of the justice or minister who officiates at the ceremony or by any "omission or informality in entering the intention of marriage" if either party really believes the marriage to be

lawful.

Nothing in all this would be inconsistent with the Uniform Probate Code. Under the definition of "child" in UPC 2-109, the child born out of wedlock would inherit from the mother in any case. It would be also the child of the father for purposes of succession if the parents took part in a marriage ceremony (even though void) or if the paternity of the putative father were established. The father or his kin could not inherit from such a child under the Code, however, unless the father had openly treated the child as his and not refused to support it. UPC 2-109 (2) (ii). Since Maine has adopted the Uniform Act on Paternity, as subchapter III of chapter 5 of Title 19, the "adjudication" of paternity referred to in UPC 2-109 would have to be made pursuant to that uniform act. Nothing in that act is in conflict with any provision of the Code.

19 M.R.S.A. Ch. 3. Rights of Married Persons.

Chapter 3 of Title 19 sets forth the civil rights of spouses under the Maine married women's acts. On the surface, it seems that each spouse may own his or her own property and may manage, sell or mortgage it without joinder or assent of the other spouse. 19 M.R.S.A. §161. The same section provides also, however, that "such conveyance without the joinder or assent of the husband or wife shall not bar his or her interest by descent in the estate so conveyed." Thus, the statute, be-

ginning consistently with the abolition of dower and curtesy and the husband's former estate by the marital right, ends by placing a new clog on real estate titles by requiring joinder of both spouses in order to release some sort of inchoate succession right. The Law Court has held that the necessity of joinder or assent is limited to conveyances of real property-- that is, does not extend to personal property. Wright v. Holmes, 100 Me. 508, 62 Atl. 507 (1905). That same case held, however, that the statute means what it says where real estate is concerned and that the husband's joinder in or assent to his wife's conveyance is required if his right to succession in the property is to be barred after her death. Maine has thus retained one of the worst features of the common law marital estates, the clog that inchoate dower placed on the conveyance of realty, even while purporting to abolish dower and curtesy.

The Code would provide that the estates of dower and curtesy are abolished. UPC 2-113. To make sure that repeal of 18 M.R.S.A. §1051 (abolishing dower, among other things) is not construed to revive common law marital estates, UPC 2-113 is included in the proposed Maine Code.

Under the Code the only property the dead spouse has conveyed before death that the surviving spouse can reach is certain property transferred to donees in cases where the spouse opts for the elective share of the augmented estate. Even in that rare case, there is no clog on title because of UPC 2-207(c),

protecting transferees for value from an original transferee. In view of the careful arrangements in Article 2 of the Code for protecting the spouse, the provision of 19 M.R.S.A. §161 requiring joinder of a spouse in a conveyance to bar his or her interest by descent in the estate so conveyed would be repealed as creating an unnecessary and pernicious threat to the security of real estate titles. The same may be said for the following sentence in §161: "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."

The final sentence of 19 M.R.S.A. §161 does not have the effect of clogging titles, but by its terms it gives creditors a sweeping remedy against the property in the spouse's hands without any showing of fraud or even insolvency on the part of the conveying spouse. It would seem that a normal creditor's bill to set aside a conveyance by one spouse to another as fraudulent would suffice as a remedy if the husband is execution-proof.

For these reasons, the Commission's bill could amend §161 to end the section immediately at the second semicolon so that it would read: "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."

Section 168. Under the Code, 19 M.R.S.A. §168 would become unnecessary as a basis for waiver of the right to an elective share. Section 168 provides, among other things, that a marriage settlement executed before two witnesses before marriage will serve as a basis for barring rights of either spouse in the estate of the other. The same effect could be achieved, before or after marriage, without the formality of witnesses, under the Code. UPC 2-204. The Code section does require such an agreement to be in writing signed by the party waiving.

The Code does not provide directly for the extraordinary arrangement that could be made pursuant to 19 M.R.S.A. §168, under which the spouses could by witnessed agreement "determine what rights each shall have in the other's estate during the marriage and after its dissolution by death." The Code provision on contracts to make wills, UPC 2-701, hardly goes so far as §168 seems to on its face, since 2-701 refers to contracts to make a devise or will, or not to revoke a devise or will, or to die intestate. Arrangements made under §168 have been deemed enforceable in equity. Bright v. Chapman, 105 Me. 62, 72 Atl. 750 (1908). Nothing in the Code would prevent the enforcement of the terms of an agreement entered into by spouses without mistake, duress or overreaching, promising rights to each other upon death of one of them. To the extent that the

surviving spouse is bound by such an agreement to take less than her elective share, it would be enforceable under UPC 2-204 or perhaps on the principle of estoppel. Almost surely, however, the survivor's rights could not be enlarged by the agreement, either beyond the amount of the spouse's elective share as against other intestate takers in the case of intestacy or as against other devisees where decedent has left a will. In fact, no case is found in which even the Maine statute is given that wide a scope. The cases under §168 involve enforcement against a survivor of promises by him or her to take less than the intestate share. See, e.g., Smith v. Farrington, 139 Me. 241, 29 A. 2d 163 (1942). The kind of case that has so far arisen in Maine under §168 would be treated no differently under Code provision 2-204.

Section 168 of Title 19 is thus not inconsistent with the Code. It goes farther than the Code at least on its face, by validating written spousal agreements for disposition of property at the death of the first to die. The Code provisions for waiver of the right of election (UPC 2-204) and for contracts concerning succession (UPC 2-701) would seem to take care of all kinds of spousal agreements that need attention. Although §168 seems to do no positive harm, it would be redundant in all important respects and would be repealed by the Commission's bill.

19 M.R.S.A. ch. 13 (§§631-635). Divorce and Annulment.

Section 31 of Title 19 prohibits marriage to specified close relatives; §32 provides that "mentally ill" or feeble-minded persons or idiots are not capable of contracting marriage; §33 provides that polygamous marriages are "void." According to 19 M.R.S.A. §631, a marriage prohibited in those sections is "absolutely void" if solemnized in Maine. When a marriage is annulled for consanguinity or affinity (under §31), the issue is pronounced illegitimate by §633 of Title 19. When a marriage is annulled for nonage, mental illness or idiocy, the issue is the legitimate issue of the parent capable of contracting marriage (19 M.R.S.A. §633). In several respects these statutes may be unwise, and it may be that §633 would be unconstitutional in certain applications.

However, the characterization of a child as "legitimate" or "illegitimate" under §633 would not cause any conflict with the Uniform Probate Code if it were adopted. When the characterization is made either way, consequences would flow in the normal way from application of the provisions of the Code. The Code does not purport to declare what offspring are legitimate or illegitimate.

A similar observation applies to §634, regarding legitimacy of the issue of a bigamous marriage.

It would not be necessary, therefore, to repeal or amend the provisions of chapter 13 (§§631-635) in connection with the proposed Maine Code. Although the effects of chapter 13 are



harsh, their amendment would not be required by the mandate of the Probate Commission.

19 M.R.S.A. §722-A. Disposition of property.

In §722-A, the divorce court is given various criteria governing the exercise of its discretion in dividing marital property in a proceeding for a divorce or legal separation. The section defines "marital property" for purposes of the section. No conflict with any provision of the Code is perceived. The fact that under the Code a judicial separation does not alone terminate the status of "spouse" for purposes of intestate succession is not inconsistent with a power in the court to divide up the marital property of §722-A between two living spouses who are separating.

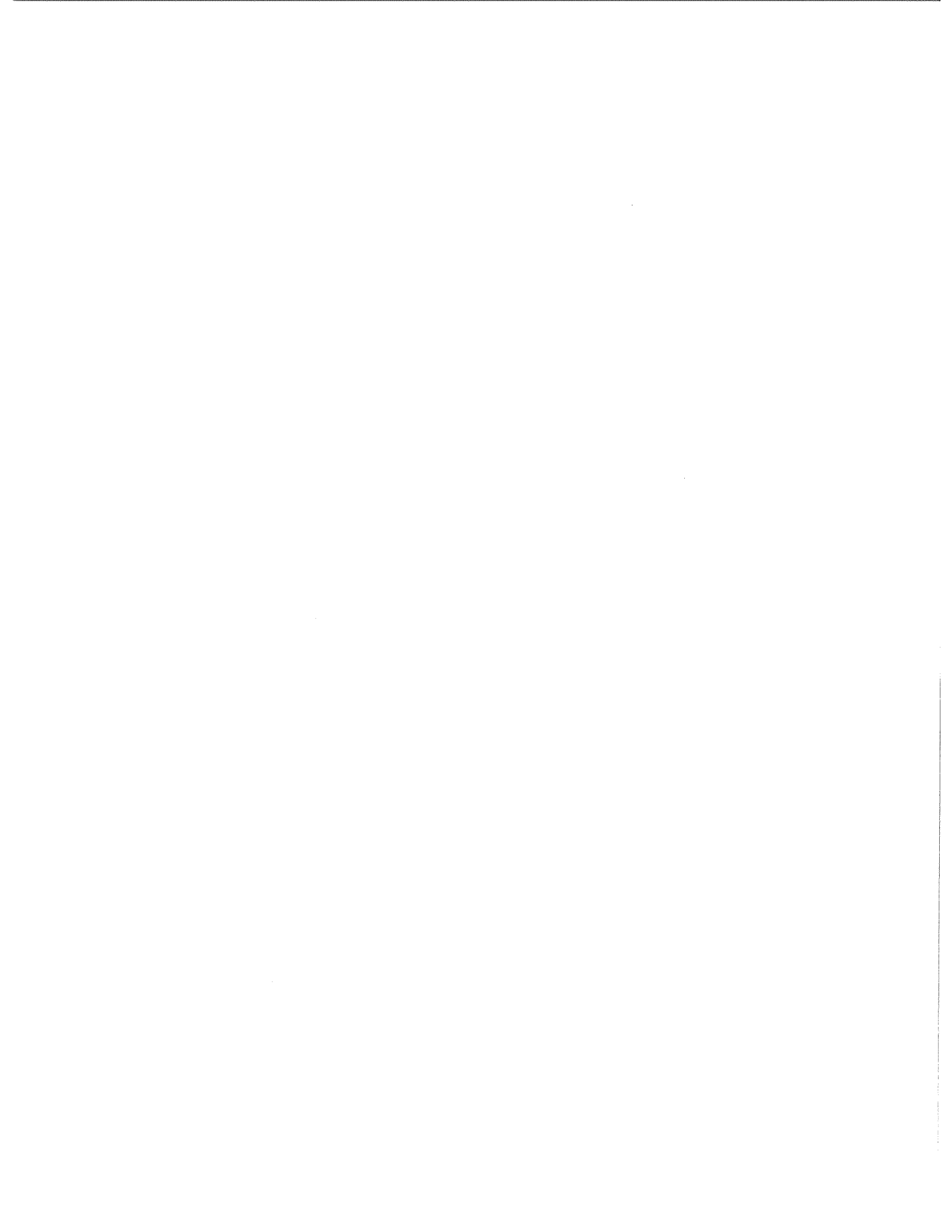
19 M.R.S.A. §724. Issue inherit despite divorce.

Insofar as §724 provides that a divorce does not bar the issue of the marriage from inheriting, it is not in conflict with the Code. However, the section goes on to say that the divorce does not "affect their rights." This proposition cannot be true even under existing Maine law since one effect of the divorce is to terminate the spouse's interest in succession and hence to enlarge the intestate share of any issue. The meaning of §724 must be that the divorce will not affect the rights of issue adversely. So understood, the section would not conflict with the Code, though it seems to be a useless provision.

Under the Code, if a divorced spouse remarries and has more

children by a new spouse the Code says (UPC 2-102 (4)) that the new spouse takes only one-half the estate and all the decedent's children, by new and old spouses, split the other half. Without a divorce and remarriage, the original spouse would have taken \$50,000 plus half, the rest going to the children. So, in a sense, the rights of "issue" are affected by divorce under the Code but, again, not adversely. Hence, 19 M.R.S.A. §724 would be as accurate under the Code as it is now if adverse effect on the issue's rights is referred to.

The Commission's bill would amend §724 by deleting the inaccurate and unnecessary words, "not affect their rights."



## Chapter 2

### PROBATE ADMINISTRATION

No doubt the major basic reforms of the Uniform Probate Code occur in the area of probate administration. It is here that the heart of simplifying probate procedures exists. The basic aspects of these Uniform Probate Code reforms lie in the following characteristics of Article III:

1. Providing informal means for probating a will or appointing a personal representative (executor or administrator) in situations where there is no need for elaborate, or even routine, formal court proceedings, while still providing safeguards against abuse, and opportunities for any interested person (defined in UPC 1-201 (20) ) to call upon the court quickly and efficiently whenever he feels a need to do so (see esp. UPC 3-706) or to require or obtain a judicial probate or appointment in formal proceedings (Part 4 of Article III);

2. Vesting in the personal representative the powers ordinarily held by a trustee in an intervivos trust so that the estate can be administered without the waste of judicial, attorney, or the parties' time, unless there is a need for proceedings, which would then be readily available (UPC 3-607, 3-704) or unless a party feels a need for the more traditional judicially supervised administration, which he can ordinarily require (Part 5 of Article III); and

3. Facilitation of interstate estate administration by dealing with some of the troublesome problems that can arise in that context.

While there are a number of other reforms in the probate administration area, and many refinements of the basic points just mentioned, these basic points would seem to be the most crucial: elimination of unnecessary and time wasting formalities while preserving adequate safeguards and options, and independence of administration with the same or more accountability and access to judicial remedies and supervision as the law generally accords in other areas which are just as important as probate and where the stakes are just as high.

In order to help provide a better understanding and overview of the Code's administrative system, this chapter describing the Commission's study will be organized in the same sequence as that of Articles III and IV themselves, which are arranged in a logical progression on the basis of the basic elements of probate administration.

A. General Provisions

Devolution of Estate and Need for Probate. Section 3-101 states the general principle, not expressly set forth in the present Maine statutes, that a decedent's estate passes according to his will or by intestate succession subject to allowances, rights of creditors, and privileges of renunciation by successors, and subject to the procedural limitations of the Code. A major purpose of the Uniform Probate Code probate procedures is explicitly suggested in UPC 3-101; namely, promptness in the settlement of estates.

Under present Maine law no will is effectual to pass property unless proved and allowed in the probate court. 18 M.R.S.A. §101. The Code, in UPC 3-102, adheres to this important principle, but with two exceptions of limited scope designed to deal with modest family situations that might otherwise result in hardship. A "duly executed and unrevoked" will that has not been probated may be admitted as evidence of a devise if no Court proceeding concerning the estate has occurred and (1) either the devisee or his successors possessed the devised property in accordance with the will or (2) the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings. These exceptions are intended to permit introduction of the unprobated will into evidence in the hardship cases described in the last paragraph of the Comment to the section.

The "exception" in §3-102 for small estates under UPC 3-1201 is not really an exception, but rather a device designed to allow an heir or devisee of a small estate to properly collect the debt owed the decedent by use of an affidavit even though no will has been probated and no estate representative appointed.

Necessity of Appointment for Administration; Creditors' Claims. The present Maine statutes on probate administration nowhere state explicitly that appointment as executor or administrator is necessary as a basis for authority to administer a decedent's estate. Such a requirement is implicit, however, in 18 M.R.S.A. §1414, which characterizes a person as executor in his own wrong if he meddles with the decedent's property without having been so appointed and which specifies certain adverse consequences flowing from the characterization.

Section 3-103 of the Code makes the requirement of appointment explicit. Even informal administration cannot proceed without the issuance of letters. It is true that the special provision in UPC 3-1201, for collection of personal property by affidavit in the case of an estate worth not more than \$5,000, would be effective where no personal representative has been appointed. But even the summary administrative procedure provided by UPC 3-1203, for paying allowances and the expenses of administration, funeral, and last illness, would presuppose that a personal representative has been appointed. The only exception under the Code would arise under Article 4, where a foreign

personal representative appointed at the out-of-state domicile of the decedent could be permitted to administer local assets without formal letters from the local probate court as long as no application for administration were pending in Maine.

UPC 4-204, 4-205, 4-206.

One of the main objects of Article 3 of the Code, particularly of Part 8, on creditors' claims, is to channel all claims against the decedent and his estate through the personal representative, either by submitting a statement of claim or by legal proceedings, except in cases where legal proceedings to enforce a claim have been already commenced against the decedent during his lifetime. (For that exception, see UPC 3-804 (2), second sentence.) This policy, of requiring generally that claims be presented to the personal representative, is carried forward into a provision prohibiting execution or levy against estate property under a judgment against the decedent or his personal representative. UPC 3-812. The purpose of these provisions of the Code is to insure fair treatment of all creditors of an insolvent estate by preventing any preferences that might otherwise be obtained by creditors who levied on or attached estate assets.

Code §3-104 bars any proceeding to enforce a claim before appointment of a personal representative. After appointment, however, the claim may be "presented," not only by filing with the Court or by mail or delivery to the representative, but also



by commencement of legal proceedings against the representative. UPC 3-804 (2). Under present Maine law, any legal action commenced on a claim before 30 days after presentation or filing of such claim may be abated until the 30 days has passed. 18 M.R.S.A. §2402. No compelling reason is perceived for retaining the thirty-day delay for legal action if the Code is adopted.

Subsection (3) of UPC 3-804 bars commencement of any legal proceeding on a duly presented but disallowed claim more than 60 days after the personal representative has mailed a notice of disallowance. Present Maine law appears to permit suit on a duly presented but disallowed claim to be brought within 12 months of qualification. 18 M.R.S.A. §2651. The Code provision has the virtue of speeding up action on the prosecution of claims against estates: if a claim is disallowed, the creditor must take legal action within 60 days or be barred. The Code arrangement appears to be a desirable improvement in its effect of stimulating prompt action on the part of creditors whose claims have been disallowed.

By cross-reference to other Code sections, the third sentence of UPC 3-104 makes provision for a creditor with an unbarred claim to recover against distributees or a former personal representative in certain circumstances where the estate has been distributed. The comparable provision of existing Maine law is 18 M.R.S.A. §2654, which, at least on its

face, permits a creditor whose claim has not been filed within the nonclaim period to have remedy against the heirs and devisees within six months after the claim becomes due. The section has been construed not to afford any relief to a creditor whose claim, originally mature and enforceable against the personal representative, has been barred as against that representative by the provisions of the nonclaim statute. Fowler v. True, 76 Me. 43 (1884). In view of that construction of 18 M.R.S.A. §2654, no important change in Maine law would be effected by the third sentence of UPC 3-104 if the Code is adopted. The Code spells out more carefully the unusual situations in which an unbarred creditor may pursue his remedies. UPC 3-1004 and 3-1005.

In one important respect, however, the Code would change Maine law relating to creditors' claims against the estate. The cases under 18 M.R.S.A. §2654 hold that even though an unmatured or contingent claim is not presented within the nonclaim period, it may serve as the basis for recovery against the heirs or devisees after distribution of the estate, at least for six months after the claim becomes due. Sampson v. Sampson, 63 Me. 328 (1874). The Code would clearly bar such a claim if it had not been timely presented to the personal representative even though it did not become payable until after the end of the nonclaim period. UPC 3-803. 3-810. The third sentence of UPC 3-104 would be applied accordingly, with a result contrary to that under the present 18 M.R.S.A. §2654.

There is one virtue in the Code requirement that unmatured or contingent claims be presented to the personal representative within the nonclaim period as a condition to the creditor's right to proceed against the distributee: it promotes greater speed and finality in the administration and distribution of estates. The Code rule would require the holder of an unmatured, contingent or unliquidated claim to be alert to the need for presenting his claim to the personal representative in order to preserve the claim. In most situations, there appears to be no excessive hardship in placing that responsibility on the holder of such a claim. For example, where a surety on an unmatured note dies, it does not seem unreasonable to require the payee to present his contingent claim to the personal representative of the dead surety's estate if the payee wishes to preserve his contingent, secondary rights against the decedent. However, some contingent claims may not be so easily recognized by their holders during the nonclaim period. An instance is the situation treated in Johnson v. Libby, 111 Me. 204, 88 Atl. 647 (1913), where the court had to consider the liability of a decedent owner of bank shares to an assessment for the benefit of depositors of the bank, which had been declared insolvent while decedent was still alive. The court order of assessment of all the bank shareholders was not made until after decedent died and after her estate had been distributed. The receiver of the bank was held entitled, under

18 M.R.S.A. §2654, to pursue a distributee of part of the decedent's estate for the amount of the assessment on the theory that the shareholder's liability was contingent and the claim was not required to be presented to the executor during the nonclaim period. The Code would seem to override the result in that case. On balance, the Code position, requiring presentation of unmatured, contingent and unliquidated claims, seems preferable to the present Maine law on the point, as promoting stability in the settlement of estates. Claimants will have to be more alert and active in presenting unmatured, contingent and unliquidated claims than they are required to be under present Maine law if they wish to preserve their rights against distributees after the estate is settled.

Proceedings affecting devolution and administration;  
jurisdiction of subject matter. Section 3-105 states in broad terms (1) the function of the register in informal proceedings, (2) the exclusive jurisdiction of the Court in what are traditionally deemed to be probate proceedings, and (3) the concurrent jurisdiction of the Court over any other action or proceeding concerning a succession or to which an estate may be a party. These provisions summarize in jurisdictional terms the basic institutional arrangements of Article III: (1) a full-power court that intervenes in the administration of estates only where some interested person asks for judicial intervention, (2) a register who determines testacy and issues letters testa-

mentary or of administration in uncontested cases (informal probate and appointment) and who maintains the records of the probate office.

These arrangements are necessary for the efficient administration of estates under Article III of the Code. One technical change is made in this section of the proposed Maine Code: exclusive jurisdiction of the court is expressed to include informal as well as formal proceedings. This was done in view of the Code's definition of "court" in §1-201 (5), which speaks in terms of the court as an institutional structure, rather than in any way as one official (the judge) rather than another (the register). The terms "judge" and "register" are used specifically throughout the rest of Article III where that distinction is important, so that this technically conforming amendment makes no change in the substance of the Code.

Section 3-106 gives the Court personal jurisdiction over any interested person in proceedings within the exclusive jurisdiction of the Court provided that person has been given notice according to UPC 1-401.

Scope of proceedings; proceedings independent; exceptions.

The provisions of UPC 3-106 afford great flexibility to interested parties in selecting appropriate modes of procedure at various stages of administration. To the extent that parties opt for informal procedures under UPC 3-107, the proceedings would not be in rem. Informal proceedings would bind a person not made a

party and would protect parties to the proceeding only by remaining unchallenged for the periods of time provided in UPC 3-108, 3-802, 3-803, 3-906 (b), 3-1005, and 3-1006.

If a party to a proceeding in probate court wants immediate protection, he may exercise his option of demanding formal proceedings or even supervised administration.

Ultimate Time Limit for Probate, Testacy and Appointment Proceedings. Section 3-108 provides the basic limitations of time for the commencement of testacy or appointment proceedings, formal or informal. Except in certain types of situations, specified in the section, such proceedings must be commenced within three years of decedent's death. The most important exception relates to the situation where a will has been informally probated and it is desired to contest that probate; such a contest may be initiated within twelve months from the informal probate or three years from decedent's death, whichever is later. The crucial effect of UPC 3-108 is to make the assumption of intestacy final in any case where no will has been probated within three years of death. The various limitations provisions of the Code are carefully articulated to assure finality of settlements to a reasonable degree. Separate considerations affect the Code limitations as they apply

- (1) to heirs or devisees (UPC 3-108, 3-412, 3-413, 3-908, 3-909, 3-1006);
- (2) to personal representatives (UPC 3-108, 3-703);

(3) to purchasers from personal representatives or distributees (UPC 3-703, 3-715, 3-910);

(4) to creditors (UPC 3-108, 3-803 (a) (2)).

These arrangements are certainly different from those obtaining under present Maine law. Section 1555 of Title 18 of the Maine Revised Statutes Annotated provides that, with certain exceptions, no probate of a will or administration on an estate shall be originally granted after 20 years from death, unless property over \$20 in value comes to the knowledge of any interested person. In that case, "original administration" may be granted on that property and the administration shall affect only the property so discovered and shall not revive debts owed to or by the intestate decedent. The effect of 18 M.R.S.A. §1555 is, generally speaking, to leave the possibility of probate and administration open for 20 years after death of the decedent.

The executor or administrator is protected by 18 M.R.S.A. §2651 against any action on a claim or demand against the estate, except for legacies and distributive shares, unless it is "commenced and served" within 12 months after his qualification as representative. (The section purports to make an exception also "as provided in" 18 M.R.S.A. §2653, but the exception is incomprehensible.) This twelve-month period, running from qualification of the executor or administrator, for commencing action on a claim is to be contrasted with the Code provision

that a proceeding on a disallowed claim must be commenced within 60 days after the mailing of notice of disallowance. UPC 3-804 (3). It is to be contrasted, also, with the overall Code requirement that claims must be presented within 3 years of decedent's death or be barred. UPC 3-803 (a).

No provision has been found in the present Maine statutes that purports to give purchasers from an executor or administrator any special protection; so the protective provisions of UPC 3-703, 3-715, and 3-910 have no counterparts in present Maine law. Under present law, an executor or administrator may be licensed to sell decedent's real estate (18 M.R.S.A. ch. 221), and the purchaser is protected by 18 M.R.S.A. §2253 from any collateral attack based on "irregularity of the proceedings" if the license was granted by "a court of competent jurisdiction" and the deed duly executed and recorded, but that is the limit of the purchaser's protection under the court license.

Statutes of limitation on decedent's cause of action. In effect, §3-109 would extend to a point four months from decedent's death the limitation period on a claim by decedent on which the statute is running at the time he dies.

Where the statute of limitations is about to run on a claim that decedent holds at the time he dies, this section extends the statutory time to a point four months from his death. There is a comparable provision of Maine law, 14 M.R.S.A. §856, the



first sentence of which provides as follows:

§ 856. Death of either party before action commenced

If a person entitled to bring or liable to any action under subchapter I, and §§851 to 855 dies before or within 30 days after the expiration of the time limited therefor, and the cause of action survives, the action may be commenced by the executor or administrator at any time within 20 months after his appointment, and not afterwards if barred by the other provisions hereof. . .

The words "or within" 30 days after the expiration... are incomprehensible if taken literally, because they would permit a person to revive a claim already barred by dying within thirty days after the claim became barred. It is arguable that this language must be deemed controlled by the language ". . . and (if) the cause of action survives . . .," but no case has been found discussing the point.

Apart from the foregoing difficulty, §856 would be inconsistent with UPC 3-109 and would be repealed by the Commission's bill.

Venue for Estate Proceedings. Adoption of UPC 3-201, which governs venue in probate proceedings, would leave existing law virtually unchanged. At present, the statutes that define the jurisdiction of the probate court necessarily control its venue as well. Title 4 M.R.S.A. §251 limits jurisdiction in proceedings to probate a will or grant letters of administration to the probate court in the county of which the decedent was a resident at the time of his death, or, in the case of decedents who were not residents of Maine, to the probate court in any

county where property belonging to the decedent is located. 4 M.R.S.A. §251. In the event that more than one probate court could properly assert jurisdiction (i.e., when an out-of-state decedent leaves property in two or more Maine counties), the court which first commences proceedings obtains exclusive jurisdiction thereafter. 4 M.R.S.A. §253. Although the UPC's venue provisions are separate from its jurisdictional sections (see Part 3 of UPC Article I), they are otherwise almost identical to the Maine statutes cited above. See UPC 3-201 (a) (1) and (2).

Both the UPC and existing Maine law recognize exceptions to the rule restricting venue to the court where proceedings first occur. Obviously, an improper assumption of venue may be corrected by process of appeal. See 4 M.R.S.A. §253 and example (1) in Uniform Comment following UPC 3-201. In addition, a proceeding commenced in one probate court may be transferred to another under certain circumstances. Under present law, transfers are appropriate only when necessary to avoid conflicts of interest involving the judge or register of probate. 4 M.R.S.A. §307. UPC 3-201 continues to allow for transfers in this situation (see reference in UPC 3-201 (b) to UPC 1-303 (c)); furthermore, it authorizes transfer in a new situation that would not come up in the present probate system: UPC 3-201 (c) provides that where initial informal proceedings have established venue in one district, a formal action may be brought before the

court in that same district for the purpose of challenging the venue and having the proceedings transferred elsewhere. Example (2) in the Comment following UPC 3-201 illustrates this procedure and points out that it provides a desirable safeguard within the UPC's system of informal administration.

UPC 3-201 (d) provides several guidelines for determining the location of certain kinds of assets when venue is premised upon their alleged presence in the county. One of these guidelines has already been judicially adopted in Maine -- the location of a debt owed to the decedent is at the residence of the debtor. Neely v. Havana Electric Ry. Co., 136 Me. §352 (1940). The Neely case, however, appears to imply that in the case of a corporate debtor, the debt is located in the state of incorporation. UPC 3-201 (d), on the other hand, specifies that the location of its principal office determines the residence of a corporation. The other guidelines in subsection (d) clarify issues that are unresolved in present law: a debt evidenced by commercial paper, investment paper, or any other instrument is located where the paper is, and an interest in property held in trust is located where the trustee may be sued.

One apparent drafting oversight in UPC 3-201 (a) (2) is corrected in the proposed Code for Maine by providing for venue in the probate court in any county where the decedent's property is located either at the time of his death or any time thereafter, as is now the case under 4 M.R.S.A. §251.

Demand for Notice. UPC 3-204 provides a procedure whereby anyone may file a demand for notice of filings or orders that pertain to an estate in which he is interested. This section thus provides an important protection against the abuse of informal proceedings in which notice is not otherwise required. By filing such a demand for notice, an interested person would automatically be notified of any informal probate or appointment proceedings, as well as the filing of any UPC 3-1003 closing statement. As the text points out, failure to comply with a demand for notice does not affect the validity of any informal order. However, the person responsible for the oversight may be held liable for any losses that result from his failure to give the notice.

Existing Maine law has no procedure that is analogous to the one described in UPC 3-204, which is an integral part of the Uniform Probate Code's provisions for informal proceedings.

B. Priority Among Persons Seeking Appointment as Personal Representative.

UPC 3-203 provides a detailed system governing priority among persons seeking appointment as a decedent's personal representative or successor personal representative. Subsection (a) outlines a generally applicable hierarchy of priority, beginning with the executor nominated in any probated will and descending to others in the following order: the surviving spouse who is also a devisee, other devisees, the surviving spouse, other heirs, and creditors. Creditors, however, must wait 45 days after the decedent's death before claiming their priority for appointment. Subsection (f) establishes an age qualification and bars appointment of persons found unsuitable by the court. The proposed Maine Code adds the State Tax Assessor as an additional category for reasons discussed in Chapter 7.D. of this study in connection with 36 M.R.S.A. §3527.

Formal proceedings are always required whenever an objection to an appointment is made. UPC 3-203 (b). They are also necessary in any case where the court appoints a person other than the one with immediate priority, even if the person with immediate priority has renounced his right. UPC 3-203 (e). In the event of a controversy concerning appointment, subsection (b) allows the court to depart from the usual order of priority in two specific situations. First, creditors may petition the court to appoint a qualified personal representative without

regard to his priority if it appears that the assets remaining after exceptions and costs will be consumed in satisfying their unsecured claims. Second, heirs or devisees whose collective interest in the estate amounts to over one-half its distributable value may join together and demand the appointment of a person other than the one with priority (unless that person was the testator's nominee).

Subsection (c) gives a person with priority (other than the testator's nominee) the right to nominate another to serve in his place. Similarly, he may renounce his right to appointment and/or nomination. Conservators and guardians may exercise these rights on behalf of their wards. UPC 3-203 (d).

UPC 3-203 is considerably more detailed than the present statutes that are relevant to questions of priority. Title 18 M.R.S.A. §107 specifies that the executor nominated in a probated will shall be granted letters testamentary if he is legally competent and gives any required bond. If the testator's nominee does not serve for any reason, however, no priority is prescribed for the appointment of the administrator -- "any suitable person" is eligible (18 M.R.S.A. §1601), which is also the case when an administrator d.b.n. (or "successor personal representative" in Uniform Probate Code terminology) must be appointed (18 M.R.S.A. §1602). Where intestate decedents are concerned, 18 M.R.S.A. §1551 (1978 Supp.) prescribes a rather curious system of priority. Contenders for appointment fall

into one of two classes, the first consisting of the decedent's relatives and the second containing all other persons. A "suitable" person from the latter group may be appointed only if relatives are either unsuitable or uninterested. No priority among the relatives themselves is imposed: "Upon the death of any person intestate, the judge having jurisdiction shall grant administration of such intestate's goods or estate to the widow, husband, next of kin, or husband of the daughter of the deceased, or to 2 or more of them, as he thinks fit. . . ."

In balance, UPC 3-203 is a definite improvement over existing Maine law; the Code provisions address a number of issues on which the present statutes are silent. It is particularly important to have a more definite establishment of priorities under the Uniform Probate Code for the guidance of the register in light of the system of informal appointment. UPC 3-203 would serve to furnish this, and to minimize controversies over priority for appointment.

C. A Flexible System of Proceedings.

1. Informal Probate.

UPC 3-301 through 3-306 describe the procedure for obtaining formal probate of a decedent's will. The purpose of providing this simplified method of making a will operative is, in the language of the drafters, "to keep the simple will which generates no controversy from becoming involved in truly judicial proceedings." Uniform Comment to UPC 3-302. Thus,

informal probate is most notably different from present Maine probate procedures in two respects. First, it involves no judicial adjudication or decree but is rather "a statement of probate by the Registrar" that is based on various facts set forth in the application for informal probate. UPC 3-302. Second, informal probate is an ex parte proceeding that does not require prior notice except to any interested party who has specifically requested it pursuant to UPC 3-204 or to any personal representative who has already been appointed on the assumption that the decedent died intestate. UPC 3-306. By contrast, public notice, as well as personal notice at the judge's discretion, is currently a prerequisite to all hearings on petitions for the probate of a will. 18 M.R.S.A. §102. Present Maine law also requires that once a will has been probated, a decedent's successors must be given notice of their interests. 18 M.R.S.A. §225 (1978 Supp.).

Despite its ready availability, informal probate is attended by a number of safeguards. For one thing, UPC 3-301 requires the applicant for informal probate to verify the accuracy of the statements in his petition before the register. Thus, persons injured as a result of informal probate that was granted on the basis of deliberate misrepresentations may take advantage of the Code's general remedy for fraud (see UPC 1-106) and thereby avoid the otherwise conclusive effect of informal probate beyond the usual time limitations. A second safeguard



is provided by UPC 3-204, which allows any interested person to file with the court a demand for notice of all orders and filings that relate to the estate. By filing such a demand, an interested person would necessarily receive notice before informal probate could be granted.

The sufficiency of these safeguards notwithstanding, the primary protection against misuse of informal probate is that even if it is not fraudulently obtained, it may be superseded by a "formal" probate order at any time before it becomes final under the applicable time limits (see UPC 3-108). Formal probate, as will be discussed in more detail later on, provides a judicial proceeding for obtaining a conclusive order of probate following notice to the testator's heirs and devisees. Thus, even though a will that at first appeared to be uncontested has been informally probated, the informal order may be vacated and replaced by a formal decree. Importantly, the prerequisites to informal proceeding preclude the use of the device in certain situations which by their very nature suggest that special problems may exist. Assuming a will is otherwise eligible for probate (see UPC 3-302 (a)) informal probate is unavailable if any of the following circumstances are present:

1. If the applicant is aware of the existence of either a revoking instrument or another later will. UPC 3-301 (2) (iii), 3-304.
2. If a personal representative has already been appointed in another county. UPC 3-303 (b).

3. If any will, including the one being offered for informal probate, has already been the subject of a previous probate order. UPC 3-308 (b). But see UPC 3-308 (d) (informal probate possible if same will has already been probated elsewhere).
4. If the application for informal probate related to one or more of a known series of wills, the latest of which does not expressly revoke the earlier. UPC 3-304.
5. If testacy proceedings or proceedings to obtain supervised administration are pending. UPC 3-401, 3-503.
6. If the original will is not in the possession of the court, does not accompany the application, and is not on file in any other court. UPC 3-301 (2) (i), 3-401 (b).
7. If proper execution is not apparent and cannot be assumed. UPC 3-303 (c).
8. If the fact of the testator's death is in doubt. UPC 3-301 (a) (1) (ii), 3-403 (b).

Rather than paraphrase in detail the various sections concerning informal probate, the Commission is referred to UPC 3-301 through 3-306 for the specific content of those sections, the more significant of which have already been commented on above. UPC 3-301 specifies what must be included in the verified application for informal probate of a will, determination of intestacy, and appointment of a personal representative, including a successor personal representative. UPC 3-302 through 3-305 describe the effects of informal probate and the essentially ministerial duties of the register in that regard, including a list of the findings required as a prerequisite to the granting of probate by the register. UPC 3-306 describes the

notice requirements for informal probate, and contains an optional subsection (b) providing for notice to heirs and devisees within 30 days after probate in a manner comparable to the information required under UPC 3-705 within 30 days after one's appointment as a personal representative.

While the optional provision of UPC 3-306 (b) may add some protection for heirs and devisees, it seems to add an unnecessary burden to the administration of the kinds of estates appropriate for informal proceedings. The crucial event for requiring such notice is really the appointment of the personal representative. At that time administration begins, and there is some reason to let heirs and devisees know that fact so they can take any steps they feel are necessary to protect their interests before the estate assets are administered on. This same need does not exist in the event of a mere determination of testacy status which may be superseded by later formal proceedings. Nothing is being done with the assets of the estate on the basis of the probate alone.

In any event, the provisions of 18 M.R.S.A. §255, providing for notification of devisees by the register after any probate of the will is preserved in §1-505 of the proposed Maine Code. This serves exactly the same purpose as the rejected "optional" subsection (b) of UPC 3-306, but without burdening at least the private party who applies for informal Probate. It merely continues a present system to which Maine registers are already accustomed.

As pointed out in Chapter 6.G.6., certain changes were made in §3-303 (e) in regard to the informal probate of certain foreign wills.

2. Informal Appointment.

Like informal probate, informal appointment is designed to simplify the granting of letters in cases where appointment is merely a matter of routine. Any person with priority for appointment as a decedent's personal representative (see UPC 3-203) may seek an informal appointment by filing the appropriate application described in UPC 3-301. Thereafter, UPC 3-307 through 3-311 describe the procedures for obtaining informal appointment. As in the case of informal probate, the register's decision does not involve an adjudication; and if an application for informal appointment is denied, the applicant is free to commence a formal judicial proceeding. UPC 3-308. Otherwise, informal appointment fully vests a personal representative with the ordinary powers of a personal representative who is formally appointed. Although an application for informal appointment may be submitted concurrently with an application for informal probate, this need not be the case. The two proceedings are of an essentially separate nature. See UPC 3-107. The advantage of distinguishing them is to confine any formal proceedings that may be instituted to the actual matter in controversy, whether it be testacy status or

the right to appointment. Thus, where the decedent's successors are involved in a dispute concerning priority for appointment under a will, it may be easier for them to have the will informally probated and restrict their court appearance to the matter of appointment. Under present Maine law, probate and appointment proceedings are generally combined (see Probate Form 16, 26) although it has been held that they involve two separate adjudications. Gurdy, Appellant, 101 Me. 73 (1905).

In terms of their effect there are differences between informal appointment and informal probate. Whereas a formal probate order would wholly vacate any informal probate previously granted, a formal appointment proceeding, although it supersedes an informal appointment, is without retroactive effect. UPC 3-307. Thus, the acts of the informally appointed personal representative remain valid, although he must refrain from exercising his powers over the estate once formal proceedings have been initiated. UPC 3-414 (a). In addition, formal appointment proceedings may not even be necessary in order to terminate an earlier informal appointment. For example, if an intervening formal testacy proceeding has altered the assumption concerning the decedent's testacy status under which the original personal representative was informally appointed, a person entitled to appointment under the later assumption concerning testacy may gain the office through in-

formal appointment proceedings, which automatically terminate the first personal representative's appointment. UPC 3-612.

UPC 3-310 specifies two notice requirements that must be met before informal appointment is granted. First, notice must be sent to any person who has filed a demand for notice pursuant to UPC 3-204. Second, notice must be given to any person having a prior or equal right to appointment under UPC 3-203, unless he has waived his priority in a writing filed with the court. Under present Maine law, notice of the pending appointment of a personal representative is ordinarily contained in the published notice of a petition for probate of a will, which may be accompanied by personal notice at the judge's discretion. 18 M.R.S.A. §102. In the case of an intestate decedent, 18 M.R.S.A. §1551 requires notice of their priority to receive letters of administration before someone else is appointed as administrator. Both the Uniform Probate Code and present Maine law require notice of an appointment after it has been made. See UPC 3-705 and 18 M.R.S.A. §203.

As in the case of informal probate, informal appointment is automatically unavailable in certain situations where formal proceedings are likely to be more appropriate:

1. If the applicant for appointment does not have priority under UPC 3-203 and those with priority have not filed renunciations with the court.  
UPC 3-303 (a) (7).

2. If the appointment relates to a will that has not been probated. UPC 3-308 (a) (5).
3. If a personal representative has already been appointed, has not resigned, and there have been no intervening formal proceedings which alter the decedent's testacy status. UPC 3-308 (b).
4. If formal testacy or appointment proceedings are pending, or if a proceeding to obtain supervised administration is pending. UPC 3-401, 3-414 (a), 3-503.
5. If the application is for appointment on the assumption that the decedent died intestate but also indicates the existence of a possibly unrevoked will. UPC 3-311.

However, the fact that informal appointment is forestalled for any reason does not necessarily preclude the informal appointment of a special administrator. UPC 3-614.

### 3. Formal Testacy Proceedings

The purpose of formal testacy proceedings is to adjudicate conclusively a decedent's testacy status. These proceedings settle the issues of whether a decedent died testate or intestate; and if testate, under which will the administration of the estate is to proceed. As actual judicial proceedings, they are quite distinct from informal probate and appointment procedures. A general discussion of formal testacy proceedings is contained in UPC 3-401. UPC 3-402 describes the contents of a petition for a formal order, and a comprehensive notice provision is set out in UPC 3-403. UPC 3-404 requires a party who opposes formal probate of a will to state his objections

in writing. Evidentiary rules for the conduct of formal testacy proceedings vary depending upon whether a petition is contested or uncontested; they are found in §§3-405,3-406 3-407, and 3-409. The content and effect of a formal testacy order is the subject of §§3-408 through 3-413.

A formal testacy order has a twofold effect. First, it automatically supersedes any determination of a decedent's testacy status that was the result of previous informal proceedings, i.e., the informal probate of a will or the assumption of intestacy upon which an informal appointment was based. Second, it is final in that it precludes the institution of any further probate proceedings except in the limited circumstances described in UPC 3-412 and 3-413. Even where exceptions are made for interested persons who were without notice of the proceeding or who were unaware of a will's existence at the time, a formal testacy order may result in an earlier deadline for asserting their interests than the general three year limitation imposed by UPC 3-108. See UPC 3-412 (1) and (3).

Formal testacy proceedings are really necessary only in exceptional cases -- primarily in the event of a will contest, in which case they cannot be avoided. In addition, they are available to anyone who wants to have more binding determination of testacy status than is provided in Part 3, and have it prior to the running of the three year statute of limitations.

Basically, there are two procedural frameworks for a will



contest under the Uniform Probate Code. First, the proponent of a will, anticipating a dispute, may apply for formal probate in the first place, or even following an informal probate of the same will. UPC 3-401. Interested parties will receive notice of the petition and may pursue their objections within the context of the formal hearing. Second, the opponent of a will may initiate the contest by commencing a formal testacy proceeding either before, during, or after the proponent's attempt to establish the will's validity by informal probate. Once a formal testacy proceeding is begun, all pending informal proceedings are stayed. Furthermore, if a personal representative has already been appointed, he must refrain from making further distributions and may also be restrained from acting in any particular ways that were found to be inappropriate, or in any capacity whatsoever. UPC 3-401. UPC 3-406 and 3-407 define evidentiary standards and allocate burdens of proof in contested formal proceedings.

Conflict, however, is not a prerequisite to formal testacy proceedings; and in some cases, the Code requires a formal proceeding even though probate or appointment is uncontested. For example, formal proceedings are necessary in order to probate a lost or destroyed will (UPC 3-402 (a)), whenever the fact of death is in doubt (UPC 3-403 (b)), and in the event that more than one will is offered for probate even though they are not inconsistent (UPC 3-410). Except in rare instances

such as these, however, estates that are free of controversy should ordinarily make use of the more efficient and expeditious informal procedures.

Except for the fact that formal testacy proceedings should be the exception rather than the rule under the proposed Maine Code, they are generally analogous to existing procedures for proving a will or establishing a decedent's intestacy. This similarity is subject to several noteworthy qualifications, however, in light of certain procedural reforms contained in the Uniform Probate Code:

Notice. The notice provisions governing formal testacy proceedings are more thorough than the requirements of the present statute, which specifies only notice by publication plus personal notice at the judge's discretion. 18 M.R.S.A. §102. UPC 3-403 (a) assures notice to all of the decedent's heirs, his devisees and executors under all known wills, and any personal representative already appointed and still in office.

Evidence. UPC 3-405 through 3-407 state the standards of proof required in formal testacy proceedings, whether contested or uncontested, and allocate burdens of proof. They introduce some innovations and make some further minor changes in existing evidentiary standards. These sections are analysed Chapter 6 of this study.

Testacy and Appointment Proceedings; Distinction. As

noted in the preceding discussion of informal appointment, probate and appointment have already been recognized as distinct proceedings in Maine. Gurdy, Appellant, supra. Nevertheless, in present probate practice the two are almost invariably combined. See Probate Form No. 26. Under the Uniform Probate Code, however, formal testacy proceedings may, but need not, be combined with formal proceedings for the appointment of a personal representative. UPC 3-401. The advantages of keeping the procedures separate are an important part of the Uniform Probate Code reforms.

Estates of Missing Persons Presumed Dead. The substantive changes in the law governing estates of missing persons who are presumed dead are covered in Chapter 6. Part 4 of Article III contains several relevant points of procedure which have no counterparts in existing law. First, a formal testacy proceeding is a prerequisite to the administration of the estate of any person whose death may be in doubt. Second, notice of such a proceeding must be sent to the alleged decedent's last known address pursuant to the requirements of UPC 3-403 (b). Finally, in the event that an alleged decedent is not dead, UPC 3-412 (5) establishes his right to recover any of his property which is still in the hands of the personal representative, or any property or its proceeds in the hands of any distributees.

Probate of Foreign Wills. Chapter 6 also contains the

discussion of Maine's existing statute for proving foreign wills and the corresponding Uniform Probate Code provisions. (The term "foreign" includes its use in its international sense.) The Uniform Probate Code allows such wills to be probated in either informal (UPC 3-303 (e)) or formal (UPC 3-409) proceedings under the standards discussed in Chapter 6 in connection with these two sections.

Other provisions of Part 4 concerning formal probate are either consistent with existing Maine law, or would serve to clarify it. UPC 3-408, requiring local courts to respect formal testacy orders from another state if the decedent was domiciled there at death, does not differ from present law. 18 M.R.S.A. §152; Holyoke v. Estate of Holyoke, 110 Me. 469 (1913). The same is true of UPC 3-411, which allows for an order of partial intestacy in addition to formal probate when appropriate. 18 M.R.S.A. §6; Davis v. McKown, 131 Me. §203 (1932). UPC 3-410 provides that two separate wills, neither of which totally revokes the other either expressly or by implication, may both be probated. The formal decree "may, but need not" indicate which provisions are controlling in case of an inconsistency. Although no Maine cases have been found on this point, the same procedure would probably be followed today in the event that separate but compatible testamentary instruments were simultaneously offered for probate. Atkinson states the general rule:

"If (the will) consists of several instruments, all should be probated, even if they are somewhat inconsistent with each other, in which case the later instrument governs so far as there is inconsistency. When a later will totally revokes an earlier one, only the subsequent instrument is probated. In case of doubt as to whether the revocation is total, the court may either determine this matter on probate, or admit both instruments and leave the question of the extent of revocation for later determination upon construction." Atkinson on Wills, page 498.

As the last sentence of UPC 3-410 points out, this procedure is unavailable once testacy has been formally adjudicated, subject to the exceptions provided for in UPC 3-412.

#### 4. Formal Appointment.

Formal appointment proceedings (see UPC 3-402 and 3-412) are available either for purposes of appointing a personal representative for the first time, or in order to confirm or contest a previous informal appointment. They may be combined with formal testacy proceedings, but can also relate to an informally probated will. Formal appointment is most appropriate when there is some dispute to be resolved concerning the person who has priority for appointment (UPC 3-203), although no such controversy is a prerequisite to formal proceedings. In the event that a formal appointment proceeding does involve a challenge to a previous informal appointment, the informally appointed personal representative must, on receiving notice of the formal action, desist from further acts of administration except insofar as it is necessary to preserve the estate.

UPC 3-412 (a). Notice of a formal appointment proceeding must be sent to all interested persons, including any previously appointed personal representative and any persons with priority for appointment. UPC 3-412 (a).

It should be stressed that formal appointment proceedings are not necessary in order to install a successor personal representative after a previous appointment has been terminated for any of the reasons discussed in Part 6 of UPC Article III - - death, resignation, removal, or a change in testacy status. Conversely, despite the fact that formal proceedings may be used in order to oust an informally appointed personal representative, even a personal representative appointed pursuant to formal proceedings may have his appointment terminated for any of the above reasons delineated in Part 6 of Article III.

Perhaps the most common reason for wanting to replace an informally appointed representative will be a change in the decedent's testacy status following formal testacy proceedings. For instance, the proponents of a formally probated will may want to replace a personal representative who was appointed informally on an erroneous assumption of intestacy with the person nominated as executor in the formally probated will. Although formal appointment proceedings may be used in these circumstances, they are not necessary. UPC 3-612 specifies that a change in testacy status automatically terminates the original representative's appointment if a successor is appointed, either formally or informally, within thirty days after the time

for appeal has expired. If no such appointment is requested within that time, the original personal representative may, upon request, be appointed under the new assumption concerning testacy status.

5. Supervised Administration.

Supervised administration places "the administration and settlement of a decedent's estate under the continuing authority of the court" and "is appropriate when an interested person desires assurance that the essential steps regarding opening and closing of an estate will be adjudicated." UPC 3-501 and Comment thereto. Thus, supervised administration provides an alternative to the Uniform Probate Code's ordinary out-of-court approach to administration. Unlike formal testacy or appointment proceedings, which involve the court only while there are specific problems to resolve, supervised administration places the estate under court supervision until distribution is completed and the personal representative is discharged.

Notice of a petition for supervised administration must be given to all interested persons. UPC 3-502. Once a petition is filed, it has the effect of staying any pending informal probate or appointment proceeding and also precludes any further acts of administration on the part of a previously appointed personal representative. UPC 3-503. Because it involves an adjudicated order of distribution, supervised

administration must be preceded by a formal determination of a decedent's testacy status. If formal proceedings have not yet occurred, UPC 3-502 requires the filing of a petition for formal testacy proceedings along with the petition for supervised administration. Whether supervised administration should be granted is a matter left to the court's discretion, although the Code prescribes that appropriate weight should be given to any instructions in the testator's will regarding supervised or unsupervised administration. UPC 3-502.

In purporting to place the entire process of administration under court supervision, supervised administration resembles the probate system now in effect in Maine to a large extent. There are some important differences, however. The Uniform Probate Code's supervised administration involves no restrictions on the ordinary powers of a Uniform Probate Code representative except where distribution is concerned, or unless further restrictions are specifically requested and endorsed on the supervised personal representative's letters of appointment. Otherwise, the only time he is actually required to obtain a court order is when an event involving a distribution occurs. UPC 3-501, 3-504, 3-505. Because UPC 3-504 allows the supervised personal representative to exercise all the other powers of his office without court supervision, he remains empowered to act independently in many matters of administration where court approval would now be required, e.g.



sales of real estate, operating the decedent's business within the limits prescribed by UPC 3-715, and other types of transactions that are discussed in connection with the personal representative's powers later in this chapter.

It should be emphasized, however, that provisions elsewhere in the Uniform Probate Code provide means of securing a judicial hearing whenever a problem arises during the course of an administration, whether or not it is supervised. Particularly, UPC 3-105 gives any interested party the right to invoke the court's jurisdiction in order to resolve an estate-related problem and UPC 3-607 provides expressly for temporary restraining orders.

One of the advantages of supervised administration under the Code is that even in this most formal device a great deal of flexibility is afforded. The provision for specific restrictions on the letters allows the court, at the request of the parties to tailor the powers to the needs of the particular case.

Whenever there is a partial distribution during a supervised administration, UPC 3-505 requires that it be pursuant to an interim court order. Whereas notice of a final order of distribution is governed by UPC 3-1001, the Uniform Comment following UPC 3-505 points out that the notice question where interim orders are concerned should be resolved by court order or rule.

D. The Personal Representative.

1. Qualification, Acceptance and Jurisdiction

Sections 3-601 and 3-602 provide that one seeking to be appointed as personal representative shall file with the court (a) a written statement of acceptance, and (b) any required bond, before letters of appointment are issued. The acceptance of appointment by the personal representative constitutes a submission by him to the jurisdiction of the appointing court, and he is thereafter entitled to receive notice of all proceedings affecting the estate.

These sections appear to make no substantive change in present Maine law, although one minor difference occurs in the timing of effective appointment of an executor or an administrator with the will annexed. Present Maine law provides that a court may issue letters to one nominated in the will as executor, "but if he refuses to accept, or if he neglects for 20 days after probate of the will so to give bond," the court may appoint someone in his stead. 18 M.R.S.A. §107. Similar treatment would apply to an administrator with the will annexed. 18 M.R.S.A. §§1601, 1602. The situation for administrators is not quite so explicit, but 18 M.R.S.A. §1551 provides for appointment of administrator, subject to the appointment of someone else "if...they...refuse for 30 days from the death of the intestate to take out letters of administration." Present Maine law, however, contemplates that bond be given by executors and administrators "before entering upon the execution of [their] trust" despite the fact that

letters may apparently issue before bond is made. See 18 M.R.S.A. §§1501 and 1554.

UPC 3-601, by contrast, provides that the letters not be issued until after the acceptance and the giving of any required bond, and provides this in a clear manner, and with consistency of treatment between executors and administrators.

As the Uniform Comment to UPC 3-602 points out, a personal representative under the Uniform Probate Code is not deemed to be primarily an officer of the court, or a party to one continuous proceeding leading to a final settlement of the estate, unless appointed under UPC 3-502 for the purpose of supervised administration. UPC 3-602, however, preserves the appointing court's jurisdiction over the personal representative by providing that acceptance of the office constitutes consent to the court's jurisdiction, and by providing for notice to the personal representative in ways that meet constitutional requirements of due process.

Section 3-607 provides that the court may issue any order restraining the personal representative, or requiring him to perform acts, upon petition of any apparently interested person, and upon the court's determination that the personal representative's action or inaction would unreasonably jeopardize the interest of an interested person. It also provides for joinder of other persons with whom the personal representative may transact business. Subsection (b) provides for a hearing within ten (10) days unless otherwise agreed among

the parties, and provides for notice to the personal representative, his attorney, and other parties named defendant. The order would be of temporary nature, analogous to a temporary restraining order or preliminary injunction, and could be made permanent, if appropriate, under the provisions of UPC 3-105.

As a keystone provision to protect interested persons during unsupervised administration, this section has no direct counterpart under present Maine law, except to the extent that under the present administration system the executor or administrator as an officer of the court is subject to the court's jurisdiction and orders.

Under 18 M.R.S.A. §302 a surety may cite the representative for depletion, wasting or mismanagement of the estate, and the court may thereupon remove the representative. But there seems to be no explicit provision for restraining orders directly against the personal representative under current statutes. Except for 18 M.R.S.A. §1852, which provides that the judge may order the sale of personal estate and require the executor or administrator to account for the proceeds when the court deems it necessary for the speedy payment of debts or for the benefit of interested parties, the provisions relating to remedies for mismanagement seem to rely solely on the recovery of damages, especially on the bond, see 18 M.R.S.A. §§502, 1602, 2456, or on removal of the representative. Thus, the provisions of UPC 3-607 provide more clearly for more direct action against

the representative that may, in fact, prevent damage to the estate, rather than merely compensate for damage already done.

In the absence of the more extensive restrictions represented by the currently required licenses to sell realty and orders to distribute assets to successors, clear provision for the court to act quickly against the representative upon petition by interested persons in separate proceedings as needed, offers at least as much protection against abuse of the personal representative's powers, but without requiring ordinarily unnecessary routine court proceedings.

## 2. Termination of Appointment

UPC 3-608, subject to the particular provisions of UPC 3-609 through 3-612, provides generally that termination of the personal representatives's appointment ends his authority to act as the estate's representative. It preserves, however, his authority and duty to preserve, account for, and deliver any estate assets still within his control. It also preserves any liability he would otherwise have for his prior transactions or omissions as personal representative.

UPC 3-609 (termination upon death or disability) provides for termination upon death or the appointment of a conservator for the personal representative, but places upon the conservator or the representative of a deceased personal representative the duty and authority to protect, preserve, account for and deliver the estate assets to the successor personal representative when a successor is appointed. UPC 3-610(c) provides for voluntary resignation of a personal representative upon

15 days written notice to known interested persons, but provides also that such resignation is not effective unless and until the appointment and qualification of a successor.

Subsections (a) and (b) of UPC 3-610 merely make reference to the "voluntary" termination of the personal representative's appointment by the filing of a closing statement or court order closing the estate under UPC 3-1001 through 3-1003.

Under UPC 3-611 any interested person may petition the court for removal of a personal representative, with notice to the representative and such other persons as the court directs. The personal representative may not act except to account, correct any maladministration and preserve the estate once he has received notice of the petition, except pursuant to order given under UPC-607. The description of causes for removal includes (a) misrepresentation of material facts in procuring the appointment, (b) disregard of court orders, (c) incapacity, (d) mismanagement, or (e) failure to perform any duty of his office. Provision is also made for removal of an ancillary representative upon petition by a foreign domiciliary personal representative in connection with obtaining his own or his nominee's appointment as ancillary representative.

The probate of a will, or the vacation of informal probate of a will, does not itself terminate the appointment of any previously appointed representative, unless otherwise ordered in formal proceedings. UPC 3-612. The authority of the previously appointed personal representative, however, may be re-

duced as provided in the last paragraph of UPC 3-401-- essentially he may not make any further distribution of the estate. He would, of course, be under an obligation to act in a manner consistent with the new testacy status, and is subject to any orders entered under UPC 3-607 which may affect his powers. The appointment of a person eligible under the new testacy status would terminate the previous representative's appointment. If within 30 days of the expiration of the appeal period for a formal testacy order, or the informal probate changing the testacy status, no request has been made for a new appointment, the previous representative may be appointed.

Existing statutes that deal with the causes for termination of appointment are similar to their corresponding UPC provisions, although not quite as explicit or complete. No express statutory section now governs termination by death, except that 18 M.R.S.A. §1603 specifies that upon the death of an executor, his own personal representative shall have no authority to administer the estate of the original testator. It would, however, seem necessary that the executor of an executor would have an implied duty to protect any property that his decedent held in trust pending the appointment of a successor. Thus, the express language to this effect in UPC 3-610 may not really be inconsistent with the present statute. Disability, neglect, and mismanagement of the estate are recognized as grounds for removal of an executor or administrator by

18 M.R.S.A. §1602, which is compatible with the more comprehensive provisions of UPC 3-611. Section 1602 also allows the probate judge to accept the resignation of any executor or administrator, following notice to interested persons, provided "that there is reasonable cause therefore and that it will not be detrimental to the estate or to those interested therein."

While UPC 3-610(c) does not condition voluntary resignation upon a showing that it will not be detrimental, and gives no discretion to the court to deny such resignation, that section does preclude the resignation from taking effect until a successor personal representative takes office. Unlike UPC 3-612, present law expressly provides for termination because of a change in testacy status only in the case of a decedent originally believed to have died intestate: it is a condition of an administrator's bond that he shall surrender his letters of administration to the probate court in case a will is later discovered and probated. 18 M.R.S.A. §1554(5). Obviously, a change in testacy status could also result under present law, in relation to testate decedents if a later will than the one originally probated is eventually discovered and allowed within the twenty year period of 18 M.R.S.A. §1555. At least in a case where the later will nominated an executor, the letters testamentary granted to the executor named in the later will pursuant to 18 M.R.S.A. §107 would probably terminate the appointment of the first executor by implication. It would seem that any change in testacy status should be an occasion to



consider whether a new personal representative should be appointed to replace the prior one. UPC 3-612, clarifies this result. Finally, it should be noted that the Maine statutes contain no provisions comparable to UPC 3-612(a) and (b), which explicitly terminate the appointment of a personal representative once administration has been completed (i.e., upon order of court closing the estate or one year after the filing of a closing statement). Again, however, a generally similar result would seem to be implicit in existing law.

### 3. Successor Personal Representative

After referring to the provisions of Parts 3 and 4 of Article III for the appropriate methods for appointing a successor representative, §3-613 provides for the substitution of the successor. No new notice or service need be made on the successor as to claims already served on the previous representative. In a way that is partially redundant and partially incomplete, the section also provides that the successor representative has the same powers and duties to continue administration as the prior representative had, except as otherwise ordered by the court. This basic rule is also established in UPC 3-716, although this latter section also provides that any successor shall not exercise any power made personal to the executor named in the will. While UPC 3-613 omits this provision, the entire section would no doubt be read as being subject to that qualification contained in 3-716.

Under present Maine law, the successor representative--referred to as administrator d.b.n.--has essentially the same authority as his predecessor. Provision is currently made for substitution on motion. 18 M.R.S.A. §1606. The UPC version is more clear in not requiring any new notice or service in regard to already pending claims.

#### 4. Special Administrators

Sections 3-614 through 3-618 of the Uniform Probate Code cover the appointment, authority and termination of special administrators to preserve, or act for, the estate at times when a general personal representative cannot be appointed immediately, or cannot appropriately act for the estate in some particular matter. The appointment can be made informally by the register on application of any interested person in two circumstances--(1) when necessary to protect the estate prior to the general representative's appointment, or (2) to fill the gap between termination by death or disability and a new general appointment. UPC 3-614(1). While a formal appointment is also available in those circumstances, any special appointment under other circumstances can only be made by the court in formal proceedings after notice and hearing (unless it appears to the court that an emergency requires the appointment prior to notice). UPC 3-614(2).

Express provision is made for special appointment by the court when necessary "to secure...proper administration including its administration in circumstances where a [particular] general personal representative cannot or should not

act." UPC 3-614(2). As the Uniform Probate Code points out, this authorizes appointment of special administrators, by the court, for the limited purpose of acting for the estate in beneficial transactions which might involve a conflict of interest for the particular personal representative.

UPC 3-615 provides that any proper person may be appointed, but gives a priority to any person named executor in a will for which a petition for probate is pending, if he is available and qualified. This priority provision is designed to discourage any will contests which are filed solely to gain some advantage for certain parties who may want at least an initial appointment of someone other than the nominated executor. It is based on the assumption that most will contests are not successful, so that it makes sense to appoint as special administrator the person who is most likely to eventually be appointed general representative, if he is otherwise qualified.

The Code defines the powers of the special administrator by reference to his duties. A special administrator who was informally appointed has the limited duties (1) to collect and manage estate assets, (2) preserve them, (3) account for them, and (4) deliver them to the general representative upon his qualification. He has the ordinary authority of a personal representative insofar as it is related to carrying out these duties. UPC 3-616. A special administrator appointed by the court has all the powers of a general representative, except, as limited in the appointment and by the description of his duties, as prescribed in his order of appointment. UPC 3-617. Thus, the powers of both informally and formally appointed

special administrators are keyed to either the general limited function of such an appointee or to the special limited functions for which a court appointed special administrator was named.

UPC 3-618 provides for termination of the special administrator's appointment (1) when the termination is provided for in the order of appointment, or (2) on the appointment of the general personal representative, as well as (3) under the general provisions for termination by death, disability, resignation or removal, as contained in UPC 3-608 through 3-611.

The current Maine provisions for the appointment and duties of special administrators do not seem to differ significantly from those of the Uniform Probate Code, except, of course, for the absence under current law of any provision for informal appointment. Provision is currently made for appointment by the probate judge when there is a delay in granting letters, when there is no executor or administrator, or whenever the probate judge decided that such an appointment is necessary or expedient. 18 M.R.S.A. §1701. The duties of the special administrator are to make an inventory of all goods that come into his hands (which would be required under the Uniform Probate Code only if the special administrator precedes the appointment of any general personal representative), account for them under oath, and deliver them to the person authorized to receive them (i.e., a subsequently appointed ex-

ecutor or administrator). 18 M.R.S.A. §1701. A more detailed specification of the particular acts which he is authorized to do is contained in 18 M.R.S.A. §1702. Despite this particularization, the authority of the current special administrator is essentially that of a present executor or administrator who had only the same limited functions. In that sense, the authority of the special administrator currently is analogous to the authority of an executor or administrator under current law in essentially the same way that the Uniform Probate Code's special administrator's authority is analogous to the authority of the Uniform Probate Code's general personal representative. The particularized authority listed in §1702 includes basically that authority necessary to preserve and manage the estate without distributing it or paying off claims against the estate, other than funeral expenses, "debts preferred under the laws of the United States, public rates and taxes, and money due the State from the deceased," expenses of administration, and allowances provided for by law. Of course, the differences between the current authority of executors and administrators and of Uniform Probate Code general personal representatives--i.e., the Uniform Probate Code concept of essentially independent administration--are thereby reflected as differences in the authority of special administrators under current law and under the Uniform Probate Code. But this same concept of independent administration is equally desirable for a special administrator insofar as it applies to the more limited functions

that he has.

Current Maine law provides specially for the compensation of special administrators for "such compensation for his services as the judge thinks reasonable, not exceeding that allowed to other administrators." 18 M.R.S.A. §1703. Compensation for special administrators under the Uniform Probate Code is covered under the general compensation provisions of UPC 3-719 through 3-721, discussed later in this chapter.

(The term "personal representative" as used in the Uniform Probate Code includes "special representative" except where it is denominated "general personal representative" and, of course, except where the "personal representative" is given authority to do acts which are not within the function of the special administrator. UPC 1-201(3); 3-616 and 3-617.)

One place where there may be a significant difference between the authority of special administrators under current law and the Uniform Probate Code lies in their ability to pay claims against the estate. Current Maine law does not include such authority within its particularized list in §1702 (except for the particular kinds of claims mentioned above), and does not seem to include it in the duties specified in §1701. 18 M.R.S.A. §1704 provides that the special administrator is not liable to an action by any creditor, and that the limitation of all actions against the estate begins to run from the time of granting letters in the usual form, rather than from the appointment of the special administrator. The comparable pro-

visions of the Uniform Probate Code are somewhat ambiguous. The payment of claims by a special administrator is not specifically provided for, although one who is informally appointed has the duty to "manage the assets of the estate" (UPC 3-616), and one who is formally appointed has the power of a general personal representative "except as limited in the appointment and duties as prescribed in the order" (UPC 3-617). The question is whether the "duties" to "manage the assets of the estate" include the payment of claims, especially in light of the fact that (1) no special provisions relating to special administrators are included in Part 8 of Article III concerning the handlings of claims against the estate, and (2) all references concerning the giving of notice and handling of claims are in terms of the duties of the "personal representative," which is defined in UPC 1-201(30) to include special administrators unless the term "general" is used (and it is not).

5. The Public Administrator

In order to preserve the present provisions of 18 M.R.S.A. §§1651-1657 providing for appointment of a public administrator in each county, the Commission's bill relocates these provisions, in somewhat amended form, in a new §3-619. This public administrator may fill a gap in a rare case where a person dies intestate without known heirs within the state and without any qualified person seeking to administer the estate. It also fills a role under the present provisions for missing or absent

persons' receiverships. The Uniform Probate Code has no comparable provisions, but the present ones--in basic concept--are not inconsistent with Code.

The public administrator provisions are drafted in a manner that leaves the present procedure undisturbed to the extent possible while still fitting it into the new system of appointment and administration under the proposed Maine code. They are also drafted on the assumption that in a case of public administration, more judicial supervision (appointment and bond; approval of fees) is appropriate since there is, by definition, no one else known to be interested in the estate who could look out for the possible beneficiaries' interest or keep an eye on the administration. Similar principles guided the Commission's drafting of the provisions for the new Article VIII, Part I, preserving in somewhat amended form, the present provisions of 18 M.R.S.A. §§2751-2764 concerning missing persons' receiverships.

E. Bonding.

1. Importance of the Code Provisions

One of the most controversial changes that the Uniform Probate Code would make in estate administration is its elimination of the routine bonding of the personal representative, which is currently required unless excused by a testator in the will.

The Code by no means eliminates bonding, and in fact pro-



vides for it automatically upon request of any person with at least a \$1,000 interest in the estate, whether the person is a creditor or successor to the decedent's property. UPC 3-605. In cases of formal appointment, the court may require bond at the time it makes the appointment if there appears to be some reason for it to do so. UPC 3-603.

At first glance, therefore, the issue may appear to be a rather minor disagreement about whether the initiative should be on the side of requiring bond or on the side of excusing bond. But any perception that this difference is insignificant in the context of the Code's attempt to informalize proceedings for appointment is a miscalculation of the possible impact a bonding requirement has on these policies.

In that context, there is potentially an important difference between saying that one must take the small initiative to trigger a bond requirement under UPC 3-605 (which does not even require going to court), and saying that a personal representative who was appointed informally for the very purpose of avoiding a routine court proceeding, must now go to court to have a routine bond requirement excused. To require the person seeking to excuse the requirement to do exactly what the informal appointment procedures are designed to avoid, undercuts the practical utility of those very procedures.

It is the almost universal practice in the drafting of wills to include a clause excusing bond. Such a practice indicates an overwhelming consensus among testators and their attorneys that

bond is ordinarily unnecessary. But it also means that most estates to which a routine bond statute would apply are typically small or modest in value and are usually administered by the surviving spouse or another close family member, who is also the person with the greatest, or perhaps entire interest in the estate. In many cases, that is, the statute would be requiring a routine bond in order to protect the surviving widow from herself.

In light of these facts, the question must arise as to what justification there would be for a statutory requirement of routine bonding, and the consequent undercutting of the Code's informal appointment procedures in the very kind of cases where they are most helpful. That question was explored in some detail by the Commission.

## 2. The Code and Present Maine Law

The provisions of the Uniform Probate Code relating to the necessity of bonding personal representatives may be summarized as follows:

### Informal appointment proceedings:

- (1) No bond is required in informal proceedings (UPC 3-603) except
  - (a) for special administrators (UPC 3-603); or
  - (b) for a personal representative where the will expressly requires a bond (UPC 3-603); or
  - (c) on demand by a creditor or other interested person with more than \$1,000 at stake (UPC 3-650).

Formal appointment proceedings

- (1) Bond may be required by the court in formal proceedings at the time of appointment unless the will relieves the representative from bond, unless, in turn, bond is requested by an interested party and the court thinks it desirable (UPC 3-603, 3-605).
- (2) Bond required by the will may be dispensed with by the court in formal proceedings upon the court's determination that it is unnecessary (UPC 3-603, next-to-last sentence).

Any proceedings

- (1) No bond is required of any personal representative who has deposited cash or collateral pursuant to the statute with an agency of the state as security for performance (UPC 3-603, last sentence).
- (2) Bond may be reduced by the value of estate assets deposited with a domestic financial institution (defined in UPC 6-101) in a manner that prevents their unauthorized disposition (UPC 3-604).
- (3) On petition, the court may excuse requirement of bond, increase or reduce the amount, release sureties, or permit the substitution of bonds (UPC 3-604).
- (4) Anyone having an interest in the estate worth more than \$1,000 or any creditor with a claim over \$1,000 may file written demand that a representative give bond (UPC 3-605). Thereupon, bond is required as

long as the demandant remains interested in the estate, unless the bond is later excused under UPC 3-603 or UPC 3-604.

The present Maine law concerning bonding of personal representatives:

(1) Excuses executors from bond where the will so provides. 18 M.R.S.A. §§109, 1501, 1502.

(2) Requires executors to be bonded unless the will provides otherwise. 18 M.R.S.A. §§1501, 1502.

(3) Gives the judge discretion to excuse bond for an administrator or administrator c.t.a. if

(a) the surviving spouse or next of kin is to be the administrator and

(b) all persons "interested in the estate," other than creditors, who are of full age and legal capacity assent in writing, and

(c) public notice is first given on the petition for appointment. 18 M.R.S.A. §1552.

(4) Requires bond of every administrator except where excused under (3) above. 18 M.R.S.A. §1554. Both (3) and (4) seem to apply to administrators d.b.n. 18 M.R.S.A. §1608.

(5) Requires bond of public administrators. 18 M.R.S.A. §1651. Since a public administrator is appointed only where the decedent dies intestate and is not known to have a surviving spouse or next of kin, one of the three conditions listed in (3) above for excuse of bond under 18 M.R.S.A. §1552 cannot

obtain, and public administrators must give bond.

(6) Requires bond of a special administrator "like other administrators." Whether a special administrator could be excused from bond by satisfying the conditions of 18 M.R.S.A. §1552 (see item (3) above) is not stated.

(7) Requires a special bond of an estate representative who is licensed to sell real estate in the decedent's estate. The bond must be given before the representative proceeds to make such sales. An executor may be excused from the special bond if the will excuses him from being bonded. 18 M.R.S.A. §§2101, 2102. See item (1) above. Foreign executors and administrators are subject to the same rule. 18 M.R.S.A. §2151.

Similarities. The Code and present Maine law are similar in the following respects in their requirements of bonding:

(1) Where an executor is appointed under a will that excuses bond, he may serve without bond. Both systems permit the judge to require bond of such an executor--under the Code on application of an interested party (UPC 3-603, last clause) and under present Maine law when it appears "necessary or proper" (18 M.R.S.A. §109).

(2) Both systems require bonding of special administrators.

(3) Both systems require bonding of executors where the will expressly requires bond, but the Code permits the judge to dispense with bond in such case in formal proceedings. UPC 3-603.

(4) Both systems ultimately allow discretion in the judge

as to whether bond should be (a) required--in formal appointment proceedings (Code) or upon the request by an interested person under 18 M.R.S.A. §1552 when an administrator has been allowed initially to serve without bond, or (b) excused--under 18 M.R.S.A. §1552 or upon petition under UPC 3-604 after either an initial requirement of bond by the court under UPC 3-603 or by the will or by demand under UPC 3-605. It is really not possible to say whether there would be any difference between the two systems as to whether one of them would focus more than the other on excusing or requiring bond, or whether, if so, that would make any meaningful difference in the factors on which that discretion would have to focus, or in the way that even the same factors would be approached by the court.

Differences. Every administrator, administrator c.t.a. and administrator d.b.n. must be bonded in Maine now, except that the judge may excuse bond if

- (1) The administrator is a surviving spouse or next of kin and
- (2) All competent persons, other than creditors, who are interested in the estate assent in writing, and
- (3) Public notice is first given "upon the petition for such appointment."

Even where such assent is given, the judge may require bond "whenever it appears necessary or proper." 18 M.R.S.A. §§1552, 1554, 1608.

Under the Code, no bond would be required of an administrator (other than a special administrator) in informal appointment proceedings except where

(1) The will requires bond of any personal representative administering the estate. UPC 3-603.

(2) Written demand for bond is made by any person having an interest in the estate worth more than \$1,000 or by any creditor having a claim in excess of \$1,000.

In formal proceedings, the Code would leave bonding discretionary with the court, in effect, but a court order would be needed to impose the requirement of bond (UPC 3-603), except that upon demand under UPC 3-605, it would be automatic. The Code states no prerequisite of unanimous waiver by devisees or heirs. Any discretion of the court whether to bond in formal proceedings would have to be exercised without statutory guidelines. Presumably, some cause for requiring bond would have to be shown before the court would order bonding in formal proceedings, absent demand under UPC 3-605, and the discretion would be based on whether bond was "necessary" (UPC 3-603), which is similar to the "necessary or proper" standard under the present statutes.

In either formal or informal proceedings, if written demand for bond is made and filed under UPC 3-605, bond must be given, at least as long as the demandant remains qualified to demand it under that section or until excused, dispensed with or reduced in amount by the court or under the other special

provisions of UPC 3-603 and 3-604. The latter exception incorporates the authorization in UPC 3-604 for the court to excuse any bond requirement, and also relates to the privilege of the personal representative to deposit cash or collateral with a state agency pursuant to statute under UPC 3-603 or to deposit assets of the estate under UPC 3-604 with a domestic financial institution in a manner that prevents their unauthorized distribution. Thus, Section 3-605 of the Code provides for bonding immediately and automatically upon demand without any court proceeding, but that requirement can be excused by the court upon petition by the personal representative or any other interested person. Except for the automatic triggering of the initial demand bond requirement under the Code, the bonding by request is comparable to present law. Under 18 M.R.S.A. §1552, after an administrator has been permitted to serve without bond, the judge may later require bond "whenever it appears necessary or proper." This discretion would exist even though demand for bond was made by an interested person.

### 3. Identifying and Resolving the Issues.

The surety companies have sometimes opposed the bonding arrangements of the Uniform Probate Code in other states, arguing that heirs, devisees, and creditors are exposed to losses resulting from the dishonesty, ignorance, or negligence of administrators, which losses could be recovered under bonding for a relatively small premium, and that it is not in the public interest to "eliminate" their



protection against those hazards. Of course, the Code does not "eliminate" the protection; it places inertia on the side of not requiring a bond. In most informal proceedings, there would be no bond unless demanded under UPC 3-605; in formal proceedings, bonding would be discretionary with the court, although one would expect courts not to require bonding without some showing of a need for it. Essentially, the sureties want mandatory bonding of administrators unless bonding is waived by all competent heirs or devisees. In their view, creditors or beneficiaries should not have the onus of demanding or justifying a bond.

The argument of proponents of the Code appears partly in the Uniform Comment to UPC 3-603, as follows:

This section must be read with the next three sections. The purpose of these provisions is to move away from the idea that bond always should be required of a probate fiduciary, or required unless a will excuses it. Also, it is designed to keep the registrar acting pursuant to applications in informal proceedings, from passing judgment in each case on the need for bond. The point is that the court and registrar are not responsible for seeing that personal representatives perform as they are supposed to perform. Rather, performance is coerced by the remedies available to interested persons. Interested persons are protected by their ability to demand prior notice of informal proceedings (§3-204), to contest a requested appointment by use of a formal testacy proceeding or by use of a formal proceeding seeking the appointment of another person. Section 3-105 gives general authority to the court in a formal proceeding to make appropriate orders as desirable incident to estate administration. This should be sufficient to make

it clear that an informal application may be blocked by a formal petition which disputes the matters stated in the petition. Furthermore, an interested person has the remedies provided in §§3-605 and 3-607. Finally, interested persons have assurance under this Code that their rights in respect to the values of a decedent's estate cannot be terminated without a judicial order after notice or before the passage of three years from the decedent's death.

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

Proponents of routine bonding deny the force of these arguments. In particular, they deny that the issue is whether the interested persons trust one another and the fiduciary. They see the issue as one of mandating insurance for interested persons against the statistically inevitable misconduct of some fiduciaries.

A brief history of the probate bond as an institution sheds a little light on the controversy.

a. Brief History of the Probate Bond

In medieval England, ecclesiastical courts probated wills of personal property, granted letters testamentary and letters of administration, and supervised generally the conduct of the executor or administrator in paying decedent's creditors and distributing his personal property to his legatees or next of kin. The procedure could be formal or informal, as the situation seemed to require. Probate in common form and administra-

tion of the personal estate could take place with no notice to interested parties unless a caveat was filed. By the 17th century, the personal representative was required to make oath that he would cause the goods to be appraised, would make a true inventory of the goods (required by statute after 1529), and would render a true and just account of the goods when called to do so. The duties of the personal representative were enforced in the church courts by ecclesiastical sanctions only.

The church courts had no jurisdiction over succession to real property. The probate of a will had no binding effect upon the common law courts which, after 1540, regarded a valid will as passing title to land directly to the devisee immediately upon death of the testator. If an heir or devisee wanted to test the validity of a devise, he brought some action to try title, such as ejectment or trespass. Still the common law courts never entertained proceedings to probate wills or to grant letters testamentary or letters of administration. Actions on surviving contracts of the decedent could be brought in the common law courts by or against the executor or administrator in his representative capacity. Judgments against the representative in such cases were enforced against the goods of the estate.

In the early 1600's, the common law courts took to issuing writs of prohibition to the church courts, further limiting their already limited jurisdiction. The result was an exten-

sion of the jurisdiction of the Chancellor who had for centuries been supervising fiduciaries through the enforcement of uses and trusts. Although probate of wills and appointment of personal representatives continued to be the function of the church courts, a creditor or distributee could apply to have the estate administered in chancery, where the strong sanctions of contempt and sequestration were available to enforce orders and decrees.

In the context of the developments outlined above, the requirement of a probate bond in intestate estates set forth in the Statute of Distribution, 22 & 23 Car. 2, c. 10 (1670), becomes understandable as an effort to repair the weakness in the authority of the probate court: in intestate estates, the required bond provided some remedy to creditors and next of kin whose interests had been lost or damaged by misconduct on the part of the administrator. The statute of 1670 required two or more able sureties in sufficient amount, respect being had to the value of the estate. The bond was to be given in the name of the ordinary, or probate judge, and its conditions included (a) making and exhibiting to the registry of the court by a stated date a true and perfect inventory of the decedent's personal property; (b) well and truly administering that property according to law; (c) accounting for his administration by a stated date and distributing the rest of the decedent's personal property as the judge might decree after examining and allowing the account; and (d) if a will should be probated, rendering up his letters of administration to the

court. The conditions of the bond specified in the statute of 1670 are remarkably similar to those appearing in the modern probate bond used by bonding companies in Maine.

The statute made the bond good and pleadable in any court. The probate judges were authorized, among other things, to call an administrator to account for the intestate's personal property. Out of regard for creditors, estates were not to be distributed until a year after the intestate's death. Distributees were required to give refund bonds to the administrator before receiving their shares. The statute did not apply to executors.

The most important result of the bonding provisions of the 1670 statute was that the duties of accounting and of well and truly administering the decedent's personal estate, came to be contract duties under the probate bond enforceable in the common law courts against the administrator and his sureties by the appropriate common law remedies. In this way the feeble authority of the probate court was supplemented by sanctions in the common law courts through making a breach of fiduciary duty breach of a bond.

As a device for creating stronger sanctions against misfeasance than the processes of the ecclesiastical probate court could afford, the probate bond began to play a significant role in probate administration. The legal interests created by a probate bond became the subject of considerable liti-

gation. After 1670, the device of the bond came to be required, in general, of executors, administrators d.b.n. and c.t.a., guardians, conservators, and testamentary trustees. The trustee of a private inter vivos trust, who had long been subject to the heavy sanctions of fine, imprisonment and sequestration that were available to the English Chancellor, was not generally required to give bond. The bond requirement was originally as much a product of the weakness of the sanctions of the probate court as of a pervasive concern about the integrity of estate representatives. Thus the probate bonds required by the statute of 1670, as amended from time to time, were no minor adjunct to the English or American system for administration of estates: in theory, at least, fiduciary misconduct amounting to breach of the bond gave rise to recovery against the sureties on the bond as the chief practical remedy of injured creditors, heirs or devisees.

b. Modern Function of the Institutional Surety Bond

Typically, the early sureties on probate bonds were individuals, often members of the family of the personal representative, who undertook the risk of fiduciary breach, often without compensation, because of the trust they reposed in the representative. As the business of insurance in its many forms developed in the 19th century, it was perceived that "fiduciary insurance," insuring against the dishonesty of officers and employees of the insured, and so-called "surety insurance," insuring against defaults by persons who had undertaken contract

obligations, bore a close resemblance to the familiar surety bond obtained by an executor or administrator. In fact, guaranty insurance was written in the form of a surety bond. Inevitably, judicial bonds, including probate bonds, came to be written by insurance companies for compensation as a "line" of fidelity or guaranty insurance.

Vance, in his handbook on insurance, comments as follows on guaranty insurance:

The insurance contract, in its general form strikingly analogous to the contract of suretyship, becomes almost identified with it in the form of guaranty insurance. Indeed, the principal reason for the existence of the contract of these forms of insurance is in substitution for the older official and fiduciary bonds with their personal sureties; and to this day guaranty insurance contracts are drawn in the form of bonds, and are ordinarily called surety bonds. These bonds of incorporated fidelity and guaranty companies are generally regarded as more efficient than the personal bonds, since there is much less danger of the corporate surety becoming insolvent, and because public policy is better served, in the case of criminal default of the principal, by the relentless prosecution carried on by the corporate surety, who is usually unaffected by those considerations of sentiment and local expediency which frequently induce personal sureties to shield a criminal principal from the punishment that should be visited upon him. In many states statutes have been passed expressly authorizing or even requiring the acceptance of these fidelity bonds for all officers and fiduciaries instead of the personal bonds formerly required. Such legislative recognition of the value of guaranty insurance renders the courts even less patient of technical rules and unnecessary conditions in these contracts that tend unfairly to defeat the indemnity contemplated by the parties. The courts will go far to prevent these bonds of

paid sureties from affording less protection than the old personal bonds which they have displaced. The undertaking of an ordinary surety is construed very strictly in favor of the surety, but not so in the case of fidelity and guaranty contracts. With little dissent, the courts agree in applying to the contracts of these compensated sureties the same rules ordinarily applicable to insurance contracts. Vance, Insurance §197 at 1007 (3rd ed. 1951).

The probate bond has been defended as a fail-safe insurance mechanism, a device for making up promptly losses sustained by creditors, heirs, and legatees as a result of fiduciary breach when breach comes to light. The surety who has indemnified the injured parties is provided a remedy by subrogation against the breaching fiduciary--the typical institutional surety being better able than most legatees or creditors to bear the credit strain of pursuing the wrongdoing fiduciary in litigation.

When the function of the probate bond is expressed in this way, the device seems reasonable enough on first impression, especially if we add to the picture the fact that the giving of bond is normally excused in most American states for an executor named in the will, at least where the will itself provides that bond need not be given. Since the bond requirement is based upon fear of fiduciary misconduct, such an expression of confidence by the testator in his own nominee is perceived as sufficient to treat the risk of fiduciary breach as small enough to be properly ignored.

Doubts about the institutional surety bond as a panacea for injury caused by administrators' misconduct have sprung



from two principal considerations; first, the weakness in final process characteristic of the church courts in the 16th and 17th centuries, which led to the probate bond's being required as a device for obtaining effective sanctions from the royal law courts, has been largely repaired. In Maine, in particular, the courts of probate are courts of record and may issue any process necessary for the discharge of their official duties and punish for contempt of their authority.

4 M.R.S.A. §201. Moreover, they have jurisdiction in equity concurrent with the Superior Court, of all cases and matters relating to administration of estates and to trusts created by will or other written instrument. Such jurisdiction may be exercised upon complaint "according to the usual course of proceedings in civil actions in which equitable relief is sought." 4 M.R.S.A. §252. Under such a statute, the probate court appears to have adequate power to enforce any reasonable decree or order it may issue to the personal representative of any estate within its jurisdiction. Enforcement may proceed supported by any of the sanctions normally available to a court of equity, including a proceeding for civil contempt. The probate bond can no longer be justified as the only available mechanism for assuring the effectiveness of the probate court's orders to the fiduciary.

Second, a suspicion exists, certainly among the architects and proponents of the Uniform Probate Code, that the institutional sureties, i.e., the bonding companies, are making exces-

sive profits from probate bonds as a result of the forced statutory market they enjoy. In a special supplement to UPC Notes, dated September, 1973, entitled "On Probate Bonds," the following statement appears at page 2:

There is evidently a marked variation in the usual price of probate bonds from state to state. According to the responses of lawyers in 23 states who answered a questionnaire distributed in 1967-68 by the Committee on Administration and Distribution of Decedents' Estates of the Real Property, Probate and Trust Law Section, ABA,<sup>3</sup> the usual cost of bond for each \$10,000 of estate assets in the following states was:

Vermont .....	\$ 10.00
Florida .....	20.00
Ohio .....	25.00
N. Hampshire .....	30.00
Iowa .....	40.00
Colorado .....	40.00
N. Dakota .....	40.00
Wisconsin .....	40.00
Illinois .....	50.00
Minnesota .....	50.00
Mississippi .....	50.00
N. Carolina .....	50.00
Rhode Island .....	55.00
Texas .....	55.00
Maryland .....	60.00
Washington .....	60.00
Michigan .....	60.00
Oregon .....	60.00
Kansas .....	72.50
Oklahoma .....	100.00

Insurance industry representatives have conceded that current price scales for bonds have been in effect since 1929 in many areas

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3. A report on the results of this questionnaire was published in Vol. 3, No. 2, Real Property, Probate and Trust Law Journal (Summer, 1968), at p. 142. References above are to the answers as tabulated from the returned questionnaire rather than as summarized in the published report.

of the country. It appears that, where bonds have been required by statute for generations, local history in each state, rather than the law of supply and demand, has controlled prices. It is difficult to explain the seemingly arbitrary variation in costs other than as a phenomenon of forcing a market by statute; certainly, it cannot be explained if cost is actually keyed to the services performed, as industry spokesmen have represented.

#### THE VALUE OF BONDS: PREMIUMS, LOSSES & PROFITS

Figures on probate bond profits are rather hard to come by. "Heirs Beware!" asserts that "a major proportion of the premium dollar is spent in checking the administration of estates to prevent losses;" but what proportion is actually spent is not divulged. And what percentage of the total revenues from bond premiums is actually paid out to offset losses covered by bonds, is another subject surety spokesmen have been less than willing to discuss. They assert that loss ratios are not really relevant, because they do not demonstrate the value of bonds as deterrents to possible wrongdoing in the first place. Perhaps for this reason, insurance industry representatives declined to provide the National Conference of Commissioners on Uniform State Laws with any figures indicating the relationship of bond premium revenues to losses covered by bonds in 1969, when the Commissioners requested them during their consideration of the bond issue.

However, some statistics on Florida's probate bond experience in 1970, which were prepared by the Surety Association of America, recently became available through the Florida insurance commission. If the Surety Associations's records are at all representative of national revenues, they are revealing indeed. In 1970, all Florida Surety insurance companies expended only about 1% of their total revenues from bond premiums in payments to offset losses caused by defalcations of administrators; that is, they paid out only \$2,380 to cover direct losses, while their total premium income

amounted to \$225,386. The 1970 statistics on executors' bonds also indicate that surety companies are quite successful in recovering losses they do incur, through subrogation or other means. In fact, because successful recoveries of losses from prior years exceeded current losses in 1970, Florida companies were able to realize a net return of 102.4% of the year's premium income on executor's bonds. It should be noted that the 1970 records do not show how much, if any, the companies ultimately recovered from losses paid in 1970.

If the facts sets forth in the foregoing passage are fairly representative of the total situation, the conclusion seems irresistible that the cost of bonding overall greatly exceeds the amounts recovered from the bonding companies in the relatively rare cases of fiduciary misconduct.

c. Arguments For and Against Routine Initial Bonding of Estate Representatives.

Bonding companies have advanced the argument that the requirement of bonding tends to keep fiduciaries careful and honest who might otherwise not be. Since injured creditors, heirs, and devisees have the same remedies directly against the wrongdoing fiduciary, absent bond, as a surety after indemnifying them would have by subrogation, the bonding companies' argument based upon a prophylactic effect of bonding must assume that either or both of the following phenomena occur: (1) that the bonding company, having a deeper pocket and better legal and accounting resources than the general run of creditors and potential distributees, is more likely in practice to discover wrongdoing or to pursue the available remedies than the creditors and distributees are, or, (2) that the bonding company engages actively in supervising administration of estates in which they bear a suretyship liability, with the result that substandard conduct of estate representatives is likely to be discovered and corrected earlier than in an unbonded estate where such supervision is lacking.

If the first of these two propositions is true, no facts to support it have been reported in any empirical study to date. Heirs and devisees -- as distinguished from creditors -- might have some reluctance, as members of the decedent's family, to pursue after loss another family member who has been estate

representative, or to carry on the pursuit with the zeal likely to be shown by a surety company, although the popular stereotype of families fighting over inheritances may indicate the contrary, at least in those cases where there is any reason for dissatisfaction. The proposition is, at best, speculative. We also have no evidence bearing upon the extent to which the potential enforcement role of the surety influences estate representatives in their conduct.

The second proposition -- that the bonding company brings about superior administration through its supervision of the personal representative -- is said by the surety companies to be true, although once again there does not appear to be any published data tending to establish its truth. One may speculate that the degree of care in supervision varies from company to company or that it varies with the amount of exposure to liability in particular estates. One would expect most sureties, as a matter of practical business considerations, to police the administration of a large estate more carefully than that of a small one, which is where the mandatory bonding requirement would have most of its impact. No figures, however, are available to prove or disprove the bonding companies' hypothesis.

While this lack of data leaves these arguments in a vulnerable position with respect to their rates, yet to the extent that sureties do police their bonded estates they perform a function that may not as a practical matter be performed by

interested parties before losses have already been incurred. Some members of the public may have the notion that the probate court keeps watch over the conduct of the estate representatives in detail, calling them to account in every estate, on the court's own initiative, for misfeasance and wrongful nonfeasance. In fact, the volume of business in nearly every probate court makes impossible such detailed supervision on the court's own initiative. At least after the testacy and appointment proceedings are completed, in traditional probate practice and under present Maine law, the court acts only upon the complaint of persons interested in the estate just as other courts act upon the complaints of plaintiffs asserting that they have been injured by the wrongful conduct of defendants. Generally speaking, it is unrealistic to expect the probate court, even within its relatively limited sphere of jurisdiction, to act as investigator and policeman as well as determiner of status, record-keeper, and adjudicator of disputes.

One can also question why in this particular area of the law, one should expect less from people's ability to watch out for their own interests than we generally assume that they can and ought to do in other areas. One can wonder why the court, or a surety, should be assigned the role of a super-guardian in what are actually the affairs of private individuals no more calling for such extraordinary solicitude than a situation involving a trustee of an intervivos trust.

An officer of one of the larger bonding companies in Maine has estimated, for the Commission's information, that well over half of the premium dollar for probate bonds is spent on service; that is, in advising personal representatives about bookkeeping methods and other procedures for administering the estate correctly, and in following up on estates to assure that personal representatives have filed probate and tax inventories, rendered timely accounts, and otherwise fulfilled their fiduciary obligations. However, that estimate of the cost of service is admittedly not based upon a cost-accounting study. The lack of volume in the estate bonding business is given by surety companies as a reason for their inability to come up with hard figures as to the cost of policing estates, just as it is given to explain the absence of meaningful classification of risks for the purpose of setting premiums. The companies assert that loss-ratio figures are misleading without taking cost of service into account, but they have produced no data bearing upon the cost of that service.

The Code proponents say that the function of policing estates should be left to the persons interested in the estate -- heirs, devisees, and creditors -- and that if they are not vigilant in this respect or do not demand bond, they must assume any risk of substandard fiduciary misconduct much as they assume risks in other business affairs where they voluntarily entrust their property to the control of others. Moreover,



Participation in group hospital or sickness insurance is often commanded by employers, though not directly required by law, as a condition of employment, the justification being the insurer's need for a fair range of risks: if participation in group plans were left to the option of employees, the insurer would be subject to adverse self-selection by insureds, with resultant increase in premiums. As mentioned above, the law also requires bonding of officers and employees of savings institutions and trust companies. This requirement is imposed out of concern for the security of the savings of thousands of investors, who may otherwise suffer in case of defalcations.

By comparison to the automobile and financial institution officers' insurance, an estate administrator's default harms a limited number of persons who would themselves have the decision on bonding under the Code, and the need for requiring bond is thus seen as less imperative. In fact, the seriousness of any risk of loss to heirs or devisees may go down to nearly zero, practically speaking, as in the case where a decedent without debts devises all his estate to his spouse and names her executrix. Except for funeral and administration expenses, the practical risk of loss through her maladministration seems close to zero.

Proponents of the Code argue, in effect, that the practical risk of loss in any informally administered estate is close

cannot persuasively defend.

What other assumption can, indeed, be made about adult parties dealing in their own practical affairs. It hardly seems appropriate to impose on such people a requirement that they go to the judge in a formal proceeding, as a routine matter, in order to establish that they do not want what most testators and their attorneys regularly judge to be unnecessary, when the only basis is speculation about possible services that the surety companies may render to some speculative extent. It somehow seems that the law should not be that paternalistic.

The surety companies have another argument to support their insistence that bonding be required, generally speaking, of administrators who do not directly offer their own assets as security and where bonding is not waived by the potential distributees of the estate. All other arguments aside, they contend, a person with assets insufficient to meet possible fiduciary liabilities cannot properly be appointed administrator of an estate without the bond as a source of indemnity for creditors and potential distributees. Even the direct remedies available to creditors, heirs and devisees in a full-power probate court would avail them nothing against an execution-proof administrator. The institution of bonding, the argument goes, thus permits less wealthy persons to serve as administrators when they might not otherwise be permitted to do so. The

difficulty with this argument is that it does not establish a case for automatic bonding. It leads equally well to an alternative conclusion; namely, that the register or probate judge, in exercising discretion whether to require bond of a particular administrator, ought to take the financial responsibility of the applicant into account. Indeed, any interested party (which would probably include the applicant for appointment) may take care of the situation by providing for bonding. Furthermore, if this argument of the sureties is valid, it would seem to apply equally to the many situations where bond is waived in a will nominating as executor a person with modest individual assets.

An argument of uncertain strength can be made that to place upon distributees who are unhappy with the appointment of a particular administrator because they suspect he will do a dishonest or incompetent job the burden of demanding that he obtain bond (as under UPC 3-605) is to require them, in effect, for their own protection to irritate the administrator and other potential distributees, perhaps create ill will, and otherwise exacerbate any pre-existing divisions within the family of the decedent. If bond were automatically required, the argument goes, this highlighting of differences would not occur. At worst, the distributees who wanted the administrator bonded would merely have to refuse to sign any proffered waiver of bond (as under 18 M.R.S.A. §1552). Such refusal would not

amount to so strong a vote of nonconfidence in the administrator as would the affirmative act of demanding bond when bond is not ordinarily required.

It is hard to judge whether such an argument has much merit. Proponents of the Code would doubtless consider it addressed to a nuance that can be properly ignored on the ground that such situations are outnumbered greatly by the majority of cases in which the estate is not large and the distributees are quite willing to trust the proposed administrator. Why, in other words, reward such timidity at the cost to the vast majority of persons who do not need the bonding or who are willing to look out for their own interests? The proponents of mandatory bonding would probably rejoin that even in that majority of cases trust in the administrator may prove to be misplaced because of unexpected negligence, stupidity, or lack of integrity on the part of the administrator. They would add that, under the Code, mandatory bonding in the types of situation in controversy becomes even more desirable than formerly because of the larger authority the Code vests in personal representatives. This greater authority, coupled with the possibility that there will be some increase in do-it-yourself probate under Code arrangements for informal administration, gives the surety companies an argument that the need for some form of insurance against fiduciary misconduct of the administrator becomes greater under the Code than formerly.

This same rejoinder, however, would once again seem to apply as well to the intervivos trust situation where there is independence of administration and no routine requirement of bonding.

In surrejoinder, the Code proponents might also assert that it has never been demonstrated that bonding either makes administrators more careful or honest or makes trustful distributees, ignorant of their rights or remedies, more inquisitive or sophisticated or vigilant. In other words, they might suggest that a distributee inattentive to his own interests will be no more likely to recognize substandard conduct on the part of a bonded personal representative than on the part of an unbonded one and hence no more likely to notice that he is entitled to indemnity.

It should be remembered, after all, that indemnification of a creditor or distributee by the sureties on the bond is not automatic. There are areas for disagreement about whether particular fiduciary conduct has been substandard or how much loss has been incurred as a result. In those areas, the allegedly aggrieved creditor or distributee will find as much difficulty in obtaining indemnity from sureties on a bond as he would have in obtaining redress, absent bond, directly from the fiduciary. If litigation should become necessary to enforce his supposed rights, the aggrieved creditor or distributee will have to bear the credit strain of that litigation.

d . Evaluation of the Arguments.

From all these competing considerations we have tried to distill the central issues upon which to determine what kind of bonding requirements ought to be imposed by statute on probate administration. The proponents of the Code seem to adduce the following arguments:

(1) That the risk of loss to the creditors or beneficiaries has been minimized by the Code system of safeguards and remedies against substandard fiduciary conduct.

(2) That the majority of estates now affected by mandatory requirements are "small, intestate and generally trouble-free estates which do not need, and can least afford, the 'protection' of probate bonds." The Code proponents support this argument with data obtained from a study of estates in Cleveland, Ohio, in 1964-1965, reported in The Family and Inheritance (New York: Russell Sage Foundation, 1970); and

(3) That the burden is on the surety companies to show a need for imposing initial bonding in cases where there does not happen to be a will to waive bond, and that they have not met that burden.

The Commission is willing to accept the factual results of the Cleveland study as fairly representative of the situation in Maine: namely, that the larger estates tend to pass by will, the smaller by intestacy; that the great majority of wills

nominate executors and provide that they shall serve without bond; that most intestate estates amount to less than \$20,000 after expenses, allowances and debts are taken care of; that inheritance by collateral heirs is far less common than inheritance by spouse or lineal descendants; that, where spouse and issue survive, wills commonly leave the spouse the entire estate or, at least, the residuary estate after minor legacies.

The fact that intestate estates are typically small is not, however, wholly dispositive of the need for bonding. If mandatory bonding is really needed as a kind of forced fidelity insurance, the fact that most estates that would be protected by it are small ought not to make any difference: to injured heirs and creditors, the losses would be serious enough. Moreover, although it is probably true that most intestate estates are "generally trouble-free," it does not follow from that hypothesis that faithful performance by administrators of those estates should not be insured for the benefit of heirs or creditors who stand to lose substantial values in the unusual case of fiduciary misconduct.

In the absence of any showing by the surety companies of loss ratios or any other data scientifically collected and arranged, bearing upon the relationship of premiums to their total costs of doing business in probate bonds, the Code proponents may be correct in their conclusion that surety bond

premiums are out of line with total default payments plus other costs. However, the possibility that the surety companies are making excessive profits from probate bonds really seems to be a separate issue: better supervision of surety bond rates may well be in order. But the question of the need for fidelity insurance can still exist in types of situations where such insurance would be called for routinely by good business judgment.

The real issues, in the Commission's view, are

(1) Whether estate administration is, in general, an appropriate situation for fidelity bonding;

(2) If so, whether that judgment should be imposed by law on successors whose decedent has either failed to write a will or failed to write a will which includes a waiver of bond.

Certainly, where legal arrangements call for individuals to be entrusted with control of the property of others, some of those individuals somewhere, sometime, will cause losses either negligently or dishonestly. At least in the absence of relevant statistics, the relevance of the size of an estate to anything but the size of possible losses is speculative; i.e., we cannot be sure that smaller estates offer more or less temptation to carelessness or dishonesty than larger ones. Also, we do not know whether the personal relationship of the fiduciary to the beneficiaries is relevant to the degree of



risk, except, of course, to the extent that the fiduciary is the beneficiary. The surviving spouse, for instance, is popularly supposed to be less likely than others to defraud decedent's children, but we do not know this. One would expect that experience with various factors over a long time should be reflected in a defensible system of premium rates if guaranty insurance can be expected to be properly supervised by state insurance departments. The bonding companies assert that the volume of the judicial bonding business is too small in any one state to serve as a basis for actuaries to draw up defensible categories for calculating risks and attaching premium rates to those categories.

By virtue of the above observations, one certainly could conclude that bonding of individuals in a fiduciary position, who are handling other persons' money and affairs, is a normal, conservative business practice, coming within the proper ambit of the insurance principle; viz., assuring indemnity in case of a substantial loss caused by an unlikely event through the payment of a relatively small premium appropriate to the risk of loss empirically determined. In a number of other matters we expect fiduciaries to be bonded. Savings banks and trust companies are required by statute to bond their officers, employees and agents. Bonding of corporate officers and employees who handle corporate funds is routine. It is also true that we do not require the bonding of some other fidu-

ciaries, perhaps most notably intervivos trustees, who are to a large extent comparable to estate representatives.

The question then presents itself, should bond be generally required by statute subject to exceptions in particular types of situations, or should bonding be left to the choice of those who would be protected by the insurance it affords, subject to the discretion of the probate court in excusing it or in requiring it in formal appointment proceedings on a case-by-case basis?

If bonding of estate administrators is generally defensible as a form of fidelity insurance, justifiable as sound business practice, the question arises, Why should bonding of estate representatives not be mandatory for all estates, large or small, testate or intestate, regardless of the relationship of the representative to the beneficiaries? The answer is complex.

Traditionally, with few exceptions, American law does not require private citizens to carry insurance for the benefit of others even in situations where most reasonable persons would consider it wise for them to do so. One obvious exception is automobile liability insurance, where the interests of third parties is considered great enough in some jurisdictions to warrant compulsory insurance as a condition to ownership. <sup>4/</sup>

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<sup>4/</sup> Yet even in this area our State does not at this time compel insurance for all drivers, despite the far greater impact that car accidents have on third persons who individually have no control over the insurance decisions of the driver who may hit them.

Participation in group hospital or sickness insurance is often commanded by employers, though not directly required by law, as a condition of employment, the justification being the insurer's need for a fair range of risks: if participation in group plans were left to the option of employees, the insurer would be subject to adverse self-selection by insureds, with resultant increase in premiums. As mentioned above, the law also requires bonding of officers and employees of savings institutions and trust companies. This requirement is imposed out of concern for the security of the savings of thousands of investors, who may otherwise suffer in case of defalcations.

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Proponents of the Code argue, in effect, that the practical risk of loss in any informally administered estate is close

enough to zero to justify requiring bond only where it is demanded under UPC 3-605. From the bonding companies' point of view, such an arrangement tends to create an adverse selection of risks, the demand for bond itself then becoming a danger signal that some creditor or heir deems the estate representative unreliable as a fiduciary.

If probate bonding were really managed on an actuarial basis like most insurance, the institutional sureties would want to mandate bonds for every individual estate representative, of course, to assure a random selection of risks. Even the present law denies them that arrangement, however, by permitting executors to serve without bond where the will says they may, and by allowing even administrators to be excused from bond if he is the spouse or next of kin and all the successors apparently believe there is no need for it. In other words, the present system allows for, and surely must to some extent result in, self-selection to remove low-risk situations from the range of insured cases.

In their nomination of individual executors, testators err sometimes in their judgment of integrity or competence. Though the insurance principle suggests some wisdom in bonding all executors, a countervailing principle comes into play to override it; namely, freedom of the testator to have his estate disposed of as he wishes as long as he does not run afoul of some overriding public policy. A common attitude seems to be

that if testator wants his money handled by an unbonded executor, such a decision is properly one for him to make. All of the evidence, and the experience of probate practitioners, points to the fact that this is the choice that is usually made in testate situations.

Whether freedom of choice by testators is a principle that comes into play with respect to administrators is another question, since testators rarely provide that any person administering the estate shall serve without bond. Under the priority appointment system provided by the Code, however, it is more than likely that the person who is appointed in intestacy would be a person who might well have been nominated executor had there been a will, given the size of the typical intestate estate and the likelihood that closeness of family relationship would be a higher priority of choice in small or modest estates than would the more specialized business or financial expertise that would be required of an executor handling large amounts of wealth. In those cases where this would not be done, or in any case, bond can be demanded automatically without judicial intervention, and if the representative is not a close and trusted family member, then the alleged timidity about requesting bond in that kind of sensitive situation should pose no major obstacle.

If we conclude that fidelity insurance is a good business practice to assure indemnification for occasional but inevitable losses of serious consequence for the particular individuals who suffer them, are we going to impose that principle on the estate where the testator has made a contrary judgment, only allowing an excuse of bond after a formal hearing before which those with an actual financial interest, and who will suffer any losses that might occur, unanimously join in a written waiver? If the self-selection of high risks is to be avoided, are we going to avoid it also in those cases of testamentary waiver or unanimous waiver of successors in intestacy where we now allow low-risk cases -- or at least what appear, perhaps mistakenly, to those involved to be low-risk situations -- to eliminate themselves from the random selection of risks?

No one, of course, is proposing that the present freedom to mistakenly waive bond, or to interfere in the random selection of risks for a viable insurance system be changed. Yet, the logic of these remaining two principal arguments for routine bonding would seem to require that. Otherwise, the selection of the insurable situations, and of which estate beneficiaries are to receive the insurance protection, would seem almost to rest on the fortuity of whether or not the decedent left a will. It would seem that the opportunity to make a choice on insurance protection without the added delay

and expense of a judicial proceeding (which the choice in favor of bond under the Code would not require) should not depend on that kind of a basis. It would seem that the law should be more sensitive to the judgment against bonds that is made in most wills by those who presumably have thought about it when the law considers whether it should impose bonds routinely on those who, particularly, have chosen through informal appointment options to avoid the need to engage in formal proceedings.

In formal administration proceedings in an intestate estate the Code leaves bonding to the discretion of the court, at the time of appointment of the administrator, subject to a requirement of bond if demand is made under UPC 3-605. The only guideline the Code sets for the court's exercise of its discretion is apparently whether a bond is "necessary." Some objection may be made to the lack of clearer criteria, or more sophisticated risk classification than exists under the Code. Yet, the guideline is probably not significantly less meaningful than the present one for excusing bond. While one of the problems of probate administration in Maine today is the lack of uniformity among different probate courts within the state in their procedural requirements, it is not clear whether the ambiguity of standards for determining informal appointments when bond is "necessary" would contribute to such disuniformity or not. One would hope, with some reason, that the basic

thrust of the Code, and the constant example of unbonded executors and unbonded informally appointed administrators, would help to prevent a probate court from converting its discretionary bonding power into a routine bonding requirement in making formal appointments.

Although most of the states which have adopted the Uniform Probate Code have adopted the Code's position on bonding, several of these states have inserted routine initial bonding in their versions of the Code. Of these departures, Arizona seems to have done the most serious job of attempting to integrate the non-uniform provisions into the rest of the statute.

The Arizona statute (Ariz. Rev. Stat. §14-3603) requires bond unless (1) the will expressly waives the bond, (2) all of the heirs in intestate cases or all of the devisees under a will not waiving bond file a written waiver of bond with the court, (3) the personal representative is a national banking institution or one of certain other kinds of financial institutions with specified bona fide certifications, or (4) the appointment petition alleges that the probate value of the estate allows summary proceedings under the Arizona equivalent of UPC 3-1203 and the personal representative is the surviving spouse or his nominee. Upon petition, the court may require bond in any of these cases "upon reasonable proof that the interest of the petitioning person is in danger of being lost



because of the administration of the estate."

The Commission seriously considered this Arizona variation as a reasonable compromise among the competing considerations that have been discussed. One of its attractions seemed to be its possibly more sophisticated classification of various risk classifications that might lead to more realistic classifications of premium rate experience and rates related more accurately to the costs of such fidelity insurance. There was also some thought that the statute might increase the likelihood of uniformity among the probate courts by circumscribing the courts' discretion more specifically. On the other hand, the Arizona variant does not allow for as immediate a provision for bond in the otherwise excused situations as does the automatic bond provision (subject to excuse in a subsequent hearing upon petition) of UPC 3-605. Also, the initial bonding requirement would still undercut the use of informal proceedings in many cases where they would be desired because of the narrow limitations of the excused situations or the added burden of rounding up the unanimous consent to waiver by all of the apparent successors.

The Commission also considered using the Arizona variation only in the case of formal appointments, on the theory that such an approach would give better guidance to the judicial discretion in the cases where it was particularly called upon to exercise that discretion regarding bond requirements (formal appointments)

while not interfering with the use of the informal proceedings. This approach was ultimately rejected, however, because the complexity of having the two systems together seemed to outweigh the speculative advantages that might be gained, and because it also seemed somewhat difficult to justify requiring bond automatically in those cases where the court had itself appointed the representative, without any waiver provision other than the somewhat narrow ones statutorily provided, but automatically excusing initial bonding for the representative appointed informally.

4. Conclusion.

Ultimately, it seemed to the Commission, that the Code system was best. Its basic no initial bond requirement squared with what the great majority of testators choose themselves. It allows the parties interested to easily, efficiently and immediately require bond, without undue solicitude for those unwilling to look to their own interests in ways ordinarily required by the law in other areas, and without a misguided paternalism adding unwanted burdens on persons for their own supposed protection. The Code, besides in fact providing for bonding itself for those who want it -- perhaps more adequately than present Maine or Arizona law -- does make more express provision for opportunities to control and oversee the administration, as needed, than does Maine law today.

In short, it is clear that the original reason for the

development of the bonding requirement in probate administration -- the weakness of the probate court -- no longer holds true, and no other reasons appear sufficient for the law to require for the typically smaller estates a provision that is usually expressly rejected by those who write wills.

5. Actions on the Bond.

The present Chapter 9 of Title 18 contains the provisions governing actions brought on the bond of executors and administrators, as well as other bonds given to the probate judge insofar as they are applicable and contrary provisions are not otherwise provided, 18 M.R.S.A. §301. These provisions are preserved, in amended form, in the Commission's bill as the proposed Maine Probate Code's Article VIII, Part 3.

Although some of the provisions of the present procedures on probate bonds would be inapplicable to the bonds of personal representatives, trustees and conservators under the new proposed Code, it would be necessary to retain many of those provisions in order to avoid disrupting their application to other kinds of bonds. Therefore, in order to avoid such disruption, they have been retained except, or as modified, in two ways: (1) repeal of those provisions that could concern only probate administration and which are inconsistent with the new Code, and (2) the amendment of any retained provisions that are inconsistent with the new Code so that they are expressly made inapplicable to the situations governed by it

(see, for example, §§8-301, 8-304, 8-309 and Maine Comment, and 8-312). Other provisions of Chapter 9 were both consistent with and supplementary to the new Code provisions and would therefore be retained essentially in their present form.

One change that is significant in form, although not in substance, is in §401 of Title 18 (MPC 8-309). Actions on the bond would be brought in the name of the real party in interest, rather than by naming the Probate Judge as the nominal plaintiff. As explained in the accompanying Maine Comment, this would make the procedure consistent with Rule 7 (a) of the Maine Rules of Civil Procedure. This would also allow the action to be brought in the probate court, which has primary responsibility for overseeing probate administration (UPC 3-606 (a) (4)), as well as in the Superior Court (as at present) under the new Code's provision for concurrent jurisdiction in non-exclusively probate matters, without the superficially awkward posture of having the nominal plaintiff presiding as judge over his own case.

F. Powers and Duties of the Personal Representative.

1. Duties Generally

One of the crucial underlying provisions of the proposed code is both the authority and the duty of the personal representative to go ahead and administer and distribute the estate without the direct supervision of the probate court to the extent possible, subject to the right of the representative to seek judicial instruction when he feels it is needed, and the right of interested persons to go to court on any individual question they desire or to request supervised administration under Part 5 of Article III. This duty and power to administer independently is expressed primarily in Section 3-704, and will be discussed in Part F.2 of this chapter, which focuses on the powers of a personal representative.

a. Time of Accrual of Duties and Powers

UPC 3-701 establishes that the duties and powers of the personal representative commence upon his appointment. At the same time, it affords necessary protections for persons who act on behalf of the estate pending the appointment of a personal representative. First, by providing that his authority shall relate back to the moment of the decedent's death, the beneficial acts of the person who is subsequently appointed to the office of personal representative become valid through the retroactive effect of appointment, but the section

does not automatically ratify acts which are found not be be beneficial to the estate. Second, this section allows the personal representative to ratify any proper acts of administration that were undertaken by others prior to his appointment. In addition, the Code specifically authorizes the person who is nominated as executor in a will to carry out the testator's written burial instructions.

The essential features of UPC 3-701, the power of ratification and the relation back of appointment, are already reflected in Maine law. Although a person who intermeddles with estate assets before the appointment of a personal representative is subject to liability as an executor in his own wrong under 18 MRSA 1414, the exceptions to this rule would encompass the same conduct permitted by UPC 3-701. The absence in UPC 3-701 of any provision for relation back to ratify acts not beneficial to the estate makes implicit the liability for non-beneficial acts of anyone who is not then appointed personal representative, thus paralleling the provision for such liability now existing in 18 M.R.S.A. §1414. Maine has long recognized the "relation back" doctrine to validate legitimate acts of administration that are undertaken by the personal representative prior to formal appointment. Gage v. Johnson, 20 Me. 437 (1841); Pinkham v. Grant, 78 Me. 158 (1886). Furthermore, the statute itself expressly relieves an executor in his own wrong from liability for disbursements

of estate funds that the rightful personal representative would have had to pay, including funeral expenses. Implicitly, this provision allows the personal representative to ratify the act of another that occurred before his appointment.

The UPC's express authorization for a person who is named executor in a will to carry out the testator's written burial instructions seems to add little to what is already possible under UPC 3-701. It does, however, clarify the nominee's authority to make funeral arrangements according to the will and to compel ratification of such authorized acts in case the testator's nominee is not appointed to the office of personal representative.

b. Priority Among Different Letters

UPC 3-702 provides that the first person who obtains appointment as personal representative has exclusive authority to administer the estate, subject to the qualification that his authority may be modified or terminated. In case two sets of general letters are mistakenly issued, without termination of the first appointment, the first-appointed personal representative has priority. Although the acts of the second personal representative are not void if they were done in good faith and without notice of the first letters, he can be compelled to surrender any estate assets that remain in his possession to the rightful personal representative.

According to UPC 3-702, the exclusive authority of the

personal representative may be modified or terminated, as provided elsewhere in the UPC. The Uniform Comment following this section cites two examples of modification, the appointment of a co-representative and the appointment of a special administrator. Co-representatives exercise a joint authority that is defined in UPC 3-717. The authority of a special administrator would be limited to the transaction that gave rise to the need for his appointment. See UPC 3-614(2). Termination of authority, on the other hand, may come about by any of the events described in UPC 3-610, 611, and 612, e.g., the closing of the estate, resignation, removal, or a change in the decedent's testacy status.

Subject to similar qualifications in the event of modification or termination, Maine law is consistent with the UPC in reposing exclusive authority for administration in the executor or administrator. See, e.g., McLean v. Weeks, 61 Me. 277 (1870). The erroneous appointment of more than one personal representative, however, is a contingency not presently provided for in Maine. Thus, section 3-702 would provide the explicit clarity not now present.

c. Standard of Care

(1) UPC 3-703(a) designates the personal representative as a fiduciary who is held to the same standards of care that would be observed by a prudent person dealing with the property of another. Besides this, his duties require him to settle and



distribute the estate pursuant to the terms of any will and the requirements of the Code, to do so as expeditiously and efficiently as possible, and to use his powers for the best interests of the decedent's successors. Other powers and duties of the personal representative are defined more specifically in the following sections of the UPC, particularly in 3-715.

The statutory conditions for the executor's and administrator's bonds provide the only general statutory outline of the fiduciary duties of a personal representative under present Maine law. These statutes tend to be somewhat more specific than UPC 3-703(a), which is only a general statement of fiduciary responsibility that overlays other duties expressly defined elsewhere in the Code. Nevertheless, most of the duties imposed by the existing bonding statutes (esp. 18 MRSA §§1501, 1554) are substantially specifically incorporated by the UPC in other sections. Of the four conditions prescribed for the executor's bond by 18 MRSA §1501, three are carried over into the Code. First, the executor is required to inventory the estate within three months. This duty is identical to one imposed by UPC 3-706. Second, he must administer the decedent's assets according to law and the will of the testator. As already noted, UPC 3-703(a) contains language to the same effect. Third, the executor must submit an accounting within one year and at any other times that the court orders him to do so. Under the UPC, there is no express duty to render a periodic accounting. How-

ever, the protection achieved by an accounting requirement is still at least as effectively achieved under the UPC as under present Maine law. The duty to account is a prerequisite to any of the various procedures for closing an estate under the UPC. See UPC 3-1001, 3-1002, 3-1003 and 3-1204. In addition, interested parties may request an accounting from the personal representative, and may petition the court at any time they feel it is necessary to obtain an order to compel an accounting. See UPC 3-105.

The fourth bond condition in section 1501, which is also contained in 18 MRSA §1554, and which is not reflected in the UPC, is the one which holds an executor liable in treble damages in certain circumstances for any damage caused by him to real estate in a case where the estate is represented to be insolvent. Of course, the personal representative remains liable under the Code for injuries to estate assets that are caused by a breach of his duties. There seems to be no significant reason to give such favored treatment to real estate and such extreme sanction is not consistent with the UPC's similar treatment of real and personal property. See e.g., UPC 3-101.

In addition, to the foregoing obligations, 18 MRSA §1554 attaches two further conditions to the administrator's bond. First, Section 1554 requires the administrator to distribute the balance of any estate assets that remain after the settlement of accounts to such persons as the judge of probate

directs. The UPC, of course, provides for distribution without a court decree, except when supervised administration is called for under Part 5 of Article III. Such provisions of present Maine law are inconsistent with the concept of informal administration to the extent that they require a court order in all cases prior to any distribution.

The second obligation specially imposed upon the administrator under present law is that he surrender his letters of administration to the probate court in the event that a will left by the decedent is proved and allowed subsequent to his appointment. UPC 3-612 similarly provides for this possibility, except that the first-appointed personal representative is not divested of his office by a change in testacy status until someone specifically requests that his authority be terminated and that he be replaced.

Thus, the fiduciary duties of the personal representative under the UPC are substantially consistent with present Maine law except for the treble damage provision for insolvent estates and the requirement that distribution be exclusively pursuant to a court decree. It seems preferable to apply these duties directly to any personal representative, rather than to do so in the indirect manner of making them conditions of the bond.

d. Authorized Acts Subject to Changes in Testacy Status

UPC 3-703(b) absolves the personal representative from

liability where the acts of administration or distribution in question were "authorized at the time." Implicitly, this language refers to conduct that later turns out to have been "improper," most commonly because of a change in testacy status. The subsection goes on to identify two specific instances of conduct that is "authorized at the time" -- actions that depend for the validity upon informal probate or appointment proceedings. Such conduct may later turn out to have been "improper" even through "authorized," because supervening formal proceedings have established that a different will is entitled to probate, or that the decedent died testate instead of intestate. In the case of a testate decedent, an informally probated will is authority to distribute the estate according to its terms. As to intestate estates, the informal appointment of a personal representative gives him full authority to proceed with distribution according to the laws of intestate succession, unless the personal representative has notice of some ongoing or pending proceeding that could lead to the termination of his appointment or a change in the decedent's testacy status.

The thrust of §3-703(b) is to equalize formal and informal probate or appointment by protecting the personal representative when he acts pursuant to authority obtained under Part 3 of Article III, as well as when he acts without court order as authorized by UPC 3-704 and other provisions of the UPC. This

provision is essential if the formal-informal distinction is to provide effectively alternative procedures, and if unsupervised administration is adopted. Although informal proceedings will be desirable in most cases for reasons to be discussed in Part C of this chapter, informal probate or appointment can be superseded by a formal proceeding at any time up to three years after the decedent's death. As a result, acts that appear to be authorized at the time may later turn out to have been improper. A personal representative would be reluctant to distribute an estate pursuant to informal authority if he were not given the protection provided by 3-703(b), which assures the personal representative that he will not be surcharged because of the late appearance of a different will or a change in the decedent's testacy status.

It deserves emphasis that 3-703(b) does not protect a personal representative whose actions were unauthorized at the time they were committed. In other words, this section is no defense for mistakes of law or fact, such as distribution per capita where the will specified per stirpes, or in case a rightful heir receives the wrong inheritance. It also should be noted that the actual difference between the effects of informal and formal probate, and the protection of executors and administrators under present Maine law, may not be as great as it might first appear to be, since under present law a later

discovered will may be probated up to 20 years after the decedent's death and thus change the definition of the "proper" distribution in the same way that is possible under the UPC. In such a situation, an executor or administrator administering the estate and distributing to heirs and devisees pursuant to a court order of distribution would presently have similar protection.

UPC 3-703(c) would give a personal representative appointed in Maine the same standing to sue and be sued as the decedent had, both in Maine courts and in the courts of other states. The Comment states that by granting the personal representative an express power to sue in foreign courts, the UPC will eliminate many of the present reasons for ancillary administration. Foreign personal representatives would be granted reciprocal standing to sue in courts of this state if UPC 4-205 were enacted.

While subsection (c) of 3-703 and UPC 4-205 are complementary sides of the same coin, the provisions of subsection (c) do not themselves eliminate the present need for foreign executors and administrators to start ancillary administration in Maine, and in addition purport to authorize Maine personal representatives to act in other states. Adoption of UPC 4-205 (the coin's other side) would, however, effect a significant change in Maine law, which requires a foreign personal representative to commence ancillary administration before bringing suit in local courts. Stearns v. Burnham, 5 Me. 261 (1926); Fort

Fairfield Nash Co. v. Noltemier, 135 Me. 84, 189 A. 415, 108 A.L.R. 1276 (1937). As with ancillary administration generally, the present rule is founded on a desire to protect local creditors in case the decedent leaves property within the state out of which their claims might be satisfied. This provision will be discussed later in this chapter in connection with UPC Article IV.

e. Information to Heirs and Devisees

UPC 3-705 requires the personal representative to notify those appearing to be actual or possible heirs and devisees of his appointment within thirty days of his taking office. Notice is to be given by ordinary mail and must contain four items of information; the name and address of the personal representative, an indication that notice is being sent to other persons who have or may have some interest in the estate, a statement as to whether the personal representative has filed bond, and the location of the court where estate papers are filed. Notice may be sent to other persons than those entitled to it under this section at the discretion of the personal representative. Failure to comply with these requirements would amount to a breach of fiduciary duty on the part of the personal representative, but it would not affect the validity of his appointment, powers, or duties.

Although UPC 3-705 requires that notice be sent to "heirs and devisees," it also provides that "the duty does not extend

to require information to persons who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate."

In this regard, there may be a gap in the language of UPC 3-705, since the notice to others than those whom the personal representative himself believes to be successors, rests in the requirement of notice to heirs and to devisees under any will "mentioned in (his) application for appointment." Thus, while the section provides notice to heirs, whatever ambiguity may exist as to the testacy status, it would not seem to provide for notice to devisees under an existing will which is not the basis of the personal representative's appointment. See UPC 3-308 (a)(5). This is corrected in the proposed Code for Maine by inserting "and, in any case where there has been no formal testacy proceedings, to the devisees in any purported will whose existence and the names of the devisees thereunder are known to the personal representative."

Subject to the above qualifications, a personal representative who is proceeding with administration under an informally probated will is still required to give information of his appointment to the testator's heirs and devisees under any other will known to have been left by the testator. This requirement protects these other parties by providing them with their first notice of administration under a will that does not



recognize their interests in the estate. The UPC allows them to initiate formal testacy proceedings at this point in order to obtain a final adjudication naming the decedent's successors. By the same token, however, UPC 3-705 would not require a personal representative who is proceeding under a formally probated will to inform anyone besides the devisees under that will of his appointment. In the case of a formally probated will, heirs and devisees under any other known will have already received information that their interests are threatened because they must be notified of the formal probate litigation pursuant to the requirements of UPC 3-405. The same would be true of a personal representative proceeding under a formal order of intestacy.

The informational notice of appointment required by the UPC is more thorough than the analogous provisions of 18 MRSA §203. Whereas the UPC provides for personal notice of appointment to the decedent's successors, notice by publication is all that is presently required in Maine. Section 203 does include a provision for such further notice as the judge may order, however. Beyond this, there are only two minor differences between UPC 3-705 and the current Maine section 203. First, the UPC imposes the duty to notify upon the personal representative, whereas it is not the responsibility of the register of probate. Second, notice is currently given within two months of the personal representative's

appointment and qualification, but the UPC shortens this period to one month. Although these may be minor details, the Code's alternatives seem more efficient in both cases, and are consistent with the philosophy of simplifying administration but placing its operation more in the hands of the personal representative than in the hands of the court officers unless there is some reason to involve the judicial machinery.

f. Appraisal and Inventory

UPC 3-706, 707, and 708 deal with the personal representative's duties of inventory and appraisal. For the most part, they are not appreciably different from the Maine statutes now in effect, 18 MRSA §§1801-07. UPC 3-706 requires the personal representative to prepare an inventory of the decedent's property within three months after his appointment. He is to list each item at its fair market value as of the decedent's death along with any encumbrance upon the property. A copy of the inventory must be sent to all interested persons who request it. At his discretion, the personal representative may also file the original of the inventory with the court. UPC 3-707 authorizes the personal representative to employ appraisers to assist him in ascertaining the fair market value of the decedent's property. Different appraisers may be employed to appraise different assets, but all of their names are to appear in the inventory along side of the items they appraised. Finally, UPC 3-708 requires the personal representative to undertake a supplementary inventory or appraisal if property not included

in the original inventory turns up, or if the original listed value or description of some item turns out to be erroneous or misleading. The personal representative is also directed to provide appropriate corrections to the inventories he has already sent out.

The present statutory provisions on inventories differ significantly from the UPC in only two respects -- the court's role in the inventory process and the lack of judicial appointment of appraisers. The present Maine law, 18 MRSA §1801, requires the executor or administrator to return the inventory to the court upon oath. Three appraisers must be appointed and sworn by the court or the register of probate under 18 MRSA §1802, unless it is shown that one court appointed appraiser is sufficient. If a supplementary inventory becomes necessary, 18 MRSA §1805 requires that it shall be ordered by the Court.

Predictably, the court is conspicuously without an active supervisory role in the analogous UPC provisions. This difference accords with the underlying policy of the Code that the personal representative should generally be independent of court supervision in routine matters of administration. Inventories and appraisals would almost certainly proceed more efficiently and with less expense under the UPC approach. As always, the court would remain accessible if it became necessary to enforce the personal representative's

duty to inventory. Just as interested persons may now petition the court to have the personal representative cited for failure to inventory (see 18 MRSA §1801), they may proceed with a variety of remedies under the UPC, including actions for injunction relief (UPC 3-607) or removal (UPC 3-611).

Besides eliminating the involvement of the court, the other difference from the present appraisement statute is that Title 18 MRSA §1802 requires that either one or three appraisers shall be appointed, depending on the nature of the estate. UPC 3-707 would leave the matter of how many appraisers should be employed, if any, up to the personal representative. The Code's approach appears to allow for more flexibility. If any losses resulted from the personal representative's failure to obtain a competent appraisement, he could be held liable for breach of fiduciary duty under UPC 3-712.

Title 18 MRSA §1804, providing for the inventory and appraisal of choses in action, is without a comparable explicit provision in the UPC. It is unclear whether UPC 3-706 encompasses choses in action because it specifies only that the inventory shall include "property owned by the decedent at the time of his death," to be appraised at its fair market value less encumbrances. The present statute specifically instructs the executor or administrator to inventory "credits of the deceased and rights to personal property not in possession," listing the amount due, the name of the debtor, and the nature

of the obligation. These items are to be appraised at the amounts that would be realized upon judgment, "exclusive of expenses and risk of settlement or collection." The Commission has included these provisions for express inclusion of the decedent's choses in action in the inventory by adding the following sentence to UPC 3-706: "The inventory shall also include a schedule of credits of the decedent, with the names of the obligors, the amounts due, a description of the nature of the obligation, and the amount of all such credits, exclusive of expenses and risk of settlement or collection."

In some cases, the inventory will contain information that warrants the posting of additional bond by the personal representative. If so, 18 MRSA §1807 now provides that the judge may require the executor or administrator to increase the amount for which he is bonded. Under the same circumstances, an interested party may petition the court under UPC 3-604 for a similar order.

Another existing inventory statute, 18 MRSA §1806, designates four categories of property that may be omitted from the estate inventory. These items are the apparel of the widow and children, the apparel of the deceased, articles consumed before appraisal if less than \$50.00 value, and life insurance proceeds. The UPC provides an adequate replacement for the first three of these provisions in its "exempt property"

section, UPC 2-402, and UPC 6-201 establishes that life insurance proceeds would ordinarily continue to be regarded as non-estate assets if the Code is adopted.

The optional, rather than mandated, filing of the inventory with the court is a furtherance of the policy of protecting the privacy of the decedent and his beneficiaries.

g. Possession of the Estate

UPC 3-709 establishes the personal representative's right to possession and control of the decedent's property. Accordingly, the personal representative is empowered to bring actions to recover possession and determine title. Once property is in his possession, it is the duty of the personal representative to safeguard and preserve it. He may allow presumptive distributees to have possession of the real estate or tangible personal property to which they may ultimately be entitled; but they must surrender the property to the personal representative if it becomes necessary for purposes of administration.

Except insofar as the UPC does not distinguish between real and personal property, the provisions of UPC 3-709 are already part of the probate law of Maine. A person who withholds a decedent's property from the executor or administrator incurs liability as an executor in his own wrong under 18 MRSA §1414. If the executor or administrator entrusts estate

property to anyone else, that person remains accountable for it through the citation procedure described in 18 MRSA §1752. It has been held that where an executor leaves the decedent's personal estate in the hands of the residuary legatee, the latter is merely a bailee of the executor, who can maintain an action to recover the property any time before administration is completed. Carlisle v. Burley, 3 Me. 250 (1825)

UPC 3-709 would change Maine law to the extent that it empowers a personal representative to bring actions to determine title to real estate. Traditionally, Maine has followed the common law rule that a decedent's real estate descends immediately to his heirs or devisees. Title to personal property, on the other hand, vests in the executor or administrator until it is distributed. Thus, a decedent's property is subject to administration only if special provision has been made by will or in the event that it is needed to satisfy claims against the estate. As a result, only heirs and devisees ordinarily have standing to bring actions involving a decedent's real estate. Crocker v. Smith, 32 Me. 244 (1950); Averill v. Cone, 129 Me. 9, 149 A. 297 (1930).

This situation would be changed by the Code proposed for Maine. UPC 3-101 eliminates the traditional distinction between the treatment of real and personal property. Thus,

under UPC 3-709, the personal representative has standing to bring actions for possession without regard to whether the property involved is realty or personalty and without regard to the fact that title to both realty and personalty is in the decedent's successors. See UPC 3-101. (Note: The reference to "section 3-712" in the second sentence of the official Uniform Comment to §3-709 should read "section 3-711.")

The Uniform Comment following UPC 3-709 refers to a possible problem in some states regarding the administration of partnership assets and recommends adoption of the Uniform Partnership Act. Maine, however, has already adopted this legislation. Section 37 of that Act, authorizing the surviving partner to wind up the partnership, appears at 31 M.R.S.A. §317 (1978 Supp.)

## 2. Powers of the Personal Representative

### a. The Duty and Power to Proceed Without Court Order.

A major reform of the UPC is to provide authority for the personal representative to act without constant court supervision. Thus, UPC 3-704 provides that the personal representative's authority in settling and distributing the estate is not ordinarily dependent on any "adjudication, order, or direction of the court." The section also imposes an express duty on the personal representative to "proceed expeditiously" with settlement and distribution -- a duty which



would be enforceable in a judicial proceeding brought by an interested party. Section 3-704 also provides that the personal representative may invoke the court's jurisdiction in case a question arises in which he needs judicial guidance or in which he feels a formal adjudication would be desirable for other reasons. Other interested parties are given a similar right to institute court proceedings under UPC 3-105. An exception to the general rule of unsupervised administration is made in the case of a "supervised administration" as described in Part 5 of Article III. Available only upon request, supervised administration involves court supervision and approval of the entire administration and distribution of an estate.

The executor or administrator under present Maine law generally may proceed without court order in paying the costs of administration, taxes, debts of the estate, and specific bequests of personal property and pecuniary legacies of a specified amount -- all of which are considered to be "claims" against the estate. Hanscom v. Marston, 82 Me. 288 (1890); Mudgett's Appeal, 105 Me. 387 (1909); 18 MRSA §1416. Once these "claims" are paid and accounted for to the court, the court determines in an order how the remaining assets will be distributed -- including those going to the residuary legatees and devisees, to other legatees and devisees, and to heirs of any intestate property. 18 MRSA §2351. Since these distribu-

tions are not "claims" against the estate, the executor or administrator can distribute them only pursuant to the court's order if he is to be officially protected in his distribution. Hanscom v. Marston, supra.

In addition, under present Maine laws court adjudication is now statutorily required in order to have an inventory or accounting approved (18 MRSA §§1501, 1551) to obtain license to sell real estate (18 MRSA §2051), or to distribute intestate assets (18 MRSA §1551). On the other hand, there are also times when a personal representative wants to secure the protection of a probate court decree even though he is free to act without it. For example, he may obtain a license to sell personal property that belonged to the decedent (19 MRSA §1852), and thus protect himself from surcharge in the event of a loss to the estate.

The court's involvement in the settlement and distribution of an estate under the proposed Code would become optional at all stages of administration, including those in which it is now mandatory. The court's imprimatur would be sought only when it was thought by the personal representative or by some interested person to be desirable or especially necessary for some reason. By the use of occasional rather than routine court proceedings, the court's involvement in administration would be tailored to the needs of each particular estate.

b. Power to Avoid Transfers

If a decedent has made a transfer of his property that is void or voidable as against his creditors, UPC 3-710 gives the personal representative the exclusive right to recover so much of the property as is necessary for the payment of the decedent's unsecured debts. Neither this section nor any other in the UPC is meant to affect the substantive law governing creditors' rights in relation to non-testamentary transfers. See UPC 6-201.

In Maine, standing to bring actions to rescind *inter vivos* transfers that are void as against a decedent's creditors is already restricted to the executor or administrator. The rule assures a fair distribution of assets among all bona fide claimants and also shields the transferee from a multiplicity of suits brought by individual creditors. McLean v. Weeks, 61 Me. 277 (1970); 65 Me. 419 (1976). As noted in Part F. e. g. of this chapter however, land is not presently subject to administration unless its sale is necessary to satisfy creditors' claims. Thus, where real estate has been fraudulently conveyed, the executor or administrator must obtain a license to sell it before proceeding against the decedent's transferee. 18 MRSA §2059; Crocker v. Smith, 32 Me. 244 (1850). The UPC would do away with this procedure. The Code recognizes no distinction between real and personal property (UPC 3-101),

nor does it require the personal representative to obtain a license from the court before he can convey real estate (UPC 3-715 (6), (23)).

The last sentence of section 3-710 of the proposed Maine code is an addition to the original UPC version and was suggested by the form of the enactment of this section in some other states. That sentence provides that the personal representative is not required to pursue property of the decedent that was transferred in a manner that made it void against creditors, unless the creditors requested such action and bore the expenses of any litigation. Upon further consideration, this seems to be a desirable refinement of the UPC section since it is the creditors who would both benefit by the action and who would have had to bear the costs of the litigation involved in pursuing such property had the decedent lived. See Comment, "Articles II and III of the Uniform Probate Code as Enacted in Utah," 1976 Brigham Young U.L. Rev. 425, at 450.

c. Transactions Expressly Authorized

UPC 3-715 sets forth a wide variety of transactions in which the personal representative is specifically authorized to engage.

Since the UPC proceeds on the assumption of full discretion in the personal representative to administer the estate with judicial intervention and supervision only when and where it is needed, the primary purpose of the enumeration in this section is to clearly establish some transactions about which doubt might otherwise be raised, and to specifically define and limit particular transactions.

In considering each authorized transaction, however, it is important to note that the entire enumeration is qualified by the opening language of the section. The fact that a particular transaction is included within the subsections of 3-715 does not necessarily mean that the personal representative has unchecked authority to engage in that transaction under all circumstances. He is, of course, subject to any court orders. The will can define the authority in more limited or more expansive ways than is done by 3-715. But beyond that, the enumerated transactions in which the personal representative may properly engage are also limited by his overall duty to administer the estate as a fiduciary for the benefit of all interested persons, by the nature of the functions of his office as representative of a decedent's estate, and by 3-715's provision that the transactions are authorized for a personal representative "acting reasonably for the benefit of the interested persons." In the context of these

explicit and implicit limitations, he is of course bound to exercise his discretion and engage in these transactions only within the limits of the other provisions of the UPC.

i. Power Over Real Estate

As already indicated, the UPC changes the substantive law that currently governs the personal representative's powers over real estate. Under present law, land is less subject to administration than personalty, since title to land descends directly to the decedent's heirs or devisees. There are two major exceptions to this practice. First, the sale of land or some interest in land may be necessary to pay claims against the estate and/or costs of administration. If so, the executor or administrator may apply to the probate court for a license to sell his decedent's real estate and then use the proceeds of the sale to meet these expenses. 18 MRSA §2051. Second, the will may contain a power to sell real estate. Express testamentary authorizations consist of either a naked power to sell or a power coupled with an interest, David v. Scavone, 149 Me. 189, 100 A. 2d 425 (1953); Bradt v. Hodgdon, 94 Me. 559, 48 A. 179 (1901). The latter is an express devise to the executor himself, coupled with a direction to sell the real estate and use the proceeds for some specified purpose. The naked power to sell usually grants the executor a power to sell at his own discretion and is not accompanied by a devise. Thus, title to the realty ordinarily

passes to the residuary legatee upon the testator's death, subject to divestment when and if the executor exercises his power. The only other currently available means for a personal representative to gain control of real estate is when the real estate is held as a mortgage or taken on execution. A mortgage that belongs to a decedent is treated as personal property in Maine and devolves upon his death to his executor or administrator. 18 MRSA §951. If the personal representative subsequently forecloses on the mortgagor, title to the real estate at that point descends to heirs and devisees.

The elimination of the difference between the treatment of realty and personalty under the UPC naturally results in some increase in the power of the personal representative to deal with realty, and this change is reflected in UPC 3-715. Previously, the personal representative's powers over realty were exercisable only on the testator's express or implied direction, or by order of the court. This change must be kept in mind while reading UPC 3-715. It should also be noted that although the UPC does not recognize the exalted status that land enjoys at common law, a decedent's real estate is no less protected under the Code than other property is. Interested persons may, if they wish, invoke the court's jurisdiction to obtain judicial review of any action

taken by the personal representative with respect to real estate or any other asset. UPC 3-105. Injunctive relief in particular instances, or general supervision of administration is available. UPC 3-607, 3-501 and 3-502. Moreover, UPC 3-906 adopts an official preference for distribution of the estate in kind, thus imposing a duty on the personal representative to preserve real property in that form unless there is a genuine need to liquidate it for some purpose. This duty overlays many of the expanded powers over real estate that UPC 3-715 otherwise gives to the personal representative.

UPC 3-715(6) and (23): The Power to Sell Real Estate.

Under present law, unless he has the authority under the will, a personal representative must obtain a license from the probate court before he can sell real estate. An elaborate statutory scheme governs the issuance of licenses. Sales are not supposed to be licensed indiscriminately, and 18 MRSA §2051 defines the specific circumstances under which licenses are available. Probably the most common situation in which an executor or administrator is licensed to sell real estate is when it is necessary to satisfy creditors' claims or to pay the costs of administration. 18 MRSA §2051(1). Only so much real estate may be sold as is necessary to meet these expenses, unless depreciation of the residue can only be avoided by selling



a greater amount. 18 MRSA §2051(3). A license cannot be granted until after notice has been given to all interested persons (18 MRSA §2052), any of whom may block the sale by posting bond for the amount needed by the personal representative in order to pay off claims and expenses (18 MRSA §2053). Besides land that belonged to the decedent at his death, lands that he conveyed fraudulently as against creditors are also liable to sale (18 MRSA §2059), as well as lands taken by the personal representative through execution or foreclosure (18 MRSA §§952, 2051(8)). Once he is licensed, the executor or administrator is required to post additional bond before carrying out the sale. 18 MRSA §§2101, 2102. All sales must be by public auction unless the court permits otherwise. 18 MRSA §§2201, 2202. If the personal representative has complied with license, bond, and notice requirements, a good faith purchaser is protected as against all claiming under the decedent after the deed has been recorded. 18 MRSA §2252. The sale is also valid as against all who claim title adversely to the decedent after the deed has been recorded. 18 MRSA §2253. Any interested person who is injured by the sale as a result of negligence or misconduct on the part of the personal representative has recourse against him in a civil action on the probate bond. 18 MRSA §2062.

UPC 3-715(6) and (23) would eliminate these procedures entirely. The UPC authorizes the personal representative to

sell land for cash or credit, with or without security, at public or private sale. The court plays no role in the sale unless an interested party commences litigation specifically in order to obtain court intervention.

This reform is certainly in keeping with the UPC's policy of eliminating the court's unnecessary involvement in administration. To continue to require a license where sales of real estate are concerned would also be inconsistent with UPC 3-101, which abolishes the distinction between the treatment of real and personal property.<sup>1</sup> Licensing is equally incompatible with many of the general powers given to the personal representative in previously considered sections (3-704, 3-709 and 3-711). Insofar as the license to sell real estate is supposed to protect the decedent's successors' interests in his land, it is adequately replaced by other safeguards in the UPC that have already been mentioned. See UPC 3-105, 3-607, and 3-906.

The need to amend certain sections of the inheritance tax statutes in connection with this change is discussed in Chapter

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<sup>1</sup> Although it is presently possible to obtain a license to sell personal property, such licenses are only for the protection of the personal representative. 18 MRSA §1852. They are not necessary to the validity of the sale, as is the case for real estate. 18 MRSA §§2252, 2253.

Seven (7) of this study.

UPC 3-715(6): The Power to Partition Real Estate.

Like sales of real estate, probate-related partition actions are currently regulated by an extensive statutory scheme which provides that the probate court may partition a decedent's real estate upon the petition of any of his successors. Its jurisdiction is limited, however, to cases in which the correct apportionment is either not in dispute or not open to doubt. Otherwise, a partition action is properly brought in the Superior Court where it may be tried before a jury. 18 MRSA §1951. The probate court procedure calls for the appointment of three sworn commissioners who must later submit a plan for partition that may or may not be approved by the court. 18 MRSA §§2001-2003. In cases where an equal division is impossible, the probate court may assign the entire parcel of real estate to one of its owners after he has paid the others a sum that will justly compensate them for their losses. In making the assignment, "males shall be preferred to females and elder to the younger children of the same sex." 18 MRSA §1953. Reversions and remainders that have not yet vested in possession are also subject to partition. 18 MRSA §1952.

UPC 3-715(6) gives the personal representative authority to partition any estate asset, including real estate, without involving the court in the process. Furthermore, UPC 3-715(8)

explicitly authorizes the personal representative to adjust any unequal division by giving or receiving consideration. Of course, if any of the decedent's successors so desired, they could take the matter out of the hands of the personal representative by commencing a formal proceeding to obtain a judicial partition. UPC 3-105, 3-607. Alternatively, dissatisfied successors could bring an action to obtain court review after the personal representative has made the initial partition.

The present statutes specially provide for cases in which an heir, devisee, or surviving spouse has conveyed his interest in the decedent's real estate to a third party, and also for cases in which the successor's creditors have attached his interest. 18 MRSA §§1954, 1955. Any such successors to the interests of heirs, devisees, and spouses are allowed to assert their claims in the event of a partition. Under the UPC, no express provision is made for these parties. However, the Code's definition of "interested party" clearly gives them standing to challenge the personal representative's partition if they wish to do so. See UPC 1-201(20). They would also be entitled to notice of any formal judicial proceedings regarding a partition. UPC 1-403(1).

The UPC does not retain the present procedure for partitions by commissioners. However, if the personal representative

needs expert help in effecting a fair division of the decedent's real estate, he is authorized to employ qualified persons to assist him. UPC 3-715(20).

Thus, when the need arises to partition a decedent's real estate, the UPC brings the proceedings out of the courtroom and puts them under the control of the personal representative. In doing so, the Code preserves all existing safeguards to the parties' various interests.

UPC 3-715(6) and (7): The Power to Improve Real Property. Subsection (7) authorizes the personal representative to make any sort of improvements to real estate in the way of structures, including the repair or demolition of existing buildings and the erection of new ones. Although no Maine law has been found on this specific point, an executor or administrator would lack any such authority under present law unless it was expressly given to him under a will. Cf. In re Estate of Paradis, 134 Me. 333, 186 A. 672 (1936) (administrator's claim for janitorial services disallowed). As it has already been explained, a personal representative ordinarily has nothing to do with his decedent's real estate. Of course, the personal representative may sometimes derive by implication the power to improve property. If, for instance, he is authorized by the will to carry on the testator's business, or if he does so pursuant to a court order, he necessarily controls any real estate belong to the business and

the structures that are upon it. Even then, however, UPC 3-715(6) and (7) make more clear than does present Maine law that the personal representative has the powers necessary to deal with the realty that his duties entrust to his responsibility.

UPC 3-715(6) and (8): General Powers to Manage Real Estate. Subsection (8) grants the personal representative four broad powers over real estate, none of which has any express counterpart under existing law. First, he may subdivide and develop. Second, he can adjust boundaries and make or remake plots. Third, by giving or receiving consideration, he can make up the difference between the parties when the land they receive after partition or exchange is unequal in value. Finally, the personal representative may dedicate land to public use; and in the case of easements for public use, he may do so without consideration. While some of these transactions may seem to be unlikely activities for a personal representative whose primary duty is to wind up and distribute the decedent's estate, this subsection makes clear that he has authority in the area. Of course, these powers can be exercised only within the limitations of the first paragraph of 3-715 -- "reasonably for the benefit of the interested persons."

UPC 3-715(9) and (23): The Power to Lease Real Estate.

Subsections (9) and (23) authorize the personal representative to enter into any lease as either lessor or lessee, including leases that extend beyond the period of administration. Under existing Maine law, and subject as always to any express provision in a will, an executor or administrator must obtain a license from the probate court and follow the same procedures applicable to sales of real estate before he can lease land that belongs to the estate. 18 MRSA §2051. If the executor or administrator wants to lease property as a lessee, his authority to do so under present law is probably dependent on express or implied authority under the will, or on an implied power pursuant to a court order to operate the decedent's business. See 18 MRSA §1403. However, no law that directly addresses this question has been found.

UPC 3-715(10): Power to Lease Mining Rights, Etc. Subsection (10) of UPC 3-715 authorizes the personal representative to lease or sell rights to explore and to extract natural resources. This section has no express counterpart in existing law, but the personal representative would not now have such authority unless he had a power under the will or a license from the probate court under 18 MRSA §2051.

UPC 3-715(18): Power to Pay Taxes on Real Estate. Although taxes on real estate will ordinarily be the responsibility of the heir or devisee to whom the real estate has descended, and

who will ultimately be responsible for them for the period during which he has had possession even if the personal representative has initially paid the taxes, subsection (18) gives the personal representative express authority to pay such taxes when appropriate as part of his responsibilities to administer. In addition, it should be remembered that UPC 3-709, which gives the personal representative authority to possess property needed for the purposes of administration, also provides that he shall pay the taxes on it for the period of his possession.

Under present Maine law, although taxes on a decedent's real estate may be assessed to his executor or administrator, they may alternately be charged to heirs or devisees; and in any case, they must be charged to heirs or devisees once the tax assessor has received notice of their identities and any division of the real estate among them. 36 MRSA §559. Moreover, the Supreme Judicial Court has held that an administrator's claim for real property taxes must be disallowed unless the taxes were actually assessed to him. In re Estate of Paradis, 134 Me. 333, 186 A. 672 (1936). The personal representative's responsibility for taxes may also result from an agreement among the heirs or devisees that he should collect rents and profits, to which they would ordinarily be entitled and out of which taxes are payable.



Parais, supra. Presently, the only other time that an executor or administrator would pay taxes on real estate is if land has been devised to him in accordance with a power to sell.

Thus there appears to be no significant substantive difference between current Maine law and this aspect of UPC 3-715 (18), except that the UPC clarifies the authority of the personal representative to pay such taxes when in the interest of the estate, and would change present Maine law to make clear that he would be reimbursed from the share of any heirs or devisees in possession of the land for which he properly made any such payment.

UPC 3-715(22): Power to Prosecute and Defend Real Actions. Subsection (22) of UPC 3-715 authorizes the personal representative to prosecute and defend claims on behalf of the estate, and undoubtedly this power extends to actions of any sort involving land. The Code departs from present Maine law in granting the personal representative standing to sue and be sued in real actions. Averill v. Cone, 129 Me. 9, 149 A. 297 (1930) (administrator cannot maintain a bill to compel the reconveyance of land on behalf of his intestate); Berry v. Whitaker, 58 Me. 422 (1870) (administrator cannot prosecute a writ of review involving a real action); Richardson v. Woodbury, 43 Me. 206 (1857) (action to obtain release of title to real estate under equitable mortgage dismissed because improperly brought against executor);

Crocker v. Smith, 32 Me. 244 (1850) (administrator cannot compel reconveyance of real estate transferred by decedent without consideration unless he obtains license to sell from probate court); Brown and Appleton v. Strickland, 32 Me. 174 (1850) (administrator de bonis non cannot maintain a real action).

The present law is, of course, founded on the common law doctrine that a decedent's land does not ordinarily come under the control of his executor or administrator. A statutory exception to the rule against a personal representative's power to bring real actions has long existed for actions to redeem mortgaged real estate. Under 14 M.R.S.A. §6303, an action for redemption may be commenced and prosecuted by the decedent's executor or administrator as well as his heirs or devisees. Under UPC 3-715, such actions would be brought by the personal representative only, at least until the property has been distributed.

UPC 3-715(23): Power to Mortgage Real Estate. Subsection (23) of UPC 3-715 grants the personal representative the power to mortgage real estate. Under present law, the executor or administrator cannot encumber his decedent's land with a mortgage unless he obtains a license from the probate court, just as if he were going to sell or lease it. 18 M.R.S.A. §2051. The same considerations that recommend abolition of the licensing requirement where sales of real estate are concerned apply equally to mortgages. Traditionally, the personal representative has had the power to pledge his decedent's personal property as security for loans. Carter v. Manufacturers' National Bank of Lewiston, 71 Me. 447 (1880). The Uniform Probate Code would simply extend this authority to include the power to

encumber real estate as well.

ii. Other Express Powers

UPC 3-715(1). In authorizing the personal representative to retain assets pending distribution or liquidation, UPC 3-715(1) is merely declaratory of existing law. This subsection also expressly allows the personal representative to retain assets in which he is personally interested or which are improper for trust investment. In managing such assets, the personal representative would of course be governed by his obligations as a fiduciary (UPC 3-703(a)), and any transactions involving a substantial conflict of interest on his part as a result of his intention of such assets may be voidable by interested persons under UPC 3-713. This section should not be interpreted as license to retain assets that would be improper for trust investment where the personal representative is acting as a trustee distributee. No existing Maine law can be found that is either consistent with or contrary to UPC 3-715(1). However, the subsection is consistent with the authority needed to administer the estate, and with general legal principles when read within the context of the opening language of 3-715 and other provisions of the Uniform Probate Code.

UPC 3-715(2). Subsection (2) authorizes the personal representative to receive assets from fiduciaries and other sources. This would appear to be a statement of the obvious, although no Maine law that expressly covers this point has been found. Cf. Storer v. Blake, 31 Me. 289 (1850) (where intestate predeceased his heir, the inheritance does not lapse but is payable to the deceased heir's administrator).

UPC 3-715(3). In authorizing the personal representative to perform, compromise, or renounce contract obligations entered into by the decedent and still binding on the estate, subsection (3) only makes explicit the full authority already implicit in 18 M.R.S.A. §2501 (1976 Supp.), which provides that any civil action that survives the death of the decedent may be prosecuted by or against his executor or administrator. Cf. UPC 3-715(22). As the Uniform Comment following UPC 3-715 points out, the subsection is only meant "to give the personal representative who is obligated to carry out a decedent's contracts the same alternatives in regard to the contractual duties which the decedent had prior to his death." Subsection (3) goes on to suggest two possible means of performance where enforceable contracts to convey land are concerned (although it expressly leaves open "other possible courses of action."). First, after execution and delivery of the deed, the personal representative may himself accept the purchaser's consideration, either in the form of cash or in a note secured by a mortgage. Second, the personal representative may make delivery in escrow, specifying by escrow agreement that the consideration should be paid directly to the decedent's successors.

Insofar as the Uniform Probate Code provides specially for enforceable contracts to convey real estate, it changes some of the law presently found at 33 M.R.S.A. §§2-8. Currently, it is not possible for an executor or administrator to perform his decedent's contracts to convey land except pursuant to a court order. The statutes set out procedures for obtaining specific performance.

Sections 6-8 of Title 33 would be subsumed within the powers of the personal representative under section 3-715(3) of the proposed Code for Maine. Sections 2-5, however, would still have a role to play in providing for enforcement of land sale contracts after the death of the seller or purchaser, but would need some revision in order to accommodate them to the new Code's policy of channeling estate adjudication through the hands of the personal representative when one has been appointed. See UPC 3-709 and 3-711. Thus, those sections would be amended in the Commission's bill to provide for suits by or against the personal representative except in cases where no administration has been commenced, in which case the suits may be brought by or against the successor to the decedent's interest in the particular property that is subject to the contract. 33 M.R.S.A. §§ 6-8 would be repealed.

UPC 3-715(4). Subsection (4) authorizes the personal representative to satisfy the decedent's written charitable pledges if he believes that the decedent would have wanted him to do so under the circumstances. The personal representative may pay unenforceable pledges as well as those that constitute binding contracts. The result is that any written charitable pledge may be given the effect of a testamentary instrument at the discretion of the personal representative. Although no Maine cases have been found that cover this question, it is likely that subsection (4) goes beyond the limits of what the common law principles developed under the wills acts would allow. New Mexico omitted subsection (4) from its version of the Uniform Probate Code. See N.M. Stat. Ann. §32A-3-715.

Although subsection (4)'s authorization to pay unenforceable charitable pledges may go beyond the wills act's principles and raise problems for the personal representative in determining whether "the decedent would have wanted the pledges completed under the circumstances," no serious objection to such provision would seem to exist. It is keyed to the decedent's intent, to be determined and carried out by one who in most cases would have been close to him. Any action may, of course, be challenged under UPC 3-607, or at the closing of the estate under UPC 3-1001 through 1003; and the personal representative may seek judicial guidance and protection under UPC 3-704 if he feels the need for it.

UPC 3-715(5). Subsection (5) authorizes the personal representative to make prudent investments with liquid assets that are not yet ready for ultimate disposition. Presently, this power and duty is implicit in the fiduciary character of the personal representative's office. Of course, the investment power of a personal representative is a function of his duty to preserve estate assets; he is not under the trustee's obligation to make the entire corpus generate a high rate of return. As the Supreme Judicial Court has stated, his duty "is to regard the safety of the fund as paramount to any rate of income. He has no occasion to make any profit for the estate, other than that obtainable from the highest security." Hanscom v. Marston, 82 Me. 288, 19 A. 460 (1890).

Although subsection (5) allows the personal representative to invest liquid assets obtained from the sale of other assets, he remains under a general obligation to distribute the estate

in kind unless the decedent has indicated a contrary intention in his will. See UPC 3-906(a). Thus, it would be improper for the personal representative to sell tangible personal property or real estate for no other reason than to obtain funds for investment.

UPC 3-715(6). Subsection (6) gives the personal representative complete power over the acquisition, management, and disposition of estate assets. As has already been pointed out, insofar as this power extends to real estate the Uniform Probate Code significantly changes present Maine law. The executor or administrator has always had absolute power over his decedent's personal property, however, so this subsection makes no departure from current law where personalty is concerned. Although it is now possible to obtain a court-issued license to sell personal property under 18 M.R.S.A. §1852, such licenses are not necessary to the validity of a sale as they are in the case of real estate. Rather, they are available for the protection of the executor or administrator in case he anticipates a challenge from the residuary legatee to the sales price he has managed to obtain. Compare Chase v. Bradley, 26 Me. 531 (1847); Gilman v. Healy, 55 Me. 120 (1868).

UPC 3-715(11). Subsection (11) allows the personal representative to abandon property that is valueless or so encumbered that it is no longer of benefit to the estate. Present probate law makes no provision for worthless property. An executor or administrator probably could not divest the estate encumbered land, however, because licenses to sell real estate are not available for this purpose. 18 M.R.S.A. §2051.

Although the personal representative's power over personality is not so restricted, he would also run a considerable risk in abandoning such property without judicial approval, although the argument could be made that he is under an obligation to dispose of valueless assets that are actually depleting the estate because of the cost of maintaining them, since he does have a general duty to preserve estate assets. If property is in fact "valueless," the personal representative may be protected by the unlikelihood of any successor being able to show damage because of its abandonment. Under present law, the personal representative might also obtain judicial authority to abandon valueless property in the order of distribution.

The Montana version of the Uniform Probate Code makes the personal representative's power to abandon any asset dependent upon the consent of the heirs and devisees unless permission has been granted by the court. Mont. Rev. Code Ann. §91A-3-713(11). This seems unnecessary in light of the fact that the power under UPC 3-715(11) is limited by the personal representative's overall duties of administration for the best interests of the estate, and the fact that any interested person can intervene under UPC 3-607 or subsequently surcharge the personal representative if in fact the power was abused. In light of the overall need to facilitate unsupervised administration, the official Uniform Probate Code version appears to be a helpful and desirable provision.

UPC 3-715(12). The personal representative's power to "vote stocks or securities in person or by general or limited proxy" is already established under the Maine Business Corporation



Act:

Shares held by an executor, administrator, guardian, committee or conservator may be voted by him upon proof of his appointment, without transfer of such shares into his name. Any other fiduciary, upon proof satisfactory to the corporation of his authority to vote, may vote shares which stand of record in the name of the person for whom he is such fiduciary. 13-A M.R.S.A. §613(4).

Executors, administrators, guardians, receivers, trustees and all other fiduciaries, agents and representatives may give proxies whenever they would be entitled to vote in person. 13-A M.R.S.A. §615(1).

UPC 3-715(13). Subsection (13) authorizes the personal representative to pay charges assessed against securities unless he is barred from doing so because of claims with priority. According to Wilson, Maine Probate Law (1896), p. 282, such expenditures are already properly allowable charges in the executor or administrator's account, although no authority is cited in support of this proposition. Where a testamentary trust is concerned, however, it has been held that the trustee has a discretionary power to make payments in order to secure relief society benefits to which the testator had acquired a right. Morse v. Morrell, 82 Me. 90 (1889).

UPC 3-715(14). Subsection (14) authorizes the personal representative to "hold a security in the name of a nominee or in other form without disclosure of the interest of the estate," although the personal representative remains liable "for any act of the nominee in connection with the security so held." This power is given to the personal representative in an attempt to eliminate the complications that can arise when a fiduciary attempts to transfer securities in the name of the estate, which is required by the more traditional doctrine that a fiduciary must earmark estate assets.

In order to simplify securities transfers by fiduciaries, three practices that obscure the fiduciary's involvement in such transactions have developed; and all of them would seem to be authorized under UPC 3-715(14):

(1) [t]he purchase of securities in unregistered or bearer form; (2) the purchase of securities in the name of a nominee who indorses the certificate and leaves it in the possession of the fiduciary (in effect making it a bearer document); and (3) the purchase of securities in the name of the individual without disclosing the fiduciary relation, with a separate record of the estate or trust for which the securities are held. The first practice has been upheld by the courts even as to securities which are available in registered form; the only explanation for such a holding is the long-standing practice. However, not all securities are available in unregistered form, and the other two devices may be resorted to. The purchase of securities in the name of a nominee is permitted by statute in a number of states; Section 9 of the Uniform Trustees Act, which has been adopted in six states, authorizes the practice. In addition, trust instruments frequently authorize the trustee to carry securities in the name of a nominee. The third device, a separate record of the fiduciary nature of the investment, is dangerous but apparently widely used. J. Ritchie, N. Alford, and R. Effland, Cases and Materials on Decedents' Estates and Trusts (Fourth Edition) (1971), pp. 1164-65.

The status of present Maine law is relevant in determining the desirability of the broad language of UPC 3-715(14). Where banks and trust companies are concerned, the nominee procedure has long been expressly approved by 19 M.R.S.A. §§4151-53. Non-corporate fiduciaries are not covered by these statutes, however, and no law has been found that indicates whether they may similarly engage nominees to hold their securities for them. Nor has any Maine law been found that would indicate whether the other two practices for transferring securities, which do not involve the use of a nominee, would be acceptable in Maine.

The most significant existing legislation related to this

question is the Uniform Act for the Simplification of Fiduciary Security Transfers, which was enacted in Maine in 1959 and is now found at 13 M.R.S.A. §§641-51. The Uniform Act frees corporations and transfer agents from liability for fiduciary security transfers. 13 M.R.S.A. §647. It allows them to assume that a fiduciary is acting properly when attempting to transfer securities held for the estate, and it does not charge them with notice of court records or recorded documents. 13 M.R.S.A. §664. Thus, when the kind of situation to which UPC 3-715(14) is addressed arises, the Uniform Act already protects corporations and transfer agents who are dealing with fiduciaries.

In light of the protections already afforded to corporations and transfer agents under present Maine law, subsection (14) raises two questions. First, how much deviation from traditional earmarking doctrine is needed in order to facilitate these transactions? Second, how much discretion should the personal representative have in choosing among the various techniques for facilitating transfers of estate securities? The Uniform Probate Code's approach to these issues is to allow the broadest flexibility, as indicated by inclusion of the language "or in other form without disclosure of the interest of the estate." In line with the more modern view of the practicalities of the situation and the overall qualification of the opening provision of UPC 3-715 to "act reasonably for the benefit of interested persons", this flexibility seems desirable.

UPC 3-715(15). Subsection (15) of UPC 3-715 authorizes the personal representative to insure estate assets, a power that he presently has under 18 M.R.S.A. §1404. However, the Uniform Probate

Code also allows him to insure himself against liability as to third persons, presumably at the expense of the estate. There is apparently no existing law on this point, but it is a practical provision that would accord with the wishes of most testators for the persons most likely to be the estate's representative.

UPC 3-715(16). Subsection (16) of UPC 3-715 authorizes the personal representative to borrow money on behalf of the estate, either with or without security. If it is necessary for the protection of the estate, he may also advance money himself and be reimbursed out of the estate. Both of these powers have already been recognized in Maine. Carter v. Manufacturers' National Bank of Lewiston, 21 Me. 448 (1880). The authority cited states that these powers are given so that the personal representative is not forced to liquidate assets in haste, to the possible detriment of the estate, in order to meet immediate expenses of administration. Of course, the personal representative can ordinarily pledge only personal assets as security for loans under existing law -- he could not encumber real estate absent a testamentary power or license from the probate court (although land would be subject to sale if necessary to reimburse the personal representative for his personal advance of funds). 18 M.R.S.A. §2051. To the extent that the Uniform Probate Code authorizes the use of real estate as security, it would change present law, as discussed earlier.

UPC 3-715(17). Subsection (17) gives the personal representative authority to compromise any debt or obligation owing to the estate. The subsection also specifically authorizes him to accept a conveyance of assets to which he holds the mortgage in

lieu of foreclosure.

The power to compromise claims, either in favor of or against the estate, is within the authority of the executor or administrator even under the common law. Chase v. Bradley, 26 Me. 531 (1847); Gilman v. Healy, 26 Me. 531 (1847). Compromises may also be effected pursuant to a statutory procedure that involves court approval of the settlement. 18 M.R.S.A. §§2401-06. However, it has been held that the statutory procedure is optional and does not abrogate the executor's or administrator's common law right to compromise claims on his own. Chase and Gilman, supra. The advantage of proceeding under the statute is that the court-approved compromise becomes binding on all interested persons, whereas otherwise the personal representative may be called to account for more than he has received from the debtor if interested parties later become dissatisfied with the terms of the settlement.

In effect, the Uniform Probate Code does not change Maine law on the compromise of debts and obligations owed to the estate. UPC 3-715(17) merely restates the personal representative's common law authority to compromise claims. Although the Code does not specifically provide for court-approved compromises of claims (assuming this is not one of the purposes of Article III, Part 11), the court's approval could easily be obtained by the personal representative if he felt that it was necessary in order to protect himself by invoking the court's jurisdiction under UPC 3-704. The court's adjudication pursuant to a formal proceeding such as this would then become binding on all interested persons, just as it is under present law. Compare UPC 1-403(2)(ii) and 18 M.R.S.A. §2403. Thus, insofar as 18 M.R.S.A. §§2401-06 deal with compromises of claims owing to the estate, they are adequately replaced

by UPC 3-715(17) and the other Uniform Probate Code sections mentioned. Although the present statutes also deal with the compromise of claims against the estate, these provisions would be governed by the Uniform Probate Code under Parts 8 and 11 of Uniform Probate Code Article III.

UPC 3-715(18). Subsection (18) authorizes the personal representative to pay expenses incident to the administration of the estate, specifically mentioning the payment of taxes, assessments, and compensation of the personal representative. Insofar as this subsection authorizes the personal representative to pay real property taxes, which he is not ordinarily responsible for under present law, see the previous discussion on the personal representative's powers over real estate. Taxes on the personal property of a deceased person are currently assessable to and payable by his executor or administrator until the time of distribution. 36 MRSA §605. In addition, 36 MRSA §606 gives priority to the payment of personal property taxes in relation to other kinds of taxes that may be owed by the estate.

Under existing law, it would be improper for the personal representative to collect his commission until after his accounts have been allowed by the judge of probate, who has discretion to allow a commission not exceeding 5% of the personal assets "having regard to the nature, liability, and difficulty attending" the trust. 18 MRSA §554. Under the Uniform Probate Code, the personal representative would be entitled to reasonable compensation (UPC 3-719), which he is authorized to collect without receiving the prior approval of the court under UPC 3-715(8). However, interested persons may obtain court review of the amount

of compensation under the express provisions of UPC 3-721.

Insofar as subsection (18) allows the personal representative to compensate other persons for services rendered to the estate, it merely continues the practice authorized by 18 M.R.S.A. §555.

36 M.R.S.A. §606 would be amended by the Commission's bill to equalize the priority of payment of real and personal property taxes assessable to the personal representative, and to tie them into the priority system of UPC 3-805.

UPC 3-715(19). Subsection (19) gives the personal representative full powers over stock subscription and conversion rights, and furthermore authorizes him to give his consent when it is needed for purposes of altering the nature of a corporation or business enterprise. Present law neither recognizes nor prohibits any such authority for the personal representative of a decedent. The basic purpose of this provision of the Uniform Probate Code is to provide the personal representative with express authority in any case where it is needed in light of his representative functions.

UPC 3-715(20). Subsection (20) authorizes the personal representative to allocate income and expenses accruing during the course of administration between income and principal beneficiaries of the estate in the way provided by law. Such allocations, of course, must be made by the executor or administrator under present law, and no change is made by UPC 3-715(20). Maine law governing allocation is found at 18 M.R.S.A. §§4015-16 and is not affected by the Uniform Probate Code.

UPC 3-715(21). Subsection (21) allows the personal representative to employ various persons to assist and advise him in

the performance of his duties. He may act upon their recommendations without undertaking to evaluate their advice himself. Furthermore, he may delegate the performance of any act of administration, including his discretionary duties, to another person.

Insofar as subsection (21) authorizes the personal representative to obtain the services of qualified persons to assist him in the performance of his duties, it departs little from present law. Employment of such persons is implicit in the statutory provisions which now authorize the allowance of fees owed to attorneys, witnesses, appraisers, and commissioners appointed to various tasks. 18 M.R.S.A. §§554-55. Although the present statutes do not mention other professional services that may be helpful to the personal representative, his fiduciary duty to safeguard the estate would ordinarily impose upon him a duty to retain such assistance in matters in which he himself lacks competence. It should be noted that persons who act as appraisers or commissioners, although paid out of the estate, are appointed by the court under present law. Under the Uniform Probate Code, they would be employed only at the discretion of the personal representative.

Subsection (21) frees the personal representative from the rigid traditional principle that he must personally see to most matters that he is capable of dealing with by allowing him to act on the advice of his advisors without independently investigating their recommendations. See, e.g., Hanscom v. Marston, 82 Me. 288, 19 A.460 (1890). Another related general rule under the common law, although no Maine case has been found expressly adopting it, holds that the fiduciary may delegate only ministerial functions.



The broad language of UPC 3-715(21) goes beyond this, although the degree of delegation is limited by the opening language of 3-715 to such delegations as are "reasonably for the benefit of the interested persons." This limitation is pointed up by the Comment following UPC 3-717, which states that "section 3-715(21) authorizes some limited delegations, which are reasonable and for the benefit of interested persons" (emphasis added).

In order to make this more clear, a similar comment is included in the Maine Comments following UPC 3-715.

The traditional argument against total delegation is based largely on the fact that the testator presumably selected his personal representative because of his nominee's capability. This rationale breaks down, of course, as probate transactions become complicated enough to require expertise that is beyond the individual capacity of the personal representative. For this reason, and as a practical matter, the flexibility provided by subsection (21), limited by the opening language of 3-715, is desirable.

UPC 3-715(22). Subsection (22) authorizes the personal representative to prosecute and defend claims and proceedings on behalf of the estate. UPC 3-702 grants the personal representative exclusive authority to represent the estate. See also UPC 3-908. This function describes a fundamental purpose of administration -- to channel all claims to a decedent's property, as well as all rights that the decedent had to the property of others, through the agency of his personal representative. However, because it gives the personal representative exclusive authority over administration (see UPC 3-702) and because it gives him control over real estate as well as personal property, the Uniform Probate Code

accomplishes this purpose of administration more effectively. Subsection (22) leaves unaltered most of the existing substantive law affecting actions by or against executors and administrators, including the right to prosecute survival actions and wrongful death actions. See generally 18 M.R.S.A. §§2481-2656.

Enactment of the Uniform Probate Code would result in two changes from present law, however. First, the Uniform Probate Code would authorize the personal representative to sue and be sued in actions involving real property. This basic change has already been discussed. Second, 18 M.R.S.A. §2455 allows legatees, heirs, and devisees to petition the court for leave to defend any civil action that has been brought against the executor or administrator. The possibility that interested persons might usurp the personal representative's exclusive authority in matters of administration is incompatible with the general approach of part 7 of UPC Article III, and certainly the Code provides adequate provisions for protecting the rights of all interested persons without impeding the administration process in this manner. Cf. UPC 1-403, requiring notice to all interested persons when any probate-related proceedings are pending.

UPC 3-715(23). Subsection (23) gives the personal representative complete powers of disposition over all estate property. This power is a counterpart to UPC 3-709 and 3-711, already tentatively approved by the Commission. Insofar as this subsection affects real estate, it has been discussed in Part F.2.C. i. of this chapter, on the personal representative's powers over real estate. As far as personal property is concerned, the Code does not change Maine law on this point: "[N]o general proposition of

law is better established than that an executor has an absolute control over all the personal effects of his testator." Carter v. Manufacturers' National Bank of Lewiston, 71 Me. 448, 450 (1880).

UPC 3-715(24) and (25). Subsection (24) of UPC 3-715 outlines the circumstances under which a personal representative may continue his decedent's unincorporated business. He may do so for up to four months after his appointment as personal representative if it will preserve the business' value and good will. Unless the personal representative has the business incorporated, he must obtain court approval in a formal proceeding in order to continue the business beyond the four month period. Subsection (25) gives the personal representative the alternative of incorporating the decedent's business, in which case subsection (24)(iii) authorizes him to continue to do business throughout the entire period of administration so long as the ultimate distributees of the business (or at least those who are competent adults) do not object.

Although present law is not as thorough as UPC 3-715(24) and (25), it does empower the executor or administrator to continue his decedent's business as a going concern if he obtains a court order authorizing him to do so. 18 M.R.S.A. §1403. The court's standards for granting such a power, however, are more restrictive than the discretionary standard given to the personal representative under the Uniform Probate Code (preservation of value and good will). Currently, the judge must be satisfied that continuation is clearly for the benefit of all interested parties and that it will result in a material increase of estate assets. The possibility of incorporating an unincorporated business is not mentioned in the statute; however, the court's power to authorize

incorporation may be implicit if such action is necessary and continuation is otherwise desirable.

In comparison, the Uniform Probate Code is an improvement over present Maine law. Subsection (24) itself contains express safeguards in the event of a need to continue the decedent's business for a longer period of time. If interested persons object to the personal representative's decision to continue the business in the first place, or if they object to his proposed incorporation of it, they can obtain restraining orders under UPC 3-607. Furthermore, the Uniform Probate Code standard for evaluating such disputes -- whether continuation will preserve the business' value and good will -- is more desirable than the one provided under 18 M.R.S.A. §1403 because even though continuation may not offer hope of increasing the value of the estate, it may be necessary for other reasons, e.g., to prevent the depreciation of assets already on hand.

UPC 3-715(26). Subsection (26) provides that the personal representative may exonerate himself from personal liability in any contract he enters into on behalf of the estate. Such a contract provision is already possible under Maine law. Call v. Garland, 124 Me. 27, 125 A. 225 (1924). By expressly stipulating against his personal liability, the personal representative agrees to perform only to the extent that estate assets permit, and the other party agrees to accept this conditional promise in return for his own performance. UPC 3-715(26) thus makes no substantive change in present Maine law, other than to clarify it by express provision.

Under UPC 3-808 the general rule for all obligations and

contracts entered into on behalf of the estate is that the personal representative is not personally liable unless there is an express agreement otherwise. Thus, the power under UPC 3-715 (26) simply complements the general rule of UPC 3-808.

UPC 3-715(27). Subsection (27), authorizing the personal representative to settle claims and distribute the estate as provided under the Code, is merely a statement of the obvious. This power is stated as a duty in UPC 3-703(a).

d. Co-Representatives

Section 3-717 of the Uniform Probate Code generally follows the common law rule that co-executors and co-administrators must act with unanimity. The Uniform Probate Code is stricter, in one sense, by requiring the concurrence of all co-representatives "on all acts connected with the administration and distribution of the estate" except the collection of estate property, whereas the common law allowed "ministerial" acts to be done by any one co-representative without the concurrence of any of the others, and applied the unanimity requirement only to more important discretionary acts. See Atkinson on Wills §105. In another sense, the Uniform Probate Code provides more flexibility by allowing unilateral action by a co-representative "for emergency action necessary to preserve the estate" when the concurrence of all co-representatives cannot be readily obtained within a reasonable time in light of the emergency. In any event, the requirement of unanimity can be waived by provision in the will. Also, one co-representative may act upon the delegation of the others, although the official comment points out that a blanket delegation of authority by one co-representative would be a breach of his fid-

udicary duties under UPC 3-703.

The section protects persons who deal with a co-representative if (a) they were in fact unaware that other representatives had been appointed, or (b) if the personal representative with whom they are dealing advises them that he has authority to act alone (i) because of such provision in the will, (ii) because of proper delegation of authority from the other representatives, or (iii) because it is appropriate under the previously described emergency provision.

The current Maine law differs from UPC 3-717 in that 18 M.R.S.A. §1502 provides that a majority of those legally qualified as executors may do all that could be done with the concurrence of all. No similar express Maine statutory provision has been found concerning administrators, although 18 M.R.S.A. §1408 provides for Superior Court jurisdiction to determine disputes and controversies between "coexecutors and coadministrators" and the same rules applying to co-executors would no doubt be judicially applied to co-administrators. See, e.g., Shaw v. Berry, 35 Me. 279 (1853). Some ambiguity concerning the Maine law is introduced by two old cases which seem to say that the action by one executor or administrator is valid because it is deemed to be the action of all of them. Shaw v. Berry, 35 Me. 279 (1853); Gilman v. Healy, 55 Me. 120 (1868). These cases may be distinguishable from the statutory language in that in neither case was there any dispute between the co-representatives, and the decision in Gilman resulted in protecting a debtor of the estate who had dealt in good faith with one of the co-representatives.

The provision of 18 M.R.S.A. §1408, giving jurisdiction of controversies among co-representatives to the Superior Court is inconsistent with the concept of a probate court with full jurisdiction within its area. Any such controversies could be brought to the probate court under UPC 3-704 by any of the co-representatives, or under UPC 3-105 or 3-607 by any interested persons seeking injunctive relief, or under UPC 3-611 by any interested person seeking to remove any of the co-representatives.

e. Successor Representatives

A successor personal representative is one who is appointed following the death, resignation, or removal of the original personal representative. See UPC 3-613. By virtue of UPC 3-716, a successor personal representative has the same powers and duties as the original representative had. Thus, all of the powers enumerated in UPC 3-715, as well as the duties spelled out in other sections of Part 7 of Uniform Probate Code Article III, are applicable to successor personal representatives insofar as any part of the estate remains subject to administration. A successor personal representative would also be governed by the terms of the decedent's will, and UPC 3-716 recognizes a testator's right to expressly limit the exercise of any particular power to the person who he has nominated as executor in his will.

Under present Maine law, a successor personal representative is called an administrator "de bonis non" ( or d.b.n.). Under 18 M.R.S.A. §1602, "[s]uch administrator shall have the same powers and be liable to the same obligations as other administrators or executors whom he succeeds." Thus, there is no real difference between the roles of the Uniform Probate Code's successor

personal representative and an administrator d.b.n. under current law.

Although they would seem to be implicit in the general language of 18 M.R.S.A. §1602, other statutes pertaining to administrators d.b.n. expressly identify some of their powers and obligations. The administrator d.b.n. is authorized to collect, administer, and distribute remaining estate property (18 M.R.S.A. §1604), prosecute and defend civil actions (18 M.R.S.A. §1605), and take appeals (18 M.R.S.A. §1607). He may be substituted as a party for the original executor or administrator on motion. 18 M.R.S.A. §1606. An executor's bond is required of him. 18 M.R.S.A. §1608. Although the Uniform Probate Code undertakes no similar enumeration of the successor personal representative's powers and duties, none is necessary in light of the broad enabling provisions of UPC 3-716 itself.

Administration "with the will annexed" is a term presently used to designate the appointment of a personal representative to administer an estate pursuant to the terms of a will when the executor nominated by testator does not serve for some reason. 18 M.R.S.A. §1601. An administrator d.b.n. may also be an administrator with the will annexed if his decedent died testate and the will continues to govern the disposition of the remainder of the estate. Although the Uniform Probate Code discontinues the use of the term "with the will annexed," any personal representative of a testate decedent is governed by the terms of the probated will, no matter who was nominated as executor in the will and no matter how many personal representatives have served before him. UPC 3-703(a).



UPC 3-716 is an adequate replacement for the current statutes dealing with administration with the will annexed and de bonis non, 18 M.R.S.A. §§1601-08.

f. Surviving Representatives

Section 3-718 merely provides that remaining co-representatives may continue to act as before in case one or more of the other co-representatives dies, or his appointment is terminated. It further provides that any appointed personal representative may act as such (in a manner consistent with UPC 3-717) in case not all of the co-representatives nominated in a will are actually appointed. These rules are subject to contrary provisions contained in any valid will.

To the extent that there are any cases related to this point, present Maine law is consistent with UPC 3-718. A relatively recent Maine case does hold that one appointed and qualified executor may validly act as such even though two co-executors were nominated in the will, when one of them failed to qualify and thus was not appointed. Davis v. Scavone, 149 Me. 189, 100 A.2d 425 (1953).

3. Payment of Compensation and Expenses

Sections 3-719 through 3-721 together provide express authorization for payment of the personal representative and those employed by him, including attorneys and the costs of any good faith litigation, as well as a system for judicial review of any such employment or compensation upon the petition of any interested persons after notice to all other interested persons.

Section 3-719 establishes the personal representative's

right to reasonable compensation for his services, subject to provisions in the will, which he may renounce before his appointment by filing a written renunciation of his fee with the court. Section 3-720 establishes his right to receive from the estate the amounts of the expenses, disbursements, and "reasonable attorneys' fees" incurred in any litigation which he defends or prosecutes on behalf of the estate, if done in "good faith."

Section 3-721 creates an opportunity and defines the procedure for review of the above acts and amounts. This last section provides for review by the court on petition of any interested person, or by motion if there is supervised administration, and requires notice to all interested persons. The court may review, and would thus implicitly have authority to determine, (a) the propriety of the personal representative's employment of any person, including an attorney, (b) the reasonableness of the compensation of any such employee, and (c) the reasonableness of the compensation of the personal representative himself. It is explicitly provided that any excessive compensation received from the estate assets must be returned.

The right to compensation for these kinds of administrative expenses is already established in present Maine law. See Crofton v. Ilsley, 6 Me. 48 (1829); Healy v. Cole, 95 Me. 272, at 277-278 (1901); Ticonic National Bank v. Turner, 143 Me. 275 (1948). Court review of the reasonableness of such reimbursement is implicit in these cases and in the statutory provisions for compensation of the personal representative. One significant way in which Maine law varies from UPC 3-719 is in the explicitness with which the personal representative's compensation is

determined. 18 M.R.S.A. §§554-556 allows executors, administrators, guardians, conservators, surviving partners and trustees travel expenses of \$1.00 per day and \$.10 per mile for court appearances, a reasonable sum for attorneys' fees, and compensation of up to 5 percent of the value of the estate assets, "at the discretion of the judge, having regard to the nature, liability and difficulty attending their trusts," as well as further provisions for the compensation of trustees. Provision is also made for payment of appraisers and expenses of partition. A copy of these sections is attached to the end of this memorandum. Rule 46 of the Probate Court Rules provides:

Before the allowance of an Account which includes the fee or compensation of an attorney or a fiduciary, such attorney or fiduciary shall present to the Court a statement of the services rendered.

Several of the states that have adopted the Uniform Probate Code have attempted to more explicitly define the allowable compensation for fiduciaries and attorneys, no doubt in response to complaints about the contribution of these particular expenses to the high costs of probate and administration. For example, both Montana and Utah have specifically set forth a schedule of fees for such services. Colorado, on the other hand, has made no such attempt, but has added a set of criteria to 3-721 to guide the personal representative and the court in their determination of reasonable fees in individual cases.

Thus, present Maine law provides some specificity in determining the compensation and reimbursement of the personal representative for a very limited category of expenses, while providing generally for such compensation and reimbursement in reasonable amounts. In addition, these items are subject to judicial

review. The difference between this system and the Uniform Probate Code approach does not seem significant, but, to the extent that present law tries to specify the amount and kinds of compensable expenses, the Uniform Probate Code approach seems preferable. First, there seems to be no reason to single out the particular travel expenses for court appearances. Second, the allowance under the Code of only reasonable expenses, subject to court review on the initiative of any interested person, seems to provide both protection for unjustified expenses and fees and flexibility to tailor these costs to what they should be in various individual cases. For this same reason, the Uniform Probate Code (and the general present Maine approach) seems preferable to the elaborate fee schedules attempted by Montana and Utah.

One important, and highly undesirable, aspect of the Montana, Utah and present Maine system is the tying of compensation to various percentages of the estate's value. It is precisely this kind of approach that has led to criticism of probate expense and has given rise to anti-trust problems when used as a general and pervasive standard for attorneys' fees throughout the bar. The existence of such percentage guidelines, even as maximum standards, would probably lead to their use as the actual general standards. Compensation should be based on the amount and value of the work done, under a variety of relevant circumstances. Attorneys, representatives, and others employed to do the work of administering the estate should not reap a lottery windfall. Neither should they forego the compensation to which they are entitled. This is the basic philosophy of the UPC, and it seems clearly correct.

The listing of the guiding factors in the Colorado statute

does, on the other hand, have value in avoiding the kind of rigidity implied in attempts to make detailed fee schedules. By the listing of the factors ordinarily considered relevant to determining reasonable and appropriate compensation, they focus the attention of the personal representative, attorneys, and the court on the task of in fact tailoring fees to the amount and nature of the work involved -- compensation for the actual services that were rendered -- which is all that is authorized by UPC 3-719 and 3-721. These standards are included in the proposed Code for Maine as subsection (b) of section 3-721.

#### 4. Conflicts of Interest

Under UPC 3-713, a sale or encumbrance by the personal representative to himself, or any transaction he undertakes that involves a substantial conflict of interest on his part, is voidable by persons interested in the estate. The prohibition against self-dealing extends to the spouse of the personal representative, his agent, attorney, or any corporation or trust in which the personal representative has a substantial beneficial interest. However, an otherwise voidable transaction remains possible under certain circumstances. First, because an interested party who has consented to the transaction after full disclosure cannot proceed under this section, the personal representative may protect himself from conflict-of-interest challenges by procuring the informed consent of all interested persons before he acts. Second, the decedent, either by provision in his will or by intervivos contract, may expressly authorize the personal representative to engage in self-dealing. Finally, the court may approve any transaction that involves a conflict of interest on the part of the

personal representative after notice to interested persons. The provisions of UPC 3-713, however, would seem to be limited in their effect by UPC 3-714, which protects persons dealing with the personal representative in good faith and for value, and relieves such persons from any obligation of inquiry as to the existence or propriety of exercise of a personal representative's power.

Two Maine cases have been found that deal with conflicts of interest involving executors and administrators, and both adopt the basic rule of UPC 3-713. Decker v. Decker, 74 Me. 456 (1883); Boynton v. Brastow, 53 Me. 362 (1865). Each case involved a personal representative who had conveyed his decedent's lands to a purchaser who afterwards re-deeded the property to the personal representative in a non-representative capacity. In one case, the executor's legal advisors acted as his "straw man;" in the other, it was the administrator's mother. On both occasions, the court held that the decedent's successors could avoid the sales by a bill in equity upon a showing that the personal representative acted collusively and for his own benefit, to the detriment of the plaintiffs' interests in the estate.

There is no present statute comparable to the provision in UPC 3-713 that allows a personal representative to obtain court approval of an otherwise voidable sale. This provision of UPC 3-713 would help to clarify the existence of this judicial authority, and thus responsibly facilitate the practical administration of estates.

##### 5. Protection of Persons Dealing with the Representative

In the event that a personal representative acts improperly or pursuant to letters that should not have been issued, UPC 3-714

protects persons who assist or deal with him for value and without knowledge of any mistake or wrongdoing. Their awareness that they are dealing with a personal representative does not by itself put them upon inquiry notice to see whether he is acting within the scope of his powers, nor are they responsible for what the personal representative does with the assets they have turned over to him. Any restriction on the personal representative's powers, such as might be contained in a will or a court order, is binding only on persons with actual notice. The provisions of this section do not apply to the case of a supervised personal representative under Part 5, however, because information of any limitation on his powers would be included in his letters. See UPC 3-504.

Except insofar as it applies to sales or real estate by a personal representative, UPC 3-714 is essentially a statement of the general rule that already exists in Maine. In light of the executor or administrator's general power to dispose of a testator's personal estate, those who deal with him for value are under no duty to inquire into the propriety of his actions simply because they know that he is acting in a representative capacity. Carter v. Manufacturers' National Bank, 71 Me. 448 (1880); Bailey v. Merchants Insurance Co., 110 Me. 348, 86 A.328 (1913). Although the questionable nature of a particular transaction may impose such a duty, persons who take the personal representative's word that he is acting lawfully are protected. Thus, where an executor wrongfully secured a personal loan with a pledge of stock that belonged to the estate, the pledgee was protected when it was foreclosed because it had accepted the pledge on the executor's representation that he needed the money for purposes of administration.

Carter, supra. Present law likewise protects persons who deal in good faith with an executor or administrator whose letters are subsequently revoked for any reason. See 18 M.R.S.A. §1409.

Although sales of land by a personal representative are treated no differently than conveyances of personal property under the Uniform Probate Code, they are governed by a distinct body of law under Maine's existing probate system. A decedent's real estate now descends directly and immediately to his heirs or devisees and is not subject to administration except under special circumstances. Land comes under the control of the personal representative only if the testator directs in his will that it should be sold, or if its sale is necessary to pay the debts of the estate. In the case of an express power to sell, the executor obtains marketable title through the abstract of the will that is filed in the registry of deeds pursuant to 18 M.R.S.A. §254. Otherwise, he must duly apply to the probate court for a license to sell real estate. 18 M.R.S.A. §2059. Purchasers of real estate from an executor or administrator are not currently protected unless their transferor has established title by one of these two procedures. See, e.g. Bradt v. Hodgdon, 94 Me. 559, 98 A. 179 (1901); Hanson v. Brewer, 78 Me. 195, 3 A 574 (1886). Unlike purchasers of personal property, they cannot rely on the personal representative's word that he is acting properly; and they are charged with notice of any irregularity in his record title.

The present Maine law, because of its requirement of express authorization or court license to sell realty, provides a record basis for determining the propriety of the representative's sales of land, although not his sales of personalty. Under present law,



if an executor offers to sell land that was expressly devised to someone in the testator's will, his prospective purchaser would be put on notice of a gap in the executor's title by the will abstract recorded in the registry of deeds. He could then check the probate records to see whether the executor had obtained a license from the court to sell the real estate, in which case the executor would be in a position to convey marketable title. Under the Uniform Probate Code there would ordinarily be no court order to explain how the personal representative became authorized to sell land that the testator expressly devised to someone else, or to show the justification for selling the land in the absence of express provision in the will to do so, even if the land is not expressly devised to someone. Thus, within the context of the Uniform Probate Code it becomes particularly important to assure protection to bona fide purchasers from the personal representative, since people might otherwise be reluctant to deal with a personal representative (or his transferees) for fear of losing their status of "good faith" purchasers where the will contains no express power to sell, and especially where a recorded will devises the land to someone else. In light of this purpose of UPC 3-714, a recorded will with a devise of the real estate presumably would not in itself put the purchaser on notice (or impose a duty or inquiry) as to any possible impropriety in the sale, so that such a purchaser would still be bona fide and would be protected by UPC §3-714.

It should be noted that the protections created by UPC §3-714 are those that apply to those who, in good faith, assist or purchase from a personal representative; the more comprehensive protection that is available to purchasers from a distributee

(including a distributee personal representative) is found in UPC 3-910.

The official Uniform Comment to UPC 3-714 points out that each state must identify the relationship between this section and the particular state's tax liens that might have attached to the estate assets before sale by the personal representative. This must be done to identify and resolve any conflict which may exist between the protection given by 3-714 and the provisions of any particular state's tax liens. To the extent that such liens must be recorded in order to be effective, no problems are presented, since the recorded notice would prevent any purchaser of such property from coming within the protection of UPC 3-714. Also, such conflicts even as to the priority of unrecorded tax liens may be precluded by the limited scope of UPC 3-714, which purports to protect persons only from the consequences of an improper exercise of the personal representative's power -- they are "protected [to the same extent] as if the personal representative properly exercised his power." Thus, the scope of the section is merely to protect against the personal representative's improper action, and the section would have no occasion to affect the operation of any liens unless such liens arose as a result of improper action, e.g., the failure to pay estate taxes that attached as a lien on the property upon the decedent's death. Maine estate and inheritance taxes constitute liens on the property in the hands of the estate or the distributee, whichever is liable for the particular tax, but the liens do not attach to property that has been sold by an executor or administrator. 36 M.R.S.A. §3404, 3745. A purchaser from the personal representative would therefore

not have to be concerned about liability on liens for these taxes so long as he was dealing with the representative in his representative capacity, rather than purchasing from him as a distributee. Likewise, there is no conflict between these lien provisions and UPC 3-910, which, by its scope, only purports to protect purchasers from a distributee with a deed of distribution against the claims of other persons interested in the estate. Thus, valid liens under 36 M.R.S.A. §3404 would not be affected by either UPC 3-714 or 3-910.

The Uniform Comment to UPC 3-714 also points out that a state law provision cannot control whether a federal estate tax lien will follow the property into the hands of the person sought to be protected by UPC 3-714. Such a person would have to determine in any particular case whether an estate tax lien follows the property they are acquiring under the federal tax law, although an analysis of I.R.C. §6324 (a) would seem to indicate that the lien on the decedent's gross estate would not ordinarily follow property sold by the personal representative in his official capacity, but would instead leave that property and attach to the proceeds in the hands of the successors to the estate. For all of these reasons, there seems to be no special problem of coordination between UPC 3-714 and other provisions of Maine tax lien law.

#### 6. Improper Exercise of Power

UPC 3-712 establishes the personal representative's liability for actual loss resulting from breach of fiduciary duty. Only persons interested in the estate -- heirs or devisees and creditors

of the decedent -- are protected under this section. The rights of others who are affected by the improper actions of a personal representative are defined in UPC 3-713 and 714. Another relevant section is UPC 3-910, which defines the protection available to purchasers from a personal representative who is also a distributee.

UPC 3-712 is generally compatible with existing Maine law, which also limits recovery for breach of fiduciary duty to actual losses. The executor or administrator is not accountable for his failure to comply with a condition of his bond unless someone is prejudiced thereby. Pettingill v. Pettingill, 60 Me. 411 (1872) (executor's failure to inventory or to account within one year). An exception to the actual damages limitation currently exists in the case of injuries to the real property of an insolvent estate that are caused by the executor or administrator, for which he is liable in treble damages. 18 MRSA §§1501, 1555. As discussed earlier, the Commission's bill would eliminate this provision. See Part F. 1. c. of this chapter.

Under present Maine law, a suit on the probate bond is probably the form of action that is most common in the event of an executor or administrator's breach of his fiduciary duties. As under UPC 3-712, such actions on the bond, or a general civil action against the representative himself, can be brought only for the benefit of persons who have an interest in the estate itself.

The Comment following UPC 3-712 points out that interested parties may avail themselves of provisions elsewhere in the Code in order to prevent a breach by the personal representative before it occurs, or remedy it immediately thereafter. They may petition the court for a restraining order under UPC 3-607 or for the removal

of the personal representative under UPC 3-611. The joinder of third parties who are associated with the personal representative is made possible by UPC 3-105.

The Uniform Comment to this section also suggests that purchasers from a personal representative could be prevented from obtaining marketable title to real estate if evidence of any of the above-mentioned proceedings is properly recorded in the registry of deeds. Presumably, this comment refers to UPC 3-714, which limits its protection of persons who deal with a personal representative who is acting improperly to good faith purchasers for value. However, if a personal representative improperly issued a deed of distribution to himself before making such a conveyance, his purchaser would still be protected absolutely by virtue of UPC 3-910. The latter section does not require purchasers to take notice of recorded clouds on title so long as their transferor is possessed of a deed of distribution. The personal representative would, of course, be liable for the value of the distributed property and for any damages caused by such a breach of his fiduciary obligation.

G. Creditors' Claims

1. Generally.

Upon his appointment, the personal representative, under the Uniform Probate Code, Part 8 of Article III, publishes notice to creditors of the estate that claims must be presented within four months of the first date of publication. A claim is deemed to be "presented" in any one of four ways:

- 1) by delivery to the personal representative;
- 2) by filing with the probate court;
- 3) by commencement of a proceeding against the personal representative;
- 4) if proceedings were pending against the decedent at the time of his death, by that fact alone with nothing more.

The personal representative may allow, partially allow, or disallow any properly presented claim. In the case of partial allowance or disallowance, the creditor has 60 days from the date of partial allowance or disallowance to petition for allowance in the probate court.

After the period for presentation of claims has expired, the personal representative pays claims that have been allowed, to the extent that funds are available. If the assets of the estate are insufficient to pay all claims, then payment is made according to a pre-established order of priority.

The personal representative may at any time pay any just

claim that has not been barred, even if it has not been "presented"; but he may incur personal liability to claimants who are injured because of such payment.

The personal representative has broad discretion to compromise claims in the best interest of the estate.

Under present Maine law, within two months of the qualification of an executor or administrator, the register of probate must publish notice of the qualification: Creditors have six months from the date of qualification to present their claims. A claim is "presented" in either of two ways:

- 1) by delivery to the personal representative, with supporting affidavit if the personal representative demands it;
- 2) by filing in the registry of probate, with supporting affidavit (mandatory in this case).

If the executor or administrator decides to disallow a claim wholly or partially, or if it appears to him that the estate may be insufficient to satisfy all claims, he may ask the probate judge to appoint a commission of at least two members to decide upon disputed claims or to determine distribution in case of insolvency. Subject to a right of appeal within 20 days of its report, the determinations of the commission are final.

The executor or administrator may compromise claims in the best interest of the estate. This requires a hearing before

the probate court, with notice to all interested parties.

As the above summaries suggest, there are some significant differences between the procedures for payment of claims under the Uniform Probate Code, and those defined in the Maine statutes. In addition, there are a number of differences in detail.

## 2. Comparative Analysis of Present Provisions and the Code.

### Notice to Creditors.

Under UPC 3-801 the personal representative is responsible for publishing notice of his appointment and the time period for presentation of claims. This duty is qualified by UPC 3-1203, which authorizes summary distribution of small estates - those with assets not exceeding allowances, exemptions, expenses of administration, and costs of the last illness and the funeral -- without notice to creditors.

The corresponding Maine notice statute, 18 M.R.S.A. §203, requires the register of probate, not the fiduciary, to publish notice of qualification of an executor or administrator, with costs and fees payable by the fiduciary. This difference in procedure is merely technical, not a matter of policy, especially in view of the Uniform Comment to UPC 3-801: that "(i)t would be appropriate, by court rule, to channel publications through the personnel of the probate court." This kind of provision is incorporated into the Proposed Rules appended to the Commission's study.



"Public notice" is defined in UPC 3-801 as publication for three successive weeks in a newspaper of general circulation in the county. Section 201 of 18 M.R.S.A. defines "public notice" for probate purposes as publication for two successive weeks. This two week period would seem to be sufficient and, in light of the established and satisfactory practice under present law, is retained in the Maine version of the proposed Code.

Finally, the time period specified in UPC 3-801 for presentation of claims is four months from the first date of publication of the notice. The presentation period under present Maine law, 18 M.R.S.A. §2402, is six months after qualification. Since publication of the notice may occur up to two months after qualification, the presentation periods are actually similar.

In summary, UPC 3-801 contains nothing that runs contrary to any basic policy of present Maine law. There are differences in detail, however.

Presentation of Claims and Limitations.

Sections 3-802 through 3-804 of the Uniform Probate Code, taken together, govern the time and manner in which claims must be presented.

Claims arising before the death of the decedent must be presented within four months of the first publication of an advertisement to creditors. If there has been no such publica-

tion, the claim must at any rate be presented within three years of death. Claims arising after the death of the decedent must be presented within four months after they arise (or four months after performance is due in the case of a contract with the personal representative).

UPC 3-803 (c) makes these claim periods inapplicable to proceedings on any liens on estate property, or on liability protected by liability insurance. Such proceedings would be governed by existing statutes of limitation, which would not be affected by UPC 3-803.

The claim period under present Maine law is six months from qualification of the fiduciary, 18 M.R.S.A. §2402. As noted before, the notice of qualification must be published within two months; so the actual post-notice presentation period is four-months-plus.

As to the exception noted in UPC 3-803 (c), pertaining to real estate liens and liability insurance, there is no comparable provision in Maine law. Whether the Uniform Probate Code provision affects substantive law, or is just a reassurance, is not clear. In any case, there seems to be no good reason to extinguish a valid lien on estate property, or to terminate liability insurance, within the short claim period.

Contingent and unliquidated claims, and claims not yet due within the claim period, must be presented under the Uniform Probate Code (UPC 3-804) in the same manner and within the same

time limit as claims certain and due. The same is true under present Maine law (with its slightly different claim period), 18 M.R.S.A. §2652.

The Uniform Probate Code provides alternative methods for presenting claims. The usual method is to deliver (or mail) to the personal representative a written statement of the claim or to file the claim with the probate court. The statement should set out the basis for the claim, together with any uncertainty if it is contingent or unliquidated, and a description of the security if it is secured. UPC 3-804(1).

Maine procedure, 18 M.R.S.A. §2402, is similar, the only difference being that an affidavit may be required by the fiduciary if the claim is delivered to him, and will be required if the claim is filed at the registry. The Uniform Probate Code does not require an affidavit, and it is difficult to see how an affidavit requirement actually protects against spurious claims. Moreover, it is difficult to see a good reason for requiring an affidavit in one case, while only leaving it to the discretion of the fiduciary in the other case.

The other method of presentation under the Uniform Probate Code is commencement of a proceeding against the personal representative in a court when personal jurisdiction over him may be obtained. UPC 3-804 (2). If a proceeding was already pending against the decedent at the time of his death, no further step is required to present that claim.

Section 2402 of 18 M.R.S.A. makes presentation by delivery to the fiduciary or filing with the registry a prerequisite to the right to commence a proceeding against the fiduciary. In fact, the creditor must first present his claim, then wait 30 days before commencing an action. A proceeding already pending at the time of the decedent's death may survive under 18 M.R.S.A. §§2501-3, the Survival of Actions section of the Maine statutes. But there is nothing to indicate that such a proceeding has the effect of presentation of the claim. According to one old case, Shurtleff v. Redlon (1912) 109 Me. 62, 82 Atl. 645, if a creditor who is the plaintiff in a proceeding at the decedent's death presents his claim to the executor, who contests it, the creditor is left with the probate contest as his only way to pursue his claim; the pending case will be dismissed.

UPC 3-802 provides that general statutes of limitation do not run during the four-month claim period. Limitations applicable at the time of decedent's death may be pleaded by the personal representative; or, unless the estate is insolvent, they may be waived.

There is no waiver provision in present Maine law. In fact, as to the short statute of limitations for actions against executors, administrators, etc. (i.e., not specifically as to general statutes of limitation), there is case law to the effect that the limitation may not be waived. Littlefield v. Eaton

(1883), 74 Me. 516.

Classification of Claims. UPC 3-805 establishes the order of priority in which debts are to be paid if the estate has insufficient assets to pay all claims. The corresponding Maine statute is 18 M.R.S.A. §3051. It is perhaps easiest to compare the two statutes by setting the respective lists of priorities alongside each other:

UPC 3-805

If applicable assets are insufficient to pay claims in full, the personal representative shall make payment in the following order:

- (1) Costs and expenses of administration;
- (2) Reasonable funeral expenses;
- (3) Debts and taxes with preference under federal law;
- (4) Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including

18 M.R.S.A. §3051

An insolvent estate, after payment of the expenses of the funeral and of administration, shall be appropriated (in the following order):

- (1) Allowance to widow or widower and children;
- (2) Expenses of last sickness;
- (3) Preferred debts under federal law;
- (4) Public rates and taxes, and money due the state;
- (5) All other debts.

UPC 3-805

18 M.R.S.A. §3051

- compensation of persons attending him;
- (5) Debts and taxes with preference under other laws of this state;
- (6) All other claims.

The "allowance to widow and children", 18 M.R.S.A. §3051.1, is treated as an exemption under the Uniform Probate Code, UPC Art. 2, Part 4; and that is why this allowance does not appear in UPC 3-805. The differences between the two priority lists, then, are:

- 1) The relatively high position for funeral expenses under 18 M.R.S.A. §3051;
- 2) The relatively low position for expenses of the last illness under UPC 3-805.

The policy of exempting allowances to the widow and children is certainly understandable as a means of providing an answer to minimal protection for the family ahead of the lawyers and the undertakers. It is not clear, however, why expenses of administration and reasonable funeral expenses are not really part of the same category. For these reasons, the UPC 3-805 priorities are preferable to those under present Maine law.

As to expenses of the last illness, the position they occupy under UPC 3-805 appears to be dictated by federal law, 31 U.S.C.A. §191 and cases decided thereunder: debts and taxes

with preference under federal law must be given priority over expenses of the last illness. Estate of Muldoon, 275 P. 2d 599. The Maine statute would seem to be simply erroneous in this regard.

A final aspect of UPC 3-805 is subsection (b):

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

There is no comparable provision in present Maine law. Presumably the general intent behind 18 M.R.S.A. §3051 is that creditors within each class be treated equally, but that intent is nowhere made explicit.

Allowance and Compromise of Claims. Sections UPC 3-806 and 3-807 govern the procedure for allowance or disallowance of claims that have been properly presented. The Uniform Probate Code procedure is in marked theoretical contrast with the procedures defined in Title 18 of the Maine statutes, although the difference is not so great in practice as it is on paper. In general the Uniform Probate Code would greatly simplify this area of the law.

UPC 3-806 gives the personal representative broad discretion to allow, disallow, or partly disallow a claim. He disallows (or partly disallows) by mailing a notice of disallowance to the creditor within 60 days of expiration of the period for presentation of claims. Failure to disallow within

this time frame has the effect of allowance. Upon disallowance, the claimant has a further 60 days within which to challenge the decision, either by petitioning for allowance in the probate court or by commencing a proceeding against the personal representative. The personal representative may reconsider his decision to disallow a claim, and allow it; but he may do this only within the 60-day period for challenging a disallowance. That is, the 60-day period for challenging a disallowed claim acts as an absolute bar to the claim if neither the claimant nor the personal representative does anything.

The Maine procedure for disallowance appears at 18 M.R.S.A. §2405. If the fiduciary finds that a claim is "exorbitant, unjust or illegal," he applies to the probate court for a hearing on the matter, with notice to the claimant. If the probate judge finds that the fiduciary's allegations are true, he appoints a commission of at least two members to review the disputed claim. The appeals provisions of 18 M.R.S.A. §§3301-06 are applicable to the report of the commissioners. (The appeals section will be discussed below in connection with payment of claims.)

In short, the Uniform Probate Code would effectuate a distinct change in the theory of disallowing claims. Under present Maine law, the fiduciary must petition for disallowance in the probate court, and the court's finding of disallowance



must be reviewed by a commission appointed for the purpose. Under the Uniform Probate Code, the personal representative may disallow a claim without going to the probate court, unless the claimant challenges the decision by petition or suit; and the probate court has full power to adjudicate a challenge to a disallowance, without resort to the cumbersome and expensive mechanism of a specially-appointed commission.

As suggested at the beginning of this section, the simplification codified in the Uniform Probate Code is a simplification more in theory than in practice. Based upon the experience of probate judges and practitioners, the commission mechanism seems to be almost, or actually, never invoked, simply because it is prohibitively expensive and inconvenient. Instead, the fiduciary and the aggrieved claimant try first to work out a mutually acceptable compromise -- perhaps under the informal supervision of the probate court. If that proves impossible, it seems that direct appeals, or separate law suits, are preferred to the commission system.

The same contrast in theory is evident when we come to compromise of claims (UPC 3-813; 18 M.R.S.A. §2403). The Uniform Probate Code authorizes the personal representative to compromise a claim against the estate "if it appears for the best interest of the estate." Such a compromise may be challenged by an aggrieved party under UPC 3-808 (d); but unless challenged,

the compromise is good. Maine law requires a hearing in the probate court before a compromise may be entered into; and before the compromise is effective, it must be endorsed by the court.

Payment of Claims. Sections 3-807 through 3-810 of the Uniform Probate Code define the procedure for the payment of claims.

The general rule, UPC 3-807 (2), is that the personal representative begins to pay allowed claims after the four-month period for presentation of claims has expired. (First, he must make provision for homestead, family and support allowances, unbarred claims not yet presented or allowed, and costs.) Under UPC 3-807 (b) the personal representative is authorized to pay any unbarred claim at any time, even before presentation; but he does so at the risk of incurring personal liability.

A creditor whose claim has been allowed but not paid may petition for payment. In this connection, it should be remembered that a claim is, in effect, allowed if not disallowed within 60 days after expiration of the claims period. UPC 3-806.

Maine law contains no specific provision as to when claims that have been allowed should be paid. Presumably there is seldom a problem in the case of solvent estates; and since administration is always supervised by the probate court, there is ready access to that court if a problem of nonpayment does

arise. Maine practice, then, appears to be consistent with the Uniform Probate Code in this area, with a general duty on the part of the fiduciary to pay allowed claims.

Insolvency, however, triggers the commission machinery that has been mentioned above in connection with allowance of claims. That machinery is described more fully here.

Section 2405 of Title 18, M.R.S.A., provides for the appointment of commissioners to report on disputed claims; 18 M.R.S.A. §3101 provides for the appointment of commissioners to report on claims against an insolvent estate. Section 2405 in terms makes the identical procedures applicable in both cases (dispute or insolvency.)

The commission is made up of two or more commissioners, appointed by the judge of probate (§3101). Claims must be filed with the commission in the same manner as has already been specified, except that a claim properly filed with the register of probate need not be refiled (§3103). The commissioners report on all claims presented, except those of the fiduciary himself, which are examined separately by the probate judge (§3106). The probate judge reviews the report of the commissioners before ordering distribution (§3106). The decree of distribution cannot come until after 30 days from submission of the commissioners' report (§3251). Within 20 days of the report there is a right of appeal from the findings of the commission. The appeal lies to the probate court, and may be

taken by the claimant or any other creditor of the estate, or by the fiduciary, or by any beneficiary of the estate (§3301).

The procedure just described is of course antithetical to the Code's theory of a full-power probate court. There are cases in the Maine Reports that involve the "insolvency commissioners"; but it appears that a commission is seldom appointed today. (As indicated above under UPC 3-806 and 3-813, "never" is perhaps more accurate than "seldom".) The commission procedure -- classic dead-letter law, which has outlived whatever usefulness it might once have had -- would be repealed with the adoption of the proposed Code.

UPC 3-809 deals with the payment of secured claims. The section is drafted guardedly, so as not to conflict with other state laws regarding secured debts.

The secured creditor has the option of surrendering his security and proceeding as if unsecured, seeking payment upon the basis of the amount allowed.

If the creditor has the right to exhaust his security before receiving payment (a question to be determined by the Uniform Commercial Code or the Maine Consumer Credit Code, not the Uniform Probate Code), and he does so, he is paid upon the basis of the amount allowed less the fair value of the security. UPC 3-809 (1). There is an important qualification upon this 'combination' of remedies, indicated by the optional language

"unless precluded by other law" in UPC 3-809 (1). The Maine Consumer Credit Code, 9-A M.R.S.A. §5.103, forces an election for consumer debts of \$1,000 or less: the secured creditor may repossess, or he may proceed against the debtor personally, but he may not do both. The inclusion of this optional clause in UPC 3-809 (1) makes it clear that the Uniform Probate Code is not meant to override the M.C.C.C.

If the creditor elects not to exhaust the security (or if he has no right to exhaust it), he may realize upon the basis of the amount of the claim allowed, less an agreed (or litigated) value of the security. UPC 3-809 (2).

The Uniform Probate Code provides no procedure for foreclosure, which would be governed by applicable existing law.

Maine probate law does not touch upon secured claims if an estate is solvent and the claim is undisputed. General rules covering secured transactions would apply.

In the case of insolvency or dispute about the claim, the Maine statute again resorts to the commission procedure. Section 3105 of 18 M.R.S.A. (applicable to insolvent estates because of its inclusion in Chapter 405, and to disputed claims because of 18 M.R.S.A. §2405) provides that the commissioners of insolvency shall estimate the value of security in the hands of a claimant. There is a right of appeal from this estimate to the probate judge, who may appoint still another commission (of "3 disinterested men") to appraise the security. The claimant

may then take the security at the appraised value and receive payment on the basis of the amount of the claim allowed less the appraised value; or he may relinquish his claim to the security and receive payment on the basis of the amount allowed plus the appraised value.

UPC 3-810 defines the manner in which uncertain or future claims are paid. The personal representative and the claimant may agree on the present value of the claim, which is then paid as if it were presently due and certain. Or arrangements may be made for future payment (as by creating a trust, or obtaining a bond for payment from a distributee).

Maine law provides similar options. The uncertain claim may be compromised under 18 M.R.S.A. §2403, discussed above in connection with UPC 3-813. If compromise is impossible, there is 18 M.R.S.A. §2652, which directs the fiduciary to set aside sufficient assets for the claim, or to require bond from a distributee.

The question of uncertain or future claims is a highly practical one, not hypothetical. For example, the case of Sard v. Sard (1951), 147 Me. 46, 83 A. 2d 286, involved alimony payable in monthly installments to a divorced wife for her life. The probate court directed the executors to retain and invest an amount sufficient to meet all possible payments, no matter how long the divorced wife might live. The same result might be reached under UPC 3-810 by the establishment of a trust fund.

Counterclaims. UPC 3-811 empowers the personal representative to deduct counterclaims when allowing claims. The counterclaim need not arise from the same transaction as the claim, and it may exceed the claim. In the latter case the probate court may render judgment against the claimant in the amount of the excess.

Section 5903 of Title 14, M.R.S.A., empowers fiduciaries to assert counterclaims "in actions against (them) in a representative capacity . . ." There is no clear authority for set-off without an "action." Section 5902 is the reciprocal of 14 M.R.S.A. §5903; it provides that the defendant in an action by the fiduciary may assert a claim against the decedent as a counterclaim. If the net result is a balance due to the defendant, the judgment has the effect of a claim against the estate, and the rules for presenting claims apply. Section 5902 would be amended by the Commission's bill to delete reference to the commissioners. Otherwise, the authority to bring counterclaims in 14 M.R.S.A. §§5902-3 is not inconsistent with the authority given the personal representative by UPC 3-811.

Execution and Levies. Section 3-812 explicitly exempts the decedent's estate from execution by creditors, and makes it clear that probate administration is the only process by which creditors' claims may be settled. The section also makes it clear that executions necessary to enforce mortgages,

pledges, or liens are not affected by the prohibition.

18 M.R.S.A. §§2452-2453 and 14 M.R.S.A. §§ 1953 and 4657 provide for execution against estate assets and would be repealed by the Commission's bill in favor of the proposed Code's policy of using administration to deal with the liabilities of the decedent's estate in a comprehensive and integrated manner.

Encumbered Assets. UPC 3-814 empowers the personal representative to pay any mortgage, lien, or other encumbrance against the assets of the estate, whether or not the holder of the encumbrance has presented a claim, if it appears to be for the best interest of the estate. This power may be seen as supplementary to the power of the personal representative to dispose of estate assets including real estate: see UPC 3-715, especially subsections (6) and (23). For example, it might be necessary for the personal representative to sell an encumbered asset in order to pay debts: UPC 3-814 makes it clear that the encumbrance may first be removed "if it appears to be for the best interest of the estate." The last sentence of UPC 3-814 specifies that the section does not alter the rule against exoneration established at UPC 2-609.

Maine law contains no provision precisely comparable to UPC 3-814. Under 18 M.R.S.A. §2051 fiduciaries may sell, mortgage, lease or exchange real estate if necessary to pay debts, and if licensed by the probate court. Possibly the power ex-



plicitly given in UPC 3-814 would be considered a necessary incident to 18 M.R.S.A. §2051; there is no case on the point.

Administration in More Than One State. UPC 3-815 governs situations in which assets of the decedent's estate are found in more than one state. Its purpose is the same as that expressed throughout the Code, notably in Article IV: as far as possible, the estate is administered as a unit, regardless of state lines. Creditors' claims are to be treated equitably, no matter where the creditors may reside or where estate assets may be located. In the language of the Uniform Comment to UPC 3-815, this section

has the effect of subjecting all assets of the decedent, wherever they may be located and administered, to claims properly presented in any local administration.

UPC 3-815 (a) provides that assets in this state are subject to claims and allowances existing or established against the domiciliary personal representative in another state. UPC 3-815 (b) makes it clear that the law of the domicile controls family exemptions and allowances, which will be recognized in this state. Beyond those, the section calls for payment of creditors in proportion to their claims, whether allowed at the domicile or elsewhere. UPC 3-815 (c) provides for marshalling of assets where there are claims in more than one state, with excess assets in this state to be transferred to the domiciliary personal representative.

The policy of UPC 3-815 already finds expression in Maine law. Section 902 of 18 M.R.S.A. provides that assets of a non-resident decedent's estate found in Maine are to be distributed so that creditors here and elsewhere may share in proportion to their debts. Section 903 of 18 M.R.S.A., like UPC 3-815 (c), provides for transmittal of residue to the domiciliary personal representative after payment of local claims in just proportion.

Section 3-816 of the UPC is in effect a choice of law provision. It provides that local administration of a non-resident decedent's estate shall be subordinate to domiciliary administration except in three cases:

- (1) If the will specified the law of the local state without reference to that of the domiciliary state, the will controls;
- (2) If there is no domiciliary personal representative, the local administration is treated as the primary administration;
- (3) If the probate court orders closing of the estate after petition and notice under UPC 3-1001, distribution may be made in accordance with local law.

Section 901 of 18 M.R.S.A. sets out the Maine rules for choice of law in this situation. As to personal estate, 18 M.R.S.A. §901 operates much the same as UPC 3-816, with the

will (if any) controlling, and distribution to a domiciliary personal representative authorized. As to real estate, 18 M.R.S.A. §901 specifies that Maine law controls in the absence of a will. It appears that this last provision is consistent with UPC 3-816 because of reference to "applicable choice of law rules" in the Uniform Probate Code section: Maine law pertinent to the succession to real estate would prevail.

3. Individual Liability of Fiduciaries.

The situations in which a personal representative, a conservator or a trustee may be held personally liable on contracts or for torts is set forth in UPC 3-808, 5-429 and 7-306, respectively. Maine has no comparable statute, and Maine law seems to be the same as that outlined in the Uniform Comment to UPC 3-808:

In the absence of statute an executor, administrator or a trustee is personally liable on contracts entered into in his fiduciary capacity unless he expressly excludes personal liability in the contract. He is commonly personally liable for obligations stemming from ownership or possession of the property (e.g., taxes) and for torts committed by servants employed in the management of the property. The claimant ordinarily can reach the estate only after exhausting his remedies against the fiduciary as an individual and then only to the extent that the fiduciary is entitled to indemnity from the property.

UPC 3-808 would alter this general common law by providing that in the case of contracts the personal representative would be individually liable only if he fails to reveal his

representative capacity, and that in the case of torts he would be individually liable only if he is at fault. The Comment continues:

This (section is) designed to make the estate a quasi-corporation for purposes of such liabilities. The personal representative would be personally liable only if an agent for a corporation would be under the same circumstances, and the claimant has a direct remedy against the quasi-corporate property.

The only present Maine law on this area seems to be contained in the following cases: Davis v. French, 20 Me. 21 (1841); Walker v. Patterson, 36 Me. 273 (1853); Plimpton v. Richards, 59 Me. 115 (1871); Plimpton v. Gardiner, 64 Me. 360 (1875); Baker v. Moor, 63 Me. 443 (1873); Baker v. Fuller, 69 Me. 152 (1879); Carter v. National Bank of Lewiston, 71 Me. 448 (1880); Goulding v. Horbury, 85 Me. 227 (1892); Bangor v. Poirce, 106 Me. 527 (1910); Call v. Garland, 124 Me. 27 (1924); Jones v. Silsby, 143 Me. 275 (1948).

This collection of cases makes it clear that adoption of UPC 3-808 and 7-306 would mark a change in Maine law, although no cases have been found involving personal liability of a guardian in comparable circumstances.

The common-law rule holding a fiduciary liable on contracts, obligations, and torts arising from administration is based on the theory that an estate (or trust) is not a legal person, and therefore is not capable of entering into contracts or committing

torts. Such conceptualism is often explicit, as shown by Justice Traynor's opinion in Johnston v. Long, 30 Cal. 2d 54, 181 P. 2d 645 (1947):

In Campbell v. Bradbury, this court held that an incompetent under guardianship was responsible for the negligent operation of an elevator in a building operated under the control of the guardian and rejected expressly any analogy to the liability of executors in similar situations. A judgment imposing liability on an incompetent to be paid out of assets controlled by a guardian is clearly distinguishable from a judgment imposing liability on an estate. The incompetent is a person and would still be liable after the discharge or removal of the guardian, but the estate is not even a legal person and after distribution of the assets and discharge of the executor it no longer exists. The court in the Campbell case had someone before it upon whom the liability could be imposed, and there is some justification for avoiding circuitry of action by imposing the liability initially on the party that would ultimately bear it even if the guardian were personally liable. (Emphasis supplied.)

The cited Maine cases go this far and no further, grounding the decision solely on the conceptualism of the non-entity theory.

But the non-entity theory, no matter how comforting it may be to a Court that must give weight to precedent and common-law tradition, does not go to the heart of the policy considerations that should be examined.

The strongest argument for retaining the traditional rule is stated in Johnston v. Long, supra, at pp. 63-64 of 30 Cal. 2d:

If the plaintiff could recover directly from the estate in an action against the executor in his representative capacity, the heirs would have no assurance that the question of the personal fault of the executor would be properly tried. It would not be in the interest of either the plaintiff, who would be attempting to recover out of the assets of the estate, or the defendant, whose interest as an individual and as an executor would be in conflict, to show personal fault on the part of the executor.

Neither the common-law rule nor the Uniform Probate Code, however, would absolve the fiduciary from liability for his own personal torts, or for contracts beyond the scope of his powers as fiduciary. Ruly 19 of the Maine Rules of Civil Procedure, furthermore, provides the mechanism for assuring that persons interested in the estate are not excluded:

. . . A person who is subject to service of process shall be joined as a party in the action if . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest . . . .

The Rule provides that the court may determine whether "in equity and good conscience the action should proceed among the parties before it" in the absence of interested persons. UPC 3-808 (d), together with Rule 19, provide an adequate answer to the Johnston v. Long argument.

The principal argument for the Code rule is that, unless the fiduciary is personally at fault or has acted outside his fiduciary authority, the estate (or trust) bears the ultimate

burden of liability under doctrine of reimbursement or recoupment -- a principle recognized under the common law - - and that imposing personal liability on the fiduciary leads to circuity of actions. The creditor can usually reach the trust estate eventually under one technique or another; so the law should allow him to reach it on the simple and sufficient ground that the obligation was properly incurred in the administration of the estate.

An important side effect of the Code rule would be to encourage responsible persons to undertake fiduciary obligations by relieving them of the fear (sometimes justified in practice; again, see Johnston v. Long) of a large personal judgment against them (or, in the alternative, of the need for high insurance coverage before undertaking such obligations).

## H. Distribution

While the method of distribution of estate assets under the Uniform Probate Code and the proposed Code for Maine has been touched upon in the previous discussion of related areas -- especially concerning the powers and duties of the personal representative to distribute under UPC 3-704 and 3-715, and the devolution of title to the successors under UPC 3-101 -- this part of the Commission's study deals more extensively with that process and certain special problems that are involved in distribution.

### 1. Establishing Successors' Title With No Administration

Section 3-901 of the Uniform Probate Code, which applies only if there has been no administration of a decedent's estate, provides that the heirs and devisees are entitled to the estate in accordance with the terms of a probated will or the laws of intestate succession. It should be read in conjunction with UPC 3-101, which provides that upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will or, in the absence of testamentary disposition, to his heirs, subject to the powers of the personal representative incident to administration, and with the limited exceptions of UPC 3-102 for establishing title through the evidentiary use of an unprobated will.

Although it would probably not make much practical difference, UPC 3-101 would make a theoretical change in the devolution of personal property at death. At common law, title to the decedent's personal property was considered to pass to the executor or admini-



strator. A successor to the decedent's personal property took by distribution, not by descent. Grant v. Bodwell, 78 Me. 460 (1886). Section 3-101 would treat both real and personal property alike; upon the death of the decedent, title would pass to the devisees or intestate successors, subject to powers of the personal representative.

The Uniform Comment to UPC 3-901 makes it clear that the section was meant to add little to the substantive provisions of UPC 3-101, except to indicate how successors may establish record title in the absence of administration. Devisees may establish title by a probated will to devised property. This is similar to present Maine law, which provides that no will is effectual to pass property unless proved and allowed in probate court. 18 M.R.S.A. §101. Once probated, the will could presumably be used to establish title under present law. Under the Code, if the will has not been probated, the devisee may not use it to establish title to the devised property under UPC 3-901. If he satisfies the conditions of the narrow exceptions to UPC 3-102, the devisee may use an unprobated will to prove the transfer of the decedent's property to himself under that section.

Intestate successors or persons entitled to property by homestead allowance or exemptions may establish title to decedent's property by proof of the decedent's ownership, his death, and their relationship to the decedent. Although no Maine statute explicitly states so, an intestate successor under present Maine law could probably establish title to the decedent's property by adducing the same proof as called for by UPC 3-901. However, the successor may experience difficulties with the marketability of the title

unless administration has occurred. Any person handling an intestate decedent's property in Maine would be wise to seek appointment as administrator and formally administer the estate, because of the provisions of 18 M.R.S.A. §1414, which characterize a person as an executor in his own wrong if he meddles with the decedent's property without having been so appointed. Personal liability could follow the characterization.

All successors take the property subject to all charges incident to administration, including the claims of creditors and allowances of the surviving spouse and dependent children, and subject to any rights of others resulting from abatement, retainer, advancement, and ademption.

Section 3-901 applies only in the absence of any administration of the decedent's estate. If administration has occurred and distribution of the property has been made in kind, successors to the estate may establish title by instruments or deeds of distribution. See UPC 3-907, 3-908.

## 2. Abatement

Section 3-902(a) of the Uniform Probate Code states that, unless otherwise provided in the will and except as provided in connection with the share of the surviving spouse who elects to take an elective share, abatement occurs in the following order: (1) intestate property (2) residuary property (3) general devises (4) specific devises. Abatement within each classification would be pro rata. The Code attempts to solve the somewhat troublesome problem of where demonstrative legacies fit into this scheme by

stating that for purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and a general devise to the extent of the failure or insufficiency.

An exception to the order of abatement set forth in UPC 3-902 occurs where a surviving spouse elects to take an elective share of the augmented estate pursuant to Article 2, Part 2 of the Code. When such an election necessitates abatement, liability for the balance of the elective share is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein.

As under present Maine law, the intent of the testator would control. The Code also would give effect to any express order of abatement made in the will, and if the testamentary plan or the express or implied purpose of a devise would be defeated by the order of abatement provided for in UPC 3-902(a), the shares of the distributees would abate as found necessary to effectuate the intent of the testator. UPC 3-902(b).

Subsection (c) of UPC 3-902 provides that if the subject of a preferred devise is sold or "used incident to administration," abatement will be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets. The term "preferred" devise used in subsection (c) refers to devises that have priority over other devises by virtue of either the statutory priorities set forth in subsection (a), or the priorities implied or expressed by the testamentary plan under subsection (b). Subsection (c) does not itself set forth an additional category of priorities for abatement, but only provides for a way to deal

with giving effect to the priorities provided for in (a) and (b) in the event that property which has priority under (a) or (b) is sold or used incident to the administration of the estate.

Under Maine law, it appears that there is one special situation in which a testamentary gift may be given preference over another legacy or bequest in the same class. In Moore v. Alden, 80 Me. 301 (1888), it was held that where a testamentary gift, in that case an annuity, was made by a husband to a wife in satisfaction of her waiver of dower in his estate, the gift has a preference over all other unpreferred legacies. The theory behind that rule was that the wife did not take the gift strictly as a beneficiary but as a purchaser for a valuable consideration. The estate got her right of dower, and she received the testamentary gift in lieu of dower. The rule applied where the gift was made in lieu of the wife's dower. It did not apply if the wife had no subsisting right of dower at the death of the testator or if the legacy was given in addition to dower. Moore v. Alden, supra; Additon v. Smith, 83 Me. 441 (1891). It has been said that the rule would apply where the gift is made in lieu of the spouse's right and interest by descent. Wilson, Maine Probate Law 344 (1896). However, no case so holding has been found. It is questionable whether or not these cases are related to the abatement issues covered by UPC 3-902. It is clear, however, that they do not represent an additional category of preferred devises under subsection (c). A court, therefore, would be free to find that a gift in lieu of dower can be an expression of an abatement priority expressed in the will or implied in the testamentary plan under

subsection (b). However, 3-902(b) would not mandate the decisions in Moore and Additon, but would leave the determination of testamentarily expressed or implied abatement priorities to be determined on a case by case basis. Thus, UPC 3-902 would in itself neither reject those cases, nor statutorily freeze them into Maine law.

The provisions of Maine law dealing with abatement and the marshaling of assets for the payment of debts are 18 M.R.S.A. §§1853-1855. The language of these sections is obscure. Section 1853, on its face, seems to disregard classifications of bequests and devises and seems to require pro rata contribution from all recipients of a decedent's estate when abatement is required, but section 1854 suggests that specific bequests are somehow preferred, while section 1855 appears to give favored treatment to real property.

Case law suggests that, except for favored treatment of real property (18 M.R.S.A. §1855), the order of abatement under 18 M.R.S.A. §§1853-1855 is quite similar to that set forth in UPC 3-902. At present, the order of abatement appears to be as follows:

- (1) intestate personal property
- (2) residuary personal property
- (3) general bequests or legacies of personal property
- (4) intestate real property
- (5) residuary real property
- (6) general devises or real property
- (7) specific bequests and devises.

See Eaton v. MacDonald, 154 Me. 227 (1958); Cantillon v. Walker, 146 Me. 168 (1951); Morse v. Hayden, 82 Me. 227 (1889); Emery v. Batchelder, 78 Me. 233 (1886). The biggest change UPC 3-902 would make in present Maine law would be to eliminate the favored treatment of real property in marshaling estate assets for purposes of abatement.

The Code language seems highly preferable to the obscure provisions of present Maine law.

3. Right of retainer

Section 3-903 of the Uniform Probate Code provides that the amount of a non-contingent indebtedness of a successor to a decedent's estate if due, or its present value if not due, shall be offset against the successor's interest. The amount of a successor's indebtedness to the estate would be deducted from his share before distribution. Present Maine law is substantially in accord with this provision. See 18 M.R.S.A. §§1901, 1903; Webb v. Fuller, 85 Me. 443 (1893). Any change that UPC 3-903 would effect in Maine law would be slight.

At common law, the personal representative had a duty to exercise the right of retainer against an indebted successor's share even though the claim against the debtor would have been barred by the statute of limitations in an ordinary civil action. Atkinson, Wills, §141 (2d ed. 1953). The second clause of UPC 3-903 provides that the successor shall have the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt. Under this provision, a successor indebted to the decedent's estate would be able to assert any defense to the set-off contemplated by UPC 3-903, including a claim that enforcement of the debt is barred by the statute of limitations.

The latter result would be the same as under present Maine law. In Holt v. Libby, 80 Me. 329 (1888), the Law Court held that an executor had no power to retain a legacy in whole or partial satisfaction of a debt due to the estate from the legatee, where a direct proceeding for recovery of the debt would have been barred by the statute of limitations.

The Uniform Probate Code version of §3-903 is changed in the proposed Maine code by the addition of a sentence preserving the present provision that such a successor's indebtedness would constitute a lien on any property distributed to him.

#### 4. Interest on General Legacies

UPC 3-904 provides that general pecuniary devises bear interest at the legal rate beginning one year after the first appointment of a personal representative until the time of payment. The testator may provide otherwise by expression of a contrary intent in his will. The Code provision differs from the common law in that under UPC 3-904, interest begins to run one year after a personal representative has been appointed, whereas at common law a general pecuniary legacy bears interest starting one year from the testator's death. Atkinson, Wills, §135 (2d ed. 1953).

Prior to 1916, Maine, having no statute on the subject, followed the common law. In Hamilton v. McQuillan, 82 Me. 204 (1889), the Law Court addressed the problem of when a general pecuniary legacy begins to bear interest. The Court noted that interest is allowed as incident to the legacy after it becomes due, and announced the general rule that a pecuniary legacy, in the absence of any designation as to time of payment, is payable at the end of one year from the death of the testator without interest, and that if not then paid, it bears interest after the expiration of the year. In 1916, a statute was enacted providing that legacies were payable in one year after final allowance of the will. Me. R.S. 1916, c. 70, §26. The present Maine statute, 18 M.R.S.A. §1416, states that legacies are payable in 20 months after final allowance of the will. If, as stated in the Hamilton case, interest is allowed as incident to the legacy after it becomes due, it would appear that

under present Maine law, general pecuniary legacies do not begin to bear interest until 20 months after final allowance of the will.

a. Judicial Discretion and Unproductive Property

Although the Commission believes the Uniform Probate Code provisions of §3-904 to be desirable, it added language to the Maine version to make expressly clear the power of the court to depart from the rigidity of the rule in case the other assets of the estate were unproductive or underproductive--situations in which a testator would presumably not desire to deplete the value of other testamentary gifts in an apparently unbalanced manner.

The rationale underlying the payment of interest on general pecuniary devises is said to be based on an assumption that the testator intended the legacy to be distributed within a reasonable time after his death, or after administration had begun, and so would expect the legatee to have the use of the money at that time. Payment of interest for any delay beyond a reasonable time would serve to compensate for the deprivation of the legatee's use of the money, although a few courts have seen it as a penalty to induce more prompt administration. See Atkinson, Wills §135 (2d ed. 1953), and 6 Page on Wills §59.11 (Bowe-Parker rev. 1960). Such payment also serves to put the general pecuniary devisee on a more nearly equal basis with other recipients when there is a delay in distribution, since in most situations the recipients of other kinds of testamentary gifts will themselves realize income and increases in value accruing during estate administration. For instance, a devisee of real estate will receive rents and profits earned during administration, as well as any increase in value of the real estate itself. A specific bequest of stock will carry with it both any value increase and income earned between the testator's death and the time of



distribution. Even a recipient of a general bequest of stock will receive any value increase, although he will not be entitled to dividends earned before it becomes his own either by distribution to him, Palmer v. Palmer, 106 Me. 25 (1909), or by law, Perry v. Leslie, 124 Me. 93 (1924). Likewise, the residuary devisee will receive all increases in value and all income earned by the residual assets during administration, as well as all income earned by the estate that does not go with the specific gifts or real estate, including all income earned by the amounts of the general pecuniary devises. In light of these examples, it seems appropriate to provide for payment of interest on general pecuniary devises, at least when the estate is productive.

The Uniform Probate Code provision, however, intentionally omits any exception for situations where the estate is not productive or is suffering losses because of adverse economic conditions. See Uniform Comment to UPC 3-904. The addition of the discretionary language in the proposed Maine Code would allow the court flexibility to excuse the payment of interest in such situations and thus avoid the possibility of both the inappropriate depletion of the residue and the unduly favored treatment of the general pecuniary devisee that might otherwise result. The proposed additional language would frame the issue of non-payment of interest on the testator's intent. It does not seem reasonable to presume that the testator intended interest to be paid to the general pecuniary devisee whose legacy comes from assets that are not productive or are declining in value, at the expense of other devisees who are more likely to be the primary objects of the testator's bounty.

The purpose of the additional language is to accommodate

reasonable presumptions about the testator's intent within the spirit of the basic presumption that interest was intended after the running of a reasonable time. It would not be used under the proposed drafting to excuse such payment or extend the grace period merely because administration is delayed for a long period when the assets are productive or generally increasing in value. It is at just such times that the interest should be paid to general pecuniary devisees under the rationale of provisions such as UPC 3-904 and the previously cited Maine cases.

b. The Time Period and Non-Pecuniary Devisees

The Uniform Probate Code's use of the term "general pecuniary devise" is equivalent to the strict, traditional "general legacy," which is a testamentary gift of money to be paid out of the general estate, rather than a non-monetary gift (bequest or devise) or a monetary gift to be paid only from a specific source or fund (specific legacy). In modern legal usage, however, the term "legacy" is used to include both pecuniary and non-pecuniary gifts of personal property (1 Page on Wills §1.2, Bowe-Parker rev. 1960), and the Maine statute's use of the term "legacies" has been applied by the courts to non-pecuniary gifts. 18 M.R.S.A. §1416; Perry v. Leslie, 124 Me. 93 (1924).

The Maine statute establishes the time at which legacies become due, but does not by its terms provide for payment of interest. The right to interest after a pecuniary legacy becomes due was judicially established in Maine by the case of Hamilton v. McQuillan, 82 Me. 204 (1889), prior to enactment of the predecessor to Section 1416, and is apparently still the law under the time period established now by Section 1416. Nichols v. Nichols, 118

Me. 21, at 23 (1919). Thus, even though "legacies" in Section 1416 is broader than "general pecuniary devise" in UPC 3-904, the Uniform Probate Code would not seem to change the Maine law insofar as it concerns the kind of testamentary gift which is to bear interest, i.e., only pecuniary devises payable out of general estate assets. This is consistent with the common law and the generally prevailing rule in this country. 6 Page on Wills §59.11 (Bowe-Parker rev. 1960). The most significant change is in when such gifts will begin to bear interest. Section 1416 provides that interest would begin to accrue 20 months after final allowance of the will. UPC 3-904 reduces the period to 12 months (which is the more generally prevailing rule) and starts counting that period from the appointment of a personal representative for the estate, rather than from the final allowance of the will.

One change that would result from adoption of UPC 3-904 and the repeal of 18 M.R.S.A. §1416 is that there would no longer be any express provision for when a distributee could enforce payment of a legacy (whether pecuniary or non-pecuniary). This in itself, however, is better covered under the Uniform Probate Code by the general duty of the personal representative to proceed expeditiously with distribution under UPC 3-704, and the right of distributees to enforce that duty by petitioning for a court order under UPC 3-105, 3-607(a), 3-1001(a), or 3-1002, if they feel the estate is not being distributed expeditiously.

However, the elimination of the 20-month period after which legacies are due may make a change in the right of a general non-pecuniary devisee to income earned on the assets distributed to him in certain rare situations. Under current Maine law a general non-pecuniary legatee has the right to income from the subsequently

distributed assets when that income is earned either after distribution to him or after the 20-month period runs, whichever is earlier.

Perry v. Leslie, 124 Me. 93 (1924). Without any set due date on such legacies, the right to income from the assets would not pass to the legatee until actual distribution. The problem, if it is one, seems relatively minor, and not likely to occur often. In most cases a legatee could protect himself by obtaining a court order to enforce expeditious distribution of the legacy, thus also obtaining the right to income prior to the 20-month period from allowance of the will which contains the legacy. The presumption that a testator intends interest payment on the value of such devises after a reasonable period has not been a part of the traditional law or Maine law and such a presumption is not as directly applicable to bequests as it is to legacies which consist wholly of money itself. In addition, any increase in the value of assets distributed as part of a non-pecuniary legacy (unlike the money in a pecuniary legacy) will of course go to the general legatee. Based on all of these factors, there seems to be no reason to preserve this incidental aspect of 18 M.R.S.A. §1416.

c. Legal Rate of Interest

Prior to 1975 the legal interest rate in Maine was established by 9 M.R.S.A. §228 as follows:

§228. Legal Interest Rate

In the absence of an agreement in writing, the legal rate of interest is 6% a year.

This section was repealed in 1975 and purportedly replaced by 9-B M.R.S.A. §432, which is entitled "Interest on loans," and provides that:

The maximum legal rate of interest on a loan made by a financial institution, in the absence of an agreement in writing establishing a different rate, shall be 6 percent per year.

While the new section purports to replace the former "Legal Interest Rate" section, it does not fit the UPC 3-904 reference to a general "legal rate" as explicitly as did the former section. The new section refers to a "maximum" legal rate, and is explicitly applicable to "a loan made by a financial institution." It would seem that the meaning of UPC 3-904 would be clarified by explicitly providing that the general pecuniary devise would bear interest "at the legal rate of 6% per year beginning one year after" etc. This language is included in the Commission's proposed Code for Maine.

#### 5. Penalty Clauses For Will Contest

Section 3-905 of the UPC states that a provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings. Generally, courts tend to enforce forfeiture provisions in wills if there is no probable cause for instituting proceedings contesting the will. When probable cause exists for contesting a will, authority is split on the enforceability of penalty clauses for contest: some jurisdictions give effect to the penalty clause while others hold it unenforceable as against public policy. See Atkinson, Wills, §82, pages 408-410 (2d ed. 1953).

No Maine cases or statutes have been found on the subject. Under the Code, such penalty clauses would be upheld if no probable cause existed for contesting the will but would be unenforceable if probable cause existed. The Code approach seems desirable. It would allow those persons with honest grievances to present their contentions to the court without fear of forfeiting a devise in their favor if unsuccessful while, at the same time, it would tend to discourage frivolous, unmeritorious litigation.

6. Distribution in kind

a. Preference for Distribution in kind

UPC 3-906 establishes a preference for distribution in kind of the distributable assets of a decedent's estate. The section is designed to cut down on the time and expense involved in converting a decedent's assets to cash when they could just as well be distributed in kind. Subsection (a) directs the personal representative to make distribution in kind whenever possible. Section 3-906(a)(1) states the obvious, that a specific devisee is entitled to distribution of the thing devised to him.

Section 3-906 (a)(4) provides that the residuary estate is to be distributed in kind if there is no objection to the proposed distribution and it is practicable to distribute undivided interests. A residuary devisee is entitled to object to a proposed scheme of distribution in kind because, as noted in the Comment to UPC 3-906, it is implicit in sections 3-101, 3-901, and 3-906 that each residuary beneficiary's basic right is to his proportionate share of each asset constituting the residue. If the residuary devisee does object or it is not practicable to distribute undivided interests, the residuary property may be converted into cash for distribution.

Even a devise payable in money may be satisfied by value in kind provided the person entitled to the payment has not demanded payment in cash, the property distributed is valued at fair market value as of the date of distribution, and no residuary devisee has requested that the asset in question remain a part of the residue. UPC 3-906(a)(2). Under this provision, where there is not enough actual cash in the estate to pay the pecuniary legacies, the personal representative will be spared the trouble of converting assets into cash where no one objects to distribution of an equivalent value in

kind.

Section 3-906 also states a preference for distribution in kind of the allowances provided for in Article 2, Part 4 of the Code. It is implicit in sections 2-401, 2-402 and 2-404 that the homestead and exempt property allowances are to be satisfied by value in kind unless there is not enough real property and unencumbered chattels in the estate to do so, but UPC 2-403 provides that the surviving spouse and minor children of a decedent are entitled to a family allowance of a reasonable sum in money. Section 3-906 makes it clear that the family allowance may also be satisfied by value in kind if there is no objection thereto.

The Maine statute relating to the distribution of a decedent's property is 18 M.R.S.A. §2351. It applies to the property remaining in the personal representative's hands which is not necessary for the payment of debts and administration expenses, pecuniary legacies of a fixed amount, or specific bequests. Under section 2351, the probate judge determines those who are entitled to this residuary property and their respective shares therein under the will or by intestate succession, and enters an appropriate decree of distribution.

It seems implicit in the language of section 2351 that the recipients of specific devises or bequests are entitled to the particular thing devised. As for the remaining property available for distribution, 18 M.R.S.A. §2352 provides that when such property consists of anything other than money, the judge may order it distributed in kind. This provision differs very little from the Code. Section 2352 states that the judge may order a distribution in kind, while UPC 3-906(a)(4), employing slightly stronger language, says that the residuary estate shall be distributed in kind if no

objection is made thereto and such a distribution is feasible.

Maine law is similar to the Code with respect to distribution of allowances and exempt property. Section 801 of Title 18 provides for allowances to widows out of the decedent's personal estate under certain circumstances. It appears that the allowance may consist of specific items or money. Dunn v. Kelley, 69 Me. 145 (1879). This provision differs very little from the Code manner of satisfying the family allowance provided for in UPC 2-403. Section 2-403 contemplates that the allowance will be paid in money, but UPC 3-906 (a)(2) authorizes payment of value in kind if no one objects to such a distribution.

Presumably, the exempt property of a decedent's estate, provided for in 18 M.R.S.A. §1858 and 14 M.R.S.A. §§4401 and 4551, is intended to be distributed in kind to the persons ultimately entitled thereto. Under the Code, the exempt property allowance is to be satisfied in kind (UPC 3-906(a)(1)), while the homestead allowance may be satisfied by value in kind if possible.

It is clear not clear how much practical difference there would be between present Maine law and the Code in respect to how estate assets are distributed. Section 3-906 of the Code states a distinct preference for distribution in kind whenever feasible, whereas the Maine statutes simply allow such distribution, without stating any preference. The Code approach would place a bias in favor of keeping the decedent's property in its original form, but allow liquidation when desired or when that would be more practical. The Code might also eliminate the time and expense involved in converting estate assets into cash for distribution in cases where distribution could just as well have been made in kind.

In order to clarify the meaning of UPC 3-906(a)(2) and to conform



it better to the terminology used elsewhere in the Code, the phrase "devise payable in money" is changed in the Maine version to "pecuniary devise."

b. Valuation

Section 3-906(a)(3) of the UPC sets forth certain rules for the valuation of certain property, such as securities and choses in action, distributed in kind or assigned pursuant to paragraph 2 of UPC 3-906(a). This paragraph should be helpful in solving the difficult problems of appraisal which sometimes accompany distribution of such assets. There is no counterpart to UPC 3-906(a)(3) in the Maine statutes.

After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object thereto. UPC 3-906(b). If a distributee fails to object to the proposed distribution in writing received by the personal representative within 30 days after mailing or delivery of the proposal, his right to object to such proposal is deemed to have terminated.

Prior to the Tax Reform Act of 1976, property which had appreciated in value during the decedent's ownership, and which passed through the decedent's estate, was given a "stepped-up" basis determined essentially by the value of the property at the decedent's death. As a result, neither the estate nor devisees of the appreciated property were liable for capital gains taxes on the appreciation during the decedent's ownership, thus allowing the appreciation to escape such taxation altogether. The 1976 Act changes this by providing that such property have a carryover basis in the hands of the estate or devisees which is essentially the basis of the property in the decedent's hands immediately before

his death, with certain adjustments. I.R.C. §1023. Thus, generally speaking, a devisee of such appreciated property covered by the new provision will be liable for capital gains taxes on the decedent's appreciated value at the time of any sale or exchange of that property by the devisee (assuming that the appreciation has not subsequently been wiped out).

A special section of the 1976 Act deals specifically with the use of such property to satisfy pecuniary bequests. I.R.C. §1040. That section provides, in essence, that the estate shall be taxable on any appreciation between the value of the property at decedent's death and the value of the property at the time of distribution. The basis of the property in the devisee is then the carryover basis of the decedent immediately before his death, plus any appreciation on which the estate was liable for a tax as set forth in the preceding sentence. The pertinent parts of I.R.C. §1040 read as follows:

(a) General Rule -- If the executor of the estate of any decedent satisfies the right of any person to receive a pecuniary bequest with appreciated carryover basis property (as defined in section 1023(f)(5)), then gain on such exchange shall be recognized to the estate only to the extent that, on the date of such exchange, the fair market value of such property exceeds the value of such property for purposes of chapter 11 [essentially the value of the property for estate tax purposes at the time of the decedent's death].

(b) Similar Rule for Certain Trusts -- .....

(c) Basis of Property Acquired in Exchange Described in Subsection (a) or (b). -- The basis of property acquired in an exchange with respect to which gain realized is not recognized by reason of subsection (a) or (b) shall be the basis of such property immediately before the exchange, increased by the amount of the gain recognized to the estate or trust on the exchange.

The explanation of the effect of these sections on the legatee's basis prepared by the staff of the Congressional Joint Committee on Taxation reads as follows:

Where this section applies, the basis of the property

to the distributee is the carryover basis of the property increased by the amount of any gain recognized on the distribution [i.e., the amount on which the estate was taxed].

General Explanation of the Tax Reform Act of 1976, p. 563 (Joint Committee on Taxation, 94th Congress, P.L. 94-455).

By way of simplified illustration, if the decedent purchased securities at \$50, which were valued at his death at \$100, and distributed by the personal representative in satisfaction of a pecuniary devise when their value was \$125, the amount recognized and taxable to the estate would be \$25, and the new basis in the distributee (pecuniary devisee) would be \$75 (the decedent's basis of \$50 plus the \$25 which was recognized and taxed as gain to the estate). Thus, if the pecuniary devisee sold the \$125 securities for their then market value of \$125 (the amount to which the devisee was entitled under the will) he would receive \$125 in cash, but also be liable for capital gains taxes on \$50 (what he received minus his basis). Had the devisee been paid in cash he would receive \$125 free of any comparable tax liability.

The above example illustrates one part of a problem that may arise under any distribution of kind. Another aspect of the problem arises when more than one pecuniary devisee is paid with appreciated carryover basis property, with accompanying questions of equitable treatment among the various pecuniary devisees. Obviously, the distribution of \$125 of high basis securities is more favorable to a devisee than would be the distribution of \$125 of low basis securities. Similar problems may exist in distributions to non-pecuniary devisees, e.g., a devise of 100 shares of AT & T to be divided equally between A and B when those shares were purchased at different times and thus have different bases in the hands of the decedent. This raises

problems that have to be worked out in the estate administration, but the only place where a problem may be peculiarly raised by virtue of the application of the Uniform Probate Code is when the distribution is made to satisfy a pecuniary devise.

The valuation section of UPC 3-906(a)(3) provides that, for purposes of distribution, securities be valued at their fair market value on the day before distribution (with some exceptions) and makes no mention of any basis problems (perhaps because the latest revision of the Uniform Probate Code occurred prior to the new tax changes). This valuation formula expressly applies only to property used to satisfy pecuniary devises provided for in subsection (a)(2) of 3-906. To the extent that the valuation formula of (a)(3) can be read mechanically to preclude consideration of the varying bases of different securities, subsection (a)(3) raises a problem of unfairness to pecuniary devisees and the possibility of inequitable treatment among different pecuniary devisees.

The problem is alleviated somewhat by the provision in subsection (a)(2) under which pecuniary devises can be satisfied by non-monetary property only if the devisee does not demand payment in cash. Thus, a pecuniary devisee could prevent such a distribution if he did not want it. He is, of course, entitled to the exact amount of money devised to him, without income tax liability. He will not, of course, have an opportunity to make an objection unless he is aware of the tax consequences of the carryover basis provisions.

For these reasons, the Commission has added a sub-paragraph (iv) to UPC 3-906 (a)(2) expressly imposing a duty to so inform such devisees. The Commission has also added language to UPC 3-906 (a)(3)

expressly recognizing the duty of the personal representative to take into account the tax consequences on devisees when fulfilling the personal representatives' overall duty of dealing fairly among all persons interested in the estate.

The sub-paragraph added to UPC 3-906 (a)(2), as a condition to distributing assets in kind, reads as follows:

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

The language inserted between the first and second sentences of 3-906 (a)(3) reads as follows:

; but any effects of the carryover basis of appreciated carryover basis property under the Internal Revenue Code must be taken into consideration in fulfilling the duty of the personal representative to act fairly with regard to all distributees and with regard to the interests of all persons interested in the estate.

The problems of dealing fairly with all distributees of non-pecuniary devises is not directly involved in the valuation formula of subsection (a)(3), and the flexibility needed to work out such problems would seem to be adequately provided by subsection (b) of 3-906.

#### 7. Evidence of Distributee's Title

UPC 3-907 states that if distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring or releasing the assets to the distributee as evidence of the distributee's title to the property. This section provides a simple, easy method by which a successor to a decedent's estate may prove his ownership of the specific property distributed to him. Whenever distribution is

made in kind, of either real or personal property, the recipient thereof would receive an instrument or deed of distribution from the personal representative. Under UPC 3-908 proof that such a distributee had received an instrument or deed of distribution from the personal representative would be conclusive evidence that the distributee had succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate except the personal representative.

The Maine statutes have no comparable provision. One must turn to various sources, statutory and otherwise, to determine what constitutes a distributee's muniments of title to property distributed in kind under present Maine law.

Section 254 of Title 18 provides for the recording of a copy of so much of a proven will as devises real estate in the registry of deeds in the county where the real estate is situated. In intestate estates, where the petition for administration indicates the deceased owned real estate, the register of probate must file an abstract of the petition showing such ownership, including the names of heirs or next of kin, in the registry of deeds in the county where such real estate is situated. 19 M.R.S.A. §1551-A. Although the instruments recorded under these two sections may be some indication of a distributee's title to the real property described therein, they are not, in and of themselves, sufficient indicia of title to ensure the marketability thereof.

Registers of probate must record, in the probate office records, all wills proved, letters of administration or guardianship granted, bonds approved, accounts allowed, all petitions for distribution and decrees thereon and all petitions, decrees and licenses relating to the sale, exchange, lease or mortgage of real

estate, all petitions and decrees relating to adoption and change of names and such orders and decrees of the judge as he directs. 18 M.R.S.A. §253 (preserved intact in the Commission's bill as §1-503). Each estate has a docket number, and at all times the docket should show the exact condition of each case. The Law Court has stated that where the proceedings disclose a full administration, after which the residue of the decedent's property (see 18 M.R.S.A. §2351) was ordered to be, and was, distributed, the probate records are sufficient muniments of title. Rose v. O'Brien, 50 Me. 188 (1860).

Maine Title Standard #5 indicates what the Maine bar feels should be included in the abstract of a probated estate in order to establish a marketable title. Maine State Bar Association, Maine Title Standards (1975 revision). The items recommended for inclusion in a title abstract of distributee's property include names of a surviving spouse and heirs, "inventory total valuation", information on the payment of estate and inheritance taxes, relevant provisions of a will, if any, proofs of claims filed against the estate and the disposition thereof, and the status of accounting. All of this information should be contained in the probate records, as required by 18 M.R.S.A. §253. These records would, therefore, appear to constitute a distributee's muniments of title under present Maine law.

Section 3-907, with its simple provisions for the execution of instruments or deeds of distribution, would greatly facilitate the search and marketability of titles and would thereby constitute a substantial improvement over present Maine law in regard to proof of a distributee's title to the assets of a decedent's estate.

8. Recovery of Distributed Assets

UPC 3-908 states that proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative, is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper. As the Uniform Comment to UPC 3-908 makes clear, the purpose of this section is to simplify controversies among successors of a decedent over claims to improperly distributed assets by channelling such controversies through the personal representative who made the distribution, or a successor personal representative appointed for the purpose of correcting the error. Although UPC 3-908 speaks in terms of conclusive evidence of the distributee's interest in the assets it does not remove any cloud on the title caused by an adverse claim prior to the running of appropriate limitation periods except as to the protection for bona fide purchasers provided in UPC 3-910.

Section 3-908 must be read in conjunction with UPC 3-909 which provides that a distributee of property improperly distributed or paid, or a claimant who was improperly paid, is liable to return the property improperly received and its income since distribution if he has the property, or its value if he no longer has the property. Under UPC 3-909, one who has received from a decedent's estate property to which he is not entitled is liable to return that property, or its value, upon discovery of the error. However, section 3-908 states that a deed of distribution to property distributed in kind constitutes conclusive evidence of succession to the interest of



the estate in the distributed assets as against all persons interested in the estate except the personal representative. Thus, if property of the estate is distributed in kind, as it is directed to be under UPC 3-906(a), and if the distributee receives a deed of distribution to the assets from the personal representative pursuant to UPC 3-907, upon discovery of any error made in the distribution the only person entitled to attack the interest of the wrongful distributee by asserting that an error was made in distribution and to thereby recover the estate assets from a wrongful distributee who holds a deed of distribution to the assets is the personal representative of the estate. Rightful heirs or distributees are precluded from proceeding individually against the wrongful distributee for recovery of the erroneously distributed assets by the conclusive presumption of rightful ownership contained in §3-908. Rightful distributees would, however, be able to proceed against the personal representative and force such return through him.

The Maine statutes have no provision comparable to UPC 3-908. Under present Maine law, every executor, unless excused by the will, and every administrator, except as otherwise provided in 18 M.R.S.A. §1552, must give bond before assuming his duties. 18 M.R.S.A. §§1501, 1554. One of the conditions of the probate bond is to faithfully administer the estate of the decedent, and to pay and deliver any balance remaining in the administrator's hands upon the settlement of his accounts to such persons as the judge of probate directs. The undertaking of the sureties on such bonds is that their principal shall comply fully with the conditions of the bond. For any failure on his part, including erroneously distributing the estate, the sureties are equally liable, along with the principal, to parties interested in the estate. Williams v. Estey, 36 Me. 243 (1853)

If an administrator or executor violates the conditions of his bond, an action for damages will lie thereon. Section 501 of Title 18 authorizes an action on the bond by judicial authority. Any party interested in the estate may be a plaintiff. However, although such a plaintiff authorized to proceed by the probate judge is the one who commences and prosecutes the action under §506, he has no direct benefit in the result. Any recovery on an action under §501 is for the benefit of the estate and not for the individual benefit of the interested party prosecuting the action. 18 M.R.S.A. §503; Hayes v. Briggs, 106 Me. 423 (1910). An action will lie under §501 for any failure on the part of the administrator to perform the duties required of him in the administration of the estate. Thus, an executor or administrator may be liable under §501 for failure to file an inventory, or to render a true account. Hayes v. Briggs, supra; Groton v. Tollman, 27 Me. 68 (1847); Brackett v. Thompson, 119 Me. 359 (1920).

Section 451 of Title 18 authorizes a party whose interest in the estate has been specifically ascertained to institute an action on the bond in the name of the probate judge, but in the interested party's own behalf and to recover judgment for his own personal benefit. The remedy of this section is based upon the theory that when an interest in an estate in his favor has been specifically ascertained by a probate court decree and the executor or administrator has failed to adjust it, the injured party has a personal remedy against the bond. Hayes v. Briggs, supra. Thus, where distribution of the estate has been ordered pursuant to

18 M.R.S.A. §2351, and where the executor or administrator there-  
after either fails to distribute the assets covered by the order or  
erroneously distributes those assets in a manner different from  
that called for by the decree, a rightful heir or distributee who  
has been wrongfully excluded from the distribution may proceed on  
the bond under §451 to recover personally that which is rightfully  
his under the court decree.

Thus, under Maine law, a wrongfully excluded heir or dis-  
tributee seeking to recover his rightful share of a decedent's  
estate would normally look to the personal representative or,  
ordinarily in practice, the sureties on the probate bond executed  
by the executor or administrator who made the erroneous distribution.  
If for some reason no bond had been posted, the wronged party would  
proceed directly against the executor or administrator for breach  
of his fiduciary duty. However, the non-deserving distributee is  
not entitled to keep the erroneously distributed funds merely because  
the rightful claimant has been made whole by recovery against the  
negligent administrator or his surety. Although no Maine cases have  
been found on this point, it is generally held that an executor or  
administrator has the right to recover erroneously distributed  
assets from a non-deserving distributee. Culbreath v. Culbreath,  
7 Ga. 64 (1849); Kunkel v. Kunkel, 110 A. 73 (Pa. 1920); Dillinger  
v. Steele, 222 N.W. 564 (1928). If a surety has been liable on  
its bond to account for assets wrongfully distributed, then the  
surety will be subrogated to the administrator's right to recover  
the wrongfully distributed assets. So, although a wrongfully

excluded heir or legatee would normally recover his rightful share from either the administrator or his surety, an action for the recovery of the erroneously distributed assets would then lie in favor of the surety or the administrator against the person to whom those assets had been wrongfully distributed.

An action on the bond, however, is not the only method of relief available to one who has been denied his rightful share of a decedent's estate. The general rule is that a rightful heir or legatee may sue a wrongful distributee under a theory of unjust enrichment for the recovery of property erroneously distributed to him by the estate representative. Restatement, Restitution §126, comment C; Moritz v. Horsman, 305 Mich. 627 (1943). Although no Maine case has been found in which such action has been taken, it would, under this theory, be possible for the rightful heir to proceed directly against the non-deserving distributee for recovery of the amount to which he is entitled, rather than to bring an action on the administrator's bond and then have the administrator or his surety turn around and recover the property from the wrongful distributee.

Thus, under present law, two remedies are available to an heir or a legatee who has been wrongfully excluded from the distribution of a decedent's estate. He may (1) sue the surety on the administrator's bond, in which case, if recovery is had, the surety will undoubtedly seek to subrogate itself to the negligent administrator's right to recover the wrongfully distributed assets from the first distributee, or he may (2) elect to proceed directly against the non-deserving distributee under a theory of unjust enrichment. As a practical matter, and this appears to be the case in Maine, the

plaintiff will nearly always proceed against the surety on the bond, since a speedy satisfaction of the judgment is usually assured if liability is made out. Nevertheless, the rightful heir may proceed directly against the wrongful distributee if he so desires.

While §3-908 would not change the predominant Maine practice in this area, it would change Maine law on this point by precluding a rightful heir or legatee from proceeding directly against the non-deserving distributee for recovery of the erroneously distributed assets by the conclusive presumption that the distributee, who has received an instrument or deed of distribution to the assets from the personal representative pursuant to UPC 3-907, is the rightful owner of those assets. Under the Code, only the personal representative, against whom the presumption does not apply, may recover erroneously distributed assets from a distributee who has received an instrument or deed of distribution therefor. This would seem to be a desirable result. The personal representative is, after all, ultimately responsible for achieving a correct distribution of the estate and it makes sense to allow him the chance to correct an erroneous distribution before private parties attempt to do so unilaterally. In addition, limiting the right to recover assets to the personal representative would also avoid subjecting the non-deserving distributee to a possible multiplicity of suits by individual heirs or legatees if he happened unfortunately to have improperly received assets which should have been divided among several claimants, as is now possible under Maine law. The personal representative may recover the assets and make a correct distribution among all the deserving successors at the same time.

This is not possible if the individual claimants each proceed separately against the one holding the assets. Each action would resolve only the relations between that particular claimant and the non-deserving distributee. The correct distribution of the entire estate among all parties would have to await the resolution of all the possible individual actions.

Section 3-908, with its provisions limiting the right to recover erroneously distributed assets from one holding an instrument or deed of distribution thereto, would appear to essentially conform to Maine practice, and to be an improvement over present Maine law in regard to the procedures available to correct an improper distribution.

Section 3-909 provides that unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a distributee of property improperly distributed or paid, or a claimant who was improperly paid, is liable to return the property improperly received and its income since distribution if he has the property. If he does not have the property, then he is liable to return the value as of the date of disposition of the property improperly received and its income and gain received by him.

The term "improper" as used in this section must be construed in light of §3-703 and the system of informal administration of estates contemplated by Article 3, Part 3 of the Code. An "improper" distribution could mean simply an erroneous distribution, such as where the personal representative makes a mistake of law and distributes an intestate estate per capita where it should have been distributed per stirpes, or where the personal representative makes a mistake of fact and distributes the wrong amount to a rightful

heir or legatee, or totally excludes one or several claimants. In such a situation, under the provisions of §3-909, the distributee improperly receiving the property is liable to return it or its value. The personal representative who made the improper distributions would also be liable, in the above situations, to interested parties for breach of his fiduciary duty to properly distribute the decedent's estate. UPC 3-712. The personal representative in this situation could recover against the improper distributees under UPC 3-909.

However, it is possible that a distribution which, upon the passage of time, turns out to be improper because of a change in testacy status, was nevertheless authorized at the time it was made. In such a case, the distributee would remain liable to return the property improperly distributed, but the personal representative would be absolved of liability to interested persons by reason of the fact that his action was authorized at the time, even though it later turned out to be improper.

Part 3 of Article 3 of the Code describes a system of informal probate and appointment proceedings which is designed to keep the simple estate which generates no controversy from becoming involved in truly judicial proceedings. Under its provisions a will may be informally probated and a personal representative informally appointed by application to the register. Upon making the findings required by §3-303 or 3-308, the register may issue a written statement of informal probate or appointment of a personal representative, or both. UPC 3-302, 3-307. The status of personal representative and the powers and duties pertaining to the office are fully established by informal appointment. UPC 3-307(b). The same problem could, of

course, occur under present Maine law where assets are distributed on the basis of intestacy, or a probated will, either of which may be superseded by a later discovered will which is thereafter probated within 20 years after the decedent's death.

Section 3-108 establishes a limitation period of three years from the decedent's death within which it may be determined, in either informal or formal proceedings, whether a decedent left a will. Informal probate of a will under the Code is conclusive as to all persons unless and until superseded by an order in a formal testacy proceeding initiated pursuant to Article 3, Part 4 of the Code. UPC 3-302. If a will has been informally probated, and if no formal proceeding challenging the will has superseded the earlier informal probate, § 3-108 has the effect of making the informal probate conclusive after three years from the decedent's death or twelve months from the time of informal probate, whichever is later. If no will is probated within three years from death, the section has the effect of making the assumption of intestacy final.

Under the Code, a personal representative would be under a duty to settle and distribute a decedent's estate as expeditiously as possible. UPC 3-703(a). Unless otherwise specified, such settlement and distribution would proceed without any adjudication, order, or direction of the probate court. UPC 3-704. These rights and obligations attach to the status of personal representative no matter what the source of his authority, whether it be appointment through formal or informal proceedings. A personal representative who has been appointed under an assumption concerning testacy which



may be reversed in the three-year period if there has been no formal proceeding, is protected by §3-703, which provides that a personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will is authority to administer and distribute the estate according to its terms and an order of appointment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent. UPC 3-703(b). Thus, a personal representative may rely upon and be protected by a will which has been probated without adjudication or an order appointing him to administer which is issued in informal proceedings even though formal proceedings occurring later may change the assumption as to the decedent's testacy status and thereby change the basis for distribution of the estate.

However, the fact that the personal representative is relieved of liability if the distribution was authorized at the time does not mean that the distributees may not be liable to return the property received or its value if the assumption concerning testacy is later changed. When an unadjudicated distribution of the estate has occurred, the rights of interested persons to show that the basis for the distribution (i.e., an informally probated will, or informally issued letters of administration) is incorrect, is preserved against distributees by §3-909. Official Uniform Comment to UPC 3-909. Thus, a distribution may be authorized, within the meaning of §3-703, at the time it was made, and yet be "improper" within the meaning of §3-909 if the basis of distribution has been changed by a reversal of the

decedent's testacy status. So distributees who receive property from an estate distributed before the three-year period provided in §3-108 expires, where there have been no formal proceedings accelerating the time for certainty as to a decedent's testacy status, remain potentially liable, under §3-908 and 3-909, to the personal representative on behalf of persons determined to be entitled to the estate by formal proceedings instituted within the basic limitations period.

Section 3-1006 sets forth the basic limitations period for actions against distributees under §3-909 for the recovery of improperly distributed assets. It provides that, unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative, such claims for the recovery of improperly distributed property are forever barred three years after the decedent's death or one year after the time of distribution thereof, whichever is later. Thus, distributees of property pursuant to an informally probated will or an assumption of intestacy in informal appointment proceedings will be protected against the possibility of having to return the property because of a change in testacy status, at the later of three years from the decedent's death or one year after the time of distribution of the property.

As will be seen, this period during which distributees remain potentially liable to return the property distributed to them because of a change in testacy status is much shorter under the Code than is presently the case under existing Maine law. Also, distributees in informal proceedings, if they feel there is a need for greater protection than that given by the limitations period

contained in §3-1006, can protect themselves against a possible change in testacy status within the three-year limitations period by bringing a formal testacy proceeding under Part 4 of Article 3, thereby shortening the period during which the basis of distribution may be attacked to the time allowed, under UPC 3-412 and 3-413, for appeals from, or petitions to vacate, formal probate court decrees. The Code leaves it up to the distributees of an estate to determine whether they feel they need the added protection that is readily available in formal proceedings, or whether they are content to rely on the limitations periods in §3-1006 and 3-108 to finally cut off all possible attacks on their right to succeed to a portion of the decedent's estate.

Under Maine law, creditors and recipients of specific legacies and bequests have claims against the estate, to be paid out of the estate according to their legal priority as assets are realized. Hanscom v. Marston, 82 Me. 288 (1890). If, after payment of these claims, a balance remains in the estate, the executor or administrator must petition the probate court for an order of distribution determining who are entitled to the residuum and their respective shares therein under the will or according to the laws of intestacy. 18 M.R.S.A. 2351. An administrator or executor has fully administered so far as the estate is concerned, when he has paid the debts and specific legacies and bequests, settled his accounts or account thereof, and obtained an order of distribution of the balance in his hands to the persons entitled thereto. From that time, his duties are not to the estate, but to the individual distributees. Mudgett's Appeal, 105 Me. 387 (1909). When an executor or administrator has paid or delivered over to the persons entitled thereto

the money or other property in his hands, as required by the decree of the probate court, he may perpetuate the evidence thereof by presenting to the probate court, within one year after the decree was made, an account of such payments or the delivery over of such property. This account, upon being proved to the satisfaction of the court, shall be allowed, after public notice, as final discharge. 18 M.R.S.A. 2351.

Thus, under Maine law there are two types of distributions-- those which are authorized to be made without a court order, and those which may be made only pursuant to a decree of the probate court. Specific legacies and bequests come within the first category, while all other distributions belong in the latter category. The Code would do away with this statutory distinction between specific bequests and legacies and all other distributions. Under UPC 3-704 a personal representative is directed to distribute a decedent's estate without any adjudication, order, or direction of the probate court, except as otherwise provided for supervised administration under Part 5 of Article 3, or when the representative needs judicial direction to resolve a question concerning distribution. Likewise, in those cases under the UPC where judicial direction is required or appropriate, no distinction is drawn between specific devises and other distributions. The distinction that is drawn under the Code is between the ordinary situation where distribution proceeds without judicial supervision, and those situations where interested parties feel a need for judicial supervision, regardless of whether it is testate or intestate and regardless of whether the property being distributed is the subject of a specific or a general gift.

The Maine statutes have no provision comparable to UPC 3-909, dealing with the liability of a distributee to return estate property which was improperly distributed to him. Although no Maine case has been found which dealt with this issue (probably because the practice in Maine is to sue on the bond), the general rule adhered to in most other jurisdictions is that a distributee is liable to return property which was improperly distributed to him, and he may be sued under a theory of unjust enrichment for the recovery of such property, by either the estate representative, Culbreath v. Culbreath, 7 Ga. 64 (1849), Kunkel v. Kunkel, 110 A. 73 (Pa. 1920), Dillinger v. Steele, 222 N.W. 564 (Iowa 1928), or by a rightful heir or legatee. Restatement, Restitution §126, Comment c; Moritz v. Horsman, 305 Mich. 627 (1943). Assuming that the Maine courts would follow the general rule if faced with the issue, UPC 3-909 would not change the basic liability of a distributee to return property which was improperly distributed to him. However, the Code would change the methods by which such an improper distribution could be corrected (see discussion of UPC 3-908) and the time limits within which recovery of the property could be sought from the distributee.

These changes in time limits for correcting improper distribution derive from the UPC's emphasis on informal distribution, and are primarily expressed in UPC 3-1006. In essence, the UPC is designed to provide the option (which would presumably be widely used) to proceed without court order, while under Maine law most distributions can be made only pursuant to court order and even those distributions that can now be made initially without court order will ultimately be reflected in a decree. Thus, the limita-

tion on correcting erroneous distributions under current Maine law is essentially the appeal period for the court's approval of the representative's account, subject, however, to subsequent determination of a change in testacy status within the 20 year statute of limitations in case an after-discovered will is found to supersede a prior determination of intestacy or a prior probate of a will.

9. Protection of Purchasers From Distributees

Section 3-910 provides that if property distributed in kind, or a security interest therein, is acquired for value by a purchaser from, or a lender to, a distributee who has received an instrument or deed of distribution from the personal representative or if the property is so acquired by a purchaser from (or lender to) a transferee from such a distributee, then the purchaser or lender takes title free of the rights of a person interested in the estate and incurs no personal liability to the estate or to any interested person, whether or not the distribution was proper or supported by court order, or whether or not the authority of the personal representative was terminated before the execution of the instrument or deed. Thus, bona fide purchasers are protected if they take from a person with a deed of distribution, but the liabilities of the distributees and personal representative are not affected. The section includes protection for a purchaser from (or lender to) a distributee who, as personal representative, has executed a deed of distribution to himself.

The protection afforded by this section is essentially that given to a bona fide purchaser for value from a distributee under present law. See Restatement, Restitution, §126, Comment f. Both take title to the purchased or secured property free of the rights

of any other persons which may have arisen because of a defect in the probate proceedings, including an error by the personal representative in distributing the property.

Section 3-910 sets forth the extent of the duty of inquiry for one who would acquire the rights of a bona fide purchaser for value under that section. To be protected under that section, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind, even if the personal representative and the distributee are the same person, or whether the authority of the personal representative had terminated before the distribution. It would seem, however, that the purchaser or lender would have to make inquiry as to the initial appointment of the personal representative in order to assure his own protection under this section. Although the section does not expressly address this point, it would seem from the section's language that any deed of distribution upon which the purchaser was relying would have to be from someone who was in fact the personal representative, under the terms of this section, and if he had never been so appointed the purchaser or lender would not come within the section's terms.

The last sentence of UPC 3-910 provides that any recorded instrument described in that section on which a state documentary fee is noted shall be prima facie evidence that such transfer was made for value. In light of the fact that there is no provision in the Maine statutes for noting a state documentary fee on recorded instruments, that language has been omitted from the Maine version of the Code.

The effect of this section, as pointed out in the Uniform Comment, is to make an instrument or deed of distribution a very desirable link in a chain of title involving succession to the property of a decedent, and substantially overcome any problems of marketability of property coming out of such an estate.

10. Partition in Distribution

Section 3-911 of the Uniform Probate Code provides that when two or more heirs or devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one or more of the heirs or devisees may petition the court prior to the formal or informal closing of the estate, to make a partition of the same. The court is directed to partition the property in the same manner as provided by the law for civil actions of partition. If the property involved cannot be partitioned without prejudice to the owners and cannot conveniently be allotted to any one party, the court may direct the personal representative to sell such property and distribute the proceeds.

Under present Maine law, provisions for proceedings to partition real estate are contained in two separate chapters of the Maine Revised Statutes. Chapter 219 of Title 18 provides for the partition, by the probate court, of the real estate of a decedent among the surviving spouse, heirs or devisees of the decedent. Ordinary civil actions in Superior Court for the partition of real estate are provided for in Chapter 719 of Title 14.

Under 18 M.R.S.A. §1951, the probate court, having jurisdiction over the estate of a decedent, upon petition, may partition the decedent's real estate among the widow or widower and heirs or devisees, or persons holding under them. Such a partition may be



made long after the settlement of the estate. Earl v. Rowe, 35 Me. 414 (1853). However, § 1951 also provides that the jurisdiction of the probate court to entertain a petition for partition is limited to those cases "where the proportions of the parties are not in dispute between them or do not appear to the judge to be uncertain, depending upon the construction of any devise or conveyance, or upon any other question that he thinks proper for the consideration of a jury and a court of common law." The provision stating that the probate court has no jurisdiction to partition real estate where the proportions of the parties are dependent upon the construction of a devise in a will, is of doubtful force at the present time because of the provisions of 4 M.R.S.A. §252, under which probate courts are given jurisdiction in equity concurrent with the Superior Court in the construction of wills. In re Estate of Cassidy, 313 A.2d 435 (Me. 1973). There appears to be no reason why a probate court should deny a petition for partition because of doubt as to the meaning of a devise, when the judge, by virtue of 4 M.R.S.A. §252, has the power to construe the will and resolve that doubt.

Partition may be ordered on the petition of any of the owners of any share, after giving personal notice to each of the other owners in the state, and public notice if any reside outside of the state. 18 M.R.S.A. §1957. Upon filing of the petition, the probate judge appoints three commissioners, who examine the property and return a plan of partition to the court. 18 M.R.S.A. §2001. If the judge is not satisfied by the return, he may set it aside and commit the case anew to the same or different commissioners. The

return of the commissioners, when accepted by the court, becomes binding on all interested persons and must be recorded in the registry of deeds. 18 M.R.S.A. §2003.

Normally, each owner will be assigned a parcel of the premises to hold as sole owner, but occasionally the property cannot be divided without great inconvenience, because of the nature of the property and the variety of fractional interests therein. Where the whole or any part of the real estate, of greater value than any party's share, cannot be divided without great inconvenience, it may be assigned to any one or more of the parties, upon payment by such party or parties to the others of such sums as the commissioners award to make the partition just. 18 M.R.S.A. §1953.

The provisions of Title 14, Chapter 719, providing for a civil action in Superior Court for the partition of real estate, are quite similar in substance to the provisions of Chapter 219 of Title 18. The proceedings under Title 14 are commenced by complaint rather than by petition. 14 M.R.S.A. §6501. Any person seized or having a right of entry into real estate in fee simple or for life, as tenant in common or joint tenant, or any person in possession or having a right of entry for a term of years, as tenant in common, may seek partition. 14 M.R.S.A. §§6501, 6502. After deciding that partition should be made, the court appoints three to five commissioners to make the partition. 14 M.R.S.A. §6511. When the commissioners' return is finally accepted by the court, judgment thereon is entered accordingly, and a copy thereof recorded in the registry of deeds. 14 M.R.S.A. §6521. As in

proceedings in the probate court under Title 18, when any parcel of the property cannot be divided without great inconvenience, it may be assigned to one party, upon his paying a just sum to those parties who receive less than their share of the real estate.

14 M.R.S.A. §6515.

One of the chief differences between partition proceedings in the probate court and similar proceedings in the Superior Court is in the jurisdiction of the two courts. Partition proceedings in the probate court are open only to surviving spouses, heirs and devisees of a decedent over whose estate the court has jurisdiction, and all those holding under them. Jurisdiction is also limited to those cases where there is no uncertainty or dispute as to the proportions of the property to which the parties are entitled.

18 M.R.S.A. §1951. The jurisdiction of the Superior Court in partition proceedings is much broader. Any person who owns real estate as a joint tenant or tenant in common may bring an action for partition, and the court is not deprived of jurisdiction because of dispute as to title or interests therein. 14 M.R.S.A. §§6501, 6502.

Under the proposed Code partitioning of property by the probate court would be controlled by 3-911 and Chapter 719 of Title 14. Repeal of Title 18, Chapter 219 and enactment of 3-911 would effect some changes in Maine law in regard to the partitioning of jointly held property by the probate court.

The probate court would no longer be able to hear petitions for partition long after the settlement of a decedent's estate. Under §3-911, any petition seeking such partition would have to be

made prior to the formal or informal closing of the estate (see UPC 3-1001-3-1003). After the closing of an estate, heirs and devisees seeking partition would have to proceed in the Superior Court, like anyone else. Also, with the repeal of 18 M.R.S.A. §1951, the probate court would no longer be limited to hearing petitions for partition only in those cases where there is no uncertainty or dispute as to the proportions of the property to which the parties are entitled.

Under 3-911, the probate court would be given specific power to direct the personal representative to sell any property "which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party." Neither Chapter 719 of Title 14 nor Chapter 219 of Title 18 has a provision explicitly authorizing the sale of the property in partition proceedings in those situations where, because of the nature of the property and the fractional interests therein, the premises are not susceptible of physical division and where they cannot conveniently be allotted to one of the parties. However, in Williams v. Coombs, 88 Me. 183 (1895), it was held that a single justice of the Supreme Judicial Court, sitting in equity, had the power, in partition proceedings, to order a sale of the property where because of the nature of the property, an actual partition thereof could not be made without a great impairment of its value. See also Burpee v. Burpee, 118 Me. 1 (1919). No case has been found in which a probate judge was held to be authorized to order such a sale under certain circumstances.

Title 14, Chapter 719 and Title 18, Chapter 219 apply in terms

to proceedings for the partition of real estate only. 14 M.R.S.A. §§6501, 6502; 18 M.R.S.A. §1951. Code §3-911 authorizes the probate court to partition personal property as well as real estate.

Section 1952 of Title 18 provides for the partition of certain future interests. Under its provisions, an owner of a reversion or a vested remainder, expectant on the determination of a particular estate under a decedent's will or otherwise, may file a petition for partition before his interest vests in possession, while the life tenant is still in possession of the property. Chapter 719 of Title 14 has no comparable provision; so one consequence of the repeal of Title 18, Chapter 219 would be to withdraw this right of a reversioner or remainderman to seek partition before his interest vests in possession. Such a result does not seem undesirable considering the limited usefulness of the section and the various problems it raises in operation.

First, in most cases, there is no reason why the reversioner or remainderman cannot wait until his interest vests in possession before seeking partition. Circumstances may change between the time of the creation of the interest and its vesting in possession, which changes may increase or decrease the desirability of seeking partition. There are also practical problems which could arise in the actual partitioning of the property which are not present in the ordinary situation where the parties to the proceeding are in possession of the property. One of these problems is the possible difficulty of surveying and appraising the property. A survey of the land may be necessary in order to make a partition of the property, but if the life tenant objects to entry onto his land for this purpose,

it is not clear that a survey could be made. Another problem arises in the situation where the property cannot be divided proportionately among the reversioners or remaindermen. If the whole is assigned to one of the parties, problems arise concerning the payment of owelty; when is it to be paid, at the time of division or at the time of vesting in possession? If owelty is to be paid at the time of the partition, is it to be based on the depressed value of a remainder interest, or on the prospective higher value of the property when the interest vests in possession? If it is not to be paid until the interest vests in possession, does the amount due collect interest from the time of partition? Another problem arises if the property cannot be divided proportionately and yet cannot be conveniently allotted to one of the parties. Normally a sale of the property will be made under these circumstances. If, however, a sale become necessary in a partition proceeding among reversioners or remaindermen, such sale of a remainder interest in the property will bring a severely reduced price compared to what could have been realized if the parties had waited until their interests vested in possession and then sold a present interest. The present §1952 is a particularly anachronistic provision. It provides for partition of future interests only where those interests are created by will, and then only by the probate court. Thus partition which is available for real estate in possession, whether the title under which possession is held derives from will, intestacy or inter vivos conveyance, is available for future interests only in the fortuitous circumstance of their having been created by will. Future interests created inter vivos cannot be partitioned. Furthermore, while §3-911 provides for partition in

probate under the same rules for partition that apply to the civil courts of general jurisdiction, the present Maine law provides that even those future interests that were created by will can be partitioned by the probate court but makes no provision for partition of those same interests by the general jurisdiction courts that can partition real estate held in possession. No reason is apparent to justify the present section's distinctions.

There is no apparent reason to preserve the anachronisms of this section, and the problems attendant upon a partition proceeding among reversioners or remaindermen outweigh any possible limited usefulness of such proceedings.

#### 11. Successors' Agreements

UPC 3-912 provides that successors to the decedent's estate who are competent may make agreements among themselves concerning how the estate is to be distributed, and that such agreements are binding upon the personal representative in his distribution of the estate to heirs or devisees. In order to be effective, the agreement must take the form of a written contract, executed by all of the successors who are affected by the provisions of the contract. The effectiveness of such a contract, as well as the binding effect on the personal representative, is subject to the rights of creditors and taxing authorities and all other successors who are not parties to the contract. The personal representative's duty is not affected by his obligation to honor such private agreements, insofar as the agreement would prejudice other interested persons who are not competent parties to the contract.

The trustee of a testamentary trust which is a devisee would be a competent successor for purposes of entering into such a private agreement. The section relieves the personal representative of the

estate from any obligation to see to the performance of the trust by the testamentary trustee. Thus, for example, if such a trustee successor entered into an agreement that deviated from the terms of the trust, the personal representative would be protected in distributing the estate under the terms of the private agreement, so long as the trustee of the trust is willing to accept the trust, and is a person other than the personal representative himself. The trustee is expressly not relieved of any of his fiduciary duties owed to the trust beneficiaries, and he remains liable for breach of any such duties that may be caused by any contract he becomes a party to under 3-912.

Present Maine law differs from the UPC section only insofar as the probate court in Maine has been held not to have jurisdiction to enforce such private agreements among successors through an order of distribution. The court's order approving distribution could send the property only to those persons officially entitled under a valid will or the laws of intestacy. Private agreements such as those covered by UPC 3-912 are valid and enforceable, but not in the probate court's decree of distribution. Their enforcement is relegated to a separate proceeding in the common law court of general jurisdiction. Hutchins v. Hutchins, 141 Me. 183 (1945); Bergeron v. Estate of Cote, 98 Me. 415, at 419 (1904).

The difference between the UPC and Maine law is at most one of procedural form. There is, in fact, language in some of the earlier Maine cases indicating that, while the decree of distribution must go only to heirs or devisees and while the probate court had no jurisdiction to consider the private agreement, the actual distribution by the administrator or executor might be made to the distributee, and that payment of the property might be made a



condition of the order of distribution. Knowlton v. Johnson, 46 Me. 489, at 490 (1860); Tillson v. Small, 80 Me. 90, at 91 (1888).

It is difficult to see how these techniques could operate to directly get the property to assignees when the court lacks jurisdiction over the contract, in light of the fact that the distribution must be authorized by court order.

In any event, the basic rationale for the procedural limitation in current Maine law is eliminated if the court handling probate matters is a court with full power jurisdiction and if there is no necessity for a court order of distribution. Thus, there would be no reason to retain the rule of the cases above cited. Such a change would increase judicial efficiency by allowing the resolution of the validity and enforcement of such agreements in one proceeding when there is a dispute appropriate for court action. Perhaps more significantly, it would make clear that the personal representative could and must follow such agreements in his distribution. Indeed, the focus of UPC 3-912 is on the effect of such agreements on the personal representative, rather than on the ability of the court to order distribution pursuant thereto. The personal representative could, of course, seek judicial guidance under UPC 3-704 in case of doubt about the validity or meaning of such a contract, and judicial enforcement of the personal representative's obligations would be available under UPC 3-105, 3-607, 3-1001, 3-1002, and the supervised administration of Article III, Part 5.

While there may appear to be some overlapping of functions between UPC 3-912 and Part 11 of Article III, there are clear differences in their focus and purposes. (1) Part 11 deals with the facilitation of settlement and compromise of bona fide con-

troversies concerning a will or the estate administration, while 3-912 deals with private agreements among successors without regard to the existence of any controversy about the will or the estate. (2) Under 3-912, only competent successors may make agreements which are binding on the personal representative, while Part II provides a way of binding persons not themselves legally competent. (3) Furthermore, UPC 3-912 itself has no effect on agreements which violate the testator's testamentary plan in ways which may not be legally recognizable. Under 3-912, agreements may bind on the personal representative even though they violate the testamentary scheme if they are valid despite that objection. The personal representative would not be bound by a contract which was not valid. For example, an assignment of an outright devise would be a valid contract and binding on the personal representative under UPC 3-912. But an agreement for premature termination of a trust in violation of the testamentary purpose, or an agreement to eliminate a valid spendthrift provision in a trust, would not gain any validity because of UPC 3-912. If such a contract had been adjudicated to be invalid, it would not bind the personal representative, but the personal representative would be under no obligation, for purposes of 3-912, to look to the validity of such agreements. The liability for unallowable deviations from any trust terms rests on the trustee, and is expressly reserved by this section, but the personal representative is removed from any role of overseeing the operation of the trusts to which he is to distribute devises, and of which he is not himself trustee.

Under Part II of Article III, on the other hand, where a bona fide controversy exists, otherwise unallowable deviations from the trust terms may be upheld upon hearing by the court. The purpose of Part II is to make settlements of such controversies possible, and thus save the estate from wasteful litigation by treating the settlement of probate disputes on a par with the settlement opportunities in other kinds of controversies.

While UPC 3-912 keeps the personal representative out of disputes concerning the validity of agreements for distribution entered into by a trustee, the following section (UPC 3-913) recognizes that the personal representative does have some fiduciary obligation to the trust beneficiaries of a testamentary trust. The kinds of issues involved in these two sections are, however, different. The concern recognized by UPC 3-913 arises if the personal representative may have reason to believe that the trustee will not perform his trust obligations properly--e.g., doubts about the trustee's integrity or his ability to function properly--and provides an optional way for the personal representative to protect himself upon distribution if he feels the risks do not require judicial resolution. The trust-related issues which 3-912 says are not the concern of the personal representative relate to changes in the terms of the trust by private agreements that may or may not be legally valid.

## 12. Special Distributees

### a. Distribution to Trustees

UPC 3-913 deals with certain methods available to the personal representative who perceives that distribution of a devise to a testamentary trustee would involve risks to the interests of the

trust beneficiaries because of some problem with the particular trustee--e.g., doubts about the integrity or competence of the trustee, conflict of interest problems, equivocation about the trustee's acceptance of the trust. In such cases, 3-913 provides that the personal representative may (a) require that the trust be registered if the state in which it is to be administered provides for registration, (b) require that the trustee inform the beneficiaries of the trust of his acceptance, and keep them further informed as required by UPC 7-303, and (c) petition the court to require the trustee to post bond if the personal representative thinks that distribution might jeopardize the interests of persons not able to protect themselves, and if bond is not excused by the trust instrument. The section finally provides that the failure to exercise any of those options will not result in an inference of negligence on the part of the personal representative.

The provisions of 3-913 seem to be appropriate and desirable ways of allowing the personal representative to make sure the trust beneficiaries are protected before distribution to the trustee. The Commission made one modification in UPC 3-913 by changing "provides for" to "requires" in subsection (a) in order to conform it to the recommendation for permissive rather than mandatory registration in Article VII.

b. Distribution to a Person Under Disability

Section 3-915 merely makes clear the authority of the personal representative to distribute devised to the conservator of any legally incompetent person, or to any other person who is legally authorized to accept such distributions by giving a valid receipt and discharge for it, and protects the personal representative who

distributes to minors and other legally incompetent persons in this way.

The only even generally related present Maine law related to this point is 19 M.R.S.A. §216 which provides that any person holding funds not exceeding \$2,500 to be paid to any minor as a result of a court order may make payment to the minor if he is at least 12 years old, or to the parents, or to some other person selected by the court. Other provisions are made for accounting and receipt and for payments to minors under the age of ten.

Under the proposed Maine code, that provision would be replaced by §5-103, as discussed in Chapter 5.B.2 of this study. UPC 3-915 is really nothing more than a clarification of the authority of the personal representative to distribute the shares of incompetents to those who are entitled by that section or by any other provisions of the law to receive them or give receipts for them.

### 13. Disposition of Unclaimed Assets

UPC 3-914 provides for the handling and escheat of estate assets unclaimed by those who are entitled to them. UPC 2-105 deals with the escheat of the estate of an intestate decedent with no heirs.

UPC 3-914 provides that the personal representative shall distribute the share of a missing person to that person's conservator, if he has one, otherwise to the state treasury to become part of the state escheat fund. The money is to be held for eight years, at which time the claims of entitled persons are barred. During the eight years, the money is to be paid to the person entitled to it, upon proof of his entitlement. If the state treasurer does not pay such person, that person may petition the court which

appointed the personal representative for an order requiring the payment.

The comparable Maine provisions are contained in 18 M.R.S.A. §§2351, 2353, and 1655-1657. The basic escheat statute is 18 M.R.S.A. §1001(8). Section 2351 provides that unclaimed assets be paid to the county treasurer after six months from the probate court order distributing those assets. Section 2353 provides for payment to a claimant upon proof of his entitlement within 20 years, with the right to petition the probate court for an order requiring payment, and an annual publication by the county treasurer of a list of the persons entitled to such funds. After 20 years, the unclaimed funds escheat to the county. There are comparable provisions in Sections 1655-1657 for the handling of funds by a public administrator administering an intestate estate of a person who apparently has no heirs living within the state. Those provisions, however, require deposit of such funds with the state treasurer instead of the county treasurer, deposit of the balance after payment of debts and other administrative expenses instead of deposit six months after the order of distribution, and ultimate forfeiture to the state rather than to the county after 20 years. The basic escheat provisions of §1001(8) provide for ultimate escheat to the state.

As can be seen, there is little basic difference between the UPC provisions and Maine law in this area. Perhaps the most significant area of disagreement is the shorter period provided by the UPC before forfeiture of the unclaimed money to the state. Another difference arises from the provision that such unclaimed assets in a regularly administered estate escheat to the county under current Maine law, whereas under the UPC and current Maine law as to escheat

with a public administrator or in the case of someone dying interstate with no heirs, the forfeiture is to the state. In addition, the current Maine law requires annual notice by the county treasurer.

The choice between an eight year or 20 year limitation period involves a policy decision in which the policy of finality after a reasonable period must be weighed against a policy favoring escheat only in absolutely necessary circumstances. It is doubtful that any escheat at the end of eight years would be saved for "new-found" successors under a twenty-year statute. Indeed, twenty years seems like an extraordinary long time to wait, while eight years is tied to the three-year overall period of limitations added on to the five year presumption of death for a missing person under UPC 1-107.

The provision of Maine law requiring deposit in the county rather than the state treasury, and requiring local notice annually, would seem to serve a useful purpose in keeping the property in the locality where it would most likely be looked for and in providing some system of notice which would increase the chances of ultimately distributing the property to the rightful persons. These provisions would have the added advantage of not disrupting the present mechanics of the system for handling unclaimed property, and have been incorporated into the Maine version of §3-914.

It would seem better, however, to provide for the ultimate forfeiture to go to the state rather than the county. There seems to be no particular reason for benefiting the treasury of the particular county in this fortuitous way. The present Maine escheat provisions of 18 M.R.S.A. §1001(8), and the publicly administered estate assets under 18 M.R.S.A. §1657, both ultimately escheat to the state. The ultimate forfeiture, therefore, is provided for the state, rather than

the county, although the money will be held by the county during the period before which claims are barred, under the Commission's bill.

The adoption of §3-914 with the modification mentioned would, in effect, bring together in one section the essential Maine law on unclaimed assets of both regularly and publicly administered estates. The sections on the public administrator are relocated as §3-619 of the proposed Maine Probate Code. The present §§1655 and 1657 appear in substance as subsection (e) of §3-619, and incorporate the provisions of §3-914 for handling the undistributed assets.



I. Closing the Administration

1. Methods of Closing: With and Without Court Order

Sections 3-1001 through 3-1003 provide alternative ways of officially closing the administration of an estate. Sections 3-1001 and 3-1002 provide for formal proceedings before the court, while §3-1003 provides for the filing of a closing statement by the personal representative.

a. Order of Complete Settlement

UPC 3-1001 is the most completely formal method for closing. Under this section a personal representative or interested person may petition the court for an order of complete settlement. The personal representative may so petition at any time, and any other interested person may do so after one year from the original appointment of a personal representative. However, no such petition can be filed by either until after the time for filing claims against the estate has expired--i.e., four (4) months after the first publication of notice to creditors, or 3 years after decedent's death if no creditor notice was published (see UPC 3-801 and 3-803 (a)).

Since 3-1001 contemplates a complete formal order of settlement, notice is provided for all interested persons, and the testacy status of the decedent may be determined in these proceedings if no formal determination of testacy has yet been made. The section does, however, provide that the petition "may" request a determination of testacy, consideration of the final account or an order compelling an account and distribution, construction of any will or determination of heirs, and adjudication of the final settlement and distribution. Therefore, the language of the section seems to indicate that orders and proceedings under 3-1001 may be tailored to adjudicate finally

a limited number of issues related to the closing of the estate, although it no doubt contemplates full adjudication in the ordinary use of these provisions. It should be noted that UPC 3-505 requires that closing under this section is to be used whenever there is supervised administration.

Provision is further made, in subsection (b), for curing any previous oversights in providing notice in earlier formal testacy proceedings. Under these provisions, notice may be given to parties previously omitted, and to other persons who are determined to have an interest (even if previously given notice) if the determination that they have an interest is based "on the assumption that the previous order... is binding as to those (who were previously) given notice of the earlier proceeding." The court, after hearing, may then confirm or alter the previous testacy order "as it affects all interested persons." In other words, the section seeks to provide for the hearing of previously omitted persons, and full modification of the previous order based on their right to be heard, while at the same time respecting the finality of the previous order for those who did have previous notice by limiting the hearing to those not already bound.

The present Maine system does not have an arrangement quite like UPC 3-1001(b). Anyone improperly omitted or not given notice in a probate proceeding would have to rely on 4 M.R.S.A. §401, which in most cases gives a person aggrieved by any order or decree of a probate judge twenty days in which to appeal to the "Supreme Court of Probate" (i.e., the Superior Court) within the county. A further extension of time to appeal is authorized in some extraordinary circumstances by 4 M.R.S.A. §403, where a person "from accident, mistake, defect of notice or otherwise without fault on

his part omits to claim or prosecute his appeal."

The Maine Law Court has held that in the absence of fraud or lack of jurisdiction attacks upon decrees of distribution for errors can only be made by appeal and then only within the one year allowed by 4 M.R.S.A. §403. In re Merriam, 241 A. 2d 602 (Me. 1968). In the Merriam case, the rule of 4 M.R.S.A. §403 was applied to bar a proceeding in the original probate court itself. In other words, the section, though in terms applying to an appeal, is treated as applying also to an action or proceeding in the probate court by the aggrieved party.

The same rule of finality was applied in one case when the probate court had erroneously ordered distribution per stirpes instead of per capita and distribution was made accordingly, no appeal being taken. When objectors later tried to oppose the allowance of the administrator's account, they were rebuffed: the order of distribution was conclusive, not having been appealed from. Mudgett's Appeal, 103 Me. 367, 69 Atl. 575 (1907).

Under present law, an omitted or unnotified heir or devisee who wanted to participate in a complete settlement could apply to the probate court itself and move to be included in the distribution. Notice of the motion would be given to other interested parties. If the probate court decided the motion against the petitioner, appeal would lie to the Supreme Court of Probate. The omitted party should apply to the probate court itself first, since Maine has a long-standing rule that the Supreme Court of Probate has appellate and not original jurisdiction, and the original jurisdiction of the probate court itself is exclusive. Kimball, Petitioner, 142 Me. 182, 49 A. 2d 70 (1946). The "accident, mistake, defect of notice"

referred to in section 403 of Title 4 has reference to an accident, mistake or defect of notice causing the person not to make a timely appeal from the decision of the probate court. It does not refer to a lack of notice causing the person not to appear in the probate court in the first instances.

One of the features of sub-section (b) is that the evidence of testacy or intestacy already taken in the testacy proceeding from which the petitioner was wrongly omitted would constitute prima facie proof of testacy or intestacy, as the case might be, in the settlement proceeding. In other words, the omitted party may be accommodated in the final settlement without going back to the beginning of the entire probate process. This last sentence of §3-1001(b) would help to clarify this point and provide reassurance to the previous finding of testacy or intestacy will not be upset when the new entrant comes upon the scene to share in distribution. Such a person would naturally treat as valid those findings favorable to him even though made without his participation, and even without the clearer authorization to do so that is contained in this subsection.

b. Closing Formally Without Formal Testacy Proceedings

UPC 3-1002 provides comparable formal closing adjudication expressly designed to finally resolve issues among persons interested under an informally probated will, without the necessity of obtaining formal probate. Such proceedings would not, of course, be binding on anyone who subsequently sought to formally probate a different will, or formally determine that the decedent died intestate, so long as such proceedings were commenced within the applicable limitations period. Because of this limited function and effect of 3-1002,

notice need not be given to the heirs of the decedent, since disputes as to the testacy status are left to the ordinary methods of replacing the informally probated will through formal testacy proceedings as provided in Parts 3 and 4 of Article III. By the same token, if it appears that the decedent is partially intestate, this section cannot be used, and proceedings must be brought under 3-1001 if any adjudication is desired, since, of course, even partial intestacy would require notice to, and participation by, the heirs at law of the decedent.

c. Informal Closing

UPC 3-1003 is the extension of the Code's informal administration concept to the closing of the estate. It provides a way by which the administration can be officially closed and the personal representative discharged without judicial involvement in the absence of any objections by interested persons. It is not available sooner than 6 months after the original appointment of a general personal representative (thus excluding a special administrator, see UPC 1-201 (30)), or 6 months after the first publication of notice to creditors under UPC 3-801, whichever is later. The use of this informal closing statement is not necessarily linked to the kind of administration, probate, or appointment that was previously used. That is, the closing statement may be used even though probate or appointment was formal, or particular issues were taken to the court under UPC 3-105 or 3-607 during the course of administration. Conversely, informal testacy determination or appointment does not preclude the use of UPC 3-1001 or 3-1002.

To proceed to close by the statement method under §3-1003, the personal representative must file a verified statement with the court, stating that he has (1) filed creditor notice beginning at least 6 months ago, (2) fully administered the estate in its particular aspects, including a statement of provisions made for any conditional distribution or any arrangements to accommodate still outstanding liabilities, (3) sent a copy of the filed statement to "all distributees and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred," and (4) furnished a full written account of his administration to the distributees whose interests are affected thereby.

The filing of this statement begins the running of a one-year period under subsection (b) for terminating the personal representatives appointment, and a 6 month period for barring his liability to successors and creditors for any prior breach of fiduciary duty (except for fraud, misrepresentation, or inadequate disclosure) under UPC 3-1005, unless relevant proceedings are commenced prior to the running of the respective time periods. Thus, the closing statement is also an alternative to what amounts to a fourth method of "closing" an estate--the distribution and settlement of the estate informally, with reliance solely on receipts and releases from distributees and creditors and on the running of the basic statutory limitations periods of UPC 3-108 and 3-1006. The closing statement would allow the personal representative to wind things up at an earlier date than the three or four year minimum period under 3-1006, and yet do so without involving the court, in the absence of timely objection. The very earliest that the representative could be discharged from liability under 3-1003 would be one year after the decedent's death, plus the period of time between his death and

the first appointment of a general personal representative, if advertising of notice to creditors was commenced promptly upon appointment. UPC 3-307(a) or 3-414(b), 3-801, 3-1003(a), and 3-1005. Somewhat earlier adjudication could be obtained in appropriate cases by court order upon petition by the personal representative under 3-1001 or 3-1002, in which case protection would be achieved at the running of the time for any appeal from such order.

Some question may exist as to the adequacy of notice to interested persons that the closing statement is being used. The statement need only be sent to all "distributees" and creditors or claimants whose unbarred claims have not been paid. Since UPC 1-201(10) defines a distributee as one who "has received property of a decedent from his personal representative" except as a creditor or purchaser, no requirement exists as to notification of those to whom the personal representative improperly failed to distribute. Such should-be distributees would still purportedly be barred under 3-1005 from requiring distribution by the representative, but without having had any notice of the event (closing statement) that triggered the running of the time period that barred their right. Thus, it seemed necessary to modify UPC 3-1003(a)(3) to require the personal representative to send a copy of the closing statement to all persons who would have a claim to succession under the testacy status upon which the personal representative is authorized to proceed (whether under informal or formal intestacy or probate), as well as actual distributees or claimants. This would cover those persons who might want to challenge the representative's administration, for example, on the basis of improperly paying claims that depleted the assets and

caused the total abatement of their claims, which in turn resulted in their failure to become "distributees" as defined in UPC 1-201(10), and so not be entitled to notice of the closing statement under the language of UPC 3-1003(a)(3).

The requirement of sending a written accounting to "the distributees" in that provision is also defined by UPC 1-201(10). Furthermore, it is not clear that the accounting would require notice that a closing statement was being filed even if such an accounting were required to be furnished to should-be distributees.

On the other hand, however, there seems to be no need to expand the class of persons to whom the accounting (as distinguished from the closing statement) should be sent. Limiting its distribution of the actual accounting to those who are affected is consistent with the Code's policy of maintaining privacy as to the affairs of the estate (see UPC 3-706). In addition, if the proper persons are notified by the closing statement that such an accounting has been made, any person who can establish sufficient interest would be able to obtain a copy of the accounting under UPC 3-105, 3-607, 3-1001, and 3-1002.

There are no present provisions of Maine law that are comparable to the settlement and closing options of the UPC, except for the provisions of UPC 3-1001(a). The present means of closing estates is contained in 18 M.R.S.A. 2351. After the payment of claims against the estate (including specific bequests and legacies) and costs of administration, taxes, etc., the executor or administrator petitions the court for an order of distribution of the balance of the estate to the successors under the will or the intestacy laws. When the balance is thereafter paid or delivered pursuant to that order of distribution, the representative may perpetuate the



evidence of that distribution by filing, and obtaining court approval of, his final accounting. See part H.8. of this chapter for a fuller discussion of the present method of distribution.

Thus, there is no present provision for officially closing the estate without a judicial order. In fact, no distribution to successors (other than specific legatees) is theoretically contemplated prior to a judicial order of distribution. The provisions of 3-1001 through 3-1003 provide flexibility for different adjudicatory needs at the closing of an estate, including the extension of the informal administration concept into this area.

## 2. Liability of Distributees to Claimants

UPC 3-1004 establishes the liability of the distributees for unbarred and undischarged claims against the estate after all of the assets have been distributed. The amount of the liability is limited to the value of the assets received, at the time of their distribution, and excludes any property that was originally exempt from the payment of such claims. The section also establishes a right of contribution from other distributees, proportional to the usual abatement principles, and subject to notification sufficient to allow the would-be contributor to join in any proceeding in which the claim is asserted. The liability is limited by UPC 3-1006 to the later of three years from the decedent's death or one year after the time of distribution, unless already barred by previous adjudication. (The liability of individual distributees to individual claimants against the estate after distribution, is to be distinguished from the provisions of UPC 3-908 and 3-909, which channel through the personal representative all action to recover improperly distributed assets from a distributee with a deed of distribution.)

3. Limitations on Actions Against Personal Representative and Distributees

UPC 3-1005, as previously mentioned in connection with UPC 3-1003, is a statute of limitations triggered by the filing of a closing statement, and bars the rights of the successors and creditors against the personal representative for breach of fiduciary duty six months after the closing statement is filed. The section expressly provides that rights arising from fraud, misrepresentation, or inadequate disclosure relating to the settlement of the estate are not barred. Rights can be barred earlier by judicial adjudication, and may be preserved by express provisions of the closing statement.

In addition to barring distributee liability for claims against that estate, UPC 3-1006 also limits the rights of heirs, devisees, or a successor personal representative to recover improperly distributed property, unless received as a result of fraud. In effect, 3-1006 establishes an ultimate time limit of at least three years from decedent's death, or at most one year from distribution where that occurs more than two years after decedent's death, for recovery of property or its proceeds from distributees. As the Uniform Comment points out, the provisions of UPC 3-412(5) for recovery of property by a "supposed" decedent are not limited by the terms of this section.

The Uniform Comment to 3-1006 also points out that, although provisions are elsewhere made for administration on after-discovered estate assets, this section forms an absolute bar against claims on the estate, and on the recovery of already distributed property.

Because these provisions are basically designed to establish and define the limits of distributee and personal representative

liability in informal administration and distribution, where no court adjudications may have occurred, there are no directly comparable provisions in present Maine law. The basic limit of liability now is established by the period for appealing from an order of distribution or from an order approving the final accounting. These two UPC sections are based upon the provisions for notice when a closing statement is filed, and the operation of the basic 3-year limitation period of UPC 3-108 and so are an integral part of the UPC structure. In addition, to the extent that they clarify the outer periods of liability that might exist in case of a change of testacy status that could occur even under present Maine law (and which could occur now for a period up to 20 years), they serve a useful function even without the concept of informal administration.

The closest approach to directly dealing with the problem of distributee liability in present Maine law is 18 M.R.S.A. §1415. That section provides that the probate judge may require a creditor, heir, or legatee receiving more than \$30 to execute a bond sufficient to secure the refund of any amount that is found to be in excess of the payee's equitable portion on final settlement of the estate. The terms of this statute, however, indicate that it is to be used only prior to final settlement, and it does not address the question of distributee liability after final settlement of the estate.

#### 4. Discharging Liens Securing Fiduciary Performance

Section 3-1007 of the UPC provides a means for clearing any property pledged or encumbered as security for the bond of the personal representative. It does not have any effect, in itself, on the liability of the representative or his sureties, which is governed by previously discussed sections of the Uniform Probate Code.

This discharge of liens on such property is made operative by the representative or his sureties by filing with the register a verified statement, after termination of the representative's appointment, showing that the estate has been fully administered and that no actions are pending concerning the estate. This is the basis for a certificate from the register that the estate appears to have been fully administered. The certificate serves as evidence of discharge of the liens.

No comparable provision appears to exist in Maine law, the liens apparently being discharged by the running of statutes of limitations and the appeals periods for adjudicatory orders.

#### 5. Subsequent Administration

UPC 3-1008 provides for administration of estate assets discovered after final settlement and discharge of the personal representative. Upon petition by any interested person, the court may appoint the same or a successor personal representative to administer the after-discovered property. The usual administrative provisions of the Code apply, as appropriate, unless the court directs otherwise. As previously pointed out in connection with UPC 3-1006, prior barred claims or rights of distributees or successors are not revived.

No express provisions have been found in present Maine law for administration of property discovered after final settlement. 18 M.R.S.A. §1556 does provide that original administration may be granted on property accruing to an estate, or first coming to the knowledge of an interested person, more than 20 years after decedent's death if (1) no original administration has been brought within the 20 years, and (2) the administration is brought within two years of the discovery or accrual.

The function of this provision of Maine law is to create an exception to the 20 year statute of limitations when the reason for not previously administering the estate was because no property was thought to exist, rather than to deal with the problem of property discovered after final settlement of an administration. The result of the statutory language, although certainly inadvertant, is to imply that property discovered after 20 years might not be subject to administration if there had been prior original administration.

Present Maine law is consistent in principle with the Uniform Probate Code as to the non-revival of previously barred debts, and the provision that the administration under §1556 "shall affect no other property" than that which is after-discovered or accrued.

The provisions of present Maine law, 18 M.R.S.A. §§1751 and 1753, giving the court authority to compel evidence in case of alleged concealment of estate assets has been preserved in the Commission's bill as an added §3-110.

#### J. Compromise of Controversies

##### 1. Affect and Use of Compromises

UPC §3-1101 allows parties to a controversy to settle their dispute by means of a court-approved compromise. Compromises are desirable because they prevent wasteful litigation that threatens to consume estate assets. Upon receiving court approval pursuant to the procedures set forth in §3-1102, a compromise is binding upon all persons interested in the estate except creditors and taxing authorities who are not parties to it. This group includes unborn and unascertained persons as well as the beneficiaries of a testamentary trust. The kinds of controversies that may be compromised under §3-1101 are those involving (1) the probate of a will, (2) the construction, validity, or effect" of a probated

will, (3) the rights or interests of any successors to the estate, and (4) the administration of the estate. The language of these broad categories would appear to cover any dispute that could arise in connection with a decedent's estate, but the main thrust of the section is focused on disputes among rival distributees or successors.

At present, 18 M.R.S.A. §2403 also appears to provide for court-appointed compromises that are binding on all interested parties. However, §2403 is positioned amidst statutes that apply primarily to creditors' claims against the estate--procedures governed in the Uniform Probate Code by Part 8 of Article III--and no cases can be found in which §2403 has been used to settle any other kind of controversy. Thus, there is no precedent for applying the compromise provisions of §2403 to the variety of contests covered by UPC §3-1101, although the language of the present statute appears to encompass these as well as the claims of creditors. Estate representatives under §2403 are authorized to compromise not only "claims for money or other property in favor of or against the estate," but also "any other actions of whatsoever nature wherein such executors or administrators are parties."

Thus the present Maine §2403 may by its language encompass as much as UPC §3-1101, but is in fact intended and used as a means to obtain judicial approval of compromises between the estate and its creditors--a function of much less significance under the Uniform Probate Code in light of the authority of the personal representative to do so without judicial order, and the assumption that this will ordinarily be the case. On the other hand, while UPC 3-1101 could arguably apply to compromises of creditor's claims, that is not its primary or intended application. So, at least from a practical legal standpoint, UPC 3-1101 and 3-1102 would more

clearly make broad provision for binding judicial approval of compromises than does Section 2403.

Creditors' claims are dealt with elsewhere in the Uniform Probate Code; and both §3-813 and §3-715(17) authorize the personal representative to compromise claims against the estate without obtaining court approval. If the personal representative desired the protection of a court order with respect to any particular compromise, he could secure it by invoking the court's general supervisory jurisdiction under §3-704. The more cumbersome compromise procedures of §3-1102, however, would require a personal representative to obtain the consent of all interested persons before he could have a compromise approved by the court. To subject a personal representative to these provisions where creditors' claims are concerned would be inconsistent with the enlarged powers of his office under Part 7 of Article III.

Compromises approved under §3-1101 are made expressly binding on trust interests created under a will. Because court approval of the compromise is required, this provision does not conflict with present law, which allows trustees to compromise controversies when authorized to do so by the court. See 18 M.R.S.A. §4009. Under UPC §3-1102(1), the written consent of trust beneficiaries is a prerequisite to the execution of any compromise affecting their interests.

Finally, it should be noted that under present Maine law, estate representatives are authorized to submit controversies to arbitration, subject to court approval. See 18 M.R.S.A. §2403. As noted below in subpart 2., the Uniform Probate Code deliberately shifts the initiative for securing court approval of most compromises from the personal representative to beneficially interested parties.

In many instances, of course, the parties to a controversy can achieve an effective settlement of their dispute without resorting to the court at all. Under both the Uniform and Probate Code and current Maine law, they can execute and bind themselves to a private agreement that substitutes a different plan of distribution for the scheme provided in the testator's will. However, such an agreement is not binding on unborn, unascertained, or incompetent parties whose interests are affected by the agreement. Furthermore, the contract would be invalid if it violated the testator's intent in some illegal way (e.g., if it modified the terms of a trust in a way that frustrated the testator's purposes.) Thus, UPC §3-1101 and §3-1102 provide a procedure for encouraging the compromise of controversies that otherwise could not be settled without resort to litigation. Upon obtaining court approval, a compromise becomes binding on all persons interested in the estate (except creditors and taxing authorities not parties to it); and it may also contain an otherwise unauthorized illegal deviation from the testamentary plan.

## 2. Procedure for Compromise

UPC 3-1102 details three procedural steps for securing court approval of compromises. First, a written agreement executed by all competent persons or parents of minor children whose beneficial interests are affected is required. Second, the agreement must be submitted to the court by an interested person. Third, following notice to all interested persons, the court will issue an order directing that further disposition of the estate be in accordance with the terms of the agreement. Two judicial determinations must precede the order, however. The court must find that a good faith controversy between the parties actually exists, and it must be



satisfied that the compromise is just and reasonable insofar as it affects the interests of parties whose consent is procured through a representative.

The Uniform Probate Code's procedures for securing court approval of compromises are substantially similar to those currently in effect in Maine. See 18 M.R.S.A. §2403 and §4009. Two differences are noteworthy, however. These involve the representation of interested persons who are not parties to the compromise and the role of the personal representative in the compromise process.

A major purpose of securing a court-approved compromise is to bind unborn, unascertained, or incompetent parties. Although such persons are not legally competent to participate in a settlement (and therefore need not execute the agreement under §3-1102(1) except for minor children whose parents must execute it), their interests are nevertheless affected by it. Therefore, although the execution by representatives of unborn or unascertained beneficiaries of the estate is not required to reach the compromise agreement and present it to the court under subsection (1) and (2), they would have to be represented in the court proceeding under subsection (3) to determine that a bona fide controversy existed and that the agreed upon compromise was just and reasonable.

Under 18 M.R.S.A. §2403 and §4009, the court is authorized to appoint a guardian ad litem to represent such interests in compromise proceedings. This approach is desirable because it precludes the possibility that a compromise will be barred because the consent of indeterminate beneficiaries cannot be obtained. By contrast, UPC §3-1102 itself contains no comparable protections beyond those that allow the parents of a minor child to execute an agreement in his stead and the requirement that the court consider the

the effects of a compromise on represented interests before approving it. As the Uniform Comment following §3-1102 points out, however, UPC §1-403(4) gives the court general authority to appoint guardians ad litem for unborn, unascertained, incapacitated, or lost beneficiaries whenever adequate protection of their interests requires it. Moreover, §1-403(2)(iii) and (3)(ii) provide that representation and notice requirements for unborn and unascertained persons are sufficiently met when known persons with substantially identical interests are actively included in the same proceedings

Section 3-1102 also differs from the Maine statutes by authorizing any interested person to submit a compromise to the court. Furthermore, the compromise need be agreed to only by persons beneficially interested in the estate, thus precluding the blocking of a compromise merely because a person without a beneficial interest (such as the personal representative or a testamentary trustee) declines to execute the agreement. The present statutes, however, purport to restrict standing to secure court approval of compromises to the personal representative or the testamentary trustee. See 18 M.R.S.A. §2403 and §4009. The Code's position is that the controversy is essentially one between persons with beneficial interests, so that they are the ones who should be able to effectuate the compromise and seek judicial approval of it. Furthermore, as explained in the Uniform Comment, a conflict of interests exists when the personal representative stands to receive additional compensation by enforcing the testator's intent, so that the validity of the compromise is better left to court determination rather than that of a personal representative who may want to block it. In light of these reasons the Uniform Probate Code's provisions seem preferable.

K. Summary Administration

Part 12 of the Uniform Probate Code Article III outlines two optional procedures for summary handling of the administration of small estates, each appropriate to different circumstances. The first method deals with collection of the decedent's assets without appointment of a personal representative when the decedent leaves a personal estate of less than \$5,000 and no real property. The second procedure provides for distribution of small estates by the personal representative, without waiting for notice to creditors, upon a determination that the value of the estate is less than the sum of all the expenses and allowances that have priority over the claims of creditors and heirs or devisees.

Special procedures for the administration of small estates, if adopted, would be new to Maine law for all practical purposes. Presently, 18 M.R.S.A. §1555 specifies that no administration shall be granted on estates that consist of personal property of less than \$20 value. In that event, provision is made that the estate shall become the property of the decedent's widow or next of kin. Because of the \$20 limit, however, it is doubtful that §1555 is of any contemporary significance. Another statute that bears a vague relation to Part 12 of Uniform Probate Code Article III is 18 M.R.S.A. §1806, which allows for certain omissions from the inventory of an estate. Under §1806, the widow and children of a decedent are entitled to immediate possession of certain minor items for which they cannot thereafter be held accountable. Those items include apparel, schoolbooks, and consumables not exceeding \$50 in value. Section 1806 is the only Maine statute that is comparable to the "existing legislation" referred to in the

Uniform Comment to UPC 3-1201, which "generally permits the surviving widow or children to collect wages and other small amounts of liquid funds."

In situations other than the special circumstances covered by §1555 and §1806, 18 M.R.S.A. §1414 now provides that a person who intermeddles with estate assets prior to the appointment of a personal representative becomes liable to the estate as an executor in his own wrong. As a result, §1414 is incompatible with UPC 3-1201 and 1202, which define limited circumstances in which "intermeddling" may be appropriate. The replacement of §1414, however, would not leave any gaps in the law because UPC 3-1202 leaves the thrust of §1414 intact. Under the UPC, a person who uses affidavit procedures remains accountable to any person having a superior right to the decedent's property. In effect, this accountability is the same liability that is presently incurred by a person who acts as an executor in his own wrong. Other situations in which §1414 would be applicable are covered in the Uniform Probate Code by 3-701, which provides that the powers and duties of the personal representative relate back in time to the decedent's death.

1. Collection by Affidavit Without Personal Representative

Applicable only to estates valued at under \$5,000 (raised to \$10,000 in the Commission's bill), UPC 3-1201 sets up a procedure for collecting decedents' property. Thirty days after someone dies, persons who possess property that belonged to the decedent are required to surrender it to any successor who presents them with an affidavit. The affidavit must contain four statements, the principle one being that the net value of the entire estate does not exceed \$5,000. In addition, the affidavit must allege

that 30 days have elapsed since the death of the decedent, that no appointment proceedings are pending anywhere, and that the affiant is entitled to the property that he claims. The kinds of property subject to collection by this procedure are tangible personal property and debts, obligations, stock, and choses in action owing to the decedent and evidenced by a written instrument.

Subsection (b) provides that the registered ownership of corporate securities should be changed upon presentation of the UPC 3-1201 affidavit. Under present Maine law, 11 M.R.S.A. §8-401 (UCC) specifies the circumstances under which an issuer is required to register transfer. In order to facilitate the use of UPC 3-1201, the Commission's bill would amend the present §8-401 to make clear the availability of §3-1201 in such a case, and to make clear that the issuer would still have the protections of UPC 3-1202 to correspond to those given him under the UCC.

Real property is not covered by UPC 3-1201. Thus, collection by a personal representative is necessary in the case of a small estate that includes land. By precluding the use of affidavits to transfer realty, the Uniform Probate Code avoids the complication of having to make special provisions in these small estate sections for protecting the marketability of land titles. The Oregon version of the Uniform Probate Code, however, applies the affidavit procedures to real estate when it is valued at less than \$10,000 and personal property does not exceed \$5,000. As a result, the affidavits that must be used contain much more detailed information than that required by the Uniform Probate Code; furthermore, they must be filed with the county clerk. Filing bars all claims against the property collected by affidavit that are not presented within the

next four months. See Or. Rev. Stat. §144.505-555. The Uniform Probate Code theory, however, is that the procedures for personal representative appointment are so simplified that the existence of summary collections of real estate would not be as valuable as the protection that is available through informal appointment of personal representative, and the facilitation of title searching by use of deeds of distribution. In addition, as the Oregon enactment shows, the summary procedures for collection of real estate would require a more complicated affidavit under UPC 3-1201, and thus eliminate some of the simplicity of that section. For these reasons, the Uniform Probate Code version seems preferable to the Oregon variation.

UPC 3-1201 is available only to "successors" of the decedent and thus creditors are precluded from taking advantage of affidavit procedures. See UPC 1-201(42). Creditors would have to secure the appointment of a personal representative in order to assure that estate assets are applied toward satisfaction of their claims. Although no notice to creditors is required before proceeding under UPC 3-1201, creditors have ample time in which to establish their superior rights through administration, which could be commenced anytime up to three years after the decedent's death. See UPC 3-108. By contrast, they have only four months to file their claims when notice by publication has been given in the course of an ordinary administration.

A successor acting under UPC 3-1201 is entitled to collect only that portion of the estate which is rightfully his. He is not like a personal representative, who is supposed to collect the entire estate and then distribute it among the claimants. As a result,

it may often occur that several successors to a small estate are proceeding simultaneously with collections by affidavits. This possibility poses no problem so long as all have agreed on who gets what. If disputes arose, the interested parties could always resort to conventional administration by securing the appointment of a personal representative.

If the decedent's successor is claiming under a will, the will does not have to be probated in order for him to take advantage of UPC 3-1201. Small estates being collected under UPC 3-1201 are expressly excepted from the general requirement of UPC 3-102 that a will must be probated before it can effectively transfer property. However, although probate does not affect the availability of UPC 3-1201, no one may proceed with collections by affidavit once conventional administration has been commenced by the issuance of letters to a personal representative.

Among states that have already enacted Part 12 of Uniform Probate Code Article III, the most notable variation from the uniform statute involves the size of estates to which the collection by affidavit procedure applies. Nebraska, Utah, and Colorado have raised the Uniform Probate Code's \$5,000 ceiling on "small" estates to \$10,000. See Neb. Rev. Stat. §30-2425, Utah Code Ann. §75-3-1201, and Colo. Rev. Stat. §15-12-1201. Montana and Wisconsin, on the other hand, have further restricted the use of affidavits to estates of less than \$1,500. See Mont. Rev. Codes Ann. §91A-3-1201 and Wis. Stat. Ann §867.03 (West). In light of the degree of inflation that has occurred since the Uniform Probate Code was promulgated in 1969, the \$10,000 amount

today may actually be a closer approximation of the present value of the Uniform Probate Code's original \$5,000 figure. The actual dollar value of the Uniform Probate Code's original amount will probably be even greater as time moves on. Thus, the argument for increasing the amount in UPC 3-1201 is quite persuasive. Although it makes for disuniformity in the size of estates subject to the summary collection procedures in the various Uniform Probate Code states, the higher amount is actually more true to the Uniform Probate Code policy of facilitating administration of small estates and in fact would more accurately reflect the size of the estate originally contemplated by the Uniform Probate Code when it was first promulgated. For those reasons, the Commission has raised the amount to \$10,000 in the Maine version of the Code.

Arizona's version of the Uniform Probate Code adds a subsection (c) to UPC 3-1201 in order to make it explicitly applicable to the transfer of motor vehicle titles. Ariz. Rev. Stat. Ann. §§14-3971(c) and 14-3927(b). The Uniform Probate Code Practice Manual explains that "the section is obviously intended to facilitate the transfer of decedents' registered titles to personal assets. It should be liberally construed." 1 Uniform Probate Code Practice Manual at 402 (2d. ed. 1977). Nevertheless, the Commission has included a similar explanation in the Maine Comment to §3-1201 to make this point clear to the extent that a successor is entitled to the decedent's automobile in light of 29 M.R.S.A. §2372(5). The Commission's bill would also amend 9-B M.R.S.A. §427.8 to coordinate its provisions with UPC 3-1201 insofar as collection of the decedent's bank deposits is concerned.

UPC 3-1202 discharges persons who transfer a decedent's property



upon presentation of an affidavit to the same extent as if they had dealt with a personal representative. They are not required to inquire into the validity of the successor's claim or the truth of the statements in his affidavit, and the successor has a right of action against anyone who refuses to honor his affidavit. However, a person who collects property by affidavit is accountable for it to a personal representative (if one is ever appointed) or to any other person having a superior right.

The protection created by UPC 3-1202 would commonly be necessary in two situations. First, if actual administration is commenced before the three year statute of limitations has run, a transferor may be confronted by a personal representative attempting to collect the same property that the transferor has already turned over to a successor claiming under an affidavit. Second, two successors may present affidavits claiming the same property. In either of these cases in which the second claimant may have the superior right, liability for a transfer to the wrong person will rest with the successor who improperly procured it, rather than with the transferor.

As UPC 3-1202 suggests, administration may be taken out on a small estate even though it was originally felt to have been unnecessary. A change in circumstances may make conventional administration either more desirable or inescapable. For example, a dispute among the successors may arise, or perhaps it will be discovered that the decedent left an estate of more than \$10,000 value. In any case, the fact that there have been previous collections by affidavit does not foreclose the availability of a conventional administration in any way. Even appointment by in-

formal proceedings is still possible. See UPC 3-308. Following the issuance of letters to a personal representative, any further collections by affidavit would be improper.

## 2. Summary Administration

UPC 3-1203 introduces summary administration as another special alternative for handling small estates. Unlike the affidavits in UPC 3-1201 and 3-1202, summary administration is available only after a personal representative has been appointed. It is also limited to a different class of "small" estates--those in which there is nothing left of the estate after allowance has been made for all exemptions and preferred claims. Specifically, these exemptions and preferred claims consist of the homestead and family allowances, exempt property, administration costs, and expenses of the funeral and last illness. Any interested party, including the personal representative, who is in doubt about how a given expense should be classified can initiate a formal proceeding in order to obtain a judicial determination. See UPC 3-105 and 3-704.

Questions of applicability aside, summary administration itself is basically an informal procedure for closing estates by sworn statement of the personal representative. It is nearly identical to the more generally applicable procedure already introduced in UPC 3-1003 except that it accelerates the closing process, bringing administration to an end much earlier than is ordinarily allowed. UPC 3-1203 authorizes the personal representative to forego notice to creditors, distribute any allowances immediately, and file his closing statement. By contrast, UPC 3-1003 requires the personal representative to wait six months after the original publication of notice to creditors before he can distribute and

close the estate. The purpose of the waiting period is to give creditors ample time in which to file their claims. Where small estates such as those described in UPC 3-1203 are concerned, however, there are no estate assets out of which to satisfy any claims that might be filed. Thus, acceleration of the procedure is possible.

By excusing the personal representative for a small estate from giving notice to creditors, UPC 3-1203 creates an explicit exception to the duty to advertise that is generally imposed upon personal representatives by UPC 3-801. Liability for breach of this duty would be limited to any actual loss that results. In the case of the estate which is defined in UPC 3-1203, a creditor could suffer no loss from lack of notice because his claim could not be satisfied even if it were filed.

UPC 3-1204 describes the sworn statement that a personal representative must file if he elects to close a small estate under these special procedures. It differs from the closing statement required of ordinary estates under UPC 3-1003 only in that the personal representative need not attest that he has published notice to creditors and waited for six months. Copies of the closing statement must be sent to the same specified persons who are entitled to them under UPC 3-1003. The personal representative's appointment terminates in one year if no challenges to his administration are filed within that time.

Subsection (c) of UPC 3-1204, giving a closing statement filed under this section the same effect as one filed under UPC 3-1003, brings other sections of Part 10 into play in the event that the personal representative turns out to have been wrong in proceeding under the small estate provisions. In case subsequently discovered

assets increase the value of the estate so that UPC 3-1203 no longer applies, UPC 3-1008 makes it possible to reopen the estate and administer the new assets under normally followed procedures.

A more serious problem could arise if it was his own negligence in undervaluing the estate that caused the personal representative to proceed under UPC 3-1203, resulting in loss to creditors. Although the injured creditors would ordinarily have a right of action against the personal representative for breach of fiduciary duty (see UPC 3-702), such an action purportedly would be barred under UPC 3-1005 if not commenced within six months after the closing statement was filed. Creditors, however, do not receive notice of administration if a personal representative elects to use small estate procedures. Thus, UPC 3-1005 as applied to UPC 3-1204 would raise a constitutional question insofar as it bars claims without previous notice to creditors. Ordinarily there would be no problem, because the size of the estate defined in 3-1203 and 3-1204 avoids the need to notify creditors since the estate's assets cannot exceed the amount of the exempt property. However, in case the estate assets turn out to be more than the exempt property for one reason or another, and if there are creditors' claims against the estate, the effect of cutting off those claims under 3-1005 without the creditors ever having been given notice of the decedent's death or of the filing of the closing statement would most probably be a violation of constitutionally required due process.

The problem would seem to be adequately handled by the kind of reminder that has been included by the Commission in the Maine Comment to §3-1204. It is a problem that cannot be avoided, and so is simply one that the personal representative must consider

to be a risk, and on that basis make a determination as to whether to proceed under 3-1203 and 3-1204. That determination will no doubt depend upon how certain he is that the estate assets are within the limitations set forth in 3-1203. If he is certain that they are within those limits, then the risk is minimal. If he is not so certain, then he had better proceed with his notice to creditors under Part 8 of Article III.

### 3. Family Members' Summary Administration

Some states have attempted to provide for simplified transfer of property at death without any administration, and in some cases without probate, if it appears that the spouse or minor children are the sole successors to the decedent's estate. Idaho, the first Uniform Probate Code state, includes a §3-1205 providing for no administration if the surviving spouse is the sole successor. The spouse may file a verified petition, whether the decedent died testate or intestate, including the original of the last will if he is claiming to be the sole devisee. A hearing is held on the petition after notice as provided by UPC 1-401. Upon order of the court upholding the petition, the spouse is determined to be the sole successor, and no administration occurs--the successor spouse then being charged with liability for all claims against the decedent. The section does not make it clear whether or not the will is in this manner "probated."

California, which is not a UPC state, has more extensive provisions for summary non-administration, but includes minor children as sole successors when there is no surviving spouse and limits to \$20,000 the size of the estate to which the sections apply. Cal. Prob. Code §§640-647. California provides that notice must be given and a hearing must be held on such a petition, and that the

petition may be made with or without the probate of any will, and the section seems to apply to give these designated successors the entire estate even in the face of a contrary will. Cal. Prob. Code §§640, 641, 645. Liability for the claims against the decedent is assumed by these successors, but only to the extent of the value of the unencumbered estate assets to which the successor succeeds. Cal. Prob. Code §645.3.

While these provisions may seem desirable at first glance, in the context of Uniform Probate Code Article III they do not seem to add anything to the simplification of administration which is the primary goal of that Article. In requiring notice and formal hearing, they are actually more cumbersome than the already available informal probate and appointment procedures and unsupervised administration. In expressly prohibiting further proceedings and administration they may tend to undercut the protections that are provided in the Uniform Probate Code for other interested persons. The interrelationship between these, or comparable provisions, and other sections of Article III would be difficult to work out. It would seem that the other provisions of Article III provide for about as simplified a system of probate and administration as can be done consistently with the need for some kind of formal winding up of a decedent's estate with protections for creditors and others who claim an interest in it. For these reasons no such comparable provisions are included in the proposed Code for Maine.

#### 4. Facilitating Social Security Payments

One related provision of present Maine law that is included in the Commission's bill is 18 M.R.S.A. §1557, preserved intact

as §3-1205 of the proposed Maine code. That section provides for the payment of social security benefits due to the decedent at the time of his death. The benefits are payable (up to \$1,000) to specified family members upon an affidavit described in the section. It appears that such provision might be helpful in some cases to which UPC 3-1201 might not apply because of the limitation on the size of the estates to which that section is applicable. The retained section is analogous to the provision for collection by affidavit set forth in UPC 3-1201, and would be supplemental to that section.

L. Foreign Personal Representatives and Administration

1. Domiciliary Representatives Without Local Appointment

UPC 4-201 through 4-203 provide a means for facilitating the ability of a foreign domiciliary personal representative of a non-resident decedent to collect the assets of the decedent's estate, including debts owed the decedent, as part of the foreign domiciliary representative's administration in the decedent's own state without the need for any ancillary appointment in the ancillary state. These provisions, along with UPC 4-204 and 4-205, are designed to avoid the need for routine ancillary administration in many ordinary cases where it should not be necessary, while at the same time protecting both the local creditors of the nonresident decedent and local residents who hold estate assets or owe debts to the estate.

These first three sections of Part 2 of Uniform Probate Code Article IV facilitate the foreign representative's collection of estate assets by providing that those owing the estate or holding its assets "may" safely pay the debt or turn over the assets to the foreign representative under certain circumstances. Such payment

may be made upon proof of the foreign representative's appointment and his affidavit stating the date of the decedent's death, that there is no local administration or pending petition for local administration, and that he is entitled to the payment or delivery. UPC 4-201. The payment or delivery is authorized only after the expiration of sixty days from the decedent's death. UPC 4-201. Payment or delivery under these circumstances, if made in good faith, protects the payor or deliverer "to the same extent as if payment had made to a local personal representative." UPC 4-202.

Protection for local creditors is provided, in the first instance, by the substantive provisions in UPC 3-815, requiring that they be given equal treatment with creditors in the state of that decedent's domicile, or with creditors in other states. These provisions are not substantively affected by anything in Article IV. In fact, the provision in UPC 4-301(2), which subjects the foreign representative to the jurisdiction of the state's courts to the extent of the value of any assets collected under UPC 4-201, gives the local state courts the authority to enforce the obligations of UPC 3-815, as well as the other fiduciary obligations of the foreign representative, should he remove assets from the local state and misapply them.

Further protection for local creditors, and for the state's interest in controlling local administration, exist in UPC 4-203 and 4-206. The resident debtor or holder of estate assets is forbidden from paying or delivering to the foreign representative without local appointment upon notification by a resident creditor that such payment or delivery should not be made. UPC 4-203. Also, the foreign personal representative's authority to proceed with



collections under UPC 4-201 does not exist if any application for local administration has been filed, so that the provisions operate only if there is no local administration and no official indication that there may be a local administration. UPC 4-206. The sixty day waiting period allows opportunity for those interested in obtaining local administration to do so before the foreign representative's informal collections can begin. See UPC 4-201. (Under ordinary circumstances the foreign domiciliary representative will have a priority of appointment under UPC 3-203(g).)

The Uniform Comment to UPC 4-201 points out that the transfer of securities is not covered by that section since such transactions are covered by the Uniform Act for Simplification of Fiduciary Security Transfers. Maine has adopted that Act, which appears in 13 M.R.S.A. §§641-651.

In addition to the ability to collect assets without local appointment, described above, the domiciliary foreign representative may also acquire the powers that a locally appointed representative would have as to assets in the local state merely by filing authenticated copies of his domiciliary state appointment and of his bond (if any) in the ancillary state's appropriate court. UPC 4-204 and 4-205. Once again, these provisions apply only when there is no local administration or pending application for local administration, UPC 4-204, and the powers of the foreign representative automatically terminate upon the filing of a petition for local administration. UPC 4-206.

In short, the provisions of Part 2 of Uniform Probate Code Article IV attempt to extend the basic philosophy of Article III to the process of ancillary administration--to provide simpler estate administration for the ordinary situations involving small or moderate

size estates where there is little to do except collect the assets, pay the debts, and distribute; to avoid unnecessary routine paper work that takes up the resources of the courts, the time of the attorneys, and delays the proper transfer of the decedent's property; and to tailor the various available procedures to the needs of those interested as they themselves perceive those needs.

UPC 4-206 makes provisions for any transition period between the non-locally-appointed administration by the domiciliary foreign representative and the beginning of local administration in case a petition for local administration is filed. It provides that the local court may allow the foreign representative (who will ordinarily have priority for local appointment under UPC 3-203(g)) to exercise limited powers to preserve the estate until the local appointment is made, and protects persons who have changed their position in reliance on the foreign representative's powers before receiving actual notice of a pending local administration. It also transfers the duties and obligations accruing from the foreign representative's actions to the locally appointed representative, and expressly provides for the local appointee's substitution as a party in any pending litigation in the local ancillary state.

UPC 4-207 provides that the provisions of Article III govern proceedings in the local state concerning the administration of the estate, the local personal representative, and the rights of all persons interested in the local administration. Part 1 of Uniform Probate Code Article IV contains definitions of "local administration," "local personal representative" and "resident creditor" which conform to the other provisions of Article IV.

Present Maine law provides for ancillary appointment of executors and administrators for the estates of nonresident decedents, 18 M.R.S.A. §154, and follows the traditional common law rule that an estate cannot be administered in a particular state without the appointment of a representative by the courts of that state. "It is a well settled principle of the common law that the power and authority of an administrator or executor, over the estate of the deceased, is confined to the sovereignty by virtue of whose laws he is appointed." Brown v. Smith, 101 Me. 545, at 547 (1906); cf. Fort Fairfield Nash Co. v. Noltemier, 135 Me. 84 (1937). The Uniform Probate Code would reverse this principle and allow the domiciliary foreign representative to collect estate assets by affidavit (UPC 4-201) and, upon filing proof of his appointment and bond, exercise all the powers of a locally appointed representative (UPC 4-204 and 4-205) whenever there is no local administration existing or pending.

A procedure for obtaining a court license to collect or dispose of a nonresident decedent's property within Maine by a foreign representative without appointment in Maine is provided in 18 M.R.S.A. §1410. The domiciliary foreign representative must file an authenticated copy of his appointment and petition the court, with due notice, for a license to carry out these acts. An apparently overlapping provision for a license to sell real property of a nonresident decedent requires, in addition, the posting of a bond with the local probate court and an accounting within six months of any such sale. 18 M.R.S.A. §2151. The first of these two sections is applicable only six months after the decedent's death, and is conditioned upon the lack of objection by resident creditors or by other persons who are residents and who are interested in the estate.

The latter section provides for payment of debts to resident creditors before any court order distributing the sale proceeds to the estate. Both sections also require a showing that any state inheritance taxes have been paid before permission for collection or sale may be granted (Section 1410) or before distribution of the proceeds will be made to the estate (§2151). Both require, as does the Uniform Probate Code, that a copy of the representative's appointment be filed with the local court.

Thus, present Maine law contains provisions somewhat analogous to the affidavit collection provisions of UPC 4-201 through 4-203. The Uniform Probate Code more expressly provides protection for estate debtors and holders of estate property than do the present Maine statutes. The present Maine statutes also allow for sale of property in Maine by the foreign representative without appointment in a way also somewhat analogous to the Uniform Probate Code, except that the Uniform Probate Code goes further in (1) granting general administration powers in the absence of any local administration, and (2) eliminating the need for judicial license for the sale of real estate for purposes of ancillary administration, just as it does in domiciliary administration.

The basic principle of the Uniform Probate Code to simplify estate administration seems preferable in the area of ancillary administration as long as local creditors are sufficiently protected, and ample opportunity is given to other residents who may have an interest in the estate to petition for local administration before the domiciliary foreign representative can act, and to terminate the foreign representative's power to act without local appointment at any subsequent time if they so desire. Since the UPC

makes provision for protecting all of these legitimate local state interests, it would achieve a desirable and significant reform.

## 2. Jurisdiction Over Foreign Representatives

As mentioned earlier, Part 3 of Uniform Probate Code Article IV subjects the foreign personal representative to the jurisdiction of the local courts in a way that provides local state authority to enforce the foreign representative's obligations as to any administration within the local state under the new authority given him by UPC 4-201 and 4-204. UPC 4-301 provides for jurisdiction in the courts of this state over the foreign representative who has filed authenticated copies under UPC 4-204, or to the extent of the value of the property he has collected under UPC 4-201. In addition, in language comparable to that of a typical long-arm statute, it provides for jurisdiction over the foreign representative for "any act as a personal representative in this state which would have given the state jurisdiction over him as an individual." UPC 4-302 also subjects the foreign personal representative to state jurisdiction to the same extent as his decedent at the time of the decedent's death.

These provisions are, in part, tied to the preceeding authority given to the foreign representative without appointment. Thus, they are necessary compliments to that new authority, required to make clear the power of the local state to enforce the obligations of a foreign representative who has not necessarily come within the local court's jurisdiction by virtue of a local appointment or action pursuant to court order (as would be the case under 18 M.R.S.A. §§154, 1410 and 2151). The phrasing of the provisions makes them both (1) clearly within constitutional

parameters of the local state's jurisdiction, and (2) effective to give to the local state the full extent of jurisdiction that would be constitutionally permissible. Insofar as they are complements to the new authority granted to foreign representatives by Part 2 of Article IV, they have no counterpart in Maine law. Insofar as they go beyond that function, they are desirable as express statutory jurisdictional provisions relating to foreign representatives.

UPC 4-303 deals with the method of service on foreign representatives. In conformity with the Commission's approach to procedural issues being dealt with by rule rather than statute, this section is modified in its Maine version to provide for judicial rule making.

### 3. Related Provisions

UPC 3-202, concerning the resolution of conflicting claims of domicile in appointment or testacy proceedings, must be read in connection with UPC 3-408. Section 3-408 provides, in essential conformity with present Maine law, that a final order of a court in another state that is based upon a finding of the decedent's domicile in that state is binding upon the courts of this state. In effect, the section provides that another court's determination of domicile is determinative here, provided that notice and opportunity for hearing were given to all interested persons in the prior proceedings.

UPC 3-202 provides that a court in this state must, "stay, dismiss, or permit suitable amendment" in a proceeding here if claims of domicile are being made in its proceedings which conflict with claims of domicile also being raised at the same time in proper

proceedings in another state. The section does not apply if the proceedings in this state were commenced before the proceedings in the other state. The application of the section is also limited to proceedings involving a formal appointment or testacy determination. Under the final sentence of the section, a determination of domicile made in the proceeding that was commenced first would be binding in this state.

The purpose of this section is essentially to avoid the wasting of estate assets through litigation of the issue of domicile in two different proceedings, when the outcome which would be binding under traditional rules and constitutional requirements would take preference solely because one judgment would happen to be arrived at before the other judgment. Considerations of comity would be likely to lead to the same result as that mandated by this section. The Uniform Comment to UPC 3-202 also provides a rather extensive explanation of its rationale and effect.

Another related provision, UPC 3-703(c), simply provides standing for a locally appointed personal representative of a domiciliary decedent in the courts of this and other states to the same extent as his decedent had immediately prior to his death. It is analogous in some ways to the jurisdiction asserted over foreign representatives on the basis of their decedents' acts under UPC 4-302. It is intended to facilitate administration by clarifying the representative's standing. While it would not seem to change the law insofar as authority to sue or to be sued in the courts of the state where the representative was appointed (i.e., the courts of this state), it may have some effect to facilitate administration without appointment in other states. The law of a state adopting UPC 3-703(c) cannot, of

course, give the local representative authority in another state which that state denies him. But it can at least make clear that the authority of a locally appointed representative includes such standing in any other state that chooses to recognize it.





Chapter 3

TRUST ADMINISTRATION

A. Registration.

1. Description of Registration Provisions

UPC 7-101 provides that all trusts shall be registered with the court at their principal place of administration, which ordinarily would be at "the trustee's usual place of business where the records pertaining to the trust are kept." Registration is defined as an affirmative duty of the trustee and is required of both testamentary and inter vivos trusts (see definition of "trust" in UPC 1-201(45)). UPC 7-305 elaborates upon the relationship between the place of registration and the principal place of administration. Importantly, UPC 7-305 provides for release of registration in order to register the trust in a different jurisdiction if for any reason the original "principal place of administration" becomes unsuitable for carrying out trust purposes. UPC 7-102 provides that the release need not be by court order but may be accomplished by written agreement of the trustee and all beneficiaries. Because a release is a prerequisite to an effective re-registration, the trustee's refusal to seek a release when circumstances warrant one is made grounds for removal under UPC 7-305. The registration procedure consists essentially of the filing of a written acknowledgment of trusteeship by the trustee. UPC 7-102. For testamentary and written inter vivos trusts, the statement need only identify the settlor, the trustee, and the trust instrument, and

also whether the trust has been registered elsewhere. More information is required when an oral trust is being registered, including the terms of the trust, a description of the trust property, and the names of the beneficiaries.

UPC 7-103 makes clear that the effect of registration is to confer jurisdiction over trust-related matters upon the court at which the trust is registered, which is by definition the court at the place where the trust is principally administered. By virtue of the act of registration, the trustee is deemed to have consented to the court's exercise of jurisdiction over him. Thus, during the period of registration, the trustee is bound by all judicial proceedings at the place of registration so long as he has been given notice pursuant to the terms of UPC 7-103(a). Likewise, beneficiaries of the trust, regardless of residence, are subject to the jurisdiction of the court of registration provided they are given notice of any proceedings in accordance with UPC 1-401.

If a trustee fails to register a trust, UPC 7-104 provides that he may not thereby escape the exercise of jurisdiction by an appropriate court. An aggrieved beneficiary may institute proceedings in any court where the trust could have been registered. For refusal to register the trust following a written demand by the settlor or beneficiaries, the trustee is subject to a variety of sanctions, including removal. The settlor cannot effectively waive the registration requirement by express provision in the trust instrument; how-

ever, the trustee of a revocable inter vivos trust incurs no liability to beneficiaries for his refusal to register so long as he is acting on instructions from the living settlor, since such a settlor can control all duties of a trustee in such a situation.

## 2. Changes from Present Law Generally

Traditionally, all litigation involving the internal affairs of trusts should be centered primarily, though not necessarily exclusively, in the courts of one place. The location of the court of primary jurisdiction has traditionally depended on whether the trust was created by will or otherwise. Testamentary trusts, by virtue of the continuing supervision exercised by the probate court at the testator's domicile,<sup>1/</sup>

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1. In Maine, court supervision of testamentary trusts begins with the requirement that the trustee qualify by giving bond, unless the testator or all interested parties have excused him from doing so. 18 M.R.S.A. §4001. The bond is conditioned on the performance of four express duties:

1. To faithfully execute the trust.
2. To inventory the trust property and file the inventory with the probate court.
3. To account to the probate judge at least once every three years.
4. To settle accounts with the probate judge when the trust is terminated.

If the bonding requirement is waived, a testamentary trustee is placed under even closer court supervision. 18 M.R.S.A. §4002 requires him to file his accounts with the probate judge annually. Other statutes, applicable to all testamentary trustees, require court approval of the reference or compromise of claims (18 M.R.S.A. §4009) and of the sale and investment of trust property (18 M.R.S.A. §4010).

are primarily subject to the jurisdiction of the courts at the place where the will creating the trust was probated. 5 Scott on Trusts §566. Inter vivos trusts, on the other hand, are in most instances independent of court supervision,<sup>2/</sup> in which case the courts with primary jurisdiction when controversies arise will be those at the place where the trust is principally administered. 5 Scott on Trusts §567. These general rules are, of course, subject to qualifications imposed by constitutional limits on a court's power to bind parties and property not subject to its jurisdiction. Moreover, courts outside of the state that have primary jurisdiction may obtain concurrent jurisdiction over the trust, although they may not always be willing to exercise it. 5 Scott on Trusts §§569-71.

The Uniform Probate Code continues the policy of designating one court as the place having primary jurisdiction over all trust-related matters. However, it abolishes the distinction between testamentary and inter vivos trusts for purposes of determining which court is to have that primary jurisdiction. In either case, the court at the place where the trust is principally administered

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2. In Maine, the settlor or trustee of inter vivos trust may choose voluntarily to place the trust under court supervision by requesting the probate judge to confirm the appointment of the trustee pursuant to 18 M.R.S.A. §4051. In that event, "[t]he trustee shall file inventory and account to the judge in the same manner as testamentary trustees, unless excused or released therefrom by the person creating the trust or for whose benefit it was created." 18 M.R.S.A. §4052. Bond is also required. 18 M.R.S.A. §§4051, 4053. In all other situations involving inter vivos trusts, the trustee may proceed with administration independent of court control, subject, of course, to judicial intervention when the equity jurisdiction of the court is invoked for purposes of resolving a controversy on instructing the trustee. See 4 M.R.S.A. §252, 14 M.R.S.A. §6051.

is given primary jurisdiction over the trust; as defined in UPC 7-101, the principal place of administration is ordinarily the place where the trustee resides or does business. In addition, the Uniform Probate Code imposes upon the trustee a duty to register the trust with the court at the place where the trust is principally administered. By the act of registration, "the trustee submits personally to the jurisdiction of the Court" in all proceedings relating to the internal affairs of the trust. UPC 7-103(a). The Uniform Probate Code also purports to subject all trust beneficiaries to the jurisdiction of the court at the principal place of administration. UPC 7-103(b).

As indicated by the foregoing discussion of procedural aspects of trust administration, Part 1 of Uniform Probate Code Article VII embodies three important changes from present Maine law insofar as present Maine law can be determined. First, the court with primary jurisdiction over testamentary trusts is now located at the place where the will creating the trust was probated, rather than the place where the trust is principally administered. Second, there is presently no requirement that an inter vivos trust be formally registered at its principal place of administration. Finally, the Code purports to provide jurisdiction over beneficiaries that "goes beyond established doctrines of in personam or quasi in rem jurisdiction." Uniform Comment, UPC 7-103.

### 3. Transferring Primary Jurisdiction Over Testamentary Trusts to the Principal Place of Administration

In Maine, as in many other states, the court where a will is probated exercises supervisory jurisdiction over the administration of any testamentary trust that the will creates. Personal

jurisdiction over the trustee is first obtained by requiring him to give bond in order to qualify. 18 M.R.S.A. §§4001,4003. If he is a non-resident, he must also appoint an agent within the state to receive service of process. 18 M.R.S.A. §4004. At this point, the general rule is that the state in which the trustee has qualified "retains" jurisdiction to adjudicate trust matters even if the trustee leaves the jurisdiction and takes the trust assets with him. 5 Scott on Trusts §566. Furthermore, courts in the state where the trustee has relocated may, in the absence of compelling circumstances, be reluctant to exercise their newly acquired jurisdiction if they feel that to do so would interfere with the active control that the state of the testator's domicile has attempted to assert over trust administration. In any event, adjudications by the original probate court would not be void for lack of personal jurisdiction over the trustee and would normally be entitled to full faith and credit in the courts of other states . 5 Scott on Trusts §572.

By doing away with continuing court supervision over testamentary trusts, the Uniform Probate Code eliminates the connection between the state where the will is probated and the administration of a testamentary trust unless the trust is also principally administered in that state. In order to locate the court with primary jurisdiction over trust-related proceedings, the Code substitutes the rule now generally pertaining to inter vivos trusts. To place primary jurisdiction over testamentary trusts with the court at the principal place of administration accomplishes a desirable reform. Because the place where the trust was created may lose its relevance to the beneficiaries and the trustee,

UPC 7-305 requires that the principal place of administration be kept at "a place appropriate to the purposes of the trust and to its sound, efficient management." In addition, jurisdictional problems will be minimized because the court's power will ordinarily be based on the actual presence of the trustee and trust property within its jurisdiction, decreasing the possibility that two proceedings may sometimes be required to litigate trust matters -- one on the merits at the place where the will was probated and one to enforce it at the place where the trust is administered. Trust registration may be transferred to a new court if the principal place of administration changes for any reason. Although the transfer may be in the best interests of the trust, the present rule in Maine would condition it on the trustee's willingness to continue to submit to the supervision of the Maine probate court. 18 M.R.S.A. §4004.

In UPC 7-101, the Code makes accommodation for non-Uniform Probate Code states in which the concept of "retained" jurisdiction will continue to pre-empt the jurisdiction of the principal place of administration where testamentary trusts are concerned: The duty to register [in the state of principal administration] 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."

#### 4. The Problem of Trust Registration

Trust registration is essentially a filing procedure by which the trustee formally consents to the jurisdiction of the court of the principal place of administration. The pro forma act of



registration itself would seem to add nothing to the jurisdictional power that the court of registration will have already acquired over the trustee on more substantial grounds, i.e., the fact that the trustee maintains the principal place of administration within the jurisdiction of the court. Thus, irrespective of any registration papers on file in the court, a trustee who administers a trust within any given state is ordinarily subject to its personal jurisdiction simply by virtue of his presence. Even if he leaves the state and takes the trust property with him, the trustee's past acts of administration would most likely constitute sufficient minimum contacts with that state to support its exercise of jurisdiction over him pursuant to a long-arm statute such as 14 M.R.S.A. §704-A (1978 Supp.), at least concerning acts of administration during the time the trustee or trust was "located" within the state. Thus, registration itself does not seem to be necessary to establish whatever jurisdiction is sought, and would not itself expand the constitutionally permissible parameters of jurisdiction over the trust or trustee. The major advantage of the registration requirement in itself may be in furnishing a record of where the principal place of administration for jurisdictional purpose is presumably located in situations where the principal place of trust administration may be in doubt. For example, although the trustee may be in the process of transferring the principal place of administration from one state to another, the trust can only be registered with one court at any given time. Thus, the proper court in which to initiate trust-related judicial proceedings is always ascertainable.

Under present law, the existence, terms, beneficiaries, and

subject matter of testamentary trusts are already matters of public record through the probate of the will creating them. Inter vivos trusts, therefore, have been particularly attractive to a settlor who desires to preserve the privacy of his beneficiaries' financial affairs. This privacy would be lost to the extent that the existence, although not the terms, beneficiaries, or subject matter or amount, of a written inter vivos trust would be a matter of public record if trust registration were required. In the case of oral trusts, the terms of the trust, the names of beneficiaries and the nature of the trust property must be included in the registration. In deciding whether to recommend trust registration for Maine, the Commission believes that the privacy interests outweigh the convenient but not essential desirability of keeping a trustee's written consent to jurisdiction on public file.

The action of the other Uniform Probate states has been mixed on this point. Alaska, Idaho, and North Dakota have enacted unaltered versions of Article VII, Part 1, while Minnesota and Montana have rejected Uniform Probate Article VII altogether. Arizona, New Mexico, and Utah have retained everything in Article VII except its registration provisions, and instead provide that the trustee is deemed to consent to the personal jurisdiction of the local courts by maintaining the principal place of trust administration within the state. In these states, the UPC 7-101 definition of "principal place of administration" is also retained, and the bases of the jurisdiction are the location of the trust and the acts of trust administration, rather than the formal act of trust registration. Finally Nebraska enacted a version of Article VII

that provides for trust registration but makes it optional.

The Nebraska approach seems to be a desirable compromise between providing the convenience of registration and preserving privacy where desired. The Uniform Probate Code provisions referring to jurisdiction based on registration have been drafted in the proposed Maine Code to provide jurisdiction over trustees and beneficiaries of trusts whose principal place of administration (as defined in UPC 7-101) is in the state and §7-104 provides for jurisdiction over unregistered trusts.

#### 5. Jurisdiction Over Non-resident Beneficiaries

In order to have jurisdiction over all litigation that may arise involving the internal affairs of a trust, a court will necessarily have to obtain jurisdiction over the trustee and the beneficiaries whose interests in the trust may be affected by its adjudications. Thus, UPC 7-103 subjects the trustee and all trust beneficiaries to the jurisdiction of the court of registration for purposes of such proceedings. As it applies to the trustee, UPC 7-103(a) raises no problems. As already pointed out, in addition to the trust registration, the court of registration will always have alternative substantive grounds for exercising jurisdiction over the trustee. However, the constitutionality of UPC 7-103(b) is questionable insofar as it purports to subject beneficiaries to the jurisdiction of a forum with which they may lack any connection other than the trustee's residence there. Whether courts would sustain such applications of UPC 7-103(b) is speculative. This unpredictability is due in part to the fact that jurisdictional doctrine is now in a state of flux; it is also attributable to the fact that the Supreme Court's cases concerning

the extent of, and limits on, state court jurisdiction lend themselves to a variety of interpretations and require a detailed and complex case-by-case application.

Under traditional doctrines of jurisdiction, a person's status as beneficiary of a trust having its principal place of administration in any given state would not by itself suffice to justify that state's exercise of jurisdiction over that person. For nearly a century, the landmark case delimiting state court jurisdiction was Pennoyer v. Neff, which identified two fountain-heads of judicial power: the presence of a person within the state, giving rise to in personam jurisdiction, or the presence of property within the state, giving rise to in rem or quasi in rem jurisdiction. In the case of quasi in rem jurisdiction, by prejudgment seizure of a non-resident's property located within its borders, a state acquired not only the power to determine the validity of competing interests in the property itself, but to adjudicate claims against the non-resident that could be satisfied out of the seized property even though otherwise unrelated to it. In effect, quasi in rem jurisdiction meant that a state's jurisdiction over property also gave it jurisdiction over the owner to the extent of his interests in the property, even though the owner was a non-resident so that in personam jurisdiction was lacking.

Under Pennoyer criteria, the constitutionality of UPC 7-103(b) might well depend upon the existence of additional circumstances that might be necessary to subject trust beneficiaries to the jurisdiction of the court of registration. Obviously, if the beneficiaries happened to be residents of the state where the trust was

principally administered (and therefore registered), then the court of registration would have in personam jurisdiction over the beneficiaries as well as the trustee. Its power to issue decrees adjudicating their interests in the trust would be unquestioned. Even if the beneficiaries were nonresidents, they could consent to the exercise of personal jurisdiction, as, for example, where they instituted an action against the trustee in the court of registration. Also, if the court of registration had jurisdiction over the trust property, it might have grounds for asserting quasi in rem jurisdiction in trust proceedings. This would afford it a means of determining the rights of non-resident beneficiaries to the extent of their interests in the trust property. 5 Scott on Trusts §565. Finally, the state court could arguably have jurisdiction to litigate interests of all beneficiaries in a trust that exists and is administered under its laws, although such jurisdiction has not been traditionally established<sup>3/</sup>

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3. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 S. Ct. 865, 70 L.Ed. 653 (1950), the Supreme Court upheld the jurisdiction of a New York court to settle the accounts of a common trust fund and to determine the liabilities the trustee had incurred to the beneficiaries, some of whom were not residents of New York. The common trust fund was administered in New York by a New York trustee. Mullane, however, is not dispositive of whether a court's jurisdiction over trust property would always afford grounds for exercising quasi in rem jurisdiction in actions to determine the rights of non-resident beneficiaries in the property. The Court expressly refused to link its holding to a rationale based upon in personam, in rem, or quasi in rem jurisdiction; the large number of beneficiaries involved, some of whom could not even be located, suggested a strong element of jurisdiction by necessity. Nevertheless, the Court did hold that:

...the interests of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or non-resident, provided its procedure affords full opportunity to appear and be heard.

339 U.S. at 313. It is perhaps on such language that the Uniform Commissioners based their judgment that UPC 7-103 (b) would pass constitutional muster. See Uniform Comment to UPC 7-103.

and is highly questionable. Notwithstanding the possibility that a court's exercise of jurisdiction pursuant to UPC 7-103(b) would sometimes be adequately supported on traditional grounds, the Code purports to have a broader sweep. For example, the principal place of trust administration (and therefore the court of registration) is ordinarily determined by the trustee's residence or place of business (UPC 7-101), without reference to the location of the trust property. Thus even if it is conceded that the state where trust property is located can exercise quasi in rem jurisdiction over non-resident beneficiaries, it is entirely possible that trust property will be located in a state other than the one where the trust is registered. In that event, although UPC 7-103(b) purports to subject non-resident beneficiaries to the jurisdiction of the court of registration, it is clear that the traditional jurisdictional prerequisites would be lacking for a decree to determine the beneficiaries' rights in the trust. The court would have neither in personam nor quasi in rem jurisdiction over the non-resident beneficiaries. Moreover, even if the court of registration does have jurisdiction over the trust property, without some other basis of jurisdiction over a non-resident beneficiary, "it is questionable whether [the court] can impose a personal liability upon him, as, for example, where he has been overpaid." 5 Scott on Trusts §568.

The foregoing discussion leads to the conclusion that UPC 7-103(b) contains a grant of jurisdiction that, on its face, exceeds traditional limits on a court's power over non-residents. Since Pennoyer, however, the guidelines for the exercise of state court jurisdiction have become considerably less precise. A person's

physical presence within the state is no longer the sole basis for asserting in personam jurisdiction over him. In International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945), the Supreme Court promulgated a "minimum contacts" test that premised the exercise of personal jurisdiction on an analysis of whether the forum was a reasonable one in light of the aggregate contacts between it, the litigation, and the parties. Most recently, in Shaffer v. Heitner, 429 U.S. 813, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), the Court announced that all assertions of state court jurisdiction will hereafter be evaluated on a "minimum contacts" analysis. The presence of property within a state, previously grounds for the exercise of quasi in rem jurisdiction over non-residents, is now merely one factor that must be taken into account for purposes of determining whether there is an adequate foundation to support jurisdiction in litigation involving non-residents:

Although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction. If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum. <sup>4</sup>

The constitutionality of an exercise of jurisdiction over

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4. 97 S.Ct. at 2582-2583. The Court did not discount the significance of local property interests for purposes of obtaining jurisdiction over nonresidents:

[T]he presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the state where the property is located not to have jurisdiction. 97 S.Ct. at 2582.

nonresident beneficiaries pursuant to UPC 7-103 (b) depends, therefore, on the existence of sufficient minimum contacts between the court of registration and the nonresident beneficiaries. In making this determination, the location of the beneficiaries or the trust property are relevant though not necessarily dispositive factors. Obviously, the theory underlying UPC 7-103 (b) is that a person's status as a beneficiary of a trust having its principal place of administration in this state is alone sufficient to establish minimum contacts between that person and the court of registration. Equally obvious is the fact that only the courts can determine whether due process requirements are met when jurisdiction is premised solely on a person's status as beneficiary of a trust.<sup>5</sup> In all likelihood, no black-and-white rule will ever emerge; rather, courts will probably proceed on a case-by-case basis, inquiring into the existence of minimum contacts of all kinds: the convenience of the forum, the location of the trust property, the intentions of the settler, etc.

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5. In Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958), the Supreme Court held that a Delaware trustee's routine remittances of income to a Florida beneficiary would not suffice as minimum contacts to support Florida's exercise of jurisdiction over the trustee. Hanson is not necessarily determinative of whether the opposite situation would give rise to jurisdiction, however; the beneficiaries' contacts with the jurisdiction in which the trust is administered may be stronger than the trustee's contacts with the jurisdiction in which the beneficiaries reside. The beneficiaries, for example, enjoy the protection of the laws of the principal place of administration even when they reside elsewhere.



Because some applications of the sweeping language of UPC 7-103 (b) may be constitutionally questionable, it seems desirable to change UPC 7-103 to allow, by the terms of the section, the widest jurisdiction that is constitutionally permissible. This is an approach that is typical of jurisdictional legislation, and is the approach taken by the present Maine long-arm statute, 14 MRSA §704-A (1978 Supp.). There, the legislature has provided that nonresidents are subject to the jurisdiction of Maine courts to the extent that they "[m]aintain any. . .relation to the State or to persons or property which affords a basis for the exercise of jurisdiction by the courts of this State consistent with the Constitution of the United States." Language to this effect, coupled with the comprehensive notice provisions already included in UPC 7-103 (b), would cure the statute of its constitutional uncertainty and allow full jurisdiction to the state's courts, while at the same time providing the inherent flexibility for the statute to expand or contract with the presently fluctuating development of constitutional jurisdiction requirements. The Commission, for these reasons, has modified UPC 7-103 (b) in this way, and has used the same approach in drafting §7-104 dealing with jurisdiction of unregistered trusts. The proposed modification would reiterate the basic principle of Maine's present long-arm statute but specifically place it in the context of jurisdiction over trust beneficiaries.

Deletion of the opening clause in the Maine version of UPC 7-103 (b) eliminates any possibility that the inclusion of the deleted language might restrict jurisdiction to a greater degree than the Constitution requires. For example, in case of an attempt

to recover an overpayment to an out-of-state beneficiary, such an overpayment might arguably be beyond "the extent of [the beneficiary's] interest in the trust," and thus outside the statutory jurisdiction provided in the uniform version of 7-103 (b) whether or not such jurisdiction could constitutionally be granted.

B. Foreign Trustees

UPC 7-105 provides that a foreign corporate trustee need not qualify as a foreign corporation doing business in this state unless it maintains the principal place of administration of the trust in this state. Thus, when a testator devises property to a foreign corporation for purposes of creating a testamentary trust that will be administered at the corporation's principal place of business, the trustee does not need to qualify as a foreign corporation doing business in the testator's state merely in order to receive distribution for his personal representative. If the foreign corporation is co-trustee of a trust having its principal place of administration in this state, that foreign corporate co-trustee is also excused from the qualification requirement. These limitations on the qualification requirement are designed to allow a testator or settlor to choose his trustee free of unduly burdensome restrictions.

The burdensome qualification requirements that present Maine law imposes on foreign corporate trustees of testamentary trusts are typical of the problem at which UPC 7-105 is aimed. Now, a testamentary trustee is not entitled to distribution from the testator's estate until he qualifies with the probate court. 18 M.R.S.A. §4003; Stevens v. Burgess, 61 Me. 89 (1872). If the testator has nominated a nonresident as his trustee, qualification

requirements beyond ordinary bonding must be satisfied. All non-resident testamentary trustees must appoint an agent with the state to receive service of process here. 18 M.R.S.A. §4004. If the foreign trustee is a corporate fiduciary, it must meet the additional requirements imposed by 18 M.R.S.A. §§4161-65 (1977 Supp.) viz., register as a foreign corporation doing business in Maine, appoint the Secretary of State as an agent to receive service of process, and provide an official certification that Maine corporate fiduciaries are permitted to serve as fiduciaries in the trustee's state of incorporation.

The purpose of UPC 7-105 is to eliminate these cumbersome requirements for foreign corporate trustees. There appears to be no sound reason why a foreign corporation named by the testator should have to qualify as a corporation doing business in Maine if, as soon as it receives distribution from the testator's estate, the assets are removed to be administered at its principal place of business. Moreover, since qualification requirements ordinarily apply only to testamentary trustees, they are easily circumvented by the use of pourover trusts. 5 Scott on Trusts §558. The Uniform Testamentary Additions to Trusts Act, now embodied in 18 M.R.S.A. §7 and continued in UPC 2-511, provides that bequests to the trustee of an inter vivos trust do not render the trust testamentary. The statute not only insulates the trustee from continuing court supervision, but it eliminates the need for him to qualify as a testamentary trustee. 5 Scott on Trusts §563.

Apart from the desirability of revising this aspect of present law, adoption of UPC 7-105 is necessitated by the Code's transfer of jurisdiction over testamentary trusts from the state where the testator's will was probated to the state where the trust is

principally administered. Only in the event that a corporation actively maintains the principal place of administration in a state other than its own would its trusteeship bear on whether it must qualify as a foreign corporation doing business in this state.

C. Actions Concerning Trusts

1. Trust Proceedings and Jurisdiction

UPC 7-201 reposes exclusive jurisdiction of proceedings involving the internal affairs of trusts in a single court. Subsection (a) defines "internal affairs" of trusts as "those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts", and provides an illustrative, but non-exclusive, list of such proceedings.

Subsection (b) of UPC 7-201 provides that the registration and proceedings under Article VII do not place the trust under continuing, active judicial supervisory proceedings; that administration of a trust is to proceed without judicial intervention unless and until the jurisdiction of the court is specially invoked by interested parties. Article VII thus provides a flexible system of nonjudicial administration for all express trusts, whether created by will or other means. The elimination of close court supervision of testamentary trusts is based on both (a) the lack of any significant reason for providing such supervision for a testamentary trust but not for an intervivos trust, and (b) many of the same reasons underlying the analogous abolition of unnecessary, routine, judicial supervision of the administration of decedent's estates. In most cases, court involvement is unnecessary, inefficient, and "more expensive than useful in relation to the vast majority

of trusts." Uniform General Comment to Uniform Probate Code Article VII.

Another major change from present law would be the elimination of the superior court's equity jurisdiction to hear matters relating to the internal affairs of trusts. Currently, the Superior Court and the probate court have concurrent jurisdiction in these matters. 4 M.R.S.A. §252, 14 M.R.S.A. §6051 (4), (10). Neither court has priority over the other. In re Estate of Cassidy, 313 A. 2d 435 (Me. 1973); Eastern Maine General Hospital v. Harrison, 135 Me. 190, 193 A. 2d 246 (1937). Particularly in light of the pending Commission study of the probate court structure, it seems advisable to leave the present concurrent jurisdiction in effect insofar as trust administration is concerned. This would be less disruptive of the present system while the Commission is still considering the overall probate or family court structure possibilities, and considering what the relationship should be between the Probate and Superior Courts. There would not seem to be any particular reason to take trust jurisdiction out of the present Superior Court and no particular reason to vest such jurisdiction exclusively in the present, part-time, elected probate court. Since trust administration is to be treated as separate from probate matters, there would not seem to be any violation of basic Uniform Probate Code policies by providing such concurrent jurisdiction in the limited area within the context of our present court structure.

Section 7-201 of the proposed Maine Code therefore retains the concurrent jurisdiction of the Superior Court, which would include both *intervivos* and testamentary trusts.

Another problem arises from elimination of those provisions of 18 M.R.S.A. §§3951-53 which currently expressly provide that either the probate court or the Superior Court may appoint a successor trustee whenever a vacancy occurs and specifically empower these courts to vest title to trust property in the new trustee. These provisions have their origin in the maxim that equity acts in personam. Thus, it was formerly thought that an equity court without personal jurisdiction over the trustee could not effectively remove him because it lacked the power to compel a conveyance of trust property to the new trustee; this was true even though the trust property was located within the jurisdiction of the court. These statutes were widely enacted to remedy this situation, which they accomplished by making local trust property subject to the jurisdiction of a court of equity. 5 Scott on Trusts 565. Although it is probably true that modern courts have this power even in the absence of a statute, it is possible that some may misconstrue the substitution of UPC 7-201 for the present statutes as evidence of a legislative purpose to limit the jurisdiction of the court in this respect. This possible and undesirable result is avoided in the Commission's bill by inclusion of the additional language in UPC 7-201(a) (1) as follows:

- (1) appoint or remove a trustee, including a successor trustee, and to vest property held in trust by the original trustee in a successor trustee;

2. Trust Proceedings & Venue.

UPC 7-202 provides that venue for all proceedings involving the internal affairs of trusts is at the court of registration. In the absence of registration, proceedings may be brought at any

court in which the trust could have been registered (in other words, the court in any place where the trust has been or is being principally administered). If venue is still in doubt following application of these provisions, the rules of civil procedure would govern.

This section determines venue by the principal place of trust administration, which is ordinarily the trustee's residence or place of business (UPC 7-101). As a result, the Code would eliminate the choice of venue now available in certain trust litigation. Presently, venue in all proceedings involving unsupervised intervivos trusts, as well as Superior Court Proceedings involving testamentary trusts, is governed by 14 M.R.S.A. 501 (1977 Supp.). In those cases, venue would ordinarily be in the county where the parties reside or where the cause of action occurred. Venue in probate court proceedings involving testamentary trusts is limited to the probate court with primary supervisory jurisdiction. 4 M.R.S.A. §253.

UPC 7-202 essentially provides for venue for both kinds of trusts in the court where the trust is principally administered-- terminology which, as has already been pointed out, is generally interchangeable with the "court of registration" or the court where it could have been registered.

UPC 7-203 provides that the court will, upon motion of a party, dismiss any action relating to the internal affairs of a trust that has its principal place of administration in another

state. Two exceptions are provided: First, when all appropriate parties could not be bound by litigation in the proper court, and, second, "when the interests of justice otherwise would seriously be impaired." Rather than exercise the jurisdiction that is given under this section, the court may dismiss an action upon the condition that parties who could not be bound anywhere else consent to the jurisdiction of the court in another state.

UPC 7-203 is aimed at resolving jurisdictional conflicts where a court in a state other than the one where the trust is principally administered acquires concurrent jurisdiction in some trust-related matter. This could occur, for example, because of the location of beneficiaries or trust property outside the state of primary jurisdiction. However, the question of whether a court has jurisdiction, which was discussed in connection with UPC 7-103, and whether a court will exercise its jurisdiction raise different issues. Traditionally, even though technical jurisdictional requirements may have been satisfied, whether to entertain proceedings relating to a trust whose court of primary supervision is located in another state has been a question for case-by-case determination. The convenience of the forum and the degree of interference with the primary court are, among others, considerations that have often influenced the results in these situations. See generally 5 Scott on Trusts §§569-71.

UPC 7-203 adopts a general rule for the resolution of the problem of whether to exercise jurisdiction once it has been acquired: in the absence of exceptional circumstances, the court at the place where the trust is principally administered (which, in a Uniform Probate Code state, would be the court of registration)



has priority in all cases of concurrent jurisdiction involving the internal affairs of trusts. Insofar as an exception is recognized if there are parties who could not be bound by proceedings at the primary court, the drafters seem to be acknowledging the problem recognized and discussed by the Commission in connection with §7-103--that their grant of jurisdiction to the court of registration over nonresident beneficiaries in UPC 7-103(b) may be ineffectual under some circumstances. That problem, of course, is addressed by the Commission's amendment of the uniform version of UPC 7-103(b).

The second exception to UPC 7-203, for circumstances that would otherwise result in manifest injustice, is designed to cover special situations arising from "the nature and location of the property or unusual interests of the parties." Uniform Comment to UPC 7-203. Application of this exception will probably entail exactly the sort of balancing analysis traditionally employed by courts when deciding whether to pre-empt another state's primary jurisdiction over a trust. 5 Scott on Trusts 569-71. The Uniform Probate Code thus seems to adopt essentially the traditional doctrine of deference to the state of primary jurisdiction with discretionary leeway for assuming jurisdiction when circumstances would make it appropriate.

### 3. Concurrent Jurisdiction of Trust-Related Actions

UPC 7-204 provides for concurrent jurisdiction between the probate court (which, under the Maine version of UPC 7-201, would include the Superior Court with which it has jurisdiction in proceedings involving the internal affairs of trusts) and the other courts of the state where proceedings involving the trustee and third parties are concerned. Concurrent jurisdiction is also granted over proceedings to determine the existence or nonexistence of

trusts created other than by will and in actions by or against creditors or debtors of trusts. Venue is the same as in ordinary civil actions.

In providing for concurrent jurisdiction in the other courts in the state of registration where actions involving the trustee and third parties are concerned, this section should not be read as an attempt to confine all such litigation to the courts of one state. Only proceedings involving the internal affairs of trusts, which must be brought at the court of registration pursuant to UPC 7-202, 203, are ordinarily limited to a single state. Rather, the proceedings referred to in UPC 7-204 include those in which the trust, through the trustee, is treated as a unified entity with the same capacity to sue or be sued as natural persons or a corporation. This sort of litigation may be instituted in any forum whose jurisdiction would ordinarily be invoked for such a purpose, as well as in the UPC 7-201 "court."

Given the inclusion of the Superior Court within §7-201(a), the existence of both of these sections together might seem to be redundant. However, even in that event, the inclusion of both sections would preserve the basic format and structure which the legislative package is following, so that (a) the changes from the Uniform Probate Code would be more visible and more easily noted, and (b) the structure would lend itself more easily to any kind of change that might be subsequently enacted in the probate court structure.

#### D. Compensation

UPC 7-205 provides a procedure whereby interested parties may obtain a court review of the reasonableness of compensation paid

by the trustee either to himself or to any employee of the trust. As the Uniform Comment to this section points out, such proceedings are implicitly authorized in UPC 7-201 even in the absence of the express statutory language of UPC 7-205. The drafters, however, made specific provision for this problem in order to mitigate criticism of the Code's theory, implicit in its system of unsupervised trust administration, that trustees should set their own compensation as well as the compensation of persons they employ, including attorneys.

Insofar as this section limits trustees to reasonable compensation, it effects no change from present Maine law. Currently, however, the fees charged by a testamentary trustee are subject to allowance by the court where he files his accounts. Maine Probate Rule 46. Partly because the Uniform Probate Code requires no routine accountings and partly because the trustee's authority to set such fees is presumed by the Uniform Probate Code, the reasonableness of a trustee's fees would be reviewed by the court only if interested parties commenced proceedings for this purpose pursuant to the same policies of independent administration found in the probate area.

UPC 7-205 also governs proceedings for reviewing the propriety of employment of persons by a trustee for purposes of assisting him in the administration of his duties. Except in the case of appraisers who are appointed by the court pursuant to 18 M.R.S.A. 4008, present law makes no specific reference to the trustee's authority to retain the services of "attorneys, auditors, investment advisors, or other specialized agents." This omission is in contrast to the Uniform Trustee's Powers Act, mentioned in

the Comment to UPC 7-205, which expressly empowers a trustee to employ such persons as are necessary to assist him in the performance of his duties. Such express provision is included in the proposed Maine code by incorporation of the Uniform Trustee's Power Act as Part 4 of Article VII.

There is no explicit authorization in present Maine law for trustee payment of such compensation under an inter vivos trust, 18 M.R.S.A. §3955, and testamentary trustees who are now required to render routine accountings to the probate court would have to obtain court approval of all fees paid to employees of the trust.

To continue to require court approval of these transactions, as well as of compensation paid to the trustee himself, would be inconsistent with the basic reform proposal of unsupervised trust administration. UPC 7-205, on the other hand, provides desirable independence for the trustee while also explicitly providing easy access to judicial remedies for beneficiaries who may be injured if that independence is abused.

The Commission did change the uniform version of UPC 7-205 in one way: the guidelines that were added to UPC 3-721 as subsection (b) are incorporated by reference in a new sentence at the end of §7-205 to give similar guidance in determining the reasonable compensation of the trustee and persons employed by him in the administration of the trust.

#### E. Duties and Liabilities of Trustees

Part 3 of Article VII of the Uniform Probate Code contains a number of basic and helpful reforms in the area of trust administration. In summary they include:

- (1) a slight modification of the statement of the fiduciary

standard of care;

(2) specification and clarification of the trustee's duty to inform and account to the beneficiaries;

(3) elimination of the distinction between testamentary and intervivos trusts for bond requirement purposes by eliminating the bond requirements for both kinds of trustees except when requested by the settlor or beneficiaries or required by the court;

(4) adding an express duty to administer the trust at an appropriate place, with procedures for achieving and enforcing that objective;

(5) reforming the rules concerning the liability of the trustee and the trust property to claims of third parties; and

(6) providing clearer time limitations on trustee liability.

1. General Duty and Standard of Care

Article VII concentrates on certain basic reforms within the area of trust administration rather than proposing a substantially new system, as in the probate area. Thus, UPC 7-301 provides that the "general duty of the trustee to administer a trust expeditiously for the benefit of the beneficiaries is not altered by this Code." Likewise, in UPC 7-302 the traditional statement of a fiduciary's standard of care is adopted, except that it is based on the standards that would be observed by a prudent man "dealing with the property of another" instead of such a person dealing with his own property. In addition, the section expressly clarifies that the trustee has a duty to use his special skills and expertise if he is named trustee on the basis of representations that he has special skills and expertise. As the Uniform Comment to this section points out, the modification in the language referring to the property of "another"

actually clarifies, rather than changes, the standard as it has been articulated in some decisions, and the modification probably more accurately states the standard that has always been intended under the traditional formulation.

The present standard in Maine is stated in 18 M.R.S.A. §4054, applicable to fiduciaries generally, which provides in part as follows:

In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering probable income as well as the probable safety of their capital.

For the most part, the additional factors expressed in the language of the Maine statute would seem to be inherent in the standard expressed in UPC 7-302. Providing a standard that looks to the "circumstances then prevailing," and requiring that the person have "discretion and intelligence" as well as prudence add little if anything to the standard. The caution against speculation and the emphasis on the safety of capital are also generally understood to be within the standard of how a prudent person would handle the property of another under most circumstances, especially where one of the purposes for creating the trust is to provide competent management of assets and where some of the beneficiaries have future or continuing interests that depend upon the preservation of capital.

The Uniform Probate Code version seems preferable for the following reasons: (a) there is in fact little, if any, difference between them, and to the extent that there is a difference the addition of the reference to a person of discretion and intelligence

might result in construing the standard to be higher than it should or needs to be, especially in light of the explicit provision for holding trustees to a stricter duty if named on the representation of having special skill or expertise; (b) the emphasis on capital safety could conceivably interfere with a fair assessment of the trustee's proper duty where some of the beneficiaries most closely related to the settlor are income beneficiaries; (c) a presumption that the settlor chose as trustee a person whose particular judgment he trusted should lead to allowing that trustee to use that judgment under a less fettered but fully sufficient standard of care; and (d) in an area where inter-state uniformity of law is important, as here, any benefit from a more explicit enumeration of factors is outweighed by the possibility of raising a question whether disuniformity of language in this particular section represented a deliberate attempt to state a different standard than the Uniform Probate Code, especially when it is done in the context of the adoption of a uniform act.

One modification in UPC 7-302 that was made in the Maine version is the substitution of the word "person" for the word "man." Such a change would more accurately reflect the intended meaning of the section, rather than make any substantive change, and would avoid any implication that the focus for determining the standard of care should be on a man rather than on any prudent person. No cases have been found under the traditional standard which have focussed on any such difference related to gender, and the Commission is not aware of any evidence that would justify such a distinction between the management capabilities of men and women. Many women in fact are competent managers of property and many men are not. Indeed, a statutory presumption of greater competence in such affairs would

raise a constitutional problem. Reed v. Reed, 404 U.S. 71 (1971)

The use of the word "person" would also tie more directly into the definitional section of Article I. The Uniform Probate Code has no definition for "man" which would provide any statutory basis for avoiding a focus on prudent men rather than prudent women under UPC 7-302. The definition of "person" under UPC 1-201 (29), however, includes "an individual, a corporation, an organization, or other legal entity." Thus, substitution of the word "person" would additionally help to focus the standard of care on prudent corporate practice where the trustee is a corporation, as well as on the conduct of a prudent "individual" rather than a prudent man or a prudent woman where the trustee is a "person." While the present Maine statutes (M.R.S.A. §71(7)) provide that "words of the masculine gender may include the feminine," the applicability of that statute would not be as obvious or direct a way of focussing the standard of UPC 7-302 on the judgment of a prudent person as would the substitution of the neutral word "person."

## 2. Investments Authorized

The middle part of 18 M.R.S.A. §4054 authorizes a trustee or other fiduciary to invest and hold trust assets pursuant to the "prudent man rule," rather than limiting such investments to those kinds enumerated in a statutory "legal list." 18 M.R.S.A. §4055 preserves the right of a settlor to control the kinds of permissible investments through the terms of the trust instrument, but provides that the use of the terms "legal investment" or "authorized investment" or "words of similar import" in and of themselves shall be construed to mean any investment permitted under the prudent man rule.

While these questions are not expressly covered by the Uniform



Probate Code, it would seem that the standard stated in UPC 7-302 would allow investment under the prudent person rule. In any event, it would seem desirable to expressly preserve these basic provisions of Maine law.

Therefore, the Commission's bill adds a new subsection (b) to UPC 7-302 to preserve the present Maine investment rule.

The remaining, and last, sentence of 18 M.R.S.A. §4054 provides for the allocation to principal of certain stock dividends which come from capital gains, and is outside the scope of the Commission's study. The provision is preserved in the proposed Code as §8-204.

### 3. Duty to Inform and Account

UPC 7-303 provides expressly for a duty by the trustee to inform the beneficiaries concerning the trust, and defines the general lines along which that duty is to be carried out. There is traditionally a legal duty on the trustee to inform and account to beneficiaries, but it is often not clearly defined in case or statutory law. In this sense, the Uniform Probate Code provision serves primarily to clarify the existence and nature of the obligations.

The Uniform Probate Code does depart from traditional trustee duties in 703 (a) by requiring the trustee to inform beneficiaries of his name and address and the name of the court in which the trust is registered, and to do this within thirty days of the trustee's "acceptance" of the trust. While beneficiaries of a testamentary trust would ordinarily receive this information during the probate process, beneficiaries of an inter vivos trust would not necessarily know about it until some event (such as distributions made to them) gave them notice of it.

UPC 7-303(b) requires the trustee to provide a beneficiary

with a copy of the trust terms describing or affecting his interest, and with relevant information about the trust assets and administration, all upon reasonable request by the beneficiary. Subsection (c), also upon reasonable request by the beneficiary, requires the trustee to account to the beneficiary annually and upon termination of the trust or change of trustee. These obligations are more in line with the traditional duty to keep beneficiaries informed. The more significant departure from traditional trust principles is that the Uniform Probate Code does not provide for any routine accounting to the court, which is typically required in the case of testamentary trusts. Trust administration under the Uniform Probate Code, in a way roughly comparable to the Uniform Probate Code's treatment of decedent estate administration, is a matter between the fiduciary and the beneficiaries in the first instance. Article VII extends this treatment (traditional in the area of inter vivos trusts) to testamentary trusts under the philosophy that there is no reason to apply the basic trust administration principles differently solely because the trustee was named in a will rather than an inter vivos instrument.

Present Maine law requires a three-year periodic accounting to the court in the case of testamentary trusts, 18 M.R.S.A. §4001(3), or trusts in which the settlor has petitioned for judicial confirmation of the trustee, 18 M.R.S.A. §§ 4051, 4052. These judicially confirmed or testamentary trustees also are required to file with the court an inventory of the trust estate, 18 M.R.S.A. §§ 4001(2), 4052, and the trust estate must be appraised by one or three disinterested appraisers. 18 M.R.S.A. §4008.

The Uniform Probate Code's unified treatment of testamentary and inter vivos trusts seems preferable to the present Maine law's

distinction between the treatment of the two. For much the same reasons that applied to the Commission's consideration of decedents' estate administration--judicial and private administrative efficiency, as well as the preservation of privacy--it also seems preferable to avoid initial and routine judicial supervision over testamentary trusts.

Although the Commission would contain optional, rather than mandatory, trust registration, the reference to registration in UPC 7-303(a) is needed to provide for those cases where the optional registration provision is utilized. The insertion of ", if any," after the word "court" in subsection (a) of the proposed Maine Code conforms this section to the optional registration provisions. See Neb. Rev. Stat. §30-2814(a).

While most of the Uniform Probate Code states which have adopted some form of trust registration have also adopted UPC 7-303 in its official form, Nebraska added language which would make the "additional" requirements of subsections (a)-(c) subject to contrary provisions in the trust. This aspect of the Nebraska version does not allow the settlor to negate the general duty of the trustee to keep the beneficiaries reasonably informed, as provided in the first sentence of the section. In light of the difficulty of protecting a beneficiary's legal interests in a trust without being able to obtain information, it seems particularly strange to tolerate trust provisions that would negate the provisions of subsection (b) and (c).

The section in the proposed Maine code does contain a minor provision in subsection (a) delaying the need to inform beneficiaries of the court of registration and the trustee's name and address in the case of a receptacle trust until it becomes more than minimally

bonded.

4. Bond

UPC 7-304 excuses any trustee from providing bond except (a) when required by the trust terms, (b) when reasonably requested by a beneficiary, or (c) when found by the court to be necessary to protect the interests of beneficiaries who are unable to protect themselves or who are not adequately represented. These provisions, of course, apply equally to testamentary and inter vivos trusts. The same section also provides that the court may excuse bond, reduce the amount, release the surety or permit the substitution of another bond or surety. It also provides that any required bond shall be filed in the court of trust registration or other appropriate court in the manner provided in the provisions relating to bonds posted by a decedent's personal representative (UPC 3-604 and 3-606).

Present Maine law requires the posting of bond by a trustee before entering upon his duties in the case of a testamentary trustee, 18 M.R.S.A. §4001, or a trustee whose settlor has petitioned for court confirmation, 18 M.R.S.A. §4051, and perhaps in the case of a successor trustee, 18 M.R.S.A. §§ 3952, 4007, unless bond is waived in the will or by all interested parties who are of full age and capacity, 18 M.R.S.A. §4002. Failure to file bond within the time prescribed by the court is deemed a rejection of the trusteeship. 18 M.R.S.A. §4003.

Partly because of the difference in the nature of the interest, and the difference in the intent between a testator passing legal title to devisees and a settlor conveying legal title to a trustee for the equitable benefit of beneficiaries, there is less reason to require bond from a trustee as a routine matter than there may be

for requiring bond from a personal representative. The trustee, after all, has been given legal title to the property because of a judgment of trustworthiness either by the settlor or by a court, with the expectation that he will retain and manage it for an extended period of time. A personal representative, on the other hand, is a temporary officer fulfilling the limited function of distributing to the heirs or devisees the decedent's property to which the heirs or devisees themselves have, or are to have, legal title. No bond has been routinely required of trustees of inter vivos trusts. Unless one is to attach undue significance to the kind of instrument by which the trustee was appointed or the trust created, there seems to be no reason not to treat the testamentary trustee in the way inter vivos trustees have traditionally been treated.

One minor adjustment, which was enacted in the Nebraska version of the Uniform Probate Code, is included in the proposed Maine Probate Code. Nebraska changed the word "reduce" in the second sentence of the section to the word "change," so that the court would expressly have authority to either raise or lower the amount of bond upon petition of the trustee or other interested person. There seems to be no reason to preclude a court from raising the bond amount upon such petition if the circumstances justify it, and without the Nebraska change there is no express authority for the court to do so.

##### 5. Duty to Administer in an Appropriate Place

Apparently as a supplement to the Uniform Probate Code's effort to localize most trust litigation in one court, and make that court the most appropriate one, UPC 7-302 provides a continuing duty on the part of the trustee to administer the trust at a place

appropriate to the purposes of the trust and its sound, efficient management. This section, it seems, ought to be read in conjunction with UPC 7-101 which (a) gives the settlor control over the principal place of administration by designation in the trust instrument, at least in the first instance, and (b) defines the principal place of administration essentially as the place where the trustee keeps the trust records.

It would also seem that this section (7-305) should not be used lightly, or in a way that would undercut the settlor's choice of trustee whose place of business or residence where the trust records would presumably be kept were known to the settlor when he named the trustee. Section 7-305 does expressly provide that the settlor's terms relating to the place of administration are to control the terms of this section "unless compliance [with the terms of the trust instrument] would be contrary to efficient administration or the purposes of the trust." This reason for deviating from such trust terms seems appropriate and consistent with general principles controlling a court's authority to authorize deviations from trust terms.

Since this section is essentially supplementary to the Uniform Probate Code's effort to localize trust administration in one, most appropriate place, to the extent possible, there are no comparable Maine provisions.

#### 6. Liability of the Trustee

The provisions of UPC 7-306 are considered in Chapter 2.G.3. of this study, along with UPC 3-808 and 5-429. The reforms of these sections seem clearly desirable.

7. Time Limitations

UPC 7-307 places a six-month limitation period for bringing a proceeding to assert a claim by a beneficiary against the trustee after the beneficiary receives a final account or other statement which fully discloses the matter in question and which shows the termination of the trust relationship between the beneficiary and the trustee. The section also provides for an ultimate three month limitation on proceedings where such full disclosure is not made, but where the final account or statement received by the beneficiary has disclosed the location and availability of records for the beneficiary to examine. For purposes of this section, receipt of the final account or statement occurs when an adult beneficiary personally receives it, or when a minor or disabled beneficiary's representative (as defined in UPC 1-403(1) and (2)) receives it.

This section is part of the Uniform Probate Code's basic emphasis on facilitating private administration without judicial supervision except where the trustee or other persons interested in the trust estate perceive a need for judicial intervention. As such, there is no direct Maine counterpart. The function of the section is to provide a non-judicial means for closing the administration of the trust comparable to the filing of a closing statement to terminate administration of decedents' estates. See UPC 3-1003 and 3-1005. It provides a means by which the trustee can protect himself from liability after his final accounting and after providing, or making available to, the beneficiary any information relevant to his administration of that beneficiary's interest. In doing so, it avoids the problems of continuing the potential trustee liability over an extended period of time, and,

while it is generally established that court approval of a final accounting will protect a fiduciary against later challenges, Scott on Trusts §260, Chaplin v. National Surety Corp., 134 Me. 496, at 498 (1936), UPC 7-307 also avoids any ambiguities that may exist about the binding effect of various aspects of allowance of the trustee's account, or ambiguities about whether the trustee could obtain binding review by a court (which is alternatively available under UPC 7-201) in the absence of an actual challenge by the beneficiary. See Mattocks v. Moulton, 84 Me. 545, at 549-550 (1892), and Connell, "Allowance of Trustees' Accounts in Maine," 2 Peabody L. Rev. 22 (1937). In addition, it provides a way for the typical non-intervivos trustee who is not under general court supervision to settle his accounts without going to court or obtaining the affirmative approval of the beneficiaries. In limiting the binding effect of such a closing statement to situations involving full disclosure and competent beneficiaries, the Uniform Probate Code is consistent with the present general principles which protect the trustee from subsequent challenge when he has privately received written beneficiary approval of his accounts. Bogert and Bogert, Law of Trusts §143 (5th ed. 1973).

The closest provision in present Maine law appears to be the statute providing that actions on the bond against sureties of administrators or executors must be brought within six years after the fiduciary is cited to appear and settle his accounts, or, if there is no such citation, within six years from the time of the breach of the bond, in the absence of fraudulent concealment of the breach. 18 M.R.S.A. §404. This section is also applicable to trustee's bonds. 18 M.R.S.A. §§4012, 4053, and 301. As previously



stated, this provision is not really analogous to the function of effect of UPC 7-307. Presumably, in the absence of a binding court approval of the trustee's account, the six year general statute of limitations on civil actions would apply to the trustee's liability. 14 M.R.S.A. §752.

F. Trustees' Powers

The Uniform Probate Code provides a space, as Part 4 of Article VII, for inclusion of provisions defining the powers of trustees. Upon consideration of the provisions of UPC 3-715 and 5-424 for powers of personal representatives and conservators --both of which are modelled on the Uniform Trustees' Powers Act, as modified to adjust it to the particular characteristics of those two positions-- it seems desirable to adopt similar, consistent provisions for trustees in Maine. Thus, the provisions of the Uniform Trustees' Powers Act are included in the proposed Maine Code as Part 4 of Article VII.

The enactment of these provisions would further the clarity of trustees' powers in a way that conforms them to the usual ways that are provided in most trust instruments and thus would eliminate the need for extensive, routine boilerplate by those settlors desiring to use them. It would also do this in a way consistent with the principle of inter-state uniformity in an area where such uniformity is highly desirable and consistent with the previously cited provisions for personal representatives and conservators.

While the proposed Page 4 of Article VII would replace the present and less comprehensive 18 M.R.S.A. §3955, the provision of section 3956--enacted to deal with tax aspects of certain kinds of trustee powers--is retained as §7-407 of the proposed Maine code.

These provisions for broad trustees' powers, while tracking the

kinds of powers typically accorded in private trust instruments,  
are of course subject to modification within the instrument.



Chapter 4

NON-PROBATE TRANSFERS

A. Multiple Party Accounts Generally

Part 1 of Article VI of the Uniform Probate Code provides for three types of multiple-party bank accounts with rights of survivorship. The first two of these, the joint account and the trust account, predate the Uniform Probate Code and derive from the application of common law doctrines of joint tenancy and revocable trusts to bank accounts. The third type of account, the P.O.D. account, is exclusively statutory in origin. Apart from minor formal distinctions, each of these devices is or would be used by a depositor in order to effect an immediate non-probate transfer to his named successors of the funds on account at the time of his death. Without statutory authorization, bank accounts with rights of survivorship have been repudiated by some courts as attempted testamentary transfers in violation of the statute of wills. The modern view embodied in the Uniform Probate Code, however, recognizes that the convenience of multiple-party accounts as estate planning devices outweighs the danger that they will result in fraud, the primary concern of the wills statute. Moreover, UPC 6-107 makes clear that real non-probate transfers cannot be used to circumvent the rights of creditors.

B. Joint Accounts

A joint account is defined in UPC 6-101(4) as "an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship."

During the lifetime of these parties, the account ordinarily belongs to them in proportion to their respective contributions to the funds on deposit. UPC 6-103(a). Despite these ownership rights among the parties themselves, however, a financial institution is protected by being allowed to pay over any funds in a joint account to any party to the account without incurring liability to the others. UPC 6-109.

Absent clear and convincing evidence of a contrary intention when the account was created, rights of survivorship exist among the parties. UPC 6-104(a). Upon the death of the final surviving party, his estate is entitled to payment under 6-104(a), and the bank may make such payment to his personal representative upon his presentation of proofs of death which evidence that the decedent was the last surviving party to the account. UPC 6-109.

To date, the joint account with right of survivorship is the only banking device for effecting non-probate transfers of wealth which has received legal recognition in Maine. At common law, joint accounts which failed to meet one technical requirement of a joint tenancy could not be used to convey rights of survivorship because they were construed as attempts to effect testamentary transfers in violation of the statute of wills. Since 1907, however, financial institutions have been authorized by statute to pay over any amount of funds in a joint account to any party to the account whether the other is living or deceased. S. Thaxter, "Some Aspects of the Joint Ownership of Property," 7 Portland U.L. Rev. 57, 61 (1961).

Early judicial decisions, however, held that joint accounts were ineffective to create rights of survivorship as against a decedent's estate. See, e.g., Maine Savings Bank v. Welch, 121 Me. 40, 115 A 545 (1921). In response, in 1929, the legislature expressly authorized rights of survivorship between parties to a joint account in certain limited situations. Thaxter, supra. Although the use of joint accounts for effecting non-probate transfers has been expanded since 1929, it remains subject to some limitations even under the present statute, 9-B M.R.S.A. §427(4).

Compared to the Uniform Probate Code, the distinguishing feature of joint accounts as now provided for in Maine is that they are divided into two categories: first, joint accounts belonging to husband and wife; and second, joint accounts between any other combination of two or more persons. The practical difference between the classification lies in the amount of money that may pass to the survivor(s) by right of survivorship. In the case of a husband and wife, unlimited funds in a joint account are transferred to the survivor without being subject to probate. In all other cases, however, the right of survivorship applies only to the extent that the amount on deposit in the joint account, including interest and dividends, does not exceed \$5,000. The Uniform Probate Code draws none of these distinctions--joint bank accounts between any group of persons carry unlimited rights of survivorship unless the parties have clearly evidenced an intention to create a non-survivorship account. UPC 6-104(a). See paragraph

2 of the Uniform Probate Code Comment. As a result of the Uniform Probate Code, the joint accounts may play a larger role in estate planning.

In other respects, Maine joint accounts are generally similar to, or have only minor differences from, Uniform Probate Code joint accounts. First, under either system, financial institutions may safely pay over all or any portion to any party named on the joint account, without regard to whether other parties are still living. UPC 6-109; 9-B M.S.R.A. §427(4)(a). Second, Maine now requires proof of fraud or undue influence to overcome the presumption of survivorship that arises from a joint account. 9-B M.R.S.A. §427(4)(b). While fraud or undue influence would no doubt also be a ground for relief from a survivorship provision resulting from fraud or undue influence, the Uniform Probate Code would also allow clear and convincing evidence of the parties' intention not to create survivorship rights to overcome the presumption of survivorship. UPC 6-104(a). Thus, under both the Uniform Probate Code and present Maine law, survivorship rights can be abrogated only if the decedent's estate can adduce adequate evidence to meet a higher-than-usual standard of proof. Finally, as between more than one living party to a joint account, proportionate ownership is computed the same way under the Uniform Probate Code as it no doubt would be determined under current law on basic principles of property ownership.

As under UPC 6-103(a) and 6-104(a), a person's ownership interest in a joint account is now measured, at least for inheritance tax purposes, by his net contributions to the jointly owned property.

Any rebuttal of the presumption of proportionate ownership among the parties during their lifetimes would presumably now be established by a preponderance of evidence. The difference, in this context, however, between a preponderance of evidence and clear and convincing evidence would seem to be inconsequential.

In order to conform the present provisions of Maine law with the proposed Maine Probate Code's treatment of joint accounts, two amendments to 9-B M.R.S.A. §427 are included in the Commission's bill. Subsection 4.B. would be amended to eliminate the distinction between husband and wife joint accounts and other joint accounts for purposes of survivorship, and to tie the ownership rights of survivors to the provisions of Code section 6-104. Subsection 4.A. would be amended to conform the provisions for payment of the deposit to the last survivor's personal representative to the standards of Code section 6-109, and to tie the bank's protection into the Code's standards through the Code section 6-112.

#### C. Trust Accounts

Popularly known as "Totten trusts" after the judicial decision in which they were first upheld, Matter of Totten, 179 N.Y.112, 71 N.E. 248 (1904), trust accounts as defined in



UPC 6-101(14) are essentially revocable inter-vivos bank account trusts in which the trustee/depositor retains both legal and equitable title for the remainder of his life or until he expresses an intention to create an irrevocable trust. UPC 6-103(c). Beneficiaries have no rights to the account until the death of the trustee(s); hence, they are not "parties" to it until that time under the definition of UPC 6-101(7) because they have no present right of withdrawal. The trust res must consist solely of the funds on deposit in the trust account which is not to be confused with regular fiduciary or escrow accounts. Ordinarily, a trust account would probably take the form of deposits in the name of "A, in trust for B", although the beneficiary does not need to be mentioned in the deposit agreements. UPC 6-101(14). Upon the death of the trustee (or upon the death of the surviving trustee if more than one trustee is named on the account), the beneficiary, if he survives, is entitled to all funds still on deposit. UPC 6-114(c). Upon proof of death of all persons named as trustees, a financial institution may properly and safely pay over the account to the beneficiary. UPC 6-111. If the trustee survives all beneficiaries, then upon his death, the account is ordinarily payable to his personal representative. UPC 6-111. A trustee may designate more than one beneficiary on the trust account. Rights of survivorship pertain as among remaining multiple beneficiaries in the event that any one of them predeceases the trustee. UPC 6-104(c)(2). Curiously, the fifth paragraph of the Uniform Probate Code Comment following UPC 6-104 states, "In the case of a trust account for two or more bene-

ficiaries, 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 section 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." [Emphasis added]. However, the actual text of the statute does not very clearly provide such a presumption. The problem referred to, however--that of apportioning a trust account among two or more surviving beneficiaries--does exist. Because rights of survivorship would no longer apply once the trustee died, beneficiaries do not become parties to a joint account by virtue of the death of their trustee. Thus, a financial institution might be reluctant to pay over any portion of the account to one beneficiary if it were uncertain whether others were still alive or if the proportions belonging to each beneficiary were for some reason in doubt. To alleviate this ambiguity the uniform language of the first clause of UPC 6-104(c)(2) is modified in the proposed Maine Code by adding the underlined words as follows: "On the death of the sole trustee...any sums remaining on deposit belong to the person or persons named as beneficiaries in equal and undivided shares, if surviving..."

The "Totten trust" has never received judicial or legislative approval in Maine. In fact, the leading decisions nationally that have rejected the validity of revocable bank account trusts are Maine cases, albeit rather dated ones. In

Cazallis v. Ingraham, 119 Me. 240, 110 A 359 (1920), the Supreme Judicial Court expressly rejected the reasoning of the New York Court of Appeals in Totten:

Under the present rule in New York, a bank deposit of one's own money in his own name as trustee for another does not, standing alone during the lifetime of the depositor, constitute other than a tentative trust, revocable at will. The case goes to this length: "In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." Matter of Totten, 179 NY 112. The rule of the Totten case does not appeal to us with favor. 119 Me. at 250.

The Court found the revocable trust theory unacceptable on traditional grounds:

A showing that Celina made a deposit in the bank on the trust that she was to hold the title and the power to dispose of the property so long as she lived, and then what was left was to go to the cestui, would disclose an executory trust, and not an executed one. Smith v. Bank, 64 N.H. 228. But such mode of making a gift would be testamentary in character, and, parting company with the statute of wills, would be without effectiveness. 119 Me. at 247 [Emphasis added].

In Cazallis, the depositor had opened savings accounts in her own name "as trustee for" various relatives. Although the court rejected the tentative trust doctrine, it did hold that a bank account in this form would give rise to a rebuttable presumption that the depositor intended to create an irrevocable trust. Ultimately, the beneficiaries' claims were upheld in Cazallis because the trustee's estate could not produce evidence to rebut the presumption--the court holding that withdrawals by the trustee during her lifetime which never exceeded earned interest were by themselves insufficient to establish that the trustee had intended to create only a revocable trust. However,

in Springvale National Bank v. Ward, 122 Me. 227, 119 A. 529 (1923) the court held that the presumption of irrevocable intent would not even arise when the account was styled "A, Trustee, payable in case of death to B" in light of the "contingency" of B's interest. Because A's attempt to transfer the account to B was testamentary in all other respects, it was disallowed for non-compliance with the statute of wills.

The present Maine banking law provision, 9-A M.R.S.A. §427.2, while silent on the rights of the trustee and beneficiary in respect to the account during the trustee's lifetime, protects the financial institution in its dealings with the trustee. Section 427.2.B deals mainly with the relations between the trustee of an account and the financial institution in which the account is kept. It states that whenever a deposit is made by a person designated on the records of the financial institution as a fiduciary, it shall be conclusively presumed, in all dealings between the institution and the fiduciary, that a fiduciary relationship in fact exists, and that such fiduciary has the 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. The receipt or acquittance of such fiduciary fully exonerates the institution from all liability to any person having any interest in such deposit.

These provisions deal almost exclusively with the relationship between the bank and the "fiduciary." In effect they are not in that respect inconsistent with either the present irrevocable trust presumption or the Uniform Probate Code recognition of tentative trusts, since they protect the bank in

paying money from the account to the trustee himself in his lifetime with no apparent obligation to see that it is used for the purposes of the "trust." The reference to the conclusive presumption of a fiduciary relationship, however, is an oblique (and seemingly somewhat out-of-place) reference to the Cazallis rejection of tentative trusts. As such, it would be inconsistent with the proposed new Code, and the Commission's bill would amend section 427.2.B by striking that reference.

Section 427.2.C. is also amended technically in order to conform its provisions for payment to the estate of the deceased trustee or to the beneficiary upon the trustee's death to the proposed new Code's section 6-111, and to conform its provision for discharge to the proposed new Code's section 6-112.

In the context of the Maine case law's substantive rejection of tentative trusts, and even of the presumption of irrevocable trusts where the language is "contingent" upon the trustee's death, it is interesting to note that banks are authorized to pay out to trustees during their lifetimes despite the Cazallis case, and to pay to the beneficiaries upon the trustee's death in disregard of the possible inconsistency of such payment with the implications of Springvale National Bank v. Ward in some situations. One might be led to conclude that there may to some extent be a difference between the formal rejection of tentative trust as a matter of law and as a matter of practice. Section 427.2. may also be an indication that the newer statutes for the protection of financial insti-

tutions represent a more modern and realistic view that is in spirit, at least, opposed to the older case law upon which the present-day rejection of tentative trusts is based.

The re-insertion of the "clear and convincing" standard in section 6-104(c) is discussed in Part G.6. of Chapter 6 of this study.

D. P.O.D. Accounts

Except in terminology, the P.O.D. account (standing for "payable on death") is virtually identical to the trust account. It is defined in UPC 6-101(10) as 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 to more P.O.D. payees. Thus, like the trustee of a trust account, the creator of a P.O.D. account has complete control over it during his lifetime (UPC 6-103(b)); and like the beneficiary of a trust account, the P.O.D. payee has no rights to the account until he has survived the last of its creators (UPC 6-104(b)). The rules governing payment by a financial institution are also substantially the same for P.O.D. accounts as they are for trust accounts. UPC 6-110. In light of the fact that the Code lacks specific guidelines for the apportionment and disbursement of a P.O.D. account in the event that more than one P.O.D. payee becomes entitled to payment, section 6-104(b) of the proposed Maine Code is modified in the same manner as the previously discussed amendment to section 6-104(c) for purposes of eliminating this problem as it arose in relation to trust accounts.

The only apparent difference between the P.O.D. account and the trust account is rooted in the historical evolution of the use of bank accounts as devices for effecting non-probate transfers. In applying revocable inter-vivos trust doctrine to bank accounts, courts were in effect allowing depositors to make testamentary transfers without meeting the formal requirements of the statute of wills. In deference to the underlying policy behind the statute of wills--the circumvention of fraud--the presumption of a tentative trust was generally rebuttable by evidence that the trustee did not intend for his named beneficiary to enjoy a right of survivorship in the trust account. Thus, the Totten case did not purport to apply to situations in which the depositor had engaged in "some decisive act or declaration of disaffirmance," and survivorship rights of beneficiaries to a trust account under the Uniform Probate Code may be defeated if there is "clear evidence of a contrary intent." UPC 6-104(c)(2). The P.O.D. account, on the other hand, would be a statutory rather than a judicial creation. There is no question that it would be used only for purposes of establishing right of survivorship as a means of facilitating non-profit transfers of wealth. Thus, the intention of the original depositor is never in doubt; and he can easily close the account if he chooses to provide for a different disposition of his wealth after his death. As a result, the statute of wills would cease to be a problem for the bank-account type of non-probate transfer. In all likelihood, the drafters of the Uniform Probate Code

have retained the trust account device only in order to accommodate what appears to be a common perception of a legal device for transferring property on death, as well as the existing practice in states which, unlike Maine, have long recognized its utility as an estate planning tool.

E. Protection of Creditors

If a decedent's probate estate is insufficient to pay debts, taxes, and expenses of administration, UPC 6-107 gives his personal representative the power to make up the deficiency with any funds in a multiple-party account to which the decedent had a present right of withdrawal immediately before his death. The right of action given to the personal representative is against parties who have succeeded to funds previously owned by the decedent through their survivorship rights in the account. It does not affect the protection afforded to financial institutions, which have made payment to those parties in accordance with the terms of the account "unless" before payment the institution has been served with process in a proceeding by the personal representative. This service-of-process exception generally accords with present Maine law, which does not require a financial institution to recognize an adverse claim to an account unless the adverse claimant has either served the institution with appropriate judicial process or provided it with an indemnification bond. 9-B M.R.S.A. §427(10). In order to technically conform section 427.10 to the coverage of the accounts dealt with in Article VI, section 427.10 would be amended in the Commission's bill



by enlarging the already existing exception to include deference for sections 6-107 and 6-112 of the proposed new Code. This would assure the operation of the Article VI provisions in their intended form, and leave the operation of section 427.10 undisturbed in its other applications.

An action by a personal representative under UPC 6-107 contains two important procedural limitations. First, it must be commenced within two years of the decedent's death. Second, it must be preceded by a written demand from a creditor of the decedent. In order to avoid any possible doubt that the "written demand" requirement requires an unsatisfied creditor's specific request that the personal representative institute proceedings to recover any funds carried by the decedent in a multiple-party account with rights of survivorship, the Commission has added a comment following this section clarifying the meaning of this requirement.

As UPC 6-107 explicitly points out, a surviving spouse, minor children, and dependent children are creditors with rights under this section if statutory allowances cannot be paid without invading a multiple-party account. The statutory allowances protected by this section are those established in Part 4 of Article II. The official Uniform Probate Code Comment following UPC 6-107 points out an important distinction between a surviving spouse's rights in one decedent's multiple-party accounts under this section as opposed to such rights in the event of an election under the augmented estate

concept of Part 2, Article II. UPC 6-107 authorizes the use of multiple-party accounts only insofar as necessary to satisfy a statutory allowance. When a spouse has elected to take his statutory share he may only reach funds held in a multiple-party account by proceeding under Part 2 of Article II.

Thus, whereas the personal representative may reach such funds for up to two years under UPC 6-107, the surviving spouse has only 9 months in which to make an election effective against non-probate transfers under UPC 2-205(a).

F. Protection of Financial Institutions

Section 6-102 emphasizes that the rules governing the rights to a multiple-party account as between the parties who create them and their successors (UPC §§ 6-103 to 6-105) are not the same as those governing a financial institution's liability to make payment pursuant to a multiple-party account (UPC 6-108 to 6-113). The purpose of this distinction is to provide financial institutions with the definitions necessary to protect them while preserving flexibility for depositors who would like to use multiple-party accounts. As the present banking code itself demonstrates, this dichotomy between the rights of parties inter se and the rights and liabilities of the banks is the standard approach to dealing with these issues.

Under UPC 6-108 financial institutions may enter into multiple-party accounts and be protected from liability for any disputes that may arise among the original parties and their successors under the conditions prescribed in the statute,

which have largely been dealt with earlier in this chapter. Specifically, under section 6-108 all or any portion of an account may be paid to any person with a present right of withdrawal.

A financial institution is discharged from liability under section 6-112 for all claims to a multiple-party account so long as it makes payment in accordance with section 6-108 through 6-111. Thus, if a withdrawal by one party violates the ownership interests of other parties to the same account, their recourse is ordinarily against the withdrawing party and not the financial institution. This distinction was also drawn by UPC 6-102. In accordance with UPC 6-105 and 6-106 which establish that the form of the account governs the rights and liabilities of the parties, this section also provides that a financial institution is bound to honor a written notice from a party with a present right of withdrawal that alters the terms of the account as originally created. In that case, upon the death of the person giving notice, the financial institution must obtain the consent of the decedent's successor before honoring another party's demand for withdrawal in order to be fully protected.

The form of the account at the death of a party governs the survivorship rights that then come into play, and section 6-105 provides that a person with a present right of withdrawal may, by written notice to the financial institution, alter the form of the account, vary its terms, or stop payment.

Where P.O.D. and trust accounts are concerned, there is no reason why the written instructions required by this section should have to be agreed to by all "parties" who have a present right to withdrawal at any one time, since the instruction would not be effective if a different party than the one who issued it turned out to be the last surviving trustee (in the case of a trust account) or original payee (in the case of a P.O.D. account).

Section 6-113 establishes a financial institution's right of set-off against a decedent who was a party to a multiple-party account for any indebtedness to the financial institution that existed immediately before his death. Of course, the set-off may not exceed the amount of decedent's beneficial ownership in the account before his death, and persons who become parties to the account by virtue of rights of survivorship obviously take subject to the set-off. The set-off right of a bank as against its depositors is already recognized in Maine, see Joler v. Depositors Trust Co., 309 A.2d 871 (Me. 1973). The Commission has included a comment following this section pointing out that the right of set-off is subject to the limitations imposed by Article IV of the Uniform Commercial Code. Specifically, for example, 11 M.R.S.A. §4-303 states circumstances under which it would be too late for a financial institution to exercise its otherwise existing right of set-off. See also Joler, supra.

G. Provisions for Payment or Transfer at Death

UPC 6-201 provides that any written instrument that is

effective as a contract, gift, conveyance, or trust will not be rendered invalid because one of the parties makes provision for the transfer of his interest in the event of his death. The risk that such a provision might be held invalid arises out of the possible view that a court could regard it as an attempted testamentary transfer which fails to meet the requirements of the statute of wills. The combined effect of subsections (a)(1) and (a)(3) is to provide that a party to such an agreement may designate any third party to receive, in the event of his death, any money or other property in which he has rights arising out of the agreement. The designations of the beneficiary may be made either in the original instrument or in any subsequent writing, including a will. Subsection (a)(2) allows either party to a contract to provide that the other party's indebtedness will be cancelled in the event of the former's death. Subsection (b) makes clear that nothing in UPC 6-201 limits the rights which creditors would otherwise have under the laws of this state. Property transferred pursuant to this section would not become part of a decedent's probate estate and therefore would not ordinarily be subject to payment of his debts. If however, the transfer was voidable as against the decedent's creditors, it could of course be reached on that ground, and UPC 3-701 gives the personal representative a right of action to recover the property conveyed.

As the Uniform Probate Code Comment following UPC 6-201 and the introductory language of the section itself, points

out, the section is aimed primarily at three types of transfers which may raise problems when statutory authorization is lacking: (1) promissory notes payable to a beneficiary named by a decedent payee, (2) land contracts in which payment is cancelled upon the death of the vendor, and (3) beneficiary designations in pension funds and under annuity contracts. No Maine cases can be found in which these problems have arisen. General policy considerations, however, favor adoption of UPC 6-201 in order to finally clarify their non-testamentary treatment under the law. Like multiple-party bank accounts, these devices provide efficient means for effecting non-probate transfers particularly well-suited for intra-family use. Relaxation of wills statute requirements seems no more likely to result in an increase in fraud where these contractual provisions are concerned than under the long-established exceptions for life insurance contracts and revocable inter-vivos trusts.

UPC 6-106, in a way complementary to section 6-201, provides that the accounts covered in Part 1 of Article VI are not to be deemed invalid as testamentary. UPC 6-104(e) provides that rights of survivorship arising under the express terms of a multiple-party account cannot be changed by will. Deposit agreements, however, are expressly within the scope of UPC 6-201, and subsections (a)(1) and (a)(3) of section 6-201 allow beneficiary designations to be made by will. Thus, UPC 6-104(e) would not preclude valid changes made otherwise

than by will, and would preclude changes by will only if the testator's deposit agreement does not reserve him that right.

Chapter 5

PROTECTION OF PERSONS AND PROPERTY:

GUARDIANS AND CONSERVATORS

A. Summary of Present Maine Law.

Present Maine law concerning guardianships is contained primarily in Title 18, Chapter 501 (§§3501 - 3903). Jurisdiction over guardianships and conservatorships is vested in the Probate Court by 4 M.R.S.A. §251. The general statutory law of the area is divided into provisions of general application, provisions for guardianships in various situations, provisions concerning conservatorships, and special sections dealing with nonresident guardians or wards, bond requirements, the sale or mortgage of property of a ward, and accounting requirements.

Various kinds of guardianships are provided -- some of them overlapping each other, and some of them constituting essentially devices to be used within the broader types. Maine law now provides basically for guardianships over (a) minors, and (b) adults who are incompetent, spendthrift, or convicts. Maine also has provision for the appointment of special guardians in cases where a guardianship appointment is pending (18 M.R.S.A. §3510) and specifically in a case where an application is pending for the appointment of a guardian for a married woman (18 M.R.S.A. §3653). In 1973 the legislature enacted provisions for the appointment of the Bureau of Retardation or the Department of Health and Welfare as a Public Guardian for a person found incapable of managing himself and his affairs independently because of mental retardation or because of a need of protective services for other reasons.



18 M.R.S.A. §§3621 - 3637 and 3638 - 3650-E.

In 1978, during the second regular session, the legislature enacted certain minor amendments to the public guardianship provisions, and, in addition, enacted provisions for limited guardianships (Pub. L. ch. 627) which now appear as §3512 of Title 18. The idea behind the limited guardianship concept is to provide flexibility for appointing guardians with powers over the ward that are tailored to the particular needs of the ward, while leaving the ward free to manage his own affairs in all other matters, or to provide for situations in which guardianship is unnecessary beyond a short period.

Limited guardianships are clearly no more than devices to be used to provide flexibility within any other kind of guardianship that may be created, and are expressly made to apply to the public guardianships. Public guardianships, while expressly made exclusive during the time of their existence (18 M.R.S.A. §§3636, 3650-D), and within whatever scope that guardianship is defined if it is a limited guardianship, cover situations in which a private guardian may also be appointed instead of the public guardian. The 1973 enactment provided that a private guardian be appointed, rather than the public guardian, in cases involving adults in need of protective services (18 M.R.S.A. §3649), and the 1978 amendments made the same priority applicable to the public guardianship provisions for mentally retarded persons through §3621.

Thus, it appears that the public guardianship provisions are to come into play only where there is no suitable private guardian available for the prospective ward. As will be pointed out further below, the criteria for determining whether or not a guardian should be appointed are not entirely clear for each kind of guardianship, and the criteria that are given are not always reconcilable with each other, or may be phrased in slightly different ways when no apparent reason exists for using different criteria. The public guardianship provisions set criteria of their own for appointments of public guardians in the cases that they expressly cover -- mentally retarded persons and incapacitated adults. These criteria for public guardian appointments are not expressly made to apply to the appointment of private guardians in these situations (and thus do not expressly supersede the criteria set forth in 18 M.R.S.A. §3601), even though the newer §§3621 and 3649 provide for the appointment of private guardians rather than the public guardian in these situations when a private guardian is available. In addition, the public guardian criteria may not exactly cover the private guardianship appointment criteria in the cases of incompetent adults (18 M.R.S.A. §3601(1)) or spendthrifts (§3601(2)), and do not cover the appointment criteria for guardianship of convicts (§3601(3)) or the appointment of guardians for minors (§3551). Thus, it can be seen, the lack of fit that exists within the private guardianship appointment criteria is made even more ambiguous by the enactment of the public guardianship criteria,

even though the latter criteria are more modern in their focus and more complete.

As mentioned above, the statutory criteria for determining whether a guardian should be appointed are not always clearly specified, and when they are provided they differ in their wording from one type of guardianship to another. No statutory criteria are set forth for determining when a guardian should be appointed for a minor. Authority is given to the Probate Judge to appoint a guardian for a minor who resides within the county, or who has property in the county and resides outside the state. 18 M.R.S.A. §3551. In a case affirming the appointment of a child's grandfather as the child's guardian in lieu of the child's parents, both of whom were living and had custody of the child, the Law Court stated that, "In cases of this kind the welfare of the child is the main and controlling consideration." In re Dunlap, 100 Me. 397, 61 Atl. 704 (1905). In that case the Probate Judge had determined that the child's welfare demanded his removal from the influences surrounding him while in his parents' custody, and that the parents were incompetent to discharge their duties to the child. The affirmance of those determinations rested heavily, as it did in other cases, on the discretion of the Probate Judge to make such determinations under the very general criteria of the welfare of the child. The Maine court emphasized this deference to the judge in Lunt v. Aubens, 39 Me. 392, 397-398 (1955). See also Berry v. Johnson, 53 Me. 401 (1866).

Criteria for determining whether a guardian should be appointed for an adult are set forth in the present Maine statutes. 18 M.R.S.A. §3601. The three basic situations where such guardianship is provided -- incompetence, incapability or spendthriftness, and criminal conviction and commitment to the state prison -- have separately articulated criteria. An "incompetent" for whom a guardian may be appointed is an adult "who, by reason of infirmity or mental incapacity, [is] incompetent to manage [his] own estate or to protect [his] rights," including those who are "mentally ill or of unsound mind and married women." An "incapable" or "spendthrift" person is an adult "who, by excessive drinking, gambling, idleness or debauchery of any kind, [has] become incapable of managing [his] own affairs, or who so spend[s] or waste[s] [his] estate as to expose [himself] or [his family] to want or suffering or [his town] to expense." A guardian may be appointed for an adult "convict" who has been "committed to the State Prison for a term less than for life." All of these criteria apply only to persons who are over eighteen years of age.

The ambiguity concerning the variations among these separate articulations of criteria for appointment of a guardian was alluded to earlier. It appears that a guardian can be appointed for any adult who has an "infirmity or mental incapacity" on the basis of his resulting incompetency to handle his own estate or protect his own rights, but not on the basis of spending or wasting his estate so as to expose himself or family to want

or his town to expense unless the problem arises from his "excessive drinking, gambling, idleness or debauchery of any kind." Presumably, most cases in which an infirm or mentally incompetent person caused himself or his family to want, or his town expense, would also involve that person's incompetence to manage his own affairs. The purpose of the additional provision for spendthrifts was no doubt to provide for guardians for those who did not provide for themselves and their families despite their possession of sound minds and bodies. The ambiguity of the language, however, and the potential question of why a distinction is made between persons who cause their families want because of their spendthrift nature and persons who cause their families want because of infirmity or mental incapacity, continue to exist within the statute.

As noted earlier, the provisions for appointment of a public guardian add to the ambiguity of the various criteria for determining whether a guardian should be appointed. This arises from the fact that the public guardianship situations, while presupposing the appointment of private guardians when they are available, are defined by new criteria rather than being based on the criteria already existing for the appointment of private individuals as guardians.

Prior to the 1973 amendments providing for public guardians, the basic line dividing different kinds of guardianships was drawn between adults and minors. Under 18 M.R.S.A. §3623 that distinction is ignored for purposes of appointing a public guar-

dian for a person "of any age" who is "mentally retarded to the degree that he is incapable, in whole or in part, of managing himself and his affairs independently and requires supervision and care." The line between minors and adults was retained in the other public guardianship provision, which authorizes public guardian appointments for any person "who is 18 years of age or over, and who is impaired by reason of advanced age, physical or mental illness or incapacity, or other cause to the extent that he lacks sufficient understanding or capacity, in whole or in part, to make, communicate or implement responsible decisions concerning his property," except for mentally retarded persons. 18 M.R.S.A. §3640.

Thus, the public guardian is not provided for non-retarded minors, adult convicts, or adult spendthrifts who are not also "incompetent" under 18 M.R.S.A. §3601(1). The problem of ambiguity arises, however, from the fact that the criteria for appointing a public guardian, and which presuppose the ability to appoint a private guardian as well, differ from the criteria set forth in §3601. If the private guardianship priorities contained in §§3621 and 3649 are read as authorizations for private guardianships under the new public guardian criteria -- as they perhaps should reasonably be construed -- then it appears that the public guardianship provisions have added two new and overlapping guardianship situations to the law of Maine -- guardians for the mentally retarded regardless of the ward's age, and a new and essentially concurrent guardianship situation for incompetent

adults in need of protective services. If the provisions of those two sections are not so read, then the phrase "that a suitable private guardian is available...for such service" would have to be construed to mean legally, as well as practically, available.<sup>1/</sup> This latter construction would mean that insofar as the pre-existing guardianship statutes did not authorize appointment of a private guardian for situations covered by the public guardian provisions, a suitable private guardian would not be "available" even when there was someone such as a parent or relative or friend perfectly willing and otherwise qualified to take charge of the person. In light of the general policy of using the public guardian only where it is necessary because there is no private individual suitable and willing to accept the guardianship responsibilities -- a policy seemingly expressed within §§3621 and 3649 -- this latter construction would not be consistent with what was no doubt the basic intent of the public guardianship provisions. But, in any event, it would be desirable to draft the statutes to eliminate the confusing variety of criteria for all guardianships except for physically and mentally competent minors, regardless of whether the guardian might be a private individual or the

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1. Section 3621 provides, inter alia: "The public guardian shall be ineligible to serve as guardian if a suitable relative or other appropriate person is available and is willing to assume the responsibilities of private guardian."

Section 3549 provides: "The public guardian shall be ineligible if it is determined by the probate court that a suitable private guardian is available and willing to assume responsibilities for such service."

Department of Health and Welfare, and to focus those criteria on the real reasons for appointing a guardian.

Special guardian appointments are authorized "when a petition is pending for the appointment of a guardian for a minor or for an adult" in the probate judge's discretion, apparently for the limited purpose of providing a guardian during the time that the petition is pending, and only until the petition is acted upon. 18 M.R.S.A. §§3510, 3653. Provision exists for the appointment of a guardian ad litem to represent a minor or incapacitated person, 18 M.R.S.A. §3651, apparently even where another person has been appointed guardian. Whether these provisions for guardian ad litem under §3651 still apply in a case where a public guardian has been appointed, however, is open to question, since both public guardian sub-chapters explicitly provide that the public guardian is the exclusive guardian once it has been appointed, 18 M.R.S.A. §§3636 and 3650-D, and provide for appointment of the public guardian as a special guardian pending determination of a petition for public guardianship. 18 M.R.S.A. §§3630 and 3648.

Although the public guardianship provisions also provide for the appointment of a guardian ad litem, if needed, in the proceeding for determining the public guardianship of incapacitated adults, 18 M.R.S.A. §3643, no comparable provision is expressly made for a retarded person, and the guardian ad litem for the incapacitated adult is appointed only "until such time as a public guardian is appointed or the petition is dismissed."



18 M.R.S.A. §3643. There is no express statutory resolution of the question whether the guardian ad litem under §3643 continues as such until the public guardianship petition is fully resolved, or whether that guardian ad litem appointment terminates upon the appointment of the public guardian as a special guardian under §3648 prior to the final disposition of the public guardianship petition. Since there would seem to be no more reason to replace the guardian ad litem in his special representative capacity when there is a private guardian than when there is a public guardian, and just as much reason to have independent representation in either case, the law should be changed to make clear that a separate guardian ad litem can be appointed for any minor or incapacitated person whether or not any other kind of a guardian has been appointed for him.

Maine's newly created concept of limited guardianship has already been noted, and does not seem to raise any issue in terms of the criteria for determining guardianships, but is, rather, a device for flexibility to be used within the basic guardianship contexts.

Conservatorships under present Maine law seem to serve a rather limited function, due to the fact that they are created only on the initiative of the person whose property is to be subject to the conservatorship. A conservator may be appointed by the probate judge upon petition of a person who deems himself unfit to manage his own estate with prudence and understanding because of infirmities of age or physical disability. 18 M.R.

S.A. §3701. Under present Maine law, a guardian generally has the power to manage his ward's estate, as well as to care for the ward's person, See 18 M.R.S.A. §§3505, 3506, 3553, 3605, 3851-3856. A conservator's authority is governed by "all provisions of law relating to the management of estates of adult persons under guardianship." 18 M.R.S.A. §3701.

Thus, the present Maine law of guardianship and conservatorship basically provides for the appointment of guardians for minors, persons who are retarded, and adults who are incompetent, spendthrift, in need of supervision, or convicted criminals in the State Prison. Management of the property, as well as the persons, of such people is achieved by the appointment of a guardian for the person, which may be of a limited or temporary nature under the 1978 amendments. Conservatorships for the management of property without an adjudication of guardianship are created only on a voluntary basis.

Other aspects and details of the present Maine law in this area will be dealt with in the subsequent discussion of the provisions of Article V of the Uniform Probate Code.

B. Uniform Probate Code, Article V.

1. Summary and General Purposes

The Uniform Probate Code provisions for guardians and conservators contemplate, in Parts 2 and 3, the appointment of guardians for the persons of those who are unable to care for themselves. Part 2 deals with guardianships for minors in a

way that attempts, in appropriate situations, to establish with the guardian and ward what was essentially the relationship between parent and minor child, except that the guardian would not be responsible to provide for the minor ward from the guardian's own property, nor would the guardian be responsible in law for acts of the child in the same way that a parent would be. Part 3 provides guardianships for incapacitated adults who lack sufficient understanding or capacity to make or communicate responsible decisions concerning their own persons.

Guardianship under the Uniform Probate Code does not itself include the authority to manage the property of the ward, and provision for management of another person's property by a conservator does not necessarily require the existence of a guardianship. The appointment of someone to supervise and be responsible for another person's (ward's) care is covered under the provisions for guardians, while the appointment of someone to manage another person's property is covered in Part 4 under the provisions for conservators. In many, if not most situations, however, the guardian may also, if desirable, be the conservator, and vice versa.

In addition to these two basic concepts of guardian and conservator, the Uniform Probate Code tries to provide devices to facilitate dealing with the kinds of problems that ordinarily arise within the law of guardians and conservators with as flexible and minimal degree of formality, and as little deprivation of an individual's liberty and independence, as possible. Part

of this policy is the division between guardianships of the ward's person and conservatorships of the protected person's property. A person with a guardian need not lose control of his own property unless the need for that is separately determined, and a person who has a conservator need not lose control over his person unless it is separately determined that he is incapacitated in that respect.

The ability to informally appoint guardians by will, and accept such appointment without court involvement, is further implementation of this policy in a way similar to the simplification of probate procedures contained in Uniform Probate Code Article III.

The Uniform Probate Code also contains a "facility of payment" clause whereby, under certain conditions, payments of up to \$5000 per year can be made to a minor in certain ways, or to the person having his care and custody, and thus may in many situations avoid the need for appointment of a guardian when it would not otherwise be necessary.

The probate judge, under Part 4, may make orders to deal with the property of a disabled person without the appointment of a conservator, when there is not otherwise any need for such appointment.

Part 5 contains provisions for the use of a power of attorney that does not terminate on the subsequent disability of the person appointing, and so furnishes a means by which an older person, by specific designation within the power, may avoid the

need to use other kinds of protective devices that are more restrictive or compromising of his own privacy. These provisions for a "durable power of attorney" are identical to those already adopted in Maine. 18 M.R.S.A. §§4201-4202.

These various devices and concepts are noted and explained more fully in the Uniform Probate Code's General Comment to Article V, and will be more fully discussed in the following analysis.

## 2. Guardians of Minors

Part 2 of Uniform Probate Code, Article V deals with the appointment of guardians for minors, along with §§5-103 and 5-104, which are also related to the handling of the property or persons of minors. These provisions will be dealt with essentially on a section-by-section basis in this part of this chapter.

Section 5-201 provides simply that a person becomes a guardian of a minor by court appointment or by acceptance of a testamentary appointment, and further provides that the status of guardian continues until terminated (which is governed by §§5-210 and 5-212) and continues until that time without regard to the location thereafter of the guardian and the minor ward. In other words, when a ward or a guardian moves outside of the county or the state of appointment the appointment continues unless otherwise terminated.

The provision of UPC 5-201 that the appointment shall continue until terminated, when read in conjunction with UPC 5-207(c), does not change Maine law

substantively. UPC 5-207(c) provides for appointment of a temporary guardian for a period of not more than six months, and so conforms to the present Maine provisions for appointment of special guardians pending the disposition of the guardianship petition (18 M.R.S.A. §3510) and the new provision for limited guardianships, under which a guardian could be appointed for a limited period of time (18 M.R.S.A. §3512), insofar as the guardianship of minors is concerned.

Present Maine caselaw holds that the court in the county where a guardianship was granted has exclusive jurisdiction of the guardianship proceedings over any other probate court in the state. Dorr v. Davis, 76 Me. 301 (1884). Likewise, express statutory provision gives similar exclusive jurisdiction when a non-resident guardian is appointed. 18 M.R.S.A. §3751. While that case, and the cited statute, go beyond what is necessary to establish the point, and in fact conflict with other sections of the Uniform Probate Code, it is clear that under present Maine law the guardianship continues when the ward or guardian of a minor moves from one county to another within this state, and the Uniform Probate Code provision would not change present Maine law. The question of continuation of the guardianship when the ward or guardian moves outside the state is not so clear. The general rule in most states is that the authority of the guardian extends only within the state in which the guardian was appointed, see Paulsen and Best, "Appointment of a Guardian in the Conflict of Laws," 45 Iowa L. Rev. 212, 223-229 (1960), and,

in the law of probate, Maine courts have held that "the power and authority of an administrator or executor, over the estate of the deceased, is confined to the sovereignty by virtue of whose laws he is appointed." Brown v. Smith, 101 Me. 545, 547 (1906). While the Maine law regarding administrators and executors is not a perfect or authoritative analogy, it may represent a judicial attitude or precedent that would influence the court if the issue arose in the context of guardianship. The closest case on point that we have found in this state held that an out-of-state guardian ad litem appointed for a particular proceeding in the other state could not sue in Maine to replace the guardian of a minor ward. In re Waitt, 140 Me. 109, 34 A. 2d 476 (1943). That case sheds little light on the Maine resolution of the question raised at the end of UPC 5-201.

The more important question, however, is whether other states would recognize a grant of authority to a guardian by Maine. While the Maine Legislature cannot itself make another state give this recognition to a Maine guardian, the last provision in UPC 5-201 does serve to make clear that the guardianship continues at all places within the state, and that Maine has granted the guardian authority outside the state to the extent that the other state is willing to recognize that authority. To that extent, the provision would help to resolve otherwise troublesome conflict of laws problems as much as a single state may do so. To the extent that the Uniform Probate

Code, or comparable provisions, are adopted in other states, the authority of a Maine guardian would be recognized outside our own state.

As for creation of a minor's guardianship under UPC 5-201, present Maine law clearly provides, of course, for appointment of a guardian for a minor by the probate judge, as well as for appointment of the nominee named by either the deceased father or mother by will if the nominee is suitable. 18 M.R.S.A. §§3551, 3552. The main difference that the first sentence of UPC 5-201 would make in present Maine law is to facilitate the creation of a guardianship for a minor by means of an acceptance by the testamentary nominee without any official court involvement. The procedures for such non-judicial acceptance are set forth in UPC 5-202.

UPC 5-202 provides for the parents' appointment by will of a guardian for an unmarried minor. Such an appointment is given effect if both parents are dead, or if one parent has died and the other is incapacitated. If both parents are dead, the appointment of the later one to die is given priority. In these situations, the appointment is made effective by the filing of the acceptance of the testamentary appointment by the appointee in the court where the will was probated, thus obviating the need for any judicial appointment. This testamentary appointment is all subject to the right of a minor, who is at least fourteen years old, to object to the



nominee under the provisions of Uniform Probate Code 5-203. Provision is also made for recognition of an appointment in a foreign-probated will, and for giving notice of the acceptance to the minor and to the person having his care or to the minor's nearest adult relative.

The provision for acceptance of testamentary appointment without judicial action would be new to Maine law. In such a situation, it would seem that a judicial appointment would not be necessary, given (1) the opportunity for the minor to object if he is at least fourteen, (2) the ability of the notified adult to petition for the removal of the guardian if that would be in the best interest of the ward under Uniform Probate Code 5-212, (3) the requirements of notification contained in Uniform Probate Code 5-202 itself, and (4) the general priority given to such testamentary nominees by both present Maine law and the Uniform Probate Code. The simplification of procedures would be in line with the basic policies that so permeate the Uniform Probate Code in this and other areas.

The Uniform Probate Code's priority for the nominee of the last deceased parent differs somewhat from the present Maine priorities. Present Maine law provides that "the most suitable guardian" named in the will of the deceased parents shall be appointed. 18 M.R.S.A. §3552. While on the surface this may appear to be more in line with the concept of considering the minor's best interest, it undercuts the policy of allowing discretion in the appointment of the guardian to the parent who

last had full responsibility for the minor. Rather than leaving the initial priority of nomination with the last surviving parent, the present Maine law appears to place that kind of very personal and private decision with the court. Under the Uniform Probate Code the probate judge is not bound to appoint a guardian, even when nominated by the last surviving parent, if that is not in the best interest of the minor. Thus, there really is no difference between present Maine law and the Uniform Probate Code in those cases where there is a legitimate need for such judicial action. But the priority for the private nomination, uninterfered with by judicial intervention without a particular reason for it, is more clearly provided by the Uniform Probate Code, which discourages, rather than invites, routine and unnecessary judicial intervention in an essentially private family choice. This same policy of deference to parental designation is further promoted by the express provision in Uniform Probate Code 5-202 for recognition of a parental nominee in a foreign will.

Uniform Probate Code 5-203 authorizes a minor who is at least fourteen years old to prevent or terminate a testamentary appointment by filing an objection in the court where the will is probated. The objection must be filed before the acceptance of the testamentary appointment in order to prevent its effectiveness, or within 30 days of receipt of notice of the acceptance in order to terminate it. Failure to file an objection within these time limitations would not preclude a later challenge to

the guardian of the minor under §5-212(a), but merely precludes the minor's objection from having the effect of automatically preventing or terminating the testamentary appointment. Nor does the timely objection of such a minor preclude the probate court from appointing the nominee to whom objection was made if subsequently done in a proper proceeding under §§5-204, 5-206 and 5-207(b) and (c), although the testamentary nominee loses the priority of appointment he would otherwise have under §5-204. Uniform Probate Code 5-206 also grants such a minor additional consideration by providing that the nominee of a minor who is at least fourteen years old shall be appointed by the probate judge unless the judge finds such nominee's appointment to be contrary to the best interests of the minor.

Insofar as the fourteen year old minor is given the ability to nominate his own guardian, present Maine law is consistent with the Uniform Probate Code, except that Maine law now has an additional procedural provision requiring the judge to "cite" the minor to make such a nomination if the minor so desires.

18 M.R.S.A. §3552; Peacock v. Peacock, 61 Me. 211 (1871).

The Uniform Probate Code provisions for objection to the testamentary nominee's acceptance have no counterpart in present Maine law since it is essentially a part of the Uniform Probate Code's procedures for facilitating informal creation of guardianships in appropriate circumstances.

Uniform Probate Code 5-204, authorizes court appointment of a guardian of a minor who is not married, for whom no testamentary

nomination of a guardian has been validly accepted (thus supporting the policy favoring parental choices while respecting the minor's own preferences), and in which "all parental rights of custody have been terminated or suspended by circumstances or prior Court order."

As the Uniform Probate Code Comment to §5-204 points out, under this last provision the court cannot appoint a guardian so long as a testamentary nominee who has accepted the guardianship without objection by a minor under Uniform Probate Code 5-203 has not had his appointment terminated in some way. Such a testamentary guardian can, of course, be removed under Uniform Probate Code 5-212 and another guardian then appointed under §5-204. The purpose of this part of the provision, as the Comment points out, "is to support and encourage testamentary appointments which may occur without judicial act."

The same limitation on court appointments -- only where "all parental rights of custody have been terminated or suspended by circumstances or prior court order" -- is based on the idea that the proper persons to be responsible for an unemancipated minor are ordinarily his parents. By limiting court appointments in this way, the Uniform Probate Code requires a finding by the appointing court or a prior court that any living parents are not suitable guardians of the person of the minor, thus buttressing parental prerogatives and responsibilities, while not undercutting

the court's ability to provide for the minor's best interests.<sup>2/</sup>

While the Uniform Probate Code would not reverse the present Maine law which allows the bringing of guardianship proceedings for minors currently in the custody of their parents (see, e.g., In re Dunlap, 100 Me. 397, 61 Atl. 704 (1905), discussed previously) and while present Maine law clearly recognizes the priority of parental rights over third persons who seek appointment as guardian of a minor (Stanley v. Penley, 142 Me. 78, at 80, 46 A. 2d 710 (1946), compare Blue v. Boisvert, 143 Me. 173, 57 A. 2d 498 (1948)), the Uniform Probate Code provisions would change the present Maine law that the care of the minor's person and education is shared by the guardian and the minor's living and competent parents unless the full responsibility is given to the guardian by the court. 18 M.R.S.A. §3553.

The basic idea of the Uniform Probate Code provision seems sound. The only problem might arise from an arguable lack of provision for flexibility in providing for retention of some parental responsibility for minors, to take care of special situations. Such flexibility would be available, however, under Uniform Probate Code 5-207(b), which gives the court discretion to "make any other disposition of the matter that will best serve the interest of the minor." Clear authorization for flexibility

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2. It should be noted that under the Uniform Probate Code the concept of guardianship is separate from that of conservatorship, so that the limitations on the appointment of guardianships for minors contained in Uniform Probate Code 5-204 do not apply to the appointment of conservatorships for minors. A conservator can be appointed for a minor under the criteria of Uniform Probate Code 5-401(1) even without, or despite, the appointment of a guardian.

would also be provided by the Commission's recommendation to retain the limited guardianship provisions as §5-105 of the new probate code. With these provisions, the needed flexibility would be provided while maintaining an emphasis on the idea that the state should not second-guess the decisions of parents regarding their to determine that the parents should not themselves have custody or responsibility for their children.

Uniform Probate Code provides that venue for guardianship proceedings for a minor is in the place where the minor resides or is present. Present Maine law gives the probate judge power to appoint guardians for minors who reside in his county, or if they are out of the state, for minors who have property in the county. To the extent that the Uniform Probate Code provides venue for guardianship proceedings involving a minor who is present but not a resident of the county, the Uniform Probate Code may provide more opportunity for dealing with problems concerning the care of a minor who is in fact present in the county and who has not had a guardian appointed for him elsewhere. Aside from this refinement, there appears to be little, if any, difference in effect between the venue provisions under the Uniform Probate Code and under present Maine law. The Uniform Probate Code's lack of venue for guardianships for minors who are not at least present in the county is due merely to the fact that the Uniform Probate Code uses guardianship for the purpose of providing someone to be responsible for the care of the person

of the minor, whereas a guardianship under present Maine law includes management of the minor's estate as well as care and responsibility for the minor's person. Uniform Probate Code 5-403 provides venue in cases where a conservatorship or orders for the protection of property are sought for a minor who resides outside the state but who has property within the probate judge's county.

Uniform Probate Code 5-206, as well as making provision for appointment of an older minor's nominee, provides that the Court may appoint as guardian of a minor "any person whose appointment would be in the best interests of the minor." This section should be read along with Uniform Probate Code 5-202, 5-203, 5-204 and 5-207(b) and (c), which set certain priorities and limitations on the court's authority in cases of testamentary nominations and in cases of objections and nominations by an older minor. All of these priorities and limitations operate within the context of the discretion of the court under the "best interests of the minor" standard expressed in Uniform Probate Code 5-206 and elsewhere.

The "best interests of the minor" standard is the same as that which is traditionally used for such guardianship appointments, and the same as that found in the Maine caselaw, as discussed previously. Thus, that part of Uniform Probate Code 5-206 does not change present Maine law in that respect.

One major change from present Maine law is the Uniform Probate Code's intentional lack of any restriction against the ap-

pointment of a non-resident guardian. Present Maine law requires a non-resident to appoint an agent or attorney within the state before being eligible for appointment as guardian.<sup>3/</sup> The policy of the Uniform Probate Code is to freely allow and encourage the appointment of the person who is nominated by the parents by will, or by the older minor, if suitable, or the person who is best suited to be the minor's guardian. Oftentimes the person who satisfies any of these three categories may well be a relative of the minor who lives outside the state. The provision allowing appointment of the non-resident, under the "best interests" criteria of Uniform Probate Code 5-206, is in furtherance of that policy. The present requirement for appointment of an in-state agent would not add any more protection for the minor's or the state's interest in controlling the guardian than does Uniform Probate Code 5-208, which provides that court appointment or acceptance of a testamentary guardianship subjects the guardian personally to the jurisdiction of the probate court in any proceeding relating to the guardianship that may be instituted by any interested person, and provides for notice of such proceeding by service by ordinary mail at the guardian's address as listed in the court's records and at the guardian's address as then known to the petitioner.

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3. 18 M.R.S.A. §3752. That section also provides that a guardian who was a resident when appointed, but who subsequently moves outside the state, shall also appoint such an agent or attorney within 30 days after such removal.



Uniform Probate Code 5-207 governs the procedure for court appointment of a guardian for a minor. Subsection (a) provides for giving notice as prescribed by Uniform Probate Code 1-401 to the minor if he is at least fourteen years old, the person who has had principal care and custody of the minor during the preceding 60 days, and to any living parent of the minor. To be consistent with the Commission's handling of the procedural provisions, and with the modification of Uniform Probate Code 1-401 in particular, the language of this section is changed in the proposed Maine code to provide for notice "in the manner prescribed by rule of the court under §1-401..."

Subsection (b) of Uniform Probate Code 5-207 simply authorizes the court to make the appointment if everything is in order, and if "the welfare and best interests of the minor will be served by the requested appointment," or to dismiss the proceedings or "make any other disposition of the matter that will best serve the interest of the minor." This subsection makes a more express provision for the court's discretion to make other orders to achieve the best interest of the minor, but does not otherwise make any significant changes from present Maine law.

Subsection (c) of Uniform Probate Code 5-207 provides, if necessary, for the appointment of a special guardian with the status of an ordinary guardian for not more than six months, and thus carries over the substance of present Maine provisions for special guardians, combined with the present ability of the probate judge to appoint a guardian temporarily. Subsection (d)

provides for appointment of an attorney to represent the minor if the court determines that the interests of the minor may not be adequately represented, with provision that the court give consideration to the preference of the minor if he is at least fourteen years old. This is consistent with the ability of the court under present Maine law to appoint a guardian ad litem to represent a minor under 18 M.R.S.A. §3651. Uniform Probate Code 1-403(4) further provides for the appointment of a guardian ad litem whenever necessary in any other kind of a proceeding.

Uniform Probate Code 5-209 provides generally for giving the guardian of a minor the same authority as parents would have, but without the obligation, by virtue of the guardianship, to provide from his own funds for the ward, and without liability to third persons for the ward's acts. In addition, and not by means of limitation on this general authority, the section expressly sets out some of the specific authority and duties of a minor's guardian, including taking care of the ward's personal effects, commencing protective proceedings if necessary to protect the ward's other property, receiving support money payable to the ward's parent, guardian or custodian, or receiving payments to the ward under the facility of payment clause of Uniform Probate Code 5-103 and applying those funds to the ward's current support while conserving any excess for the ward's future needs. If a conservator has also been appointed under Uniform Probate Code Article V, Part 4, any funds exceeding what is needed for current support must be paid over at least annually to the con-

servator. Naturally, if the guardian and conservator are the same person, this requirement is a formality. The guardian is forbidden from using any of the support funds for his own compensation except as approved by the court, or unless approved by the ward's conservator, unless the guardian and conservator are the same person. The guardian is authorized to institute proceedings to enforce the ward's right to support or welfare payments, to facilitate the ward's education, social or other activities, to authorize medical or other professional care, and to consent to the marriage or adoption of the ward. The guardian is expressly made not liable by reason of his consent to acts by the ward for injuries to the ward caused by the negligent acts of third persons unless it would have been illegal for a parent to have given such consent. Finally, the guardian must report on the condition of the ward and of that part of the ward's estate that has been within the guardian's possession or control as ordered to do so by the court on petition of any person interested in the minor's welfare, or as required by court rule.

Some of these provisions are in response to the Uniform Probate Code's division of function between guardians and conservators -- under which the guardian is responsible for the ward's personal welfare, while the conservator, if there is one, is responsible for managing the protected person's estate -- and so have no counterpart in Maine law. The same is true to the extent that the provisions reflect the Uniform Probate Code func-

tion of a minor's guardianship as creating essentially a parent-child kind of relationship. The provisions of present Maine law regarding the guardian's authority and duties in handling the estate of the ward are not applicable to Part 2, but are dealt with in the Uniform Probate Code under Part 4 of Article V.

In other respects, the provisions for the authority and responsibility of the guardian for the personal welfare of the ward do not seem to differ significantly from present Maine law, except for the more explicit provision for the parent-child type of relationship, and the clearer spelling out of certain aspects of that authority and responsibility under the Uniform Probate Code. 18 M.R.S.A. §3553.

The clarification of the liability of the guardian to third persons and to the ward seems desirable. The Uniform Probate Code accounting provisions, although different than present Maine law, probably are not significantly different. Present Maine law requires an accounting by a guardian to the judge at least once every three years "and as much oftener as the judge cites him for that purpose." Failure to so account constitutes a breach of the bond and can be cause for removal of the guardian. 18 M.R.S.A. §3901. Insofar as the substantive requirement for accounting is concerned, the only real difference between present Maine law and the Uniform Probate Code is the present law's requirement of an accounting at least every three years. In light of the opportunity for any interested person to petition for an accounting, the three year requirement hardly

seems to be a major factor in checking on the guardian.

It should be noted at this point that the Uniform Probate Code has no bond requirement for one appointed as guardian, or accepting a testamentary nomination, but reserves its bond requirements for anyone who is appointed a conservator of property under Part 4. This change from present Maine law is explainable in part by the fact that a guardian under the Uniform Probate Code, unlike a guardian under Maine law, does not have charge of a large amount of the property of a minor ward. Separate bonding provision is made for conservators under Part 4 of the Uniform Probate Code.

Uniform Probate Code 5-210 merely describes the occasions on which a guardianship terminates -- death, resignation or removal of the guardian, and death, adoption, marriage or attainment of majority of the minor -- but makes termination by resignation of the guardian effective only upon court approval. The section also preserves the guardian's liability for prior acts and accounting beyond the time of the termination, and provides for the termination of a guardianship created by acceptance of a testamentary nomination under an informally probated will if that will is later denied probate in a formal proceeding under Part 4 of Uniform Probate Code Article III.

Uniform Probate Code 5-211 provides in subsection (a) for the concurrent jurisdiction of the probate court where the ward resides with the probate court which made the original guardianship appointment or the court in which the acceptance of testa-

mentary nomination was filed. This provision apparently conflicts with present Maine law which apparently gives exclusive jurisdiction to the court which made the original appointment. *Dorr v. Davis*, 76 Me. 301 (1884). The Uniform Probate Code seems preferable in order to provide greater flexibility in dealing with any problems that might arise concerning the minor. It should be noted that the wording of the jurisdictional provision of Uniform Probate Code 5-211(a) differs from the wording of the venue provision in Uniform Probate Code 5-205. The original appointment may be made in a county in which the minor is "present," but concurrent jurisdiction thereafter exists only where the minor "resides." Thus, concurrent jurisdiction would not be conferred on another probate court merely because the minor happened to be passing through, or because someone took him there for the purpose of avoiding the court of original appointment or acceptance. Rather, it would have to be established that the minor "resided" within the county before concurrent jurisdiction would arise, and thus adequate protection is provided against unnecessary interference with the jurisdiction of the original court.

Subsection (b) of Uniform Probate Code 5-211 further provides for coordination between the original court and the court of concurrent jurisdiction in such cases. If the court of the ward's residence is not the original court, the second court is to notify the original court of the subsequent proceedings and, after consultation with the original court, determine on the

basis of the minor's best interests whether to retain jurisdiction or transfer the proceedings back to the original court. The section also provides that a copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of the appointment was filed. This provision constitutes a highly desirable attempt to create a system for rational, cooperative determination of the appropriate court for dealing with guardianship problems.

Uniform Probate Code 5-212 provides for a petition to remove a guardian by anyone interested in the welfare of the ward, or by the ward himself if he is at least fourteen years old, and provides for a petition of resignation by the guardian. Any of these petitions may or may not also ask for the appointment of a successor guardian. Subsection (b) authorizes the court to terminate the guardianship on the basis of such petitions and make any further appropriate orders. Subsection (c) provides for appointment of an attorney to represent the minor in the same manner as provided in Uniform Probate Code 5-207(d).

Other provisions of the Uniform Probate Code that relate entirely or in part to the guardianship of minors include Uniform Probate Code 5-101, 5-102, 5-103 and 5-104. Uniform Probate Code 5-101 is a definitional section for Article V that is supplementary to the Uniform Probate Code's general definitional provisions contained in Uniform Probate Code 1-201. Subsection (4) merely defines a "ward" as a person for whom a guardian has been appointed, and distinguishes a "minor ward" as a person for

whom a guardian has been appointed solely because of minority. The other three subsections are not directly related to Part 2 of Article V, except that subsections (2) and (3), defining "protective proceeding" and "protected person" respectively, help to draw the distinction between the Uniform Probate Code's division of functions between guardians and conservators.

Uniform Probate Code 5-102 provides that "[t]he court" has jurisdiction over protective and guardianship proceedings, and provides for the permissive consolidation of both kinds of proceedings when they are commenced or pending in the same court. While the language of subsection (a), giving "the court" the "jurisdiction" over such proceedings, is consistent with the present Maine provisions for giving the probate court exclusive jurisdiction over guardianship proceedings, 4 M.R.S.A. §251, by giving it general jurisdiction with no grant of such jurisdiction to any other court, the Commission's proposed code §5-102 is drafted to make it more expressly clear that jurisdiction in guardianship proceedings is exclusively in the probate court and jurisdiction in conservatorship and other protective proceedings is covered by Uniform Probate Code 5-402. It should be noted that the "court" is defined in the proposed MPC 1-201(5) as the probate court.

UPC 5-103 is the "facility of payment" section designed to facilitate the payment of funds owed to a minor, avoiding in some situations the need to appoint a guardian in order to make that payment. It may also enable the payment of such funds,



limited to \$5,000 per year, without the appointment of a guardian or without protective proceedings in certain situations. The section authorizes a person who has a duty to pay or deliver money or personal property to a minor, within the permitted amount, to pay or deliver (1) to the minor if he is at least eighteen years old, (2) to the person with whom the minor resides and who has the care and custody of the minor, (3) to the minor's guardian, (4) into a federally insured savings account in the sole name of the minor and with notice to the minor. The section does not apply if the payor or deliveror has actual knowledge that a conservator has been appointed or that conservatorship proceedings are pending. Persons receiving the property in the first three categories are bound to handle the property in a way similar to that provided for a minor's guardian under UPC 5-209(b). The payor or deliveror complying with this section is relieved from responsibility for the application of the money or property after such payment or delivery.

Present Maine law dealing with the payment of funds to a minor is generally not as broad as UPC 5-103, and applies by its terms only to situations in which one holds property of a minor under a court decree. 19 M.R.S.A. §216. The amount held at one time under these circumstances is limited to \$2,500. It may be paid to any minor who is at least twelve years old who does not have a guardian appointed in this state, to either parent of such a minor, or to someone whom the court selects

upon conditions set by the court. A person making direct payment to the minor may require the countersignature of one or both parents, and shall receive a receipt from either or both parents when the child is under ten years old, and if both parents are dead the person may withhold payment until further court order or until a guardian has been appointed. A receipt for such payment relieves the payor of any subsequent responsibility.

As the Uniform Probate Code Comment to this section points out, the Uniform Probate Code provisions are not as broad as many facility of payment clauses in trust instruments, and the section does not preclude provision for broader facility of payment clauses within those instruments. But it was felt by the drafters of the Uniform Probate Code that it would be unwise to grant by law such wide discretion generally to all persons as is often granted to those who are specifically contemplated by a settlor, at his own option, in the creation of a trust. At the same time, the provision that is contained in UPC 5-103 may help to facilitate payment where no trust instrument is involved, or where no other provision for such payment exists and a conservatorship or protective proceedings might otherwise be needed to protect the payor, and reduce somewhat the need for facility of payment clauses where no greater discretion was desired by a settlor of a trust.

The Uniform Probate Code provision has the advantage over present Maine law of applying to the payment of funds that are not subject to court proceedings, and to a wider category of

responsible persons than is presently provided. While the provisions for receipts expressly made in the present Maine law may be helpful to the payor, it would be presumed that such a payor would ask for such evidence of payment in any event. Where a receipt is not provided there would seem to be no reason to still hold the payor to the discharged obligation when it could be otherwise established that payment was properly made. For all of these reasons, the Uniform Probate Code provision is preferable to the present 19 M.R.S.A. §216.

The Commission has changed the Uniform Probate Code version of §5-103 by deleting the provision that payment may be made directly to the minor if he is at least eighteen years old, since this has no meaning under Maine law, where minority is defined by the age of eighteen. This change does not in any way change the policies of that section, since the setting of eighteen as the age of majority in Maine itself achieves what the Uniform Probate Code allows.

UPC 5-104 provides that a parent or guardian of a minor or of an incapacitated person may delegate his powers over that person by a power of attorney, except for his powers to consent to the marriage or adoption of the ward. This power is limited to a maximum of six months, and is designed to deal with situations in which the parent or guardian is away for several months. No comparable provision has been found in present Maine law.

### 3. Guardianship of Incapacitated Persons

UPC 5-101(1) defines an "incapacitated person" as "any per-

son who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person." Given the inclusion of the phrase "or other cause," the definition essentially requires that the person "lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person." Since this would seem to be the crux of any justification for providing a guardian over the person of an individual, it would seem to be an improvement over the variety of overlapping, differently worded criteria that presently exist in Maine, as discussed in the first part of this chapter. It would eliminate the ambiguities inherent in these definitions and their variety, while at the same time getting down to the heart of why a guardian should or should not be appointed.

UPC 5-301 provides for the testamentary nomination and appointment of a guardian of the person for incapacitated persons by the will of that person's spouse or parents, in a manner analogous to such nomination and appointment of a minor's guardian by the will of a minor's parents. The nomination becomes effective by an acceptance filed with the court where the will is probated after having given seven days notice to the incapacitated person and to the person who has his care or to the person's nearest adult relative. The person appointing must, of course,

be deceased -- and in the case of appointment by parents, both must be deceased or the surviving parent adjudged incapacitated -- and the will must be probated (either informally or formally). The spouse's appointment has priority over that of the parent unless the spouse's informally probated will is denied probate in subsequent formal proceedings, and the appointment by the last surviving parent has priority over that of the predeceased parent subject to the same qualification concerning subsequent formal probate proceedings. Express provision is made for recognition of testamentary appointments by filing acceptance under a will probated at the testator's domicile in another state.

Maine has no present provision comparable to this procedure, which is more unique than recognition of testamentary nomination of a guardian for a minor. Given the protection afforded by (1) the provisions of subsection (d) of this section for the termination of the testamentary appointment by written objection of the incapacitated person, (2) the requirements of notice, and (3) the subsequently provided procedures for removal and appointment of a different guardian, this section seems to be a desirable way to further pursue the policy of simplifying the means for protecting the persons of those who cannot care for themselves, and of respecting the discretion of those who last had the responsibility for such care.

UPC 5-301 does raise one problem, however, since the language seems to leave open the possibility of a parental appointment of a guardian while the incapacitated person's spouse is still alive

and able to care for the person. This would not seem to be the intent of the Uniform Probate Code, given the priority provided by this same section to the spousal nomination over that of the parents. But the language seems to allow it in a case where both parents die before the death of the spouse. This problem is resolved in the Commission's proposed code by inserting "and if the person is not then under the care of his spouse" at the end of the second sentence of §5-301(a).

Subsection (c) provides for recognition of a testamentary appointment accepted by filing at the testator's domicile in another state. If the state of probate recognizes acceptance of such testamentary nomination, an acceptance filed in that court would be recognized in this or any other Uniform Probate Code state.

UPC 5-302 provides venue for such guardianship proceedings where the incapacitated person resides or is present, in the same manner as UPC 5-205 does for guardianships of minors. In addition, UPC 5-302 also provides venue in the county probate court where any order was entered admitting the person to an institution. This additional venue provision thus enables guardianship proceedings to be heard in the same court which has dealt with the person previously on issues relating to incapacity.

UPC 5-303 governs the proceedings for court appointment of a guardian for an incapacitated person. Subsection (a) allows any person who is interested in the prospective ward's welfare, including the person himself, to petition for a finding of incapa-

city and the appointment of a guardian. A hearing is required, with provision for appointment of counsel as guardian ad litem if the person does not have counsel of his own choice, and with the right of the person to be present, examine and cross examine witnesses, and to be represented by counsel. In addition, the court is to have the person examined by a physician who will report to the court in writing, and shall appoint a visitor who, under UPC 5-308, must be trained in law, nursing or social work and who is to be an officer, employee or special appointee of the court with no personal interest in the case. This visitor is to interview the person seeking to be appointed guardian, the abode of the prospective ward, and the place where it is proposed to place the ward if the guardianship is granted, and to submit a written report to the court. Provision is further made for a closed hearing if requested by the prospective ward or his counsel.

The provisions of present Maine law are not so detailed as those contained in UPC 5-303(b), but are essentially similar in practice, except for the absence now of any comparable explicit requirements for examination by a physician and a visitor. The Uniform Probate Code's express provision for the basic factors constituting due process seem preferable to the very general hearing provisions contained in 18 M.R.S.A. §3602.

While most of the states that have enacted the guardianship provisions of the Uniform Probate Code have enacted this section without change, several other such states have modified the man-

datory aspects of the appointment of counsel, physician's examination or use of the visitor, or all three.<sup>4/</sup> The policy apparently underlying the mandatory use of these devices when seeking appointment of a guardian for an incapacitated person is to prevent abuse of such proceedings, especially in light of the alleged incapacity of the prospective ward to look after his own interests in the proceeding itself. Thus, the Uniform Probate Code section would require appointment of counsel whenever the prospective ward did not already have counsel of his own, and would require the appointment of a physician and a visitor in every proceeding, on the theory that such devices may be the only safeguard to assure the court as to whether or not the particular case is one in which the use of these devices was necessary in the first place. The use of a visitor is not required in proceedings seeking removal of a guardian, or a termination of the incapacity status, presumably because those proceedings are not dealing with an initial determination of whether the person's liberty and discretion ought to be so restricted, although the provisions of UPC 5-303(b) otherwise apply.

It is the Commission's judgment that the probate judge can adequately determine whether counsel need be appointed to repre-

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4. Of the eleven states that have substantially enacted Article V of the Uniform Probate Code, four have made the appointment of counsel discretionary (Colorado, Hawaii, Oregon and Utah); five have made the physician's examination discretionary (Colorado, Hawaii, Nebraska, Oregon and Utah); and four have made the use of a visitor discretionary to some degree (Colorado, Nebraska, Oregon and Utah).



sent the prospective ward, and the uniform language was consequently changed in the proposed Maine Probate Code to allow the judge discretion on the appointment of counsel.

Likewise, the Commission believes that there may be many cases in which a visitor may be unnecessary for a responsible determination of the need for a guardianship, or the appropriateness of appointing a particular guardian. Rather than require the judge to use a visitor routinely, and perhaps as an unnecessary formality in such cases, it seems preferable to allow the judge discretion in the appointment of a visitor, also, and that change has been incorporated into the proposed Maine Probate Code.

The use of an examining physician does seem to be advisable in any case where incapacity is the crucial issue, and it is also desirable that the physician have some responsibility to the court itself, rather than only to one of the parties to the proceeding. It does not seem advisable to the Commission, however, to involve the court directly in the act of appointing physicians in each case, so long as the physician is acceptable to the court. The proposed section in the code, therefore, retains the requirement of a physician's examination, but the physician need only be one who is acceptable to the judge, rather than one who is actually appointed by the judge.

These changes from the uniform text would not seem to undercut the need for uniformity in any significant way. The proposed section of the new code retains all of the essential de-

vices of UPC 5-303(b), and only modifies them in a way that allows a little more practical flexibility and that is similar to modifications made in a number of other Uniform Probate Code states.

UPC 5-304 provides that the court may appoint a guardian if it is satisfied that the person is incapacitated and that such appointment is "necessary and desirable as a means of providing continuing care and supervision of the person of the incapacitated person" or it may dismiss the petition "or enter any other appropriate order." UPC 5-305 provides for consent by the guardian to the jurisdiction of the court by the guardian's acceptance of appointment, and for service by mail, in ways essentially the same as those provided for guardians of minors by UPC 5-208 and for personal representatives by UPC 3-602.

UPC 5-306 provides for the termination of the guardianship of an incapacitated person in the same way as provided by UPC 5-210 for termination of the guardianship of a minor, with modifications to fit the obvious differences between the two situations. These differences lie in the ways that such situations leading to guardianship may come to an end. In the case of incapacitated persons, the guardianship terminates upon the death of the guardian or ward, upon a determination of incapacity of the guardian, or upon resignation or removal of the guardian as provided in UPC 5-307. That section includes provision for removal on the ground that the person is no longer incapacitated.

UPC 5-307 governs removal and resignation of the guardian

and termination of the incapacity status. Subsection (a) provides for petition for removal and appointment of a successor guardian by the ward or any person interested in his welfare, and for petition for resignation by the guardian. Subsection (b) provides for petition, by informal letter if desired, for termination of the ward's incapacity status. Any person who knowingly interferes with the transmission of such a request may be found guilty of contempt. The right to petition for termination of the incapacity status may be limited, if done in the order adjudicating incapacity, so that it cannot be brought within a certain period of time not exceeding one year unless special leave is granted by the court. Subsection (c) applies to these proceedings the same procedural safeguards provided for the guardianship appointment procedures (see UPC 5-303) and authorizes the court to use a visitor as in the appointment proceedings.

Present Maine law provides part of what is provided in UPC 5-307 and is not inconsistent with the additional provisions found in the Uniform Probate Code. 18 M.R.S.A. §3509 does explicitly provide for the court's removal of the guardian "at its own request," a provision not explicitly spelled out in the Uniform Probate Code. Such a provision, however, would really add little or nothing in light of the almost total unlikelihood that the court would have any occasion to know about the need for removal without the informal petition of someone else that is provided for in that section. The language of the present Maine

provision provides for removal by the court "when it appears necessary," rather than "if in the best interests of the ward," which is the standard in the Uniform Probate Code. The Uniform Probate Code standard appears more protective of the court's discretion and of the ward's liberty and interests than does the language of the Maine standard on this particular point. Also, the Maine section provides for notice only to the guardian, whereas the Uniform Probate Code requires notice, through §5-309, to the ward, his spouse, parents and adult children, as well as to the guardian, conservator, or any person who has the ward's care and custody. In addition, discretionary use of the visitor is provided in the Uniform Probate Code. These additional safeguards and investigational machinery seem to be desirable additions to Maine law.

UPC 5-308 defines the "visitor" who is used in proceedings for appointment (UPC 5-303) and for removal, resignation or re-determination of incapacity (UPC 5-307) as "a person who is trained in law, nursing or social work and is an officer, employee or special appointee of the court with no personal interest in the proceedings." The Idaho version of this section adds to these characteristics, "or has other significant qualifications that make him suitable to perform the function." Idaho Code Ann. §15-5-308. Such a modification seems a desirable way to provide the judge with a greater ability to deal with particular cases sensitively and intelligently, while still retaining the focus on the three basic characteristics suggested by the

uniform version. With this in mind, the Idaho language was incorporated into the proposed Maine Probate Code.

UPC 5-309 governs notice in proceedings for the appointment or removal of a guardian and, through UPC 5-307(c), proceedings for accepting a guardian's resignation or terminating a ward's incapacity status, but excluding the appointment of a temporary guardian pending notice and hearing under UPC 5-310, or the temporary suspension of a guardian. Notice is to be given to the ward or prospective ward and his spouse, parents and adult children, to his guardian, conservator or any person having his care and custody, and to at least one of his closest adult relatives if no one in the first                    can be notified. Service must be made personally on the ward, and on his spouse and parents if they can be found within the state. All other persons, and the ward's spouse and parents if not within the state, may be served as provided in UPC 1-401. Provision is made that the prospective ward cannot waive notice effectively unless he attends the hearing or unless his waiver is confirmed in an interview with the court's visitor. Representation of the prospective ward by a guardian ad litem is not necessary.

The provisions for notice under UPC 5-309 are more detailed than the present Maine statute, which provides that the judge "shall appoint a time and place for hearing and shall order that notice of the proceedings be given by serving the person for whom a guardian is requested...at least fourteen days before the day of hearing." 18 M.R.S.A. §3602. In light of the nature of

the proceedings -- the deprivation of an individual's liberty in exercising his own discretion over himself -- the additional, statutory notice requirements of the Uniform Probate Code are desirable. It may be essentially meaningless to notify a person who is not capable of caring for himself unless those persons around him are also notified so that they can come forward and raise any issues related to the particular person and the suitability of the person who is requesting appointment as guardian.

While the provision for non-waiver of notice is partially consistent with present Maine law, the Uniform Probate Code provision that the prospective ward may waive notice is contrary to one Maine case which held that no waiver by one adjudged to be incompetent could be made even when the person is present at the proceeding without having been given statutory notice. Winslow v. Troy, 97 Me. 130, 53 Atl. 1008 (1902). The UPC provision, in reality, offers just as much protection against abuse of the waiver of notice. Most such abuse would take place prior to the hearing, and under the Uniform Probate Code the judge would have the prospective ward before him and would be able to determine whether or not the prospective ward had in fact competently waived notice prior to the hearing, and inquire into the circumstances surrounding the lack of notice under the statute. Within those parameters, the Uniform Probate Code section would adequately protect the prospective ward while at the same time avoiding the legal requirements of technical notice in a situa-

tion where it was demonstrated that no one was prejudiced.

The provision at the end of UPC 5-309 that a guardian ad litem is not necessary for the alleged incapacitated person should be read in conjunction with the provisions of UPC 1-403(4) which authorizes a court "at any point in the proceeding" to appoint a guardian ad litem to represent the interest of an incapacitated person "if the court determines that representation of the interest otherwise would be inadequate." Thus, the last sentence of UPC 5-309(b) serves only to make clear that a guardian ad litem is not required every time there is a guardianship proceeding, leaving such appointment within the sound discretion of the judge. As a matter of clarification, this point is explicitly made in the Maine Comment to this section of the proposed code, and the last word of the section was changed from "necessary" to "mandatory" in the proposed Maine Probate Code.

A significant refinement was made by the Commission in drafting §5-309(b), and also §5-405(a), of the proposed Maine Probate Code. It seemed to the Commission that (1) a clearer statement of the operation of the personal service provisions of these sections was needed, (2) the alternative persons to be served personally should include the adult children of the prospective ward or protected person, especially since they were given an equal or greater priority for appointment as guardian or conservator under §§5-311 and 5-410 as those persons included in the uniform version relating to personal service, and (3) personal service should have to be made on the prospective ward or protected per-

son and only one of the listed relatives, in an order of priority consistent with the priority for appointment. These modifications, which are incorporated into the Commission's bill, are actually clarifications of what apparently was intended in the uniform version, or conform these sections more to the underlying priorities contained in other sections, and thus do not constitute any significant departure from desired uniformity.

UPC 5-310 provides that the court may appoint a temporary guardian in an emergency if an incapacitated person has no guardian, or may itself exercise the power of guardian pending notice and hearing on a regular guardianship appointment. Furthermore, a temporary guardian may be appointed for a period not exceeding six months if an appointed guardian is not effectively performing his duties and the ward's welfare requires immediate action, thus suspending the authority of the previously appointed guardian. The temporary guardian has the authority of an ordinary guardian, but may be removed at any time, and must make any report required by the court. This provision for dealing with emergency situations where there is no effective guardian of an incapacitated person is consistent with part of the policy behind the 1978 Maine amendments seeking to plug such gaps and provide flexibility.

UPC 5-311 sets mandatory priorities among persons who may be appointed guardian. The guardian may be any competent person or suitable institution, and persons who are not disqualified have priority in the following order: (1) spouse; (2) an adult



child; (3) parent or person nominated by the will or other writing of a deceased parent; (4) any relative with whom the ward has lived more than six months prior to the filing of the petition; and (5) a person nominated by someone who is caring for him or paying benefits to him.

Present Maine law has no provision for priorities in the appointment of guardians, and no statutory standard for the choice of such a person. The court is merely authorized by the statute to appoint guardians upon a finding of incompetence, spendthriftness or a State prison commitment. 18 M.R.S.A. §§ 3601, 3602. The language of UPC 5-304 is a desirable clarification and tightening of the standard in this area by providing that the court may appoint a guardian if the prospective ward is incapacitated and if "the appointment is necessary or desirable as a means of providing continuing care and supervision of the person."

The question of providing mandatory priorities among those who might be appointed guardian raises a different question. The priorities set for appointment of a conservator by UPC 5-410 do not purport to be mandatory, and the court may appoint a person with less priority than another "for good cause" under the express provision of subsection (b) of UPC 5-410. Such provision is not spelled out in UPC 5-311 concerning priority for appointment as guardian of an incapacitated person. Nor are any priorities spelled out for the appointment of a guardian for a minor, where UPC 5-206 and 207 merely rest the standard on the

best interests of the minor.

It may be that the question of priorities is more important in the case of an incapacitated person who is likely to be an adult, if one wants to avoid fights between different groups of relatives who may want to indirectly control the wealth of the prospective ward. In the case of conservators of a protected person's property, some greater discretion may be needed to allow the court to choose someone less related, or not at all related, but who has greater experience or judgment in the management of property. Also, in conservatorship proceedings problems of conflicting interests can arise because those who are closest to the ward may also be likely to have a financial interest in the disposition of the ward's property upon his death.

It is worth noting that of the eleven states which currently have enacted Article V to a significant degree, eight states have left UPC 5-311 unchanged,<sup>5/</sup> one has omitted the section,<sup>6/</sup> and two have modified it to provide explicitly for court discretion to supersede the priorities based on the best interests of the ward.<sup>7/</sup> Of these latter two states, Colorado's provision adds at the beginning of subsection (b), "Subject to a determination of the court of the best interests of the incapacitated

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5. Alaska, Arizona, Idaho, Montana, Nebraska, New Mexico, North Dakota, Utah.

6. Oregon.

7. Colorado and Hawaii.

person," thus making clear that the priorities can be overridden on the basis of the best interest standard.

The possible reasons for distinguishing between mandatory priorities for guardians of incapacitated persons and discretionary choice of guardians for minors or for conservators are not persuasive to the Commission. It seems far more important to allow the court the kind of discretion that may be needed to appoint a guardian rationally in many cases. The Colorado modification would allow that kind of discretion, and at the same time preserve the Uniform Probate Code's priorities as suggestions that the closeness of relationship to the ward is a primary consideration in determining who should be appointed guardian.

UPC 5-312 governs the general powers and duties of the guardian of an incapacitated person. Before setting forth a number of specific powers and duties, subsection (a) establishes the same general relationship between the guardian and ward as exists between a parent and his unemancipated minor child, except that the guardian is not liable to third persons for the ward's acts solely because of the parental relationship. This provision is similar to UPC 5-209 concerning the guardian of a minor, except that here there is no exemption from responsibility to provide for the ward from the guardian's own funds. In addition to the powers and duties arising from this relationship, the section provides the guardian with authority to "establish the ward's place of abode within or without this state" and to

have the care and custody of the ward, all subject to any court orders relating to the ward's detention or commitment. If the guardian is entitled to the ward's custody, he is to provide for his care, comfort and maintenance, and for any appropriate training and education. Whether or not the guardian is entitled to custody, he is to take reasonable care of the ward's personal property, and commence protective proceedings if necessary in relation to any of the ward's other property. The guardian has authority to consent as necessary to enable the ward to receive medical or other professional service. In the absence of any conservator, the guardian may bring actions to enforce the ward's rights to payments for his support and welfare, and may receive money or tangible property deliverable to the ward. Such money shall be applied to the ward's support, care and education, and any excess conserved for the ward's needs. These funds may not be used to pay the guardian or his family for any room or board for the ward unless approved by court order, or under subsection (b), unless they are agreed upon between the guardian and conservator and are reasonable. Accounting must be made as requested by the court or by court rule. If a conservator has been appointed, the guardian must account to the conservator, and must turn over to the conservator any funds exceeding what is used for the current support, care and education of the ward.

This section is similar for the most part to UPC 5-209, including the relationship of such kinds of provisions to present Maine law.

All but two of the eleven states that currently have enacted Article V provisions have enacted this section without change. Colorado and New Mexico both inserted in the general opening provisions of subsection (a) the exemption of the guardian from the obligation to provide for the ward out of his own funds. Since any financial responsibility of a guardian for his ward would seem to be a separate question that should not necessarily be determined by the guardianship status alone, the Commission adopted this Colorado and New Mexico change. The Maine Comment to the section, however, emphasizes the fact that such responsibility might arise from other relationships or legal determinations.

Colorado also amended its original enactment of this Uniform Probate Code section to modify the guardian's power to "establish the ward's place of abode" by making explicit reference in subsection (a) (1) to the provisions of Colorado law to be used for obtaining hospital or institutional care for the ward. The broad language of the Uniform Probate Code section might raise a question about the guardian's power to commit a ward involuntarily to a mental care facility. To make clear that the guardianship itself is not sufficient authority to achieve involuntary commitment of the ward by the guardian without the ordinary procedures required by law -- which would be a major infringement on the ward's right -- subsection (a) (1) was amended by the Commission by adding at the end, "and may place the ward in any hospital or other institution for care in the same manner as other-

wise provided by law." This language makes the limitation on the guardian's involuntary commitment powers clearer than does the Colorado change, and conforms the guardian's authority in this regard to the general provisions of the law that govern everyone else.

UPC 5-313, governing concurrent jurisdiction of the court in the county of the ward's residence, and accommodations between that court and the appointing court, is essentially identical to UPC 5-211 concerning guardianships of minors.

4. Protection of Property of Persons Under Disability and Minors

While the Uniform Probate Code draws a distinction between the care of the person (guardianship) and the care of another person's property (conservatorship), present Maine law treats the care of another's property as an aspect of guardianship, automatically inhering unless excluded under the 1978 amendments providing for a limited guardianship. 18 M.R.S.A. §3512. Conservatorship, under Maine law, is limited, as such, to the voluntary submission by an individual to the court's appointment of someone else to manage his property. 18 M.R.S.A. §3701.

UPC 5-401 establishes the basic criteria for determining the appropriate situations for the use of "protective proceedings." Protective proceedings may involve the appointment of a conservator, or may involve only court authorization for particular transactions without the appointment of a conservator.

UPC 5-408, 5-409. Under UPC 5-401, a court may appoint a conservator or enter protective orders as provided by subsequent

sections when, in the case of a minor, the minor owns property that requires management or protection that is not otherwise available, or has business affairs that may otherwise be jeopardized because of his minority, or needs the proceedings to obtain or provide funds for his support and education. In the case of proceedings for a person for reasons other than minority, the standard is whether the person is unable to manage his property and affairs effectively, and has property that will be otherwise wasted or dissipated, or funds are needed for the support, care and welfare of the person or his dependents and protection is needed in order to obtain those funds.

These criteria are not identical to the present Maine provisions for appointing a guardian, but would seem to provide for vicarious property management in the same kinds of general situations now covered by Maine law of guardianship and discussed at the beginning of this chapter -- minority, incapacity, incapability or spendthriftness, commitment to the state prison, and the two situations for which public guardianships exist. In addition, the standard of the Uniform Probate Code may go further in some cases where a person is incapable of managing his property effectively but does not fall within one of the more technically defined situations specified in present Maine law. While being less technical and more focussed on the heart of why someone may need his property managed for him, the Uniform Probate Code criteria are also clearer. Their adoption in Maine, to replace the present accumulation of standards, would eliminate the

ambiguity discussed earlier.

UPC 5-402 provides the court in which such a proceeding has been brought and notice served with exclusive jurisdiction over those proceedings and over the management of the estate subject to them, with concurrent jurisdiction to determine claims against the person or his estate and his title to any property or claim. UPC 5-403 provides for venue in the county where the protected person resides, or, if he resides outside the state, venue is in any county where he has property.

The venue provisions seem consistent with present Maine law concerning venue for guardianships. 18 M.R.S.A. §3551, 3601. The provisions for exclusive jurisdiction over the proceedings and estate are more consistent with present Maine law of guardianship than were the concurrent jurisdiction provisions of UPC 5-211 and 5-313, dealing with guardianships, no doubt because in guardianships it is important to be able to deal with the guardianship of the person wherever the ward may be and in conservatorships it is important to coordinate the management of the property in the one court where its management originates. The concurrent jurisdiction provisions of UPC 5-402(c) would broaden the jurisdiction of the present probate courts in a way that is consistent with the Commission's recommendations concerning probate administration.

UPC 5-404 and 5-406 have been modified in the Commission's bill in accordance with the treatment of procedural provisions throughout the proposed Maine Probate Code.



UPC 5-405 provides for personal service on the person to be protected and his spouse, or on his parents if there is no spouse within the state, or served in accordance with UPC 1-401 if they cannot be found within the state. These provisions, and provisions limiting waiver of notice by the person to be protected, are identical to those found in UPC 5-309 (b) concerning guardianship of incapacitated persons, and discussed earlier. Provision is also made for notice to anyone who has filed a request for notice under UPC 5-406. In order to conform to the Commissions's approach on rulemaking by the court, the first sentence of subsection (a) and the last sentence of subsection (b) were changed to read "in accordance with the rules of the court under Section 1-401." Changes were also made in the provisions for personal service and were previously discussed in connection with UPC 5-309.

UPC 5-407 outlines the procedure for protective proceedings. It authorizes the court to appoint an attorney as guardian ad litem for a minor if necessary to adequately protect his interests, and requires such an appointment in the case of proceedings based on something other than minority unless the person to be protected has counsel of his own choice. A physician may be appointed if the alleged disability is among the kind for which a physician's examination would be relevant, and the court may appoint a visitor to interview the person to be protected. The court is authorized to make an appointment or other appropriate protective order upon a finding that the criteria of

UPC 5-401 are satisfied.

The Commission's proposed Maine Probate Code §5-407 has been modified from the uniform version in two respects already discussed in connection with similar changes in UPC 5-309. The appointment of counsel for the prospective protected person is made discretionary with the court, and the physician in §5-407 is to be one who is "acceptable to" rather than "designated by" the court.

UPC 5-408 and 5-409 provide means for protection of the person's property without the appointment of a conservator. These sections are highly significant aspects of the effort of the Uniform Probate Code to provide greater flexibility and options for the protection of a person's property without subjecting him to undue formalities or loss of his own usual prerogatives. UPC 5-408 deals with the power of the court itself to manage the protected person's estate pending the appointment of a conservator, or in cases where no conservator is necessary but where some kind of protective action is. After a preliminary hearing and without notice, the court may preserve the property and apply it as required for the benefit of the person or his dependents. After a hearing and determination of the need for protection under the UPC 5-401 criteria, the court is given broader powers of management over the estate, including a list of specific kinds of action that it can take. Any orders under UPC 5-408 do not otherwise affect the legal capacity of the protected person. UPC 5-409 deals with court orders con-

cerning particular transactions, whether or not a conservator is appointed, although much of its use would presumably be to avoid the appointment of a conservator where the problems concerning property management can be taken care of under this section. The court may also appoint a special conservator to assist the court, and who would serve until discharged by order after reporting to the court.

These provisions do not have any real counterparts to present Maine law and, as part of the attempt of the Uniform Probate Code to provide for greater flexibility and avoid unnecessary restrictions of an individual's liberty to manage his own property, they would achieve significant and desirable reforms in the present law.

UPC 5-410 provides for the appointment of an individual or a corporation which has general power to serve as a trustee, and sets up a list of suggested priorities which can be overridden by the court under express provisions in subsection (b). Except for the Uniform Probate Code's greater clarity and the inclusion of a system of priority guidelines, these provisions would not appear to significantly change the Maine law concerning the persons who could be appointed as guardian or conservator.

UPC 5-411 provides for a bond for the conservator if required by the court. Although this differs from present Maine law, which requires bond from every guardian or special guardian, the change in this context does not raise the same issues to the same degree as in those parts of the proposed code

dealing with probate administration, since there is no informal way of obtaining a conservatorship. A conservator will not have an effective appointment under the Uniform Probate Code until the judge has first had a hearing and thus had an opportunity to determine whether bond should be required in the individual case. Unlike the present bonding provisions for guardians under 18 M.R.S.A. §3801, the proposed code would open the way to avoid bonding in cases where the court does not find it necessary.

UPC 5-412 contains provisions for the terms and conditions of the bond under UPC 5-411 which are virtually identical (except for the designation of the obligee) to those which apply in the cases of probate and trust administration under UPC 3-606 and 7-304.

UPC 5-413 provides for consent to jurisdiction by acceptance of the conservatorship in terms virtually identical to those for guardians in UPC 5-208 and 5-305, and raise no issues beyond those raised there.

UPC 5-414 authorizes compensation for a visitor, lawyer, physician or conservator. In order to help clarify the basic principle of compensation stated by this and other related sections, the Commission added a reference to the criteria to be used, and which are set forth in §3-721(b) of the proposed Maine Probate Code. This conforms to a similar provision inserted into §7-205, concerning compensation in the context of trusts.

UPC 5-416 gives standing to "any person interested in the welfare" of the protected person to file a petition requiring

bond and related issues, requiring an accounting, directing distribution, removing a conservator and related issues, or seeking other appropriate relief, and authorizes the conservator to petition for, and the court to give, instructions concerning the conservator's fiduciary responsibility, to which duty the conservator is bound by UPC 5-417.

UPC 5-418 requires the conservator to file with the court a verified inventory of the person's estate within 90 days of his appointment and provide a copy to the protected person and to any parent or guardian with whom he resides. The conservator must also keep suitable records and show them on the request of any interested person. Present Maine law requires an inventory by the guardian within three months, and in that respect does not differ from the Uniform Probate Code. Maine also, however, requires the appointment of one or three appraisers by the court, 18 M.R.S.A. §3504, which under the Uniform Probate Code is the responsibility of the conservator himself. For the same reasons discussed in connection with UPC 3-706 and 3-707, the provisions for appointment of appraisers should be eliminated in favor of the basic reforms sought in the proposed new code.

UPC 5-419 requires the conservator to account to the court on his resignation, removal and when the court otherwise directs. On termination of minority or disability, the conservator may account to the formerly protected person himself or to his personal representative. Approval of an account after hearing is an adjudication of the conservator's liability as to matters within

the account, and if it is a final account it adjudicates his liability as to the conservatorship. The court may require a physical check of the estate in the conservator's control. As noted in relation to guardianships, present Maine law requires an accounting at least every three years or oftener if the judge requires. The Uniform Probate Code provisions seem to offer at least as adequate a safeguard as the present accounting provisions. See 18 M.R.S.A. §§3901-3903.

UPC 5-420 provides that the protected person's title to property becomes vested in the conservator as trustee, but the change in title is not deemed a transfer or alienation in such a way as to affect rights of the protected person in trusts or other benefits that might be defined by restrictions on alienations and transfers. UPC 5-421 provides for the recording of the letters of conservatorship in the Registry of Deeds, along with orders terminating conservatorships, in order to give record notice of the actual state of the title as affected by UPC 5-420. The vesting of title under the UPC is designed to help facilitate the independent administration of the estate by the conservator. As the Uniform Probate Code Comment to §5-420 points out, the UPC contemplates that the appointment of a conservator is a serious matter and that the court will select him with great care. "Once appointed, he is free to carry on his fiduciary responsibilities. If he should default in any way, he may be made to account to the court." The vesting of title in the conservator would constitute a change in present Maine law,

Dorr v. Davis, 76 Me. 301, 305 (1884), but is probably more a change in form than in substance.

UPC 5-422 provides that certain transactions involving substantial conflicts of interest for the conservator are voidable, but provides for protection for the conservator in such situations by allowing him to seek court approval after notice to interested persons. UPC 5-423 provides protection to persons dealing in good faith with the conservator in terms virtually identical to the provisions of UPC 3-714.

UPC 5-424 governs in detail the powers of a conservator in administering the protected person's estate. With appropriate modifications to fit the conservatorship context, these provisions are similar to those applicable to personal representatives (UPC 3-715) and trustees (MPC 7-402). As in those other contexts, the provisions here are part of the system designed to facilitate independent administration. As an editorial matter, the unnecessary reference in subsection (a) to a minor "under the age of 18 years" has been deleted from the proposed Maine law.

UPC 5-425 governs in some detail the duties and powers of the conservator in making disbursements of the principal or income of the protected estate. Subsection (a) authorizes the conservator to expend from income and principal, without court order, for the support, education, care or benefit of the protected person or his dependents, and sets forth some guidelines concerning his determination of the person's appropriate standard of living and the amounts to be spent for it. Subsection (b)

authorizes the conservator of an adult to make gifts to charity, and to other objects, that the protected person might have made, if the estate is otherwise ample to provide for the person's support under subsection (a), and not to exceed twenty percent of the estate's income. Subsections (c) and (d) provide that the conservator turn the estate over to the protected person (if protected as a minor) when he reaches majority, or (if his disability is other than minority) when the conservator is satisfied that his disability has ceased. In subsection (e) he is directed to deliver to the court any will of a deceased protected person and to retain the estate for delivery to the personal representative. Provision is also made for the conservator to seek appointment as personal representative.

While it is difficult to specify exactly what powers of distribution a guardian has under present Maine law, the provisions of the Uniform Probate Code, although giving more guidance to the conservator's discretion, do not seem to be generally different insofar as the protected person's personal property is concerned. He is expressly given management of the ward's estate and authority to pay the ward's debts, 18 M.R.S.A. §3505, and in the case of a minor is given express power over the minor ward's person and property by statute. 18 M.R.S.A. §3553, Homstead v. Loomis, 53 Me. 549 (1866). No express statutory provision can be found defining the distribution powers of a guardian of an adult's property, cf. 18 M.R.



S.A. §3605, but general principles would allow and require the guardian to make provision for the person's support, education and comfort as well as to manage his property and preserve it. The added guidance found in the UPC would be a desirable addition to Maine law.

The provision for charitable contributions is not clearly authorized under any cases that we have been able to find. Nor does provision for turning the estate back to the ward upon the guardian's determination that the disability has ended appear to presently exist. Even in such a situation, however, the Uniform Probate Code contemplates the need for an order terminating the conservatorship upon the petition of any interested person, UPC 5-430, and in order to protect the conservator and terminate his liability, UPC 5-419.

UPC 5-426 provides, insofar as conservators are concerned, a device for tailoring the nature of the particular conservatorship to the needs of the individual situation in much the same manner as provided by the 1978 Maine amendment for limited guardianships. 18 M.R.S.A. §3512. The same kind of flexibility for guardianships under the Uniform Probate Code is not so clearly expressed, and perhaps is less necessary. The language of UPC 5-207(b) and 5-304, authorizing the court to make other appropriate orders, would probably allow the same kinds of tailoring. However, in order to make the limited guardianship provision more clearly available, §5-105 was added to the proposed Maine Probate Code, based upon the new limited guardian-

ship section.

UPC 5-427 directs any conservator or any court entering protective orders to take any known estate plan of the protected person into consideration in the managing of the protected estate, and authorizes the conservator to examine the protected person's will in order to be able to do this. This section would be a welcome addition to Maine law in furtherance of the policy of managing the person's estate in accordance with his desires.

UPC 5-428 directs the conservator to pay claims against the person or his estate, and sets forth the procedure for presenting them, including requirements for preserving claims pending at the time of the conservator's appointment, and a system of priorities in case the estate is likely to be exhausted before all existing claims are paid.

UPC 5-429 dealing with the conservator's individual liability is similar to UPC 3-808 and 7-306 and is discussed in connection with those sections.

UPC 5-430 provides for termination of the conservatorship upon the petition of any interested person, and after notice and hearing and determination by the court that the minority or disability of the protected person has ceased. The same procedural protections exist for the protected person as are provided for in the original proceeding to determine the appointment. Upon termination, the title to the property returns to the former protected person or his successors, subject

to any outstanding expenses.

UPC 5-431 facilitates collection of a protected person's property by protecting one who turns it over to a conservator appointed in another state, upon the affidavit of the foreign conservator as prescribed in this section. UPC 5-432 provides for the acquisition by a foreign-appointed conservator of the powers of a locally-appointed conservator by filing authenticated copies of his foreign appointment and bond, if no local protective proceedings are pending and no local conservator has been appointed. These provisions are designed to further the same policies of facilitating interstate conservatorship situations that were involved in Article IV dealing with foreign personal representatives.

##### 5. Powers of Attorney

Part 5 of Article V is an attempt to provide an additional informal device for avoiding unnecessary protective proceedings and conservatorships, and to simplify the ways in which people can, by advance planning, provide for the management of their property voluntarily by someone else of their own choosing. In order to make a power of attorney extend beyond the principal's future potential disability under UPC 5-501, such provision must be explicitly made in the power. By express provision it can also be made to become effective only upon the commencement of a disability. A conservator can still be appointed despite the existence of such a power, and the attorney must thereupon account to the conservator, and the conservator thereupon has

the same powers of revocation as the principal would have if he were competent. UPC 5-502 provides validity to actions taken by the attorney who did not know of the death or disability of the principal at the time he was acting, and who is acting under a power of attorney that does not explicitly provide for its extension beyond the principal's disability.

Both of these sections were enacted in Maine in 1975 and exist as 18 M.R.S.A. §§4201 and 4202. In the Commission's bill, the references to "guardians" have been deleted in order to conform them to the distinction between guardians and conservators drawn by the proposed Maine Probate Code and the Uniform Probate Code but not under present Maine law.

#### C. Public Guardians

The Uniform Probate Code contains no provisions for public guardianships, although it does not reject the concept. Public guardianships can fill a need where there is otherwise no person to take on the care of a minor or disabled person or the management of his property. In order to preserve the present system of public guardianship, the existing provisions have been integrated into the proposed new code as Part 6 of Article V, and have been modified so that public guardianships and conservatorships will fit into the general system under the new code. Except to the extent necessary to make this integration into the general guardian-conservator system, the Commission has attempted to leave the operation of the present public

guardianship provisions essentially undisturbed.

D. Uniform Veterans Guardianship Act.

Article V of the Uniform Probate Code is intended to supersede the Uniform Veterans Guardianship Act, which presently appears in this state as 37 M.R.S.A. §§201-221. The repeal of these sections would eliminate the problems that can sometimes arise from the co-existence of two different systems. At the same time, the proposed code explicitly preserves the right of governmental agencies, such as the Veterans' Administration, to participate in protective proceedings (§5-406), and thus to seek whatever safeguards are available under the Uniform Veterans Guardianship Act, but to do so within the single system of Article V.

Of the eleven states that have so far enacted the Uniform Probate Code guardianship provisions, two have never enacted the UVGA,<sup>8/</sup> eight states repealed the act in connection with the adoption of the Uniform Probate Code,<sup>9/</sup> and only one state has retained the Veterans Act when adopting Article V.<sup>10/</sup>

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8. Alaska and Oregon.

9. Arizona, Hawaii, Idaho, Montana, Nebraska, New Mexico, North Dakota and Utah.

10. Colorado.

Chapter 6

EVIDENTIARY PROVISIONS OF THE  
UNIFORM PROBATE CODE AND PRESENT MAINE LAW

A. Summary List of Evidentiary Provisions of the Uniform Probate Code.

The Uniform Probate Code provisions directly affecting the admissibility and effect of evidence may be listed as follows:

UPC 1-107(1) and (2), concerning evidence as to death or status, a matter now dealt with by 22 M.R.S.A. §2207 and related sections, concerning the evidentiary character of vital records.

UPC 1-107(3), creating a "presumption" of death at the end of five years of continuous absence that is not satisfactorily explained despite diligent search or inquiry.

UPC 1-310, providing that every document filed with the court under the Code shall be deemed to include an oath or affirmation that its representations are true as far as the person executing or filing it knows or is informed.

UPC 2-109(2)(ii), which, among other things, provides that a person born out of wedlock is a child of the father if the paternity is established after the father's death by clear and convincing proof, with certain exceptions. This subsection, which, in the form that the Commission has recommended, would make some changes in the existing Maine law, has been treated in Chapter 1 of this study in connection with §2-109.

UPC 2-202(2)(iii), creating a presumption in valuing the augmented estate that property owned by the surviving spouse at decedent's death was derived from decedent, except as the surviving spouse establishes otherwise. This particular presumption is a part of the operation of the Uniform Probate Code's augmented estate concept, and as such has no real counterpart in present Maine law.

UPC 2-202(3), which provides that any recorded instrument on which a state documentary fee is noted is prima facie evidence that the transfer described therein was made to a bona fide purchaser. Since under present Maine law there is no provision for affixation of a stamp noting payment of a filing fee for the recording of such instruments, there would be no use in Maine for such a provision and it has been omitted for this section in the proposed Maine code.

UPC 2-207(a), providing that for purposes of determining the spouse's elective share, the spouse's beneficial interest in any life estate or in any trust shall be computed as if worth 1/2 of the total value of the property subject to the life estate, or of the trust estate, unless higher or lower values for these interests are established by proof.

UPC 2-301 and 2-302, which, respectively, provide under certain circumstances shares for omitted spouses and for later-born children who are not included in a will. These sections and the changes they would effect in Maine law are discussed in Chapter 1 of this study. Sections 2-301(a) and 2-302(a)(3),

though they read in terms of "evidence", in fact state rules of substantive law; i.e., the exceptions relate to a testator who provided for the spouse or child by transfer outside the will and manifested an intent that such transfer be in lieu of a testamentary provision.

UPC 2-504, providing that an attested will may be made self-proved at or after the time of its execution by acknowledgment of the testator and affidavits of the witnesses having form and content specified by the section. Compliance with signature requirements for execution of such a will would be conclusively presumed, even in a formal proceeding (UPC 3-406), when the will and the acknowledgments and affidavits contained therein or annexed thereto are filed. Also, in such case, other requirements of execution would be presumed subject to rebuttal, even without the testimony of any witness. Proof of fraud or forgery would undercut such an acknowledgment or affidavit, of course. UPC 3-406(b). Maine has no arrangement quite similar to the self-proved will, though Rule 44 of the Maine Rules of Civil Practice permits an admissible official record to be evidenced by a copy attested by a person purporting to be the officer having the legal custody of the record. Even so, such attested copy is not made "conclusive evidence" of anything. Compare also 18 M.R.S.A. §§2702, 2703, 2704, concerning certified copies of findings of life or death by federal officers under the Federal Missing Persons Act.

UPC 2-505, permitting any person generally competent to be



a witness to act as witness to a will even where the person is to take under the will. The change in Maine law that would be thereby created is mentioned in Chapter 1 and is discussed further later in this chapter.

UPC 2-509, permitting certain evidence of testator's intent to revive an earlier will when a later, revoking will is itself revoked. Where the second will is revoked by an act such as burning, the earlier will remains revoked "unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed." Where the second will is revoked by a third will, the evidence of intent to revive the first will must be found in the terms of the third will. Section 2-509 fills a gap in the present Maine law, and was discussed in Chapter 1.

UPC 2-701, providing that execution of a joint or mutual wills does not create a presumption of a contract not to revoke the will or wills. Section 2-701 would not conflict with present Maine law, since there are no Maine cases or statutes on this point. See Chapter 1 of this study.

UPC 3-303(c) and (e), relating to the evidence necessary to justify informal probate of an instrument as a will.

UPC 3-405, 3-406, and last sentence of 3-409, regarding evidence necessary to justify probate of an instrument as a will in a formal testacy proceeding.

UPC 3-407, allocating various burdens of proof and per-

suasion in contested cases involving the probate of an instrument as a will; e.g., proof of death, venue, heirship, due execution of will, testamentary capacity, undue influence, fraud, duress, mistake, revocation.

UPC 3-303(e) and the last sentence of 3-409, which state the manner of probating a will "from a place which does not provide for probate of a will after death" (e.g., a "notarial will").

UPC 3-907, making the personal representative's deed of distribution evidence of the distributee's title to the distributed property.

UPC 3-908, making such deed of distribution, or payment of money to a distributee, conclusive evidence that distributee has succeeded to the interest of the estate in the distributed assets, as against all but the personal representative in the case of an improper distribution.

UPC 3-910, which provides that any recorded instrument described in that section on which a state documentary fee is noted is prima facie evidence that the transfer described therein was made for value. As with a similar provision in UPC 2-202(3) there would be no use in Maine for such a provision because present Maine law does not provide for the affixation of a stamp noting payment of a filing fee for the recording of such instruments. This provision was therefore omitted from the corresponding section of the proposed Maine Code.

UPC 5-421, providing that letters of conservatorship are evidence of transfer of all assets of a protected person to the conservator, and that 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. This provision is simply the evidentiary counterpart to UPC 5-420, which is dealt with in Chapter 5 of this study.

UPC 5-205(b), making an affidavit by an agent that he did not know that his power of attorney had been revoked by the principal's death, disability or incompetence "conclusive proof" of nontermination of the power at that time, absent fraud. Such an affidavit would be recordable if exercise of the power required execution and delivery of a recordable instrument. This provision is identical to the present 18 M.R.S.A. §4202.2.

UPC 6-103(a), providing that a joint account (defined in UPC 6-101) belongs to the parties (defined in UPC 6-101) during their lifetimes in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing proof otherwise.

UPC 6-103(c), providing that when a trust account is set up the trustee owns the account beneficially while he lives unless a contrary intent is manifested by the terms of the account or deposit agreement or there is other clear and convincing evidence of an intention that the account be the subject of an irrevocable trust.

UPC 6-104(a), requiring clear and convincing evidence to show an intent that sums on deposit at death of a party to a joint account do not belong to the surviving party or parties, rather than to the decedent's estate.

UPC 6-104(c), requiring clear evidence to show an intent that on death of the trustee of a trust account any sums remaining on deposit are not to belong to the persons named as beneficiaries. The original version of the UPC stated the same "clear and convincing standard here that is stated in §§6-103(a) and (b) and in 6-104(a). Since there is no apparent reason for the deletion of the words "and convincing," which occurred, perhaps inadvertently, in the 1975 Uniform Probate Code revision, and since it would tend to cause confusion to have two different linguistic standards within this section, for no apparent purpose, the proposed Maine code retains the original UPC version requiring "clear and convincing evidence" in this subsection.

UPC 6-110, 6-111, requiring proofs of death to be given to financial institutions to establish survivorship to P.O.D. ("pay on death") and trust accounts.

B. General Applicability of Rules of Evidence and Principles of Law and Equity.

The Uniform Probate Code provides in §1-103 that unless displaced by particular provisions of the Code, the principles of law and equity supplement its provisions. This Uniform Probate Code section, which would be a continuation of exist-

ing Maine law, has the effect of importing familiar principles into the application of certain Code provisions relating to evidence, including those governing the use and effect of records and certificates of birth and death. Thus, under the Uniform Probate Code, for example, probate courts would require proper foundation for evidence, would require testimony to be relevant and material, and would apply the hearsay and best-evidence rules, with their exceptions.

In addition, the Code provides in §1-107 for the applicability of the rules of evidence in courts of general jurisdiction "unless specifically displaced by the Code."

The basic provisions now controlling the use of evidence in Maine probate courts are §651 of Title 16, which states that the rules of evidence in special proceedings of a civil nature, "such as before referees, auditors, county commissioners and courts of probate," are the same as provided for civil actions, and Rule 1101 of the Maine Rules of Evidence which states that the rules apply to all actions and proceedings in the Supreme Judicial Court, the Superior Court, the District Court, and the Probate Court. These provisions are closely similar to the first sentence of UPC 1-107, referred to above. The one difference is that the Code provision specifically gives precedence to any Code statutory provisions that may conflict with any rules of evidence. Since 16 M.R.S.A. §651 also applies to types of proceedings besides those in probate court, however, it cannot be completely replaced by

UPC 1-107.

The Commissions's bill would resolve this difference between the two sections by amending §651 to delete the present reference to probate courts, and add a new reference providing that the rules of evidence apply to probate courts as provided in Title 18-A, §1-107. This approach would leave §651's applicability to other proceedings undisturbed, allow the new Code to govern evidentiary matters in probate proceedings as provided in §1-107, and leave within §651 a reference to the section governing evidence in the probate courts.

C. Vital Records

Section 1-107 of the Uniform Probate Code provides in paragraphs (1) and (2) as follows:

§1-107. Evidence as to death or status

In proceedings under this Code the rules of evidence in courts of general jurisdiction including any relating to simultaneous deaths, are applicable unless specifically displaced by the Code. In addition, the following rules relating to determination of death and status are applicable:

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

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

the dates, circumstances and places disclosed by the record or report;

The official comment on §1-107 includes a statement that the introductory language is designed to accommodate the Uniform Simultaneous Death Act if it is part of a state's law. Maine has that act already, 18 M.R.S.A. ch. 113 (§§1101-1108), which would be preserved as §2-805 of Title 18-A.

Maine also has a statute providing generally for the evidentiary effect of vital records, 22 M.R.S.A. §2707, which provides as follows:

§2707. Evidentiary character of vital records

Any certificate or record of any live birth, marriage, death or fetal death filed under this Title, or a copy thereof duly certified by its official custodian, shall be prima facie evidence of the fact of such birth, marriage, death or fetal death, if not "amended" or "delayed." The probative value of "amended" or "delayed" records shall be determined by the judicial or administrative body or official before whom the certificate is offered in evidence.

Section 2707 is applicable to the use of vital records as evidence for all kinds of judicial or administrative proceedings, not merely for the purposes intended by the Uniform Probate Code. The "official custodian" referred to in §2707 may be the municipal clerk or the state registrar of vital statistics. 22 M.R.S.A. §§2701-2704. The "amended" records referred to in §2707 are those amended pursuant to 22 M.R.S.A. §2705, providing for correction of errors in various vital statistics records in accordance with departmental regulations.

An amended certificate is marked "amended" and is endorsed with a summary of the evidence submitted in support of the correction. The "delayed" record mentioned in §2707 refers to a certain form, entitled "Delayed Registration of Birth," authorized under 22 M.R.S.A. §2764.2 for registration of live births filed more than seven years after the births take place.

Paragraphs (1) and (2) of UPC 1-107 are consistent with the first sentence of §2707. However, the second sentence of 22 M.R.S.A. §2707 leaves the probative value of "amended" or "delayed" records to be determined by the court or administrative body or official before whom the certificate is offered in evidence, whereas UPC 1-107(1) would make no exception to the rule that a certified or authenticated copy of a death certificate is to be prima facie proof of the fact, place, date and time of death and identity of the decedent. Paragraph (2) of UPC 1-107 likewise attaches the status of "prima facie evidence" to all certified or authenticated official death records without exception in proceedings under the Code.

There is thus a minor discrepancy between the second sentence of 22 M.R.S.A. §2707 and UPC 1-107(1), since the Code subsections would require the probate court to treat an "amended" or "delayed" certificate as prima facie evidence, while §2707 leaves the evidentiary weight of such a certificate to be determined by the court in each case. With respect to paragraph (1), the discrepancy exists only with respect to "amended" death records, since the "delayed" records referred to in §2707 are birth records, with which UPC 1-107(1) has nothing to



do.

With respect to paragraph (2), while the reference to a record that a person is alive might be thought broad enough, by a stretch, to cover birth records in, say, a paternity suit under UPC 2-109(2)(ii), the better view would be that paragraph (2) of UPC 1-107 is really intended only to cover official reports of the status of missing persons. In such cases, also, "delayed" records of birth would not be involved.

The conflict is thus a minor one. Section 2707 leaves the evidentiary weight of an "amended" official death report to the judge, while the Code would make such a report prima facie evidence of death. In other material respects, the two provisions can stand together.

The very existence and prominence of a process for amending vital records such as these might be seen as an argument for the greater reliability of an amended record than of an original one. The purpose of amendment is for the "correction of errors". 22 M.R.S.A. §2205. An amended record, presumably has been given more consideration for its accuracy than one that has been made or issued only in the first instance, since by definition it is a reconsideration of what had been done originally. At the least it seems hard to make a good case that an official record (which may be in need of amendment) should be given more evidentiary weight than one that has been corrected by an official process.

Also, the difference that is involved is the difference between prima facie evidence and the probative value of evidence that stands on its own. When a matter is before a court or a jury, that difference is ordinarily very slight. The prima facie validity of evidence before a judge counts for little in the face of any significant rebuttal: the prima facie evidence will be evaluated along with the rebutting evidence as if both essentially stood on their own. On the other hand, an officially amended birth certificate which is unrebutted by any other evidence will have essentially a prima facie evidentiary value.

Especially in proceedings under the Uniform Probate Code, there would be some merit in making an "amended" official death certificate prima facie evidence. Under UPC 3-407 a petitioner who is the proponent of a will or who seeks to establish intestacy has the burden of establishing prima facie proof of death in order to stay in court in a contested case. It would be convenient if an "amended" official death certificate could establish a prima facie case under UPC 1-107, and, indeed, strange if it could not. Since, under UPC 3-407, parties would have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof, the petitioners would have to satisfy the probate judge by a fair preponderance of the evidence that the supposed decedent was in fact dead. In short, if any death certificate, whether or not "amended", were challenged in a contested tes-

tacy proceeding, the ultimate decision would still be made on a full consideration of all the evidence for and against the fact of death. There seems to be no good reason for modifying UPC 1-107(1) or (2) merely because of the second sentence of 22 M.R.S.A. §2707.

A distinction in effect should be noted, also, in that 22 M.R.S.A. §2707 merely makes the official certificate prima facie evidence of the fact of live birth, marriage, death or or fetal death, whereas UPC 1-107(1) makes a death certificate evidence in a proceeding under the Code of the place, date and time of death and identity of the decedent as well as the fact of death. The certificate under UPC 1-107(2), that a person is missing, detained, dead or alive, is prima facie evidence not only of the status itself, but of the dates, circumstances and places disclosed by the record or report. It seems clear enough that in a proceeding under the Code, the Code section should control to give a death certificate its more extensive effect; matters other than proceedings under the Code would continue to be governed by 22 M.R.S.A. §2707 whenever that section applied.

In order to maintain these distinctions and assure the intended role of such records under the Uniform Probate Code, the introductory part of the second sentence of §1-107 is amended in the proposed Maine code to read as follows:

In addition, notwithstanding the provisions of §2707 of Title 22 of the Maine Revised

Statutes, the following rules relating to determination of death and status are applicable:

The added language is to make it clear that in a proceeding under the Code, UPC 1-107 should control in the rare case of a conflict between that section and 22 M.R.S.A. §2707.

Section 2707 of Title 22 applies in terms only to records filed under that title. Hence it does not apply to records and certificates from other jurisdictions. Reed v. Stevens, 120 Me. 290, 113 Atl. 712 (1921). On the other hand, UPC 1-107(1) would permit the use of out-of-state death records and make them prima facie evidence.

Under the full faith and credit clause of the Constitution (Art. IV, §1), full faith and credit must be given in each state to the public records of every other state. The federal statute prescribing the manner in which such records shall be authenticated and proved is 28 U.S. Code §1739 (1970), which provides that such public records or books or copies thereof, so authenticated, "shall have the same full faith and credit in every court and office...as they have by law or usage in the courts or offices of the State, Territory, or Possession from which they are taken." Thus, while the federal statute requires giving full faith and credit to the extent required in the home jurisdiction, the Code would go farther in UPC 1-107(1) and (2) by giving the status of prima facie proof to any certified or authenticated copy of a death certificate purporting to be issued by an official or agency

of the place where the death purportedly occurred, regardless of its treatment in the jurisdiction of origin.

Rule 44(a) of the Maine Rules of Civil Procedure and Rule 902 of the Maine Rules of Evidence provide the methods of authenticating either domestic or foreign official records and admitting them into evidence. Nothing in M.R.C.P. 44(a) or Rule 902 would conflict with the Code provision, UPC 1-107, making such death records prima facie proof of the fact, place, date and time of death and the identity of the decedent. Since the Code does not provide any inconsistent rule for authenticating, UPC 1-304 (court-promulgated rules of procedure to govern formal Code proceedings unless displaced) and UPC 1-107 (rules of evidence applicable to proceedings under the Code unless specifically displaced) would have the effect of making a court rule presumably similar to M.R.C.P. 44(a) and Evidence Rule 902 govern the authentication of records in a formal proceeding under the Code.

Paragraph (2) of UPC 1-107 does not refer to the ordinary records of birth, death, or marriage that are filed with municipal clerks or with the state office of vital statistics under chapters 701, 703, 705 and 707 of Title 22. It alludes to the type of record or report authorized by the Federal Missing Persons Act, 5 U.S.C. §5565(1970), also referred to in 18 M.R.S.A. §§2702 and 2703, concerning findings of presumed death or reports that persons are missing, missing in action, captured, or dead, or alive.

Paragraph (2) of UPC 1-107 goes farther than 18 M.R.S.A. §§2702 and 2703, by making the official report of the responsible federal officer concerning status of a missing person prima facie evidence of the reported status, whereas §§2702 and 2703 provide merely that such an official report shall be received as evidence. Since contrary evidence is admissible under either statute, no serious difference is perceived.

Paragraph (2) of UPC 1-107 would not be mere surplusage, however, because it applies to a foreign, as well as a domestic, governmental agency, whereas 18 M.R.S.A. §2703 applies only to reports made under authority of the Federal Missing Persons Act or any other law of the United States. With respect to reports by foreign governmental agencies, it may be assumed that the courts applying the Code will require a showing that the agency making the report was required to do so within its normal functions. Such a requirement is a normal prerequisite for admissibility of this kind of hearsay evidence. See Reed v. Stevens, 120 Me. 290, 113 Atl. 712 (1921).

D. Missing Persons.

1. Presumption of Death

Paragraph (3) of UPC 1-107 would create a presumption of death in proceedings under the Code after five years of unexplained absence and diligent search or inquiry. This paragraph conflicts with Maine's existing seven-year presumption

statute, 18 M.R.S.A. §2701, which, though in terms limited to probate of the will or administration of the estate of a missing person, has been applied to actions and proceedings generally. Section 2701 has not been regarded by the Maine high court as absolutely mandating a finding of death where a person has been absent and unheard of more than seven years where no reason is advanced for even supposing him dead. Wilson v. Prudential Ins. Co., 132 Me. 63, 166 Atl. 57 (1933) (named insured abandoned family, remained absent 11 years, family having no word from or about him. Held, wife not entitled to proceeds of life insurance policy on the particular facts.) On the other hand, the court has permitted the trier of fact to infer death from circumstances even when seven years have not passed. Bernstein v. Metropolitan Life Ins. Co., 139 Me. 388, 34 A. 2d 682 (1943) (insured, depressed because of financial troubles, went aboard overnight steamer from Boston to New York, never arriving in New York. Suit for insurance brought within four years after disappearance. Held, master's finding of death was supportable; judgment for widow against insurer, affirmed.) This same approach could be taken by the courts under UPC 1-107(3) in probate proceedings. The section could also be applied to actions, especially to recover life insurance proceeds, in non-probate courts just as 18 M.R.S.A. §2701 has been. Such an action would presumably be deemed a "proceeding under this Code" within the meaning of UPC 1-107 since UPC 1-301 makes the Code applicable to the affairs and

estates of domiciliary missing persons.

Considering modern means of communication and transportation, five years today may be as sufficient a time for raising a presumption of death as seven years was in the past. It seems a sufficient length of time to make a family wait, especially in light of the individualized evidentiary consideration that the Maine courts have given such cases, and could continue to apply under UPC 1-107(3). Three-fourths of the states that have the UPC have adopted five years or less as the presumptive period. Eight of the twelve such states have enacted the five-year presumption in §1-107(3),<sup>1/</sup> while one state has further reduced it to four years,<sup>2/</sup> and the remaining three have retained the older seven-year period.<sup>3/</sup>

The Commission believes that the five-year period is more realistic and fairer to the families involved in such a situation, and has included paragraph (3) of UPC 1-107 in the proposed Maine code in its uniform version, replacing the present §2701.

## 2. Bonding of Distributees of Missing Person's Estate

Section 2701 requires a distributee to give a bond with sufficient surety conditioned to return the distributed estate to the person presumed to be dead in case he reappears.

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1. Alaska, Arizona, Florida, Hawaii, Idaho, Nebraska, New Mexico and Utah.

2. Minnesota.

3. Colorado, Montana and North Dakota.



If the distributee cannot give the security, his portion of the estate is not distributed, but is to be placed at interest and the interest paid annually to him. Five years after appointment of the executor or administrator, §2701 provides, the court may order payment or distribution of the principal without the security, and after such administration and distribution the executor or administrator is not liable to the missing person in any action for recovery of such estate.

Section 2701 does not state explicitly whether the returning owner whose estate has been distributed (either after seven years where bond has been given or after twelve years where it has not) has a right to restitution from the distributee. It does not state the rights of purchasers from the distributee as against the returning owner. The Uniform Probate Code covers both those problems. Section 3-412(5) provides that the finding of death is conclusive as to the alleged decedent if, but only if, notice of the hearing on the petition in a formal testacy proceeding was sent by registered or certified mail to the alleged decedent at his last known address and if a diligent search for decedent was made under UPC 3-403(b). Even where notice was sent and search was made, the returning supposed decedent would be able to recover any of his estate assets still in the hands of the personal representative, and any of the estate or its proceeds in the hands of distributees or the value of distributions received by them to the extent that any recovery from distributees would

be equitable under all the circumstances. UPC 3-412(5). Purchasers for value from a distributee who holds a deed of distribution from the personal representative would take title free of any claims of the estate, whether or not the distribution was proper. UPC 3-910.

The Uniform Probate Code contains no provision for requiring security from distributees where a missing person's estate is being distributed after a finding of death under UPC 3-412(5).

It is hard to justify the stringent bonding requirements for distributees under §2701. In fact, it is so onerous that it in effect vitiates the usefulness of administering and settling a missing person's estate. Twelve years, under the present law, is a long time for a family of ordinary means to wait for distribution.

Under the proposed Maine Probate Code, there is no reason to retain any of the provisions of 18 M.R.S.A. §2701, since all of the areas that it covers are either also covered under the code, or, as in the case of bonding of distributees, deliberately rejected.

E. The Automatic Oath

Section 1-310 of the Code provides as follows:

§1-310. Oath or affirmation on filed documents

Except as otherwise specifically provided in this Code or by rule, every document filed with the court under this Code in-

cluding applications, petitions, and demands for notice, shall be deemed to include an oath, affirmation or statement to the effect that its representations are true as far as the person executing or filing it knows or is informed, and penalties for perjury may follow deliberate falsification therein.

Maine has a roughly comparable provision in Rule 11 of the Maine Rules of Civil Procedure governing the effect of an attorney's signature in pleadings; namely, that the signature of an attorney constitutes a certificate by him that he has read the pleading, that to the best of his knowledge and belief there is good ground to support it; and that it is not interposed for delay. Of course, this provision of Rule 11 applies only to attorneys who sign pleadings, whereas UPC 1-310 would apply to anyone filing any document with the probate court under the Code.

No problem of conflict would arise between UPC 1-310 and existing Maine law. The peculiar language "penalties for perjury may follow deliberate falsification therein," must be deemed to refer to the fact that other requisites for perjury must be met before the penal statute applies. See 17A M.R.S.A. §§451, 452, defining perjury and false swearing. Code §1-310 would be supported by 22 M.R.S.A. §2708, making it a misdemeanor to provide false information or to alter a vital record except as provided in Title 22. There would be no conflict between the provisions.

Existing law provides that persons who have scruples against

taking oaths may "affirm under the pains and penalties of perjury," under 16 M.R.S.A. §152, which affirmation has the same effect as an oath.

F. Valuation of Electing Spouse's Interest in Life Estate or Trust.

Section 2-207(a) of the Code provides that for purposes of computing a spouse's elective share of the augmented estate under Part 2 of Article 2 of the Code, the electing spouse's beneficial interest in any life estate or in any trust shall be computed as if worth one-half of the total value of the property subject to the life estate, or of the trust estate, unless higher or lower values for these interests are established by proof.

The present practice in Maine, when it is necessary for whatever reason, such as in eminent domain proceedings, to compute the present value of a life tenant's or beneficiary's interest in a life estate or trust estate, appears to be for the parties involved to negotiate over which of numerous mortality and annuity tables should be used in computing the present value of the interest. When agreement is reached, the selected tables are used to reduce the life tenant's or beneficiary's interest to a present value lump sum amount. The Code would not necessarily change this practice. Section 2-207 (a) simply states that if no other value for the interest is established by proof, it shall be deemed to be worth one-half of the total value of the property subject to the life estate

or the trust. The parties would be free to attempt to establish higher or lower values for their interests. Section 2-207(a) would be quite helpful in cases where it is difficult to assign a monetary value to an interest, such as where a widow has a life estate in the family homestead, which is not producing income.

G. Provisions Relating to Proof and Effect of Wills.

1. Necessity of Proving a Will

Of course, the entire Part 3 of Uniform Probate Code Article III, providing for informal probate and appointment proceedings, would work an important change in Maine law. The only informal procedure sanctioned in Maine at present is the inconsequential provision of 18 M.R.S.A. §1555 denying jurisdiction to administer the estate of an intestate "unless it appears to the judge that the decedent left personal estate to the amount of at least \$20, or owed debts to that amount, and left real estate of that value." If administration is denied for want of such estate, the decedent's personal property goes to his widow or next of kin. With that one exception, all decedents' estates in Maine are administered under supervision of a judge of probate. See 4 M.R.S.A. §251; 18 M.R.S.A. §§107, 1551. No will is effectual to pass an estate unless proved and allowed in the probate court. Section 101 of Title 18 has been construed several times to have that effect. See, e.g., Gray v. Hutchins, 150 Me. 96, 194 A. 2d 423 (1954). Only after the

will has been proved and allowed in the probate court, it is said, does the title of the devisee relate back to the date of death of the testator. Appeal of Martin, 133 Me. 422, 179 Atl. 655 (1935); Spring v. Parkman, 12 Me. 127 (1835).

The Uniform Probate Code, with two minor exceptions, also requires probate to make a will legally effective. UPC 3-102. One at least formal difference from present Maine law is that the title to both the personal and real property of the decedent devolves at his death to devisees or heirs as the case may be, subject to allowance rights of spouse or children, creditors' rights, spouse's elective share, and subject to the overriding power of the personal representative to use or possess the property as needed for administering the estate. See UPC 3-709 and 3-711. The will is evidence of a transfer to the devisees named in the instrument, but to be effective to prove such transfer or to nominate an executor, the will must be declared valid by an order of informal probate by the Registrar or a formal adjudication of probate by the court. UPC 3-102. Certain minor exceptions in UPC 3-102 permit the use of an unprobated will as evidence of a devise in specified types of situations. As explained by the Comment to UPC 3-102, the chief purpose of the exceptions is to accommodate certain hardship cases, where probate is ignored by a spouse who remains in possession mistakenly thinking he had been a joint tenant with his spouse, or who mistakenly thinks the decedent had no estate.

2. Informal Probate Generally

The major difference from present Maine law, and one of the most basic reforms sought by the Uniform Probate Code is its provision for two methods of probating wills: a non-adjudicative determination by the Registrar (informal probate); or a judicial determination by the probate court after notice to all interested parties (formal probate). Likewise, appointment of executors or administrators (personal representatives) may be informal, by the Registrar, without prior notice to interested parties and upon verified application showing that statutory criteria have been met and that the applicant satisfies the statutory priority for appointment; or formal, by court order after notice to interested parties, as at present. Upon informal appointment, the personal representative must give notice of his appointment to possible successors of the decedent. UPC 3-705. Under the Code, any "interested person," (defined in UPC 1-201(20)) who is worried about protection of his rights at any stage may commence formal testacy proceedings under UPC 3-401 that will supersede informal proceedings theretofore held, or he may petition in a formal proceeding for appointment of a personal representative under UPC 3-414.

Part 3 of Article 3 of the Code sets forth the procedures for informal probate and appointment of a personal representative. The status of the personal representative and the powers and duties of the office would be fully established by informal appointment by the Registrar. UPC 3-307(b). The proof and

findings required for original probate of a will in an informal proceeding would be set forth in UPC 3-303. Under subsection (c) of UPC 3-303, a will may be informally probated by the Registrar if it appears to have the required signatures and contains an attestation clause showing that statutory requirements of execution have been met or if it appears otherwise to the Registrar to have been properly executed. Subsection (e) states the requisites for informal probate of a will from a place which does not provide for probate of a will after death, e.g., a foreign "notarial" will.

These Code provisions for evidence to support an informal probate have no analogue in present Maine law for the obvious reason that Maine has no statutory system for informal probate except in the trivial instance covered by 18 M.R.S.A. §1555, discussed in part G.1. of this chapter. Subsections (c) and (e) of UPC 3-303 are useful evidentiary provisions if a system for informal probate is adopted. Subsection (c) would obviously be inconsistent with the present requirement of 18 M.R.S.A. §105, that in cases where there is no objection to the will, a probate judge shall decree probate on the testimony or deposition at least one of the subscribing witnesses who can substantiate all the facts. Subsection (e) is discussed further in part G.6. of this chapter.

### 3. Evidence for Establishing Execution

Uniform Probate Code §§3-405, 3-406, and the last sentence



of 3-409 set forth the evidentiary requirements for proof of wills in a formal probate proceeding. Section 3-405 relates to uncontested cases, and §3-406 relates to contested cases.

Under UPC 3-405, if evidence about execution of the will would be necessary in a formal proceeding, the affidavit or testimony of any one attesting witness would be sufficient in an uncontested case. If such testimony or affidavit should not be available, execution could be proved by other evidence. If no interested person wanted to force the production of evidence in a formal probate proceeding, UPC 3-405 would permit the court to order probate or intestacy on the basis of the pleadings provided other jurisdictional and venue requirements were met.

Section 3-405 of the Code would change present Maine law slightly. The provision thereof permitting the court to order probate or intestacy on the "strength of the pleadings" in certain cases is not in accord with 18 M.R.S.A. §105, which seems to require the judge in an uncontested case to take the testimony of at least one subscribing witness, or at least a deposition under §104. The Code says that if there is no opposition to the will the court, if satisfied, may determine that the pleadings satisfy such proof. If not satisfied, the court may require further proof in open court.

Under 18 M.R.S.A. §105, the judge may accept a will for probate on the testimony or affidavit of one attesting witness taken before the register of probate. One case has held that

the register may take the affidavit at any time after the petition for probate is filed. In re Knapp's Estate, 145 Me. 189, 74 A.2d 217 (1950). Essentially, as under Code section 3-405, proof of the will by use of only one attesting witness is permissible where the petition is unopposed. 18 M.R.S.A. §105, first sentence. The somewhat similar Code provision, UPC 3-405, does not require the affidavit to be taken before the register.

There is no general provision in the present Maine statutes comparable to the last sentence of UPC 3-405 providing that if the affidavit or testimony of an attesting witness is not available, execution of a will may be proved by other evidence or affidavit in an uncontested case. However, special cases of unavailability of witnesses are covered in 18 M.R.S.A. §106 (subscribing witness in the armed forces) and 18 M.R.S.A. §108 (wills lost, destroyed, suppressed or carried out of the state); in those special cases, proof by other evidence than testimony or affidavit of an attesting witness is now permissible even in contested cases. Section 104 of Title 18 provides for taking depositions of attesting witnesses and other witnesses "whose testimony is required to prove the signatures of the testator or of the witnesses" in cases where they live out of the state or more than 30 miles away, or cannot attend court because of age or indisposition of body.

In addition, the Maine cases have said that a proper attestation clause is prima facie evidence of proper execution of

the will, after death of attesting witnesses or upon their failure to remember what happened at execution. In re Goodridge, 119 Me. 371, 111 Atl. 425 (1920) (dictum); Barnes v. Barnes, 66 Me. 386 (1876) (dictum). In the Goodridge case, the court said that the attendant circumstances and evidence may also be considered in such a case. In effect, the Code would generalize from these special situations to provide for proof of the will in any uncontested case where attesting witnesses were not available. The provisions of the present §105 are more than adequately covered by UPC 3-405.

In contested cases, Maine appears to follow the old non-statutory rule that requires the testimony of all necessary subscribing witnesses to prove a will unless such testimony is excused by impossibility or supervening legal disqualification to testify, such as insanity (18 M.R.S.A. §103), or unless the case falls within exceptions recognized by statute; e.g., 18 M.R.S.A. §§104, 105, 106, or 108. Section 105 of Title 18, like the UPC 3-405, applies only in uncontested cases, but §§106 (witness in armed forces) and 108 (lost will or will carried out of the state) are available also in contested cases. The rule requiring testimony of all necessary subscribing witnesses unless excused was announced in Patten v. Tallman, 27 Me. 17, 28 (1947).

The Code provides as follows in §3-406, for contested cases in formal testacy proceedings:

- (a) If evidence concerning execution of an

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

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

The implication of subsection (a) is contrary to the Maine rule that all necessary witnesses must testify in a contested probate proceeding except as excused by impossibility, incompetence or otherwise under 18 M.R.S.A. §§104, 106 or 108. The implication of subsection (a) of UPC 3-406 is that the will may be proved in a formal, contested proceeding by the testimony of only one attesting witness, provided the proponent of the will carries the burdens of proof and persuasion placed on him by UPC 3-407. Even though available, the testimony of the other attesting witnesses would not be required in such a case. Of course, in a contested case a petitioner-proponent would normally be well-advised, out of sheer self-interest, to fortify his case by testimony of other attesting witnesses friendly to the will. So the change that UPC 3-406 would introduce in this respect would rarely make an important difference, practically speaking.

The second sentence of UPC 3-406(a) makes clear what is not explicitly stated in any present Maine statute: that due execution of a will may be proved, even in a contested case, without testimony or affidavit of attesting witnesses. Presumably this provision would be subject to the rule of the first sentence of subsection (a), requiring testimony of at least one such witness if within the state, competent and able to testify. Probably the second sentence of (a) would make only a minor change in Maine law in view of the Goodridge dictum referred to above. Even now, where attesting witnesses are incompetent or unavailable, due execution of the will may be proved by other evidence.

Subsection (b) of UPC 3-406 would apply the innovation of the "self-proved" will, established in UPC 2-504. Under UPC 3-406(b), if the will were "self-proved" (as defined in UPC 2-504), no testimony of any attesting witness would normally be required to prove its due execution. No such dispensation is possible at present for any attested wills in Maine, though the idea would not be totally strange here. As the high court said In re Goodridge, 119 Me. 371, 375, 111 Atl. 425, 427 (1920), a proper attestation clause is prima facie evidence of proper execution of the will after the witnesses are dead or unable to remember the circumstances of execution. That language does not go as far as UPC 3-406(b) goes with a self-proved will, but it does suggest

that the court does not believe that it is opening the flood-gates to fraud to accept a will as duly executed without testimony of any attesting witness. On the other hand, the self-proved will provisions would be a very significant way to simplify the proof of a will in many ordinary situations.

Where one or more subscribing witnesses to a will were serving in the armed forces or as merchant seamen when they subscribed to the will, the present §106 of Title 18 provides for the method of proving the will when one or more of the subscribing witnesses are serving in the armed forces or as merchant seamen or are dead or unavailable or incapable of testifying, at the time the will is to be proved. As it is written, the statute does not make much sense. No reason appears for requiring that one or more of the subscribing witnesses have been in the armed forces or merchant marine at the time of execution of the will in order for the section to apply. The crucial time on availability is the time when the will has to be proved. The Code would take care of situations where under present Maine law §106 would be needed, by providing generally for proof of execution by other evidence where testimony of an attesting witness is not available. UPC 3-405, 3-406.

Lost, destroyed or suppressed wills or wills carried out of the state may be proved under the first sentence of 18 M.R.S.A. §108 by a copy, by testimony of subscribing witnesses, or by any other evidence competent to prove the execu-

tion and contents of a will. In effect, the first sentence of that section codifies the non-statutory law. Atkinson, Wills 506-513 (2d ed. 1953). The Code has no express provision for proof of such wills, assuming that such provisions are more appropriately left for the rules of evidence, which under the proposed Maine code would be promulgated under §1-304.

The second sentence of 18 M.R.S.A. §108 provides that when "such original will" is produced for probate, the time during which it has been lost, suppressed, concealed or carried out of the state shall not be taken as a part of the time limited in 18 M.R.S.A. §1555 for the granting of probate or administration. With certain exceptions, that time limitation is 20 years from death. Thus, this sentence of §108 would be superseded under the proposed Maine code by §3-108, which with certain exceptions, limits the time for commencement of a probate or appointment proceeding to three years after decedent's death. The official Uniform Probate Code Comment UPC 3-108 more fully explains the Code system of time limitations.

The deposition provision of §104, described above, is not contained in the Code. It is a useful provision, but as in the case of evidence to prove lost or destroyed wills in §108, it is more appropriately included in procedural or evidentiary rules promulgated under §1-304.

#### 4. Competency of Witnesses

When witnesses are competent at the time of attestation, §103 of Title 18 provides that their later incompetency will not prevent probate of the will. The Uniform Probate Code does not have express language to the same effect. However, if the requirements of execution are met, the will is valid unless successfully challenged on other, unrelated grounds, and the execution may be proved in a variety of ways, even without the testimony of the witnesses, as discussed in part G.3. of this chapter. Moreover, the implication from several Code sections is clear that though competency of witnesses is required at the time of execution, validity of the will is not impaired by supervening incompetency of a witness. Section 3-406 is particularly persuasive, in its provision that if evidence concerning execution of an attested will which is not self-proved is necessary in a contested case, the testimony of at least one of the attesting witnesses, if within the state, competent and able to testify, is required. See also UPC 2-504, 2-505, and, generally, Parts 3 and 4 of Article 3. This provision of §103 is sufficiently and clearly preserved in the proposed Maine Probate Code.

As discussed in Chapter 1 of this study, the Uniform Probate Code would change present Maine law by allowing persons to attest as witnesses to a will without losing any interest that they might have thereunder (UPC 2-505). This changes the effect



of the present §1 of Title 18, which allows such persons to be witnesses, but reduces their share under the will to no more than they would be entitled to take by intestacy.

In 1856 Maine abrogated the common rule that made parties and interested witnesses incompetent to testify in lawsuits. 16 M.R.S.A. §53. Section 54 of that Title was enacted as an express exception from this abrogation insofar as it involved the attestation of wills, and was intended to preserve the then-existing wills act prohibition against the attestation of interested witnesses. In 1957, with the amendment of §1 of Title 18 to allow attestation by such witnesses, but reduce their interest to their intestate share, §54 actually became at least partly obsolete; consistently with §53, such interested persons were no longer disqualified as attesting witnesses. Section 54, however, remained pointlessly resting on its statutory shelf.

Under any normal interpretation of UPC 2-505 and 16 M.R.S.A. §54, there should be no difficulty in holding beneficiary witnesses competent to testify in probate proceedings even though they are financially interested in the result. Nevertheless, §54 is remotely capable of a construction that the abrogation in §53 of the bar to testimony of interested witnesses does not apply where proof of wills is concerned, thus arguably allowing the intent of the Code section to uphold devises to beneficiary witnesses to be defeated by application of the old

common law exclusionary rule. Such a construction seems only a far-fetched possibility, especially in light of Evidence Rule 601, but to eliminate any doubt §54 of Title 16 would be repealed by the Commission's proposed bill.

5. Burden of Proof in Contested Testacy Proceedings

The term "testacy proceeding" is defined in UPC 1-201(44) to include a proceeding to establish a will or determine intestacy. The Code sets forth in UPC 3-407 rules that would allocate the burdens of proof and of going forward with evidence in contested cases, both where a will is offered for probate and where decedent is alleged to have died intestate. In most respects UPC 3-407 accords with present Maine law, placing upon petitioners who seek to establish intestacy the initial burden of proof and the ultimate burden of persuasion of death, venue and heirship. The section would assign the burden of proof of due execution to the proponent of a will, but the contestants against a will would have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation.

Section 3-407 would change Maine law in only one significant respect. The Law Court has ruled in a 1906 case that the burden rests upon the proponents of a will to prove that the testator was of sound mind at the time of making the will. In re Chandler's Will, 102 Me. 72, 66 Atl. 215 (1906). That burden seems to remain on the proponent despite a recent case holding that the burden on the issue of testamentary competence

shifts to the contestant after a prima facie showing of mental competence. In re Leonard, 321 A. 2d 486 (Me. 1974). The Leonard case leaves the impression that the proponent can satisfy his duty of establishing a prima facie case rather easily where testamentary competence is at issue, placing the burden of going forward upon the contestant. As a result, the change that UPC 3-407 would effect in the allocation of burden of proof on the issue of testamentary competence would be less important for practice than it might seem at first.

Section 3-407 of the Code leaves the burden of showing undue influence or fraud on the contestant, where the Maine cases now place it. Appeal of Rogers, 123 Me. 459, 123 Atl. 634 (1924) (undue influence); In re Deehan's Will, 130 Me. 243, 154 Atl. 645 (1931) (undue influence and fraud). No Maine statutes or cases have been found expressly allocating the burden of proof on an issue of mistake, duress or revocation. The Code position on these matters is in harmony with the approach of the Rogers and Deehan cases. Like undue influence and fraud, duress, mistake and revocation are in the nature of affirmative defenses in a probate proceeding.

The provision of UPC 3-407, that "parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof," is not inconsistent with existing Maine law and seems to accord with the approach of the Law Court to the problem of burden of proof in the recent Leonard case, cited above. See also, as being generally in

accord with this provision of UPC 3-407, Appeal of Martin, 133 Me. 422, 179 Atl. 655 (1935).

The last sentence of UPC 3-407 merely states a sensible order of business in will contests, first, where two instruments are competing for probate and, second, where the will is opposed by a petition for a declaration of intestacy. No substantial question of policy would be posed by enactment of this provision of the Code, and the adoption of the UPC provision would be valuable in adding clarity to the law on these questions.

6. Proof of Wills From Other Jurisdictions

Under present Maine law, a will properly executed in another state or country may be proved and allowed in Maine like a will executed in Maine. Section 151 of Title 18, which so provides, would be superseded by UPC 2-506, which validates a will executed in compliance with the law of the place where it was executed or where testator was at time of execution or at time of death domiciled, had a place of abode, or was a national.

Present Maine law also provides, under 18 M.R.S.A. §152, that a will duly proved and allowed in another state or country may be allowed and recorded in Maine. A copy of the will "and the probate thereof," duly authenticated must be produced to the judge of probate of any country where there is any real or personal property on which the will can operate. After public notice and hearing, the judge may allow the will and

order the copy filed and recorded, with the same force as a proved local will. 18 M.R.S.A. §152. The provisions of UPC 3-408 are analogous, giving controlling force in Maine to a final order of a court of another state determining testacy, validity or construction of a will, when made in a proceeding involving notice to all interested persons and an opportunity for contest, if the order includes, or is based on, a finding that decedent was domiciled at death in the state where the order was made.

The approach of UPC 3-408 is, however, different from that of 18 M.R.S.A. §152. The Code makes the order of the sister state binding if jurisdictionally valid--presumably out of deference to the full faith and credit clause of the Constitution. The existing law merely says that the will probated in the other state or country may be allowed and recorded in Maine. This language would permit the rejection of an order of a sister state's court that was not the product of constitutionally valid procedures. Hence, the two provisions do not differ greatly in their application to an interstate situation. Code §3-408 is more carefully tailored to constitutional requirements of due notice and hearing, and more explicitly focuses on the elements relevant to full faith and credit requirements than does the present section.

Because UPC 3-408 is tailored to situations involving inter-state wills and their full faith and credit implications, it does not deal with the effect of the probate of a will in

a foreign country, as does 18 M.R.S.A. §152. This would appear to be an oversight in the Uniform Probate Code, although there is provision for recognition of a foreign will from a place that does not provide for probate. The preservation of this aspect of §152 will be dealt with in connection with those two sections.

Uniform Probate Code §3-303(e) provides as follows:

(e) A will from a place which does not provide for probate of a will after death and which is not eligible for probate under subsection (a) above, may be probated in this state upon receipt by the registrar of a duly authenticated copy of the will and a duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has become operative under the law of the other place.

The last sentence of UPC 3-409 provides as follows:

A will from a place which does not provide for probate of a will after death, may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become effective under the law of the other place.

The language of these two provisions is strikingly similar to the first sentence of 18 M.R.S.A. §153 which concerns itself with wills from a jurisdiction "where probate is not required." All three sections would permit probate in Maine of a notarial will (i.e., a will acknowledged before a notary and filed with him from a country that provides for the passing of property by will but does not provide for probate of wills.) See, e.g., R.S.F.S.R. 1964 Civil Code Part 7 (1966), from Law

in Eastern Europe, translated by A.K.R. Kiralfy, London, No. 11, published by Sijtoff-Leyden.

There is, however, one difference that might be of significance in some cases. Where a jurisdiction "provided for" probate but did not "require" it in all instances (presumably as a condition to effective operation of the will), 18 M.R.S.A. §153 would apply but UPC 3-303(e) would not. In this type of case, the existing language seems preferable to that of the Code. No reason suggests itself for refusing informal probate to a notarial will, for example, from a country that per-mits (i.e. does "provide for") probate of such a will but does not require it, provided the legal custodian certifies that the will has become operative under the law of the other country. Therefore, the proposed Maine code changes the words "which does not provide for probate" in these two UPC sections, to "which does not require probate." The change would actually make only a small practical difference, and certainly would not violate any underlying Uniform Probate Code policy.

Under the present Maine §153, dealing with the use of such foreign wills in formal probate proceedings, the court must hold a hearing, after notice, as in the case of an original will presented for probate. The last sentence of UPC 3-409, also dealing with formal proceedings, says that such a will "may be proved for probate" by an authenticated copy. Under neither statute does it appear that the Maine probate court would be bound absolutely to admit such an instrument

to probate and enforce it. The Code provision appears to be as permissive as §153, making the authenticated certificate admissible in evidence under the described conditions-- not as creating a mandate that the court must accept the certificate as settling irrevocably and against all countervailing evidence any questions of death, or domicile, or revocation, or even authenticity of the instrument.

The lack of any provision for the similar use of wills that have been probated in foreign countries, discussed earlier in connection with UPC 3-408 and 18 M.R.S.A. §152, can also be taken care of by a slight modification of Uniform Probate Code §§3-303(e) and 3-409. If treatment of probated foreign wills is provided in these two sections in a manner similar to the treatment of legally effective wills from jurisdictions that do not require probate, the foreign probated will can be integrated into the system distinguishing between formal and informal probate proceedings. It seems clear that there is no reason to give a foreign will that has been probated any less recognition than is accorded to a foreign will that has become effective under the law of the foreign jurisdiction without being probated. UPC 3-408 would stand on its own terms as the provision for dealing with a will probated in a different state of the United States, with its special full faith and credit ramifications. Thus, §3-303(e) of the proposed Maine Probate Code reads:

A will from a foreign jurisdiction, includ-



ing a place which does not require probate of a will after death, and which is not eligible for probate under subsection (a), may be probated in this state upon receipt by the register of a duly authenticated copy of the will and duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has been probated in the foreign jurisdiction or has otherwise become operative under the law of the other place.

The last sentence of §3-409 of the proposed Maine Probate Code reads:

A will from a foreign jurisdiction, including a place which does not require probate of a will after death, may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has been probated in the foreign jurisdiction or has otherwise become effective under the law of the other place.

[underlining indicates words added to or changed from the uniform version]

#### H. Deeds of Distribution.

UPC 3-907 provides that the personal representative shall give instruments or deeds of distribution to the distributees of the estate assets as evidence of their title to the property. UPC 3-908 makes such a deed of distribution "conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets" except that the personal representative may recover the assets or their value if the distribution was improper. Thus, besides furnishing evidence of the transfer of title from the decedent to his successor, one of the functions of this section is to channel through the

personal representative all actions concerning who the rightful successors are, rather than leaving these questions to be determined by a variety of actions by various would-be successors on their own. (Improper distributions could occur because the probate of a newly discovered will has overturned a previously probated one, or overturned a prior determination of intestacy. This could, of course, happen under either present Maine law or under the Uniform Probate Code.)

The more important evidentiary aspect of these instruments, however, lies in their use to protect subsequent purchasers from distributees, and their consequent value as evidence of good title to the distributed property for subsequent purchasers. UPC 3-910. Present Maine law has no similar provision. A transferee under a personal representative's deed at the present time acquires only such title as his transferor had or had the power to convey.

The use of deeds of distribution thus not only helps to support the Code's dual system of proceedings, but adds to the stability of title for land passing through a decedent's estate.

#### I. Multiple-Party Accounts.

At several points in Article VI, on non-probate transfers, the Uniform Probate Code supplies presumptions as to ownership or prescribes the quantum of evidence necessary to overcome presumptions about the ownership of the kinds of multiple-party accounts covered by that Article. Since the evidentiary

aspects of Article VI are ancillary to the substantive provisions, their analysis is included in Chapter 4 of this study.

## Chapter 7

### APPORTIONMENT OF DEATH TAXES

#### A. General Analysis of Maine Statutes and Decisions on Inheritance, Succession and Estate Taxes.

##### 1. Pertinent Maine Statutes

The Maine law establishing death taxes and providing for their administration, collection and enforcement is set forth in twelve chapters of Title 36 of the Maine Revised Statutes Annotated as follows:

<u>Chapter</u>		<u>Sections</u>
551	General Provisions	3401-3404
553	Property Taxable	3461-3470
555	Powers and Duties of State Tax Assessor	3521-3527
557	Duties and Liabilities of Estate Representatives	3581-3584
559	Valuation	3631-3636
561	Payment and Liability for tax	3681-3687
563	Estate Tax	3741-3745
565	Abatement and Refunds	3801-3802
567	Reports	3851-3852
569	Interstate Arbitration	3911-3924
571	Interstate Compromise	3981-3985
573	Reciprocity in Collection	4041-4046

In addition, §1410 of Title 18 of the Maine Revised Statutes denies a foreign personal representative the right to be licensed by the probate court to receive or transfer any personal property of a foreign decedent until any Maine inheri-

tance taxes are paid or secured. Moreover, §3051 of Title 18 sets forth priorities for appropriations out of an insolvent estate for payment of expenses, allowances, taxes and debts. Since this section is applicable only to insolvent estates, it can never apply to inheritance taxes, and therefore is not relevant to this particular commentary. Finally, §2763 of Title 18 requires a receiver of the estate of an absentee at the end of fourteen years of receivership to distribute the absentee's estate and pay inheritance taxes out of the distributees' shares.

2. The General Scheme of Maine Death Taxes and Their Collection

The principal death tax in Maine is an inheritance tax, imposed upon a person who receives property as a result of the death of another by will, intestate succession, inter vivos gift in contemplation of death, survivorship as a joint tenant, or as the beneficiary of life insurance or of a pension or profit-sharing trust. Rights accruing to a surviving spouse or issue as beneficiaries of life insurance or of a pension or profit-sharing trust are exempt. The rates of inheritance tax vary according to which of three described classes the successor falls into, those persons commonly regarded as having a stronger claim to the decedent's bounty being subjected to lower rates.

Besides the inheritance tax, Maine also provides for a so-called estate tax, resembling the federal estate tax in its

incidence on the total taxable estate, and designed to give Maine the benefit of credit allowed under the Internal Revenue Code in any case where eighty percent of the federal estate tax exceeds the aggregate amount of all state succession taxes actually paid in connection with the estate. Since such a credit is realized only in most exceptional situations the Maine "estate" tax is rarely imposed in practice. No forms are known to be available for reporting it, and Mr. Harold S. Skelton's valuable text and form book, The Settlement of Decedents' Estates, makes no reference to it.

The provisions for collection and enforcement of inheritance taxes in Maine, however, are not so unusual. The State Tax Assessor certifies inheritance taxes for any estate on the basis of an inventory submitted by the "executor, administrator or trustee" supplemented by any investigation the Assessor decides to make. Sections 3402 and 3521 of Title 36 vest in the State Tax Assessor the right and duty to assess, collect, enforce and administer all Maine death taxes, although the Assessor's decision may be appealed to the probate court within ninety days after the Assessor's certification. Questions of law may be reported by the probate court to the law court.

A statutory lien is created on all property subject to all death taxes that are or may become due on such property. That lien will expire, unless renewed, five years after the

inventory is filed with the State Tax Assessor. The Assessor may renew the lien for additional five-year periods by recording a certificate of lien in the appropriate registry of deeds.

An executor or administrator must assure payment of the appropriate death taxes before making distribution; otherwise the probate court will not allow the final accounting or discharge the representative.

The Assessor may compel an estate representative to give bond, even where a bond would not otherwise be required from the representative, to secure payment of death taxes. If testacy proceedings or appointment of an estate representative is delayed more than six months after death, the Assessor may petition for appointment of an administrator. If the estate representative refuses or neglects to give the Assessor necessary information for computing death taxes, the Assessor must certify taxes at the highest rate at which they could be computed in any event.

Provision is made for settlement and compromise in any case where computation is impossible or the persons to take cannot be determined. Section 3636 provides that if a compromise cannot be reached, imposition of the tax must be deferred until the contingencies are resolved and the beneficiary becomes entitled to possession or enjoyment. A bond or deposit may be required of the estate representative, trustee, or "grantee" to secure payment of all taxes that may become due in such a case.

B. Apportionment of Death Taxes: Maine Law, the Uniform Probate Code and the Uniform Estate Tax Apportionment Acts.

1. Purposes of Estate Tax Apportionment Statutes

The purpose of §3-916 of the Uniform Probate Code is to provide a system for apportionment of estate taxes; i.e., for apportionment among the successors to an estate of any tax, like the federal estate tax, which is imposed upon the transfer of the entire estate after deductions and exemptions are taken into account. The federal estate tax law itself leaves to state law the apportionment of the total tax liability among the various beneficiaries. In response, five states currently have the 1964 Revised Uniform Estate Tax Apportionment Act,<sup>1/</sup> and three the 1958 form of the act.<sup>2/</sup> In addition, seven states that have adopted the Uniform Probate Code have substantially similar provisions by their inclusion of §3-916.<sup>3/</sup> Two of those seven states,<sup>4/</sup> repealed their former versions of the Uniform Estate Tax Apportionment Act in favor of the Uniform Probate Code provisions. On the other hand, two other Uniform Probate Code states retained their versions

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1. Hawaii, Maryland, Oregon, Rhode Island and Vermont.
  2. Michigan, New Hampshire and Wyoming.
  3. Alaska, Colorado, Idaho, Montana, New Mexico, North Dakota and Utah.
  4. Alaska and North Dakota.



of the earlier acts rather than adopting UPC 3-916.<sup>5/</sup> Two other Uniform Probate Code states already had their own apportionment statutes,<sup>6/</sup> and only two UPC states that omitted §3-916 apparently have no provisions to deal with this issue.<sup>7/</sup>

The following table shows the action taken on UPC 3-916 by the states that have adopted the Uniform Probate Code, or large portions of the Code:

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5. Hawaii and Oregon.
  6. Florida and Nebraska.
  7. Arizona and Minnesota.

TABLE OF ACTION TAKEN BY CODE STATES ON UPC 3-916

<u>State</u>	<u>Ref.</u>	<u>Has 3-916?</u>	<u>Comments</u>
ALASKA	AS 13.16.610	Yes	Alaska repealed the 1958 Uniform Act, in favor of the UPC version.
ARIZONA		No	
COLORADO	CRS (1973) 12-15-916	Yes	"Tax" includes "additional inheritance tax imposed by Colorado."
FLORIDA	FSA (1974) 773.817	No	Apportionment statute provides for "equitable apportionment", then goes on to define it as proportional contribution, with no apportionment to temporary interests.
HAWAII	HRS §§236A-1 to 236A-9	No	Hawaii retained its version of the 1964 Uniform Act.
IDAHO	IC 15-3-916	Yes	"Estate" and "tax" are both defined in terms of Federal Estate Tax only.
MINNESOTA		No	
MONTANA	1947 RCM 91A-3-916	Yes	"Tax" includes "any additional inheritance, estate or death taxes imposed by the laws of any state."
NEBRASKA	L. 1974 - 354 §192	No	Incorporates by reference Nebraska's apportionment statute, §§77-2108, which is similar to Florida's.
NEW MEXICO	L. 1975 Ch. 257	Yes	"Tax" means the Federal Estate Tax and any death taxes imposed by New Mexico.
NORTH DAKOTA	1973 Sess. Laws ch. 257	Yes	North Dakota had 1964 Uniform Act, but repealed it in enacting Uniform Probate Code version.
OREGON	ORS 116.303 - 116.383	No	Oregon retained its version of the 1964 Uniform Act. ORS 116.303 - 116.383.
UTAH	UCA 75-3-916	Yes	"Tax" means "Federal Estate Tax and the inheritance, estate, or other death tax payable to this state."

Maine has not adopted either of the earlier uniform acts or any other statute to deal with problems of apportioning the Federal Estate Tax, but has resolved such problems as they have arisen by judicial decision on an ad hoc basis. See, e.g., Bragdon v. Worthley, 155 Me. 284, 153 A 2d 627 (1959); Old Colony Trust Co. v. McGowan, 156 Me. 138, 163 A 2d 538 (1960); National Newark & Essex Bank v. Hart, 309 Me. A 2d 512 (1973).

The main purposes of the 1964 Uniform Estate Tax Apportionment Act are set forth in the Commissioner's Prefatory Note to that Uniform Act, as follows:

Under the Internal Revenue Code the executor or administrator has the primary responsibility for paying the Federal estate tax. The Code gives the executor or administrator a right of recovery for a prorated portion of the tax payable with respect to two types of property: insurance on the decedent's life, and property subject to tax because the decedent had a power of appointment over it. So far as the Federal law is concerned, the burden of the tax with respect to all other types of property is left to state law. Absent a state statute on the subject, the estate tax falls on the residuary estate, even though much of the property included within the taxable estate consists of joint tenancy property, savings bonds with named beneficiaries, revocable trust and other property not subject to probate, but subject to estate tax.

While a testator may, without any special state law on the subject, vary the burden of the tax on the residuary estate by providing, if he chooses, that some portion of the tax should be paid out of specific bequests and the like, a testator cannot by will impose on nontestamentary assets previously transferred a greater tax burden than the law provides. He cannot

require, for instance, that joint tenancy property or an inter vivos trust shall bear its share of the tax unless there is a state law authorizing the executor to apportion a portion of the tax to that property and to recover such proportion from the present holder of the property, or unless the joint tenancy or trust agreement authorized testator to vary its terms by will.

About one-half of the states have acts containing some form of apportionment of Federal estate taxes. Few of the existing state laws effect a recovery of a proportionate part of the estate tax apportioned to a nonresident. And in states which have apportionment of Federal estate taxes there is a conflict of authority on the conflict of laws question of which jurisdiction's rule of apportionment or nonapportionment should be applied if property subject to tax in the decedent's estate has a situs in a jurisdiction other than that of his domicile. See annotations, 16 A.L.R. 2d 1282 (1951).

The Uniform Act proposed here is designed to meet these problems. The best provisions of the estate apportionment acts of the various states have been incorporated in the Uniform Act. Given the mobility of persons and property from state to state, there is advantage in uniformity of law on this matter. The Act will permit an executor or administrator of one jurisdiction to recover the proportionate part of the estate tax from a transferee residing in another state. The Act apportions the Federal estate tax where neither the Federal estate tax law nor the will of the taxpayer provides for a different apportionment. The Act also permits that which a will cannot, that a proportion of the estate tax should be charged to the nontestamentary assets and authorizes the executor to proceed to recover the necessary amounts from the owners of the nontestamentary property. This provision actually frees the testamentary draftsman because it permits him to vary the burden on the nontestamentary assets imposed by the Act, if the testator chooses.

In 1958 the National Conference of Commission-

ers on Uniform State Laws approved a Uniform Estate Tax Apportionment Act. The recommended Act was approved by the American Bar Association in the same year. A few states have adopted the original Uniform Estate Tax Apportionment Act adopted in that year. Since promulgation of that Act in 1958, several matters have come to the attention of the National Conference. The Act made no provision for the apportionment of the expenses incurred by the estate in connection with the determination of the tax and its apportionment. Finally, the 1958 Act providing a remedy to a nonresident fiduciary against a resident of the state seemed to require action by Congress.

The present Revised Uniform Estate Tax Apportionment Act meets these problems, and in addition certain changes in language and style have been carried out in the revised draft.

The substantive changes in the revised Act from the 1958 Act are found in §3, where a new subsection (c) has been inserted between subsections (b) and (c) of the 1958 Act; and in §8, the last sentence of which has been added to eliminate the necessity of Federal participation in the validity of the reciprocity provisions. States already having the 1958 Uniform Estate Tax Apportionment Act may make their Act conform to the present version by amendment to the Sections indicated (8 Uniform Laws Annotated 157-158 (Master Ed. 1972) ).

Section 3-916 of the Uniform Probate Code is very similar to, and achieves the objectives of the 1964 version of the Uniform Estate Tax Apportionment Act, although, contrary to the characterization of the official Comment to UPC 3-916, that section is not an identical "copy" of the earlier act. Three changes of substance have been made in subsections (a) (5), (g) and (h), as well as some minor changes in wording, and will be discussed in the detailed analysis of the UPC provisions.

2. Apportionment of Death Taxes Under Present Maine Law and the Uniform Probate Code

The only present Maine provisions in the inheritance tax law which bear directly upon the apportionment of death taxes among beneficiaries of the decedent are contained in §3634, providing that where any interest less than an estate in fee is given with remainder over, the value of the limited estate is to be determined by applying specified actuarial tables and assessing the tax according to the beneficiary's classification: Class "A" (spouse and descendants), Class "B" (certain collaterals), or Class "C" (others).

Though §3634 continues by providing that a tax shall be imposed at the same time upon the remaining values of the property at the rate applicable to the class to which the remaindermen belong, the Law Court has held that if the remainder is contingent, the inheritance tax cannot be imposed until the uncertainty is resolved. In the Matter of Cassidy, 122 Me. 33, 118 Atl. 725 (1922). An estate representative or trustee holding property subject to a Maine death tax must collect the tax or deduct it from the given property before delivery to the beneficiary. The final sentence of §3582 requires the executor, administrator, or trustee, upon payment of a tax assessed under §3634, to deduct the tax so paid "from the whole property devised, bequeathed or given," absent testamentary language to the contrary.

A recent case has held that §§3634 and 3582 together im-

ply that an inheritance tax on the succession privilege of a trust beneficiary for life or years is payable out of the corpus of the trust, absent contrary language in the creating instrument. National Newark & Essex Bank v. Hart, 309 A. 2d 512 (Me. 1973). This holding is in harmony with the second clause of UPC 3-916(e)(2) and with 3-916(f), which call for charging corpus with estate taxes referable to the property which is the subject of both the temporary interest and the remainder. The Code would not apportion estate taxes as between the limited interest and the remainder; the National Newark case, in its construction of §§3582 and 3634 of Title 36, has adopted the same approach for the Maine inheritance tax. The Law Court also held in the National Newark case that the share of the federal estate tax attributed to the trust should not be apportioned between income and corpus but should be paid directly out of corpus, thereby also apportioning the federal estate tax in a manner that is in accord with the provisions of UPC 3-916(e)(2) and (f). The court observed that in paying out of corpus, the income to the temporary beneficiary is automatically reduced, so that the result is equitable enough as between temporary beneficiary and remainderman.

In general, where a testator's or settlor's intent is not apparent, UPC 3-916 follows the principle of "equitable apportionment" under which the estate tax is apportioned ratably among all persons interested in the estate rather

than extracted entirely from the residuary estate. The same general principle has guided the Maine Law Court in its decisions on apportionment of estate taxes. See the Bragdon and McGowan cases cited above.

A slight problem with the Code version has been created, perhaps inadvertently, by a change in the definition of "tax" in UPC 3-916(a)(5) from the definition in §1(6) of the 1964 Uniform Estate Tax Apportionment Act, hereinafter referred to as "the 1964 Uniform Act." The latter defines "tax" to mean "the Federal estate tax [and the estate tax payable to this state] [and the death duty payable by a decedent's estate to this state] and interest and penalties imposed in addition to the tax." Subsection (a)(5) of §3-916 of the Uniform Probate Code defines "tax" to mean "the federal estate tax and the additional inheritance tax imposed by [presumably here would be inserted "the provisions of Part 6 of Title 36 of the Maine Revised Statutes Annotated"] and interest and penalties imposed in addition to the tax." The definition in the 1964 Uniform Act is more accurate since the taxes it refers to are payable by the estate and are imposed upon the transfer of the estate as a whole.

The Uniform Probate Code language would be too narrow in not including the Maine estate tax and too broad in including the Maine inheritance tax, which is not the proper subject of a tax apportionment statute because the incidence of the tax is upon the beneficiary's succession to the decedent's



property, not upon the transfer of the whole estate. Under the Maine inheritance tax each beneficiary pays the tax based upon the value of the property he receives from the decedent, taking into account the beneficiary's classification and any exemptions to which he may be entitled. The estate representative ordinarily extracts the tax from each beneficiary's share before making distribution, but some taxable transfers occur which may not result in the transferees's having any property in the probate estate; e.g., by survivorship to jointly owned real estate or by receipt of a lifetime gift in contemplation of death or by receipt of life insurance proceeds. In such cases, the state inheritance tax is not "payable by the estate" though it is payable by the transferees.

The estate tax apportionment statutes (i.e., UPC 3-916 and the 1964 and 1958 Uniform Acts) are aimed at taxes on the transfer of the whole estate, payable from the whole estate by the estate representative. They establish rules for apportioning that one tax among the various beneficiaries. Section 3-916 is carefully tailored to provide only for apportionment of death taxes: it does not apply to income taxes, owed by either decedent or his estate, and it does not apply to property taxes. The intent is fairly obvious, however, to include a state estate tax as well as the federal estate tax.

For the foregoing reasons subsection (a)(5) of UPC 3-916

has been changed in the Commission's bill to read as follows:

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

Section 3-916 of the Code, as so modified, would have no effect on the administration, collection or enforcement of the Maine inheritance tax, but would provide a fairly detailed system for apportioning the federal estate tax and also the Maine estate tax in the rare cases in which it is levied. Moreover, since Maine now has no statute affecting apportionment of federal estate taxes, it remains necessary only to consider the court decisions establishing rules for apportionment of estate taxes in order to determine the impact in Maine of adoption of this section of the Code.

The Code provisions are quite harmonious with decisions of the Law Court on the apportionment of estate taxes. As pointed out earlier, the National Newark case is in accord with the provision of subsection (f) of UPC 3-916.

The Law Court in the National Newark case distinguished an earlier case requiring direct pro rata contribution to the estate tax from intervivos transferees where gifts had been made in contemplation of death. That earlier case, Bragdon v. Worthley, 155 Me. 284, 153 A. 2d 627 (1959), had recognized the theory of "equitable contribution" that forms the basic theory of apportionment under UPC 3-916. The Law Court has

made it clear, however, that "equitable apportionment" is a doctrine to be applied as circumstances dictate and not as an inflexible rule governing contribution. The Court refused to apply the rule of the Bragdon case to exonerate a widow electing against the will from a share of the federal estate tax burden. Old Colony Trust Co. v. McGowan, 156 Me. 138, 163 A. 2d 538 (1960).

The Maine decisions on apportionment thus accord with three basic principles of UPC 3-916 (or of either version of the Uniform Estate Tax Apportionment Act):

- (1) If the probate estate passes by will, the terms of the will must govern any apportionment of estate taxes among persons interested in the estate, including transferees outside the will. UPC 3-916(b).
- (2) Equitable apportionment is the general rule, absent controlling language in the will; *i.e.*, each person interested in the taxable estate must pay his proportionate share of the total estate tax, due account being taken of exemptions and credits. UPC 3-916(b) and (e). In the case of property transferred outside the will, such as gifts in contemplation of death, life insurance proceeds, or property acquired by survivorship where the will is silent on apportionment, equitable contribution is normally required from all transferees. UPC 3-916(b) and (c)(5).
- (3) Absent terms of the will to the contrary, no interest in income and no estate for years or other temporary interest is subject to apportionment as between the temporary interest and the remainder. The tax on each interest is chargeable against the corpus of the property or funds subject to the temporary interest and remainder. UPC 3-916(f).

The conclusion seems correct that UPC 3-916 would effect no change in the decisional law of Maine. Many situations covered by the section, however, have not been the subject of judicial decision by the Law Court. With respect to those situations the rules set forth in the Code should be examined on their own merits. The detailed Code provisions are therefore analyzed in detail in Part C of this chapter.

C. Analysis of UPC 3-916 in Relation to Maine Law.

Subsection (a) (Definitions). This subsection defines the terms "estate," "person," "person interested in the estate," "state," "tax," and "fiduciary" for purposes of UPC 3-916. The definitions follow fairly closely those in the 1964 Uniform Estate Tax Apportionment Act, except for the change, discussed earlier in this chapter, in the definition of "tax." The other variations from the 1964 Uniform Act appear to be inconsequential.

Subsection (b) (Apportionment). The general rule of "equitable apportionment" is here set forth, subject to provision otherwise by the decedent's will. Subsection (b) resembles §2 of the 1964 Uniform Act but adds a new sentence: "If the decedent's will directs a method of apportionment of tax different from the method described in this Code, the method described in the will controls." The new sentence is unexplained in the Comment to UPC 3-916, but is presumably designed to make clear what is implicit in the first sentence

of the subsection: that the will controls the apportionment of estate taxes on the estate.

Subsection (c) (Procedure for Determining Apportionment).

The most important feature of subsection (c) is the giving of jurisdiction to the probate court to hear and determine questions of apportionment. In doing so, the provision also deals with the constitutional problem that would arise if the court apportioned part of the estate tax against a donee of a gift in contemplation of death or a person who takes jointly owned property by survivorship where such a person was not a party to the probate proceeding. The Commissioners' Note to §3 of the 1964 Uniform Estate Tax Apportionment Act says:

After consideration the Section of Taxation, A.B.A., and the members of the Committee who have expressed an opinion believe that the Probate Court should determine the apportionment as a part of the administration procedure. This is in accord with most, if not all of the state statutes...In order to meet the constitutional objection as above stated, the motion provides that the determination of the Probate Court shall be only prima facie correct in any suit to recover the apportioned tax.

Paragraph (3) of this subsection also usefully fills a gap in existing Maine law, by making a fiduciary chargeable for assessment of penalties and interest assessed in relation to the estate tax where the assessment is due to delay caused by the negligence of the fiduciary.

Subsection (d) (Method of Proration). There is no important difference between this subsection and §4 of the 1964

Uniform Act from which it is derived. The provisions are straightforward and create no problem. The method of pro-rata apportionment prescribed is consistent with the Law Court's handling of apportionment problems in the cases previously cited.

Subsection (e) (Allowance for Exemptions, Deductions and Credits). The Commissioners' Note to §5 of the 1964 Uniform Act, from which subsection (e) is derived, says:

Subsection (e) [similar to subdivision (5) of §(e) of UPC 3-916] relates to a complicated portion of the Federal estate tax law concerning the marital deduction and charitable deductions. For the marital deduction, the problem with which the Section deals may be illustrated by the following: If a husband's will bequeaths half of his estate of \$200,000 to his wife, under ordinary circumstances \$100,000 would be deductible from the gross estate as a marital deduction. If, however, a state should assess an inheritance tax of \$10,000 against the bequest of the widow, \$90,000 only would be deductible and \$10,000 would be included in the gross estate and taxed. Subsection (e) [subdivision (5) of UPC 3-916 (e)] provides that in such an instance no apportionment is made against the \$10,000 of the widow's bequest, which was deducted in computing the Federal estate tax. The matter is ignored. The same is true as to transfers to exempt charitable institutions.

The provisions of subsection (e) of UPC 3-916 also fill in gaps in present Maine law, and are not inconsistent with existing Maine decisions.

Subsection (f) (No Apportionment Between Temporary and Remainder Interests). The effect of subsection (f) and its conformity with the decision in National Newark & Essex Bank

v. Hart, 309 A. 2d 512 (Me. 1973), has been discussed previously.

Subsection (g) (Exoneration of Fiduciary). There is one significant change in subsection (g) of UPC 3-916 from §7 of the 1964 Uniform Act from which it is derived. The 1964 Uniform Act calls for the residuary estate to bear the entire burden of paying any estate tax that is not collectible from another person interested in the estate and permitting equitable apportionment among all beneficiaries only where the residue is insufficient. The Uniform Probate Code calls for equitable apportionment of such uncollectible taxes among all other persons interested in the estate who are subject to apportionment. The Code provision seems to be a fairer way to apportion this kind of a tax burden, and outweighs any additional difficulty of administration. Once again, this provision would usefully clarify an issue on which there appears to be no present Maine decision.

Subsection (h) (Action by Non-Resident). This section, as did §8 of the 1964 Uniform Act, carries forward a basic Uniform Probate Code policy of facilitating interstate administration of estates by authorizing a foreign personal representative or a non-resident estate-tax payer to sue in this state for recovery of proportionate shares of estate taxes paid elsewhere. Section 3-916(h), which otherwise exactly follows the language of the earlier act, omits a reciprocity provision found in those acts. Such provisions are generally

contrary to the basic policy of facilitating interstate handling of estates, and raise additional problems of determining the nature of rights in various other jurisdictions. The policy of fairly apportioning the tax burdens in an individual estate is sound, and the rights of the persons in any given case ought not to depend on the fortuity of what their state would do in a different case.

D. Analysis of Maine Revised Statutes Annotated, Title 36, Part 6, "Inheritance, Succession and Estate Taxes," in Relation to Pertinent Provisions of the Uniform Probate Code.

The following material analyzes the present statutes of Maine governing death taxes and their collection, in relation to pertinent provisions of the Uniform Probate Code

36 M.R.S.A. §§3401 and 3466. This first section defines "person" and "property" for purposes of Maine death taxes. "Person" is defined in the Code at 1-201(29), and again in more specific terms at 3-916(a)(2) as part of the apportionment section. The gist of all three definitions, including the Maine statutory definition, is that corporations and other organizations are included in the term as well as natural persons. No conflict appears among the three definitions.

"Property" is also defined in the Code at section 1-201(33). Both definitions aim to abolish the distinction between real and personal property and would be compatible. The second section referred to here, 36 M.R.S.A. §3466, makes an unconditional general power of appointment a taxable property in-



terest; the Uniform Probate Code does not speak specifically to this point, but the broad definition of property in the Code is not inconsistent.

36 M.R.S.A. §3402. The last sentence of this section provides that "all proceedings incident to the payment and collection of inheritance and estate taxes...shall be conducted under the terms hereof [chapters 551-567 of Title 36] and full jurisdiction shall be vested in the State Tax Assessor rather than in the probate courts of the several counties of the State." This section, in effect, empowers the State Tax Assessor, in the first instance, to establish values and apply rates to be used as a basis of assessment and to assess state inheritance taxes. Section 3801 of Title 36 makes it clear that the Assessor's assessments are subject to revision in a proper case by the probate court at the instance of interested persons. The purpose of the last sentence of §3402, despite its broad language concerning jurisdiction, is to place with the Assessor, rather than the probate courts, the basic responsibility to assure the assessment and collection of Maine death taxes, not to oust the probate courts of jurisdiction to hear and determine controversies relating to death taxes or of jurisdiction to apportion federal estate taxes among successors in interest to the decedent. In the absence of any dispute over the amount or incidence of a death tax in a particular case, the probate court must exercise its administrative control over the estate in a fashion that will bring about the

payment of Maine death taxes as determined by the Assessor. This is the scheme of the Maine death tax statutes, and nothing in the Uniform Probate Code conflicts with it, although in the absence of any dispute, the assessment and payment may proceed without any judicial intervention under the Code.

36 M.R.S.A. §§3403, 3404. These sections define rights and duties of the State Tax Assessor in relation to inspection of documents (§3403) and liens for taxes (§3404), and would be unaffected by adoption of Uniform Probate Code.

36 M.R.S.A. §3461 and 3470. The property subject to the State inheritance tax is defined in §3461. Adoption of the Uniform Probate Code would not affect this provision, since UPC 3-916(a)(5) restricts application of the apportionment rules to estate taxes, not inheritance taxes.

It should be noted that under §3461.1.A amounts allowed to a spouse or children by the probate judge are includable in property subject to inheritance tax even though the Uniform Probate Code makes allowances not chargeable against shares passing to the spouse or children by will or intestacy or elective share. UPC 2-401, 2-402, 2-403. No conflict is created, however, since the tax statute would control the definition of what is taxable, and the Code would control the definition of the successors' shares for purposes of distributing the estate.

Section 3461.1.B provides that for tax purposes inter

vivos transfers made in contemplation of the death of the grantor or donor shall be considered to be part of the estate. Section 3470 sets time limits for such transfers: no transfer made more than two years before the death of the grantor or donor is taxable unless "made or intended to take effect in possession or enjoyment after the death of the grantor or donor," whereas transfers made within six months of death are prima facie deemed to have been made in contemplation of death.

36 M.R.S.A. §§3462, 3463, 3464. These three related sections establish the inheritance tax rates and exemptions for three classes of beneficiaries. The classes are defined in terms of degrees of relationship to the decedent. Adopted children are mentioned specifically in §3462 but treated in every case in exactly the same way as the corresponding natural children. A stepchild or spouse of a child to whom property passes (necessarily by will) falls within the group designated as "Class A" (§3562), even though such persons are not "children" under the definition of the Uniform Probate Code. Once again, however, this does not create a conflict with the Code.

36 M.R.S.A. §3465. All property passing to a single beneficiary because of the decedent's death is united into a single interest for purposes of taxation. No conflict would arise with the Code.

36 M.R.S.A. §3467. Deductions are defined for nonresident estates. UPC 3-916(e)(1) recognizes exemptions, deductions

and credits allowed by the tax law.

36 M.R.S.A. §3468. The value of property exempt from Maine inheritance tax in a nonresident estate is to be only such proportion of the exempted amount as the nonresident's estate taxable in Maine bears to the total estate wherever situated.

36 M.R.S.A. §3469. This section imposes the inheritance tax on the value of bequests to executors and trustees in excess of their reasonable compensation. That part of the section creates no conflict with the Uniform Probate Code. The section, however, refers to the compensation "as determined by the probate court having jurisdiction of their accounts." To the extent that this implies a necessity for judicial determination of such compensation in every case, the section is inconsistent with the basic policy of independent administration which underlies all of UPC Article III. Both in the case of a personal representative and a trustee, the initial determination of compensation is left with them, subject to review by the court on the petition of any interested person, and subject to the obligation to return any amount not then approved by the court. MPC 3-715, 3-721, 7-205. In light of these provisions, it would be unnecessary to include the above-quoted language within §3469; the court would clearly have the power to determine the amount in any case of controversy about it. Deletion of the language would, however, prevent the undercutting of the policy of Article III, just re-

ferred to. Certainly, in a case involving the State Tax Assessor, there would be more than the usual likelihood of an interested person keeping an eye on the compensation determined by the personal representative or trustee of a testamentary trust, when the effect of excessive compensation is to reduce the amount of that person's taxes. For these reasons, the Commission's bill would amend §3469 of Title 36 by deleting the language "as determined by the probate court having jurisdiction of their accounts."

36 M.R.S.A. §§3521-3527. These sections define powers and duties of the State Tax Assessor in relation to the assessment and collection "of all taxes on inheritances and successions and of all estate taxes" and the enforcement and administration of all laws relating thereto. None of these sections is in conflict with the Code, but minor technical amendments, noted below, are included in the Commission's bill.

Section 3521 defines the duties of the State Tax Assessor in general terms.

Section 3522 empowers the State Tax Assessor to "institute proceedings of any nature" needed to collect taxes, interest, and penalties. Such proceedings may include actions in the probate court to remove "executors, administrators and trustees" who have failed to pay assessments. No conflict with the UPC is perceived. In fact, §3522 would mesh well with UPC 3-916(c)(3), which authorizes the probate court to hold a personal representative liable for penalties and interest assessed in rela-

tion to estate taxes because of their negligent delay.

Section 3523 provides that the State Tax Assessor determine the value of property subject to taxation, with a right of "appeal" to the probate court by an executor, administrator or trustee or by any party "interested in the succession." In practice, the estate representative submits a schedule of property valuations for approval by the State Tax Assessor, who either "confirms" or "adjusts" the valuation and imposes the tax. Procedure for such review is defined in §3801.

Section 3526 empowers the State Tax Assessor to summon and examine witnesses under oath and compel production of books, papers and documents on questions of valuation and taxability. Any justice of the superior court may compel attendance of witnesses and the giving of testimony before the Assessor. In view of the Code's intent to make the probate court a full-power court this provision needs to be amended to provide that a judge of probate, as well as a justice of the superior court, may compel such testimony. The Commission's bill therefore would amend 36 M.R.S.A. §3526 by changing the last sentence to read as follows:

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 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.

Section 3527 empowers the Assessor to petition for appoint-

ment of an administrator in cases of delay for six months or more in the holding of testacy proceedings or appointment of an estate representative. This section should be considered in relation to UPC 3-203 governing priority among persons seeking appointment as personal representatives. In the Comment to UPC 3-203, the following sentence appears:

If a state's statutes recognize a public administrator or public trustee as the appropriate agency to seek administration of estates in which the state may have an interest, it would be appropriate to indicate in this section the circumstances under which such an officer may seek administration.

The purpose behind this Comment would be pervasive enough to include a statute like 36 M.R.S.A. §3527, and to envision compatibility of such a statute with the Code.

The simplest way to achieve this accommodation with 36 M.R.S.A. §3527 would be to add the Assessor to the list of persons having priority for appointment under subsection (a) UPC 3-203, as follows:

(7) 6 months after the death of the decedent if no testacy proceedings have been held or no personal representative has been appointed, the State Tax Assessor upon application by that officer.

This amendment is included in the Commission's bill.

Sections 3581-3584. These sections define the duties and liabilities of executors, administrators and trustees with respect to submitting a tax inventory of the estate to the Assessor (§3581), deducting or collecting inheritance taxes from

distributees before delivery of property of the estate to them (§3582), and supplying pertinent information to the Assessor upon request (§3583). Section 3584 forbids the allowance of the fiduciary's account by the probate court until inheritance taxes have been paid or secured.

While nothing in the Uniform Probate Code would directly conflict with these provisions, there is a need for accommodation in some of their aspects. Section 3581, requiring the filing of an inventory with the State Tax Assessor "in addition to the inventory returned into the probate court file," raises one such point. One of the changes made by the Uniform Probate Code, in furthering a policy of protecting privacy in individual probate cases, makes the filing of an inventory optional, rather than mandatory. UPC 3-706. Also, by eliminating most distinctions between testamentary and inter vivos trusts, no inventory, as such, must be filed by a testamentary trustee, although all trustees have a duty to keep trust beneficiaries informed of the terms of the trust and the conduct of its administration to the extent of the beneficiaries' respective interests. UPC 7-303. This is also in furtherance of the policy of preserving the kind of privacy that most settlors and beneficiaries would desire. Therefore, it would seem advisable to modify the language of §3581 to read as follows:

Every personal representative or trustee, in addition to any inventory otherwise required, shall within 3 months of the



date of his appointment or acceptance of the trust file with the State Tax Assessor on blanks to be furnished to 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 inventory.

This amendment is included in the Commission's bill.

The time requirements for filing the inventory with the State Tax Assessor are conveniently complementary to those for preparing and mailing the estate inventory by the personal representative under UPC 3-706. In many cases the two inventories would be identical in content. Exceptions would occur where transfers had been made in contemplation of death or where the decedent owned property with another in joint tenancy. In such kinds of cases the tax inventory would need to include property not appearing in the probate inventory. See 18 M.R.S.A. §3461.

To the extent that a trustee is charged with duties under the Maine inheritance tax law, there is no question that he would have the authority to fulfill those duties under Part 4 of Article VII of the Commission's bill. It is also worth noting that insofar as a testamentary trustee is called upon to fulfill inheritance tax obligations, he might be deemed to be a person "who perform[s] substantially the same function [as a personal representative] under the law governing their status" within the meaning of "personal representative" as defined in UPC 1-201(30), and so have the same powers under

Article III of the Code for purposes of carrying out his inheritance tax obligations.

Under §3582, the estate representative or trustee holding property subject to inheritance taxes must deduct the taxes or collect them from the distributees entitled to the property, and he may not deliver estate property subject to any such tax until he has collected the tax. In the case of real property, if the distributees refuse or neglect to pay the tax, he may have the property sold. The penalty for failure to extract inheritance taxes before distributing the estate is denial of approval of the representative's account by the probate court under 36 M.R.S.A. §3584.

The Uniform Probate Code places a duty on the personal representative to pay taxes on the estate in his possession (§3-709), and expressly empowers him to do so (UPC 3-715). There would be no conflict between 36 M.R.S.A. §3582 and the Code, since §3582 is the explicit requirement which the Code obligates and authorizes the personal representative to fulfill. A helpful reference, however, could be provided by amending UPC 3-715(18) by adding the following sentence:

In the collection and payment of state inheritance taxes, the personal representative shall observe the provisions of chapter 557 of Title 36 of the Maine Revised Statutes.

This amendment is included in the Commission's bill.

One of the accommodations that needs to be made in §3582 concerns the consequence of the Uniform Probate Code's system of independent administration. That section's reference to

judicial authorization for selling real estate in order to satisfy the tax when those liable for it neglect or refuse to pay it implies that the personal representative cannot so proceed without judicial authorization, as provided in UPC 3-704 and 3-715, subject to any limiting orders under UPC 3-607 or 3-105, or judicial direction sought by the personal representative himself under UPC 3-704. Since these references are unnecessary under the proposed Code, and are implicitly inconsistent with it, §3582 is amended in the Commission's bill by the deletion of those words in the second sentence which provide for judicial authorization of sales of real estate.

Under §3583 the State Tax Assessor is empowered to impose taxes at the highest possible rate when the personal representative neglects or refuses to provide information needed for proper computation of taxes. Thus, §3583 is in the nature of a penalty provision. Under UPC 3-712 the personal representative would presumably be liable to beneficiaries damaged because of this statutory penalty.

Section 3584 prevents probate court approval of any accounting of distribution except upon certification by the State Tax Assessor that inheritance taxes have been paid or security provided for their payment. If the Code is adopted, absence of certification by the Assessor that taxes have been paid could hold up termination under UPC 3-1001 or 3-1002, the

Code provisions for official judicial closing of administration. While UPC 3-1003, providing for a non-judicial closing statement, does not involve any judicial approval of the personal representative's accounting, it requires a verified statement that the death taxes have been paid.

While the provisions of §3584 are drafted on the assumption of a judicially controlled system for closing estate administration, and therefore do not fit perfectly into the Uniform Probate Code's procedures, especially the closing statement provisions of UPC 3-1003, the provisions of the present section do not directly conflict with anything within the Uniform Probate Code or the Commission's proposed code for Maine. The requirements of §3584 would find their function in the judicial closing under the Code §3-1001 and 3-1002. The assurance of payment of taxes when a closing statement is used under the Code's §3-1003 lies in the requirement of the verified statement that they have been, as well as the potential liability of the personal representative for breaches of any of his obligations under the Maine death tax provisions, including especially §3582. The limitation on the personal representative's liability after filing the closing statement under UPC 3-1003 is governed by UPC 3-1005, which bars only the rights of successors and creditors under the conditions set forth therein, and thus would not bar any liability of either the personal representative or the successors for any death taxes that were yet unpaid. Thus, there would seem to be adequate protection

for the payment of the taxes under the Code's system, and, although there is not a perfect fit between that system and §3584, there does not seem to be any reason to tinker with the language of that section.

36 M.R.S.A. §§3631-3636. These sections of Title 36 relate to the valuation of property for purposes of taxation. Thus, they carry out the purpose of §3523, discussed above, which empowers the State Tax Assessor to make the initial assessment of values and application of rates in decedents' estates. These sections relate to the Code only in §3635, which permits settlement of certain tax claims, and in §3636, which governs what happens in default of settlement.

Section 3635 empowers the Assessor, with approval of the attorney general, to make a compromise settlement where it is impossible to determine the persons entitled to an interest or to compute the present value of any interest. Executors, administrators, and trustees are also authorized by this section to compromise the amount of tax. While the Code would give personal representatives such authority by a fair reading of UPC 3-715(17) and (18), there is certainly no conflict between the Code and §3635, which, in fact, would serve to clarify the personal representative's authority.

Section 3636 works in conjunction with §3682 to authorize requiring security from the personal representative for payment of taxes which may become due, including those which cannot be valued or compromised under §3635. The demand for bonding is

covered in the Code at UPC 3-605. Moreover, UPC 3-603 would provide for deposit of cash or collateral with a state agency in lieu of bonding--a provision almost identical to the last sentence of §3636.

36 M.R.S.A. §§3681-3687. These are technical provisions having to do with collection of inheritance taxes.

Section 3681 makes the tax payable 12 months from the date of death. Since the lien of an inheritance tax attaches at the time of death, this section must refer to the time that the amount owed begins to draw interest.

Section 3682, mentioned above in connection with §3636, authorizes a taxpayer to make an interim arrangement for deposit of cash or bonds in cases where all the information is not available to make it possible to arrive at a final determination of the tax and where the tax has not been compromised, as discussed in connection with §3636 above.

Section 3683 sets interest rates chargeable on taxes that become payable.

Section 3684 defines the persons liable for payment of an inheritance tax: administrators, executors, trustees, or grantees or donees under conveyances or gifts made during the life of the grantor or donor, and persons to whom beneficial interests accrue by survivorship. The section is consistent with UPC 3-709 with reference to the duty of the personal representative to pay taxes.

Section 3685 provides for a lien on real property that is

chargeable with a legacy subject to tax. This provision supplements the general provision for a lien on estate property under 36 M.R.S.A. §3404.

Under §3686, the state may maintain a civil action against a personal representative, grantee or donee for recovery of death taxes. Personal representatives are liable on their administration bonds for assessable death taxes. If bond has been waived by the will or by consent of the parties, the probate judge may still require a bond for payment of death taxes. If death taxes are not reasonably secured by the real estate liens afforded by 36 M.R.S.A. §§3404 and 3685, the probate judge "shall" require such a bond. An action lies on the bond for recovery of death taxes.

The provision for bonding of personal representatives to secure payment of death taxes would not necessarily conflict with the Uniform Probate Code. Section 3-603 of the Code provides generally that no bond is required except in specified circumstances including a case under UPC 3-605 where a person apparently having an interest in the estate worth more than \$1,000 or a creditor having a claim over \$1,000 may demand that the personal representative give bond. Even when such a demand has been made, the probate judge is given discretion in certain cases by UPC 3-603 and 3-604 whether to compel the bond to be given. Since the probate judge apparently must order bond to be given under 36 M.R.S.A. §3686 if the lien on real estate does not adequately secure the payment of death taxes, it would be necessary to construe the Code bonding pro-

visions as subject to the specific bonding requirement of the inheritance tax law in that situation. In order to remove any question about which provision would control, the Commission's bill includes an amendment to §3686 to add language providing for the tax bond notwithstanding any contrary provisions in UPC 3-603 through 3-606. This would assure the State Tax Assessor clear power to require bonding of the personal representative for payment of death taxes in any case where the tax lien on real estate does not afford adequate security.

Section 3687 empowers the probate court to authorize personal representatives and trustees to sell the real estate of the deceased for payment of taxes in the same manner as it may authorize the sale of real estate for payment of debts. Of course, under present Maine law, a personal representative must have authority of the probate court to sell any real estate of the deceased whereas under the language of the Code, particularly §§3-704 and 3-715, the personal representative would be able to sell real estate without court orders, absent some testamentary provision to the contrary.

While there is no direct conflict between 36 M.R.S.A. §3687 and the Code, it should be recognized that templates the necessity of a court order. The present language of §3687 is open to a construction that it would require court authorization for exercise of a personal representative's power to sell for death taxes. Conceivably an heir or devisee or the probate court itself might regard a personal represen-



tative who sold real estate for taxes under the authority of UPC 3-704 and 3-715 as exceeding his authority because of an apparent requirement of court authorization under 36 M.R.S.A. §3687.

The Code itself contains ample provision for judicial orders by persons seeking to prevent improper sales by the personal representative, including temporary restraining orders under UPC 3-607, or other orders generally within the jurisdiction of the probate court under UPC 3-105. The personal representative is himself authorized to petition the court for judicial guidance in appropriate cases by UPC 3-704--the same section that also obliges him to administer the estate without adjudication or order to the extent possible. In light of these provisions, and the historical meaning and implications of §3687, its retention in any form would serve no good purpose; it would either be redundant or mischievous. For these reasons, the Commission's bill would repeal §3687.

36 M.R.S.A. §§3741-3745, State "Estate Tax." These sections, comprising chapter 563 of Title 36, defined a state estate tax, which is imposed, according to §3743, to obtain for Maine the benefit of a credit against the federal estate tax for state death taxes, 26 U.S.C.S. (I.R.C. 1954) §2011.

A history of the federal credit may be summarized as follows: The summary is based upon Lowndes, Kramer, and McCord, Federal Estate and Gift Taxes, 584-89 (1974). In 1924, under pressure from the states to repeal the federal estate tax, Con-

gress enacted a 25 percent credit against the tax for death duties actually paid to any state. The credit was raised to 80 percent in 1926, and that is nominally where it stands today. The states, including Maine in 1927, responded by enacting new death taxes with rates and limits calculated to take maximum advantage of the 80 percent credit, without increasing the overall tax burden on estates.

During the depression Congress increased the federal estate tax. In order to avoid extending the 80 percent credit to cover the new higher rates, Congress specified that the credit would apply only to the "basic tax"--defined as the tax imposed under the 1926 revenue act. The result was a complicated dual tax structure with the credit for state death taxes applicable against part of the estate tax but not against all of it. This feature was simplified for the taxpayer in the 1954 Internal Revenue Code, which provides a single schedule of rates and credits (reproduced as Table B in the instruction for filling out Form 706, the Federal Estate Tax Return). This schedule merely reproduces the results that would have been obtained by computing the credit under the dual tax structure; so the credit now defined in I.R.C. §2011 is in reality the same credit enacted in 1926, upon which the Maine estate tax is based.

Discussion of this state estate tax is perhaps only of academic interest, for state and federal tax rates today are such that the state inheritance tax virtually always exceeds

the maximum credit allowable, so that the "sop-up" estate tax does not come into play.

Nevertheless, the tax is on the books, and it is conceivable that rates could be changed so that its imposition would become a practical possibility. 36 M.R.S.A. §3741 is the basic statute defining the Maine estate tax. The tax is clearly distinct from the inheritance tax: by its terms it is imposed upon the transfer of the whole estate, not upon the privilege of individual recipients to inherit. 18 M.R.S.A. §3745 provides that the inheritance tax statutes apply to the Maine estate tax "wherever the same are applicable," but the classification provisions of 36 M.R.S.A. chapter 553, which are based upon categories of recipients, cannot be "applicable" to a tax on the whole estate. Therefore, present Maine law provides no method of apportionment for the estate tax. For reasons of consistency and uniformity the state estate tax should be apportioned in the same manner as the federal estate tax, a result that would be accomplished by the enactment of UPC 3-916.

The remaining sections of Chapter 563 fill in the details of the estate tax. None of them would be affected by enactment of the Uniform Probate Code, nor would any of them affect any provisions of the Code.

36 M.R.S.A. §3801. This section makes it clear that the authority of the State Tax Assessor to determine valuations and rates and impose the inheritance tax under 36 M.R.S.A.

§§3402 and 3521 is subject to judicial review. Section 3801 provides the procedure for such a review; namely, by petition for abatement in the probate court; questions of law may be certified by that court to the Law Court.

On its face, §3801 would not conflict with UPC 1-302, which gives the probate court full power to make orders, judgments and decrees and take all other action necessary and proper to administer justice in the matters which come before it. However, it must be said that the provision in §3801 for certifying questions of law to the Law Court hints, at least, at some implied limit on the power of the probate court to decide a question of law in the first instance before certifying it to the Law Court. In this respect, the section reflects the ancient distrust of the legal competence of the probate court.

The question thus arises whether to recommend amendment of 36 M.R.S.A. §3801 if the Code is adopted, to provide for review of the assessor's decisions by the probate court by procedures similar to those now followed by the superior court in reviewing decisions by other state administrative officials. The question is a close one, but on balance it seems preferable to leave §3801 alone, letting the new full-power probate court establish in practice its ample authority under the Code and using the certification procedure as needed on a case-by-case basis. If difficulties develop, §3801 could be amended in the future. No change is recommended in 36 M.R.S.A. §3801.

36 M.R.S.A. §3802. This section seems to make no sense, taken literally, but its general drift seems to authorize personal representatives and trustees to refund over-payments of death taxes. There would be no conflict with the Uniform Probate Code.

36 M.R.S.A. §§3851, 3852. Reports to the Assessor are provided for. Section 3851 provides for a report by a bank, savings bank, trust company, or loan and building association, of information relating to any joint account when an officer or employee has knowledge of the death of a co-owner. The section would have no bearing on the Uniform Probate Code or its application.

Under §3852, each register of probate must notify immediately the State Tax Assessor of every appointment of an executor, administrator or trustee made in his court. Failure to make such a report subjects the register to a penalty of up to \$50. Since the Uniform Probate Code contains no provision for notice of such appointments to be sent to the State Tax Assessor this provision serves as a useful supplement to the administrative procedures under the Code.

36 M.R.S.A. §§3911-3924. These sections comprise chapter 569, the Uniform Act on Interstate Death Taxes, providing for arbitration of conflicting claims among states as to the domicile of a decedent at death. An agreement to submit the controversy to arbitration may be made, with the estate representative as a party. The statute assumes, or by implication

grants, the authority of the estate representative to enter into a binding arbitration as to domicile. Since that authority is not explicitly set forth in UPC 3-715, the interstate arbitration would help to clarify the existence of that authority.

In other respects, the Code and 36 M.R.S.A., Chapter 569, would have no effect on each other.

36 M.R.S.A. chapter 571, Interstate Compromise. Sections 3981 to 3985 embody the Uniform Act on Interstate Compromise of Death Taxes. The only section which affects administration of estates directly is §3984 which provides for interstate compromise of disputed death taxes where Maine and one or more other states are claiming the domicile of decedent at death. A compromise under §3984 requires the assent of the executor or administrator, and the section explicitly confers the authority upon the executor or administrator to join the compromise. As in the case of authority to enter into binding arbitration under 36 M.R.S.A. §3914, these provisions clarify powers of the personal representative generally accorded by UPC 3-715.

36 M.R.S.A. chapter 573, Reciprocity in Collection. This chapter (§§4041-4046) makes available a reciprocal arrangement by which another state in which the decedent was a resident at death is given assurance of the collection of its death taxes in a Maine probate court administering decedent's estate here. Where another state reciprocates with similar provisions the

Maine probate court will not grant the Maine executor or administrator a final accounting or discharge unless proof is made that all death taxes due the domiciliary state have been paid or secured or that no such taxes are due.

This chapter contains nothing in conflict with any Code provision, but it should operate to bar the granting of an order for complete settlement of an estate under UPC 3-1001, or the approval of an accounting and distribution under UPC 3-1002, until any requirements of 36 M.R.S.A. §§4042 and 4043 are met.

For the same reason, §4-207 of the Code, relating to ancillary or other local administration of the estate of a non-resident decedent, would have to be applied in the light of 36 M.R.S.A. chapter 573, on reciprocity in collection. There should be no doubt that the specific requirements of chapter 573, in any case where applicable, would be properly imported into the general Code arrangements governing administration of a non-residents's estate.

E. Summary of Recommendations.

Section 3-916 would be a useful and desirable addition to Maine law. Many of its provisions would fill gaps now existing in the Maine decisional law on estate tax apportionment, and such decisional law as now exists in Maine is in accord with UPC 3-916. There are, however, some changes which the Commission believes are required, and some modifications of

of present Maine sections. These changes are all incorporated into the Commission's bill.

1. The definition of "tax" in §3-916(a)(5) of the Code itself is worded to include the federal estate tax and the Maine estate tax but not the Maine inheritance tax.

2. 36 M.R.S.A. §3526 would be amended to give the probate court, as well as the superior court, power to compel testimony before the State Tax Assessor.

3. The State Tax Assessor is added to the list of persons having priority of appointment under UPC 3-203(a).

4. To make clear to the probate bar and others that the Code would not set forth all duties of personal representatives and that, in particular, they would continue to have duties to perform under the inheritance tax law, language was added to UPC 3-715(18) referring to their obligations under 36 M.R.S.A. §§3581-3584 (chapter 557).

5. Language would be added to 36 M.R.S.A. §3686 to make it clear that those provisions for bonding for the payment of taxes prevails over any interpretation of the Code to the contrary.

6. Section 3687 of Title 36 would be repealed as unnecessary in light of the Code's system of essentially independent administration of the estate, and the Code provisions providing opportunity for judicial control when necessary. See MPC sections 3-715(6), (18) and (23); 7-402(c)(7) and (20); 3-704;



3-607; 3-105.

7. Section 3469 would be amended by deleting the language concerning judicial approval of the executor's or trustee's compensation.

8. Section 3581 would be amended to conform it to the inventory requirements of the Code.

9. Section 3582 would be amended to eliminate the reference to the need for judicial license for the sale of real property.

APPENDIX

PROPOSED RULES  
OF  
PROBATE PROCEDURE

Prepared as an Appendix  
to the  
Report  
of the  
Maine Probate Law Revision  
Commission  
to the  
109th Maine Legislature

September 1978



## Foreword

This text of the Proposed Maine Rules of Probate Procedure is prepared to accompany the Report of the Maine Probate Law Revision Commission to the 109th Maine Legislature. That Report summarizes and sets out at length the study and recommendations upon which the Commission bases the proposed Maine Probate Code which it is simultaneously presenting.

Section 1-304 of the proposed Code would give to the Supreme Judicial Court procedural rulemaking power for the Probate Courts akin to that which the Court now has for civil and criminal procedure and evidence. The Proposed Rules are designed to illustrate the manner in which that rulemaking power might be implemented if the Code as proposed is adopted. Under proposed section 1-304, the Court would presumably establish a Probate Rules Advisory Committee similar to the committees that aid in implementation of the other rulemaking powers. It is contemplated that, in that event, these proposed rules would be available to the Advisory Committee as a starting point for its work.

The Proposed Rules are an effort to harmonize the procedure required to implement the Maine Probate Code with the procedure now applicable in civil actions generally. This harmonization has three principal advantages: (1) it simplifies the task of the lawyer in mastering and using procedural rules; (2) it makes available in the probate courts many of the desirable features of the Civil Rules, such as discovery; (3) it makes possible the effective use of the Probate Courts' concurrent jurisdiction in law and equity by providing essentially the full battery of civil procedure for proceedings brought under that jurisdiction. Accordingly, the

Proposed Rules seek to blend procedurally the Probate Courts' exclusive and concurrent jurisdictions, retaining the necessarily distinctive concepts of the former and making the latter resemble as closely as possible an ordinary civil action in the Superior Court.

The proposed Rules, like the proposed Maine Probate Code, can be implemented within the present system of probate courts. In bringing discovery and many other provisions of the Rules of Civil Procedure into full play in those courts, the Rules are merely an expansion of familiar features of the present practice. Currently by statute civil discovery is largely available in the probate courts, and by rule of court virtually all of the Civil Rules apply when the probate courts exercise their equity jurisdictions. Moreover, the proposed Rules and Code do not provide for a jury in the probate courts and allow freely for removal to the Superior Court of any matter of concurrent jurisdiction.

Thus, the burden of the probate judges would not be increased under the Rules. The parties may be expected to resort to the Superior Court whenever the desire for a jury, or procedural complexity, make removal advantageous. At the same time, when the parties prefer to remain in probate court or are within the exclusive probate jurisdiction, the judges will have the advantage of the many convenient provisions of the Civil Rules under a clear set of guidelines as to their use and scope.

While the proposed Rules will work in the present court system, they do not by any means represent a commitment to, or an expression of preference for, that system. The plan and approach of the

Rules will be appropriate under any court structure that may be adopted to implement the Code. Whatever court is established must in some combination balance in rem probate jurisdiction with an ancillary in personam jurisdiction in law and equity. The basic aim of the proposed Rules is to achieve that balance.

These Proposed Rules are offered as guides only. Careful study of the problems they deal with by a Rules Committee may suggest areas of revision and elaboration. It is the hope of the Commission, however, that the general concepts embodied in these Proposed Rules will be carried forward upon the enactment of the Code.

I wish to acknowledge the invaluable assistance of the members of the Commission; my two valued colleagues, Honorable Edward S. Godfrey and Professor Merle W. Loper, former and present consultants respectively; Stephen Collier, Esq., of the Maine Bar for his research assistance while a student; and the secretarial staff of the University of Maine School of Law.

L. Kinvin Wroth  
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September, 1978

PROPOSED RULES OF PROBATE PROCEDURE

September 1978

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APPENDIX OF FORMS  
[to be drafted]

I. SCOPE OF RULES -- FORM OF PROCEEDINGS

RULE 1. SCOPE OF RULES

These rules govern the procedure in all proceedings in the Probate Courts, with the limitations stated in Rule 81. These rules also govern the procedure on removal from the Probate Courts to the Superior Court and in appeals from the Probate Courts to the Supreme Judicial Court sitting as the Law Court. The rules shall be construed to secure the just, speedy, and inexpensive determination of every proceeding.

Comment

This rule is based on MRCP 1. It describes the general applicability of the Rules, subject to any specific limitations which may be imposed in Rule 81.

RULE 2. FORM OF PROCEEDINGS

There shall be two forms of proceedings to be known as "probate proceedings" and "civil proceedings."

(a) Probate Proceedings. "Probate proceedings" are all proceedings within the exclusive jurisdiction of the Probate Courts.

(b) Civil Proceedings. "Civil proceedings" are all proceedings within the concurrent jurisdiction of the Probate Courts.

Comment

This rule is similar to MRCP 2. The rule establishes two procedural tracks. "Probate proceedings" are essentially all those peculiarly administrative proceedings concerning estates, guardianships, and trusts that are within the exclusive jurisdiction of the Probate

Courts. "Civil proceedings" are all other matters concerning estates, guardianships, and trusts in which the Probate Court has jurisdiction. These matters are also within the concurrent jurisdiction of the Superior Court. See MPC, §§3-105, 5-102, 5-402, 7-201, 7-204. For probate proceedings, there are a number of special procedural provisions in the Rules that recognize their unique character, but in the interests of uniformity the basic provisions of the Rules of Civil Procedure apply whenever possible. In civil proceedings, the Rules of Civil Procedure generally apply with a few modifications to take account of the special characteristics of the Probate Courts.

It should further be noted that in probate proceedings concerning decedents' estates, there are two subcategories -- informal and formal proceedings. Most of the provisions of these rules apply only to formal proceedings.

II. COMMENCEMENT OF PROCEEDINGS; SERVICE OF NOTICE, PROCESS, PLEADINGS, MOTIONS AND ORDERS; TIME

RULE 3. COMMENCEMENT OF PROCEEDINGS

A probate proceeding is commenced by filing the appropriate application or petition with the court. A civil proceeding is commenced in the manner provided for commencement of civil actions by Rule 3 of the Maine Rules of Civil Procedure.

Comment

This rule is similar to and in part incorporates MRCP 3. The rule provides that probate proceedings are to be commenced by filing whatever paper is called for by the provisions of the Code applicable to the particular

proceeding. Cf. present Probate Rule 5. Civil proceedings are commenced by filing or serving a summons and complaint as in civil actions.

RULE 4. NOTICE; PROCESS

(a) Form: Notice; Summons.

(1) In probate proceedings, the notice shall bear the signature or facsimile signature of the register, be under the seal of the court, contain the name of the court and the name of the decedent or minor or incapacitated or disabled person, be directed to the recipient by name if known, state the name of the petitioner's attorney, state the date and place of hearing, and advise the recipient that the action or order sought in the petition may be granted if no interested person appears to object.

(2) In civil proceedings, the form of summons shall be that provided in Rule 4(a) of the Maine Rules of Civil Procedure.

(b) Issuance of Notice or Summons. The notice or summons may be procured in blank from the register and shall be filled out by the petitioner's or plaintiff's attorney as provided in subdivision (a) of this rule. The attorney shall deliver to the person who is to make service the original notice or summons upon which to make return of service and a copy of the notice or summons and of the petition or complaint for service.

(c) By Whom Served. Service of the notice in accordance with paragraph (1) of subdivision (d) of this rule may be made by the party or his attorney or authorized agent. Service by any other method shall be made by a sheriff or his deputy within his county, by a constable or other person authorized

by law, or by some person specially appointed by the court for that purpose. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.

(d) Service of Notice or Summons. The notice and petition or the summons and complaint shall be served together by one of the following methods:

(1) Service of the notice and petition in a probate proceeding may be made upon a personal representative or conservator of the estate or property in question previously appointed by the court where the petition is brought, upon an interested person who has filed a demand for notice, and upon any person who has previously entered an appearance in any probate proceeding involving the estate or property in question by delivery or mail as provided in Rule 5(b) of the Maine Rules of Civil Procedure.

(2) In all other cases, service within the state shall be made personally by one of the methods provided in Rule 4(d) of the Maine Rules of Civil Procedure. Service outside the state may be made personally or by mail as provided in Rules 4(e) and (f) of the Maine Rules of Civil Procedure. Service in a foreign country may be made personally or by mail as provided in Rule 4(j) of the Maine Rules of Civil Procedure.

(3) In any case where service cannot with due diligence be made by one of the foregoing methods, the court shall order service by publication as provided in Rule 4(g) of the Maine Rules of Civil Procedure.

(e) Return of Service. Rule 4(h) of the Maine Rules of Civil Procedure governs procedure for proof of service of notice

and petition or summons and complaint in all proceedings in the probate courts.

(f) Amendment. Rule 4(i) of the Maine Rules of Civil Procedure governs procedure for amendment of notice, summons, or proof of service in all proceedings in the probate courts.

Comment

This rule is based on and incorporates portions of MRCP 4. The rule implements MPC §1-401. Under Rule 4(d)(1), special provisions are made for service in probate proceedings upon parties who have previously appeared or demanded notice in connection with the matter. Rule 4(d)(2) incorporates the service provisions of Civil Rules 4(d)-(f), (j) for all other proceedings. Rule 4(d)(3) makes service by publication under Civil Rule 4(g) a last-ditch alternative to all other methods. Cf. UPC §1-401(a)(3).

RULE 4A. ATTACHMENT

Rule 4A of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 4A, which makes detailed provision for attachment of goods on mesne process.

RULE 4B. TRUSTEE PROCESS

Rule 4B of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 4B, which makes detailed provision for attachment of goods, effects or credits in the hands of another on trustee process.



RULE 4C. ARREST

Rule 4C of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts, so far as applicable.

COMMENT

This rule incorporates MRCP 4C, which continues to provide a limited form of civil arrest--the equitable writ of ne exeat--subject, of course, to constitutional limitations. See 1 Field, McKusick & Wroth, Maine Civil Practice §§4C.1, 4C.4 (2d edn. 1970, Supp. 1977).

RULE 4D. DEMAND AND WAIVER OF NOTICE

(a) Demand for Notice. Any interested person desiring notice of any filing, hearing, or order in a proceeding concerning a decedent's estate or in a protective proceeding may file a demand for notice with the register of any court at any time after the death of the decedent or at any time during the minority or disability of a person who may be the subject of a protective proceeding. The demand shall state the name of the decedent or minor or disabled person, the nature of the demandant's interest in the estate, and the address of the demandant or his attorney, and shall be accompanied by a fee of \$10. The register shall mail a copy of the demand to any personal representative or conservator who has been or shall thereafter be appointed. Thereafter, any filing, notice of hearing, or order entered in that court concerning the estate of the decedent or minor or disabled person shall be served upon the demandant as provided in Rule 4(d)(1) by the person making the filing or seeking the hearing or by the register of the court

where the order is entered.

(b) Waiver of Notice. Any person, including a guardian ad litem, conservator, or other fiduciary, whether or not he has previously filed a demand for notice, may at any time after the commencement of a proceeding waive all further notice of any filing, hearing, or order by filing with the register a written waiver signed by him or his attorney.

Comment

This rule implements MPC §§3-204, 5-406, 1-402.

RULE 5. SERVICE AND FILING OF  
PLEADINGS AND OTHER PAPERS

(a) Probate Proceedings. Rule 5 of the Maine Rules of Civil Procedure governs procedure in the Probate Courts so far as applicable for all papers filed in probate proceedings, except petitions requiring notice to be served under Rule 4. Service under this rule shall be made upon all interested persons, upon any person who has filed a demand for notice concerning the estate in question, and upon any other person as required by law or ordered by the court.

(b) Civil Proceedings. Rule 5 of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts. Service under this rule shall be made upon any person who has filed a demand for notice concerning the estate in question.

Comment

This rule incorporates MRCP 5, with special provisions to assure service on all necessary persons.

RULE 6. TIME

(a) General. Rule 6 of the Maine Rules of Civil Procedure governs procedure in all proceedings in the Probate Courts, so far as applicable.

(b) For Hearings on Petitions. In probate proceedings, a petition and notice of hearing thereof shall be served not later than 14 days before the time set for hearing unless a different period is fixed by law or by order of the court.

Comment

Rule 6(a) incorporates the time provisions of MRCP 6.

Rule 6(b) carries into the rules the special time provisions of UPC §1-401(a)(1), (2) for service of the petition in probate proceedings.

III. PLEADINGS AND MOTIONS

RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS

(a) Pleadings.

(1) Probate Proceedings. In probate proceedings, there shall be an application in informal probate and appointment proceedings and a petition in all other proceedings where provided by law. There shall be a reply to a petition when required or permitted by these rules or by order of court. No other pleading shall be allowed except when required or permitted by order of court.

(2) Civil Proceedings. Rule 7(a) of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

(b) Motions and Other Papers. Rule 7(b) of the Maine Rules

of Civil Procedure governs the procedure in all proceedings in the Probate Courts, except that in probate proceedings an order shall be sought by application or petition where so provided by law or by these rules.

(c) Demurrers, Pleas, Etc., Abolished. Rule 7(c) of the Maine Rules of Civil Procedure governs procedure in all proceedings in the Probate Courts.

Comment

This rule is similar to and incorporates parts of MRCP 7 concerning titles of pleadings and form of motions. Rule 7(a)(1) is consistent with relevant Code provisions.

RULE 8. GENERAL RULES OF PLEADING

(a) Probate Proceedings.

(1) Content of Pleadings. Every application or petition in a probate proceeding shall describe the interests to be affected by reference to the instrument creating them or in other appropriate manner giving reasonable information to owners by name and class, and shall contain a short and plain statement of the grounds provided by statute or other rule of law for the action or order which the applicant or petitioner seeks and a specific request for the action or order sought.

(2) Objections; Denials Not Required; Effect. When a reply is required or permitted by these rules or by order of court, objections or other affirmative matter shall be set forth in short and plain terms. Denials of the allegations of the petition shall not be made. Such allegations, and any affirmative matter pleaded in a reply, shall be taken as denied or avoided.

(3) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

(b) Civil Proceedings. Rule 8 of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

Comment

This rule is based on and in part incorporates MRCP 8, setting forth rules concerning pleading content.

Rule 8(a)(1) tracks the general requirements of MPC §1-403(1). Specific pleading requirements are found in MPC §§3-301(a), 3-402, 3-414(a), 3-502, and 5-404(b). Although several of these provisions expressly authorize elaboration of the pleading requirements by rule, such elaboration has been deferred pending experience under the Code.

RULE 9. PLEADING SPECIAL MATTERS

Rule 9 of the Maine Rules of Civil Procedure governs procedure in all proceedings in the Probate Courts so far as applicable.

Comment

This rule incorporates MRCP 9, which provides for pleading of special matters such as capacity, fraud, and the like.

RULE 10. FORM OF PLEADINGS

(a) Caption; Title. Every pleading shall contain a caption setting forth the name of the court and the county, the title of the proceeding, the docket number, and a designation as in Rule 7(a).

(1) In an application, petition or other pleading in a probate proceeding, the title of the proceeding shall include the name of the decedent, minor, or incapacitated or disabled person involved and an appropriate phrase describing the type of proceeding. An application shall be directed to the register and a petition shall be directed to the court.

(2) In a complaint in a civil proceeding the title of the proceeding shall include the names of all the parties, but in other pleadings in a civil proceeding it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(3) An application, petition, or complaint shall be dated.

(b) Paragraphs; Separate Statements. Rule 10(b) of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

(c) Adoption by Reference; Exhibits. Rule 10(c) of the Maine Rules of Civil Procedure governs procedure in all proceedings in the Probate Courts.

#### Comment

This rule adopts MRCP 10.

#### RULE 11. SIGNING OF PLEADINGS

Rule 11 of the Maine Rules of Civil Procedure governs procedure in all proceedings in the Probate Courts.

#### Comment

This rule incorporates MRCP 11, which imposes an obligation of good faith and potential sanctions for violation thereof upon an attorney signing a pleading.

RULE 12. APPEARANCES; DEFENSES  
AND OBJECTIONS--WHEN AND HOW  
PRESENTED BY PLEADING OR MOTION--  
MOTION FOR JUDGMENT ON THE PLEADINGS

(a) Probate Proceedings.

(1) Appearance. Every interested person receiving notice of hearing upon an application or petition who wishes to be heard on the matter involved shall by his attorney or in person enter his appearance in writing or orally in open court at or before the opening hour of the session of the court at which the hearing was to be had.

(2) Reply. Any interested person who has entered an appearance as provided in paragraph (1) of this subdivision shall at the hearing state orally any objections which he has to the action or order sought or any other matter which he wishes to raise. If an interested person in a formal testacy proceeding orally opposes probate of the will he shall file a reply specifically stating his objections to probate within such time as the court may order. In any other formal proceeding, the court on the motion of the petitioner or on its own motion may order an interested person who has orally stated objections or other matter to file a reply specifically stating the objections or other matter within such time as may be just. If a reply is required or ordered under this paragraph, the hearing shall be continued as to all issues involved in the objections or other matter until a date not less than seven days after the date set for filing the reply, unless the parties agree to a shorter time.

(3) Waiver. Every objection or other matter that could

reasonably have been known to and presented by an interested person shall be deemed waived if not presented as provided in paragraph (2) of this subdivision, except that (1) an objection raising the legal insufficiency of the petition or a failure to join an indispensable person may be raised at any time prior to final disposition of the petition, and (2) whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the petition.

(b) Civil Proceedings. Rule 12 of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

Comment

Rule 12(a) (1) provides a procedure for appearance in probate proceedings based on present Probate Rule 3. The provision is necessary because, in contrast to the Civil Rules, a formal written answer is not necessary in all cases. Pursuant to MPC §3-404, written objections must be made in a formal testacy proceeding. In other respects the rule is based on present Probate Rule 28. Paragraph (3) is similar in effect to Civil Rule 12(g), (h).

Rule 12(b) incorporates MRCP 12, which provides generally for presentation of defenses by written answer and motion, and for judgment on the pleadings.

RULE 13. COUNTERCLAIM AND CROSS-CLAIM

(a) Probate Proceedings.

(1) In formal probate proceedings to determine a claim against the estate of a decedent or a protected person brought



on petition of a creditor, the personal representative or conservator, whether or not he raises objections or other matters, may file a reply as provided in Rule 12(a)(2) stating as a counterclaim any claim for liquidated or unliquidated damages that the estate has against the creditor. No other counterclaims shall be permitted in probate proceedings.

(2) Rules 13(d), (e), and (f) of the Maine Rules of Civil Procedure govern procedure on counterclaims brought under paragraph (1) of this subdivision.

(b) Civil Proceedings. Rules 13(b) through (i) of the Maine Rules of Civil Procedure govern procedure in civil proceedings in the Probate Courts.

Comment

Rule 13(a) provides a procedure for the limited form of counterclaim in probate proceedings accorded a personal representative against a creditor of the estate by MPC §3-811. The rule also provides a counterclaim for a conservator, which is not expressly provided for in the Code. Cf. MPC §5-424(c)(19), (24).

Rule 13(b) makes permissive counterclaims and cross-claims as provided in MRCP 13 available in civil proceedings. This change in present practice is warranted because concurrent probate jurisdiction is no longer confined to equitable relief but includes jury-waived actions at law. Compulsory counterclaims are still not included, however, because it would be undesirable to force removal as an alternative to litigation in the

Probate Courts. Cf. 1 Field, McKusick & Wroth, Maine Civil Practice §1.8 (2d edn. 1970).

RULE 14. THIRD-PARTY PRACTICE

Rule 14 of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 14, which provides generally for impleader of third parties who may be liable to the defendant for all or part of the plaintiff's claim.

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

Rule 15 of the Maine Rules of Civil Procedure governs procedure in all proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 15, which provides liberally for amendment of pleadings at all stages of the proceedings.

RULE 16. PRE-TRIAL PROCEDURE

In civil proceedings, the court may in its discretion order the parties to appear before it for a pre-trial conference to consider the matters specified in Rule 16(c)(2) of the Maine Rules of Civil Procedure. Upon completion of the conference, the court shall make an order which may recite the matters enumerated in Rule 16(c)(4) of the Maine Rules of Civil Procedure. Such order when entered controls the subsequent course of the proceeding, unless modified at the trial to prevent manifest injustice. If a party fails to comply with any order issued under this rule, the court may impose upon

the party or his attorney or both such penalties and sanctions as the circumstances warrant, including those specified in Rule 16(d) of the Maine Rules of Civil Procedure.

Comment

This rule incorporates the principal provisions of MRCP governing pre-trial conferences, omitting provisions of that rule related to the progress of the civil docket.

IV. PARTIES

RULE 17. PARTIES PLAINTIFF  
AND DEFENDANT; CAPACITY

(a) Real Party in Interest. Rule 17(a) of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

(b) Guardians and Other Representatives. Rule 17(b) of the Maine Rules of Civil Procedure governs procedure in all proceedings in the Probate Courts.

(c) Subrogated Insurance Claims. Rule 17(c) of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

Comment

Rule 17(a) incorporates for civil proceedings the real party in interest rule of MRCP 17(a), requiring a proceeding to be brought in the name of the real party in interest, which includes an executor, administrator, guardian, or trustee. See 1 Field, McKusick & Wroth, Maine Civil Practice §17.1 (2d edn. 1970). Note that the Code expressly provides for actions on probate bonds to be brought in the name of "any person"

interested" even though the bond is given to the judge. MPC §8-309. Compare 1 Field, McKusick & Wroth, supra, §17.3. Subdivision (a) is not made applicable to probate proceedings because the Code provides throughout that such proceedings are to be brought by "interested persons". See, e.g., MPC §3-401 (formal testacy proceedings).

Rule 17 (b) makes MRCP 17 (b), extending capacity to guardians and like representatives and providing for appointment of guardians ad litem, applicable to civil and probate proceedings. The guardian ad litem provision is very similar to MPC §1-403 (4).

Rule 17 (c) incorporates MRCP 17 (c), which reflects the fact that under an exception to the real party in interest rule found in Rule 17 (a) a subrogated insurer may sue in the name of the assured. Subdivision (c) requires such an insurer in a civil proceeding to notify the assured so that he may assert a claim in his own right.

RULE 17A. SETTLEMENT OF CLAIMS  
OF INFANT PLAINTIFFS

Rule 17A of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

Comment

Rule 17A incorporates MRCP 17A, which provides a procedure to implement the requirement of 14 M.R.S.A. §1605 (formerly 18 M.R.S.A. §3652) that a court approve any settlement of the claim of an infant plaintiff, whether or not the claim is the subject of pending litigation. The rule applies only to civil proceedings, because MPC §§3-1101-1102 provide a comparable

procedure for compromise of probate proceedings.

RULE 18. JOINDER OF CLAIMS  
AND REMEDIES

(a) Joinder of Claims.

(1) Probate Proceedings. In formal probate proceedings, a petitioner may join as many requests for relief as he has concerning the estate which, or minor or incapacitated or disabled person who, is the subject of the proceeding. Requests for the appointment of guardians or conservators or other protective orders may be joined with requests for formal orders concerning decedents' estates if the minor or incapacitated or disabled person involved is a person interested in the estate. An application for informal probate may be joined with an application for informal appointment of a personal representative. No other joinder of requests or claims for relief shall be allowed in probate proceedings.

(2) Civil Proceedings. In civil proceedings, a party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join either as independent or as alternate claims as many claims either legal or equitable or both as he has against an opposing party, provided that each of such claims is independently within the jurisdiction of the court.

(b) Joinder of Remedies; Fraudulent Conveyances. Rule 18(b) of the Maine Rules of Civil Procedure governs civil proceedings in the Probate Courts.

Comment

Rule 18(a)(1) implements the intention of the Code to

insure maximum flexibility in all probate proceedings. Like MRCP 18(a), the rule is one of pleading convenience only. To bring as many issues as possible before the court at the initial stage, the rule allows all reasonably related requests for relief to be joined in a petition in formal proceedings. Thus, the petitioner need give notice only once for all matters joined. Subsequently, when the practical scope of the issues has become clearer, the court may order separate hearings of some or all requests under Rule 42(b). Rule 18(a)(1) is permissive only. Unless the Code expressly provides otherwise, failure to join requests for relief does not make the petition defective or bar a subsequent petition. See MPC §3-107. See, generally, 1 Field, McKusick & Wroth, Maine Civil Practice §18.1 (2d edn. 1970). As the last sentence of Rule 18(a)(1) makes clear, no joinder but that delineated in paragraph (1) is permitted in probate proceedings.

The first sentence of Rule 18(a)(1) is broader on its face than relevant provisions of the Code, but is not inconsistent with them. Thus, MPC §3-107(2) permits the petition to combine various requests "in a single proceeding if the orders sought may be finally granted without delay." This provision merges the concepts of pleading joinder covered in the present rule and hearing consolidation dealt with in Rule 42(a). Rule 18(a)(1) reflects the view that it is practically impossible for the petitioner to determine at the outset what will cause delay. That determination under the Rules will be made by the court under Rule 42.

Other provisions of the Code permit joinder or consolidation in specific circumstances. The present rule assumes that, if consolidation is permitted, joinder is a fortiori appropriate. See, e.g., MPC §§3-107(3), 3-401, 3-502, 5-102.

The second sentence of Rule 18(a)(1), allowing joinder of guardianship or protective proceedings with proceedings concerning decedents' estates if the ward or protected person is interested in the estate, is not specifically provided in the Code. Such a procedure is consistent with the Code's intended flexibility, however, and may be of great utility in situations such as, for example, those where a personal representative seeks appointment as guardian or conservator.

The third sentence of Rule 18(a)(1) allows joinder of informal probate and appointment proceedings. The final sentence makes clear that no other joinder is permitted. Cf. MPC §3-107(3).

Rule 18(a)(2) carries forward the liberal joinder provisions of MRCP 18(a) for civil proceedings with the sole limitation that each claim joined must be independently within the Probate Court's jurisdiction. The joinder rule cannot be a source of ancillary jurisdiction. Cf. Rule 82.

Because of the many procedural differences between probate and civil proceedings, the Rules do not permit joinder of such proceedings at the pleading stage. Where common issues are involved, however, the court may order a joint hearing under Rule 42(a).

Rule 18(b) incorporates for civil proceedings the provision of MRCP 18(b) abolishing the common-law rule that required certain forms of action to be completed before others could be undertaken.

RULE 19. JOINDER OF PERSONS  
NEEDED FOR JUST ADJUDICATION

Rule 19 of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

Comment

This rule incorporates for civil proceedings the provisions of MRCP 19 for determining when persons have interests so closely related to the subject of the action that they must be joined as parties and when if such a person cannot be joined the action may proceed without him.

No such rule is required for probate proceedings, because the Code provides a different mechanism for dealing with the multiple interests involved in such proceedings. Thus, MPC §1-201 (20) defines "interested person" as including all persons having a right in or claim against the estate to be affected as well as persons having priority for appointment and fiduciaries representing interested persons. MPC §1-401 provides that whenever notice is required under the Code, it shall be given to "any interested person," and MPC §1-403 (3) (i) specifies that, in formal proceedings, notice shall be given to every interested person and to any one who can bind an interested person by virtue of certain relationships spelled out in MPC §1-403 (2) (1), (ii). If unborn or unascertained persons are not represented by a guardian ad



litem, MPC §1-403(3)(ii) provides that notice is given to them by notifying all known persons with substantially identical interests, and MPC §1-403(2)(iii) provides that an unborn or unascertained person is bound to the extent that his interest is adequately represented by a party having a substantially identical interest.

Thus, the effect of the Code is to make all persons having an interest parties to the proceeding in the sense that they are to receive notice of it and will be bound by its result. If an interested person is unborn or unascertained, the proceeding goes on, but the court has discretion to treat such a person as not bound if his interests are not adequately represented. See also, MPC §§3-106, 3-403(a), 3-412, 3-414, 3-502, 3-1001, 3-1101-1102, 5-405, 7-206.

RULE 20. PERMISSIVE JOINDER OF PARTIES

(a) Permissive Joinder.

(1) Probate Proceedings. In probate proceedings, all interested persons who seek the same action or relief may join in any application or petition for an informal or formal order for such action or relief. It shall not be necessary to serve notice of the proceedings upon any person joined as an applicant or petitioner. All interested persons appearing in a probate proceeding who have the same ground of objection may join in stating that objection or filing a written reply as provided in Rule 12(a)(2) of these rules.

(2) Civil Proceedings. Rule 20(a) of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the

Probate Courts.

(b) Separate Hearings. Rule 20(b) of the Maine Rules of Civil Procedure governs procedure in all proceedings in the Probate Courts.

Comment

Rule 20(a)(1) provides a flexible means for individuals interested in the same estate or matter to commence proceedings with a minimum of formalities. By joining as petitioners they can avoid the need for service of notice, so long as they seek the same relief. Similarly, parties opposed to a petition may join in stating their objection if it is based on the same ground. Joinder under this paragraph is more restricted than that allowed in civil proceedings under Rule 20(a)(2), which essentially requires only a common question of law or fact for joinder.

Rule 20(a)(2) incorporates the flexible rule of MRCP 20(a) for permissive joinder in civil proceedings.

Rule 20(b) incorporates MRCP 20(b), which gives the court discretion to separate claims for trial if necessary for justice or convenience. Like joinder of claims under Rule 18, permissive joinder of parties is a matter of pleading convenience and does not control the future course of trial. See Comment to Rule 18; cf. Rule 42(b).

RULE 21. MISJOINDER AND  
NON-JOINDER OF PARTIES

Rule 21 of the Maine Rules of Civil Procedure governs procedure in all proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 21 which provides for flexible treatment of misjoinder and nonjoinder situations.

RULE 22. INTERPLEADER

Rule 22 of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 22 for civil proceedings. The rule permits interpleader -- the action of a stakeholder to compel those having claims against the stake to resolve them.

RULE 23.

Reserved

Comment

MRCP 23 providing for class actions has not been adopted due to the complexity and uncertainty of the process. A class action concerning a matter within the probate jurisdiction may be brought in the Superior Court under its concurrent jurisdiction.

RULE 24. INTERVENTION

Rule 24 of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 24 for civil proceedings. The rule provides a procedure for intervention as of right and by permission for parties having the requisite degree of connection with the case. No such rule is needed in probate proceedings for the same reasons that Rule 19

concerning necessary joinder is not required. See Comment to Rule 19.

RULE 25. SUBSTITUTION OF PARTIES

Rule 25 of the Maine Rules of Civil Procedure governs procedure in all proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 25, which provides the procedure for substitution of successors in interest when a party dies.

V. DEPOSITIONS AND DISCOVERY

RULE 26. GENERAL PROVISIONS

GOVERNING DISCOVERY

Rule 26 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 26 for all proceedings. The Civil Rule covers the method and scope of discovery and makes provision for protective orders, the sequence and timing of discovery, and the supplementation of responses.

For probate proceedings, the rule extends the discovery devices available. By virtue of 18 M.R.S.A. §551, depositions and interrogatories to parties could be had as provided in MRCP 27-33. There seems no reason not to make available the procedures for production, physical and

mental examinations, and admissions provided by MRCP 34-36.

RULE 27. DISCOVERY BEFORE  
ACTION OR PENDING APPEAL

Rule 27 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 27 which provides procedures for taking depositions to perpetuate testimony or obtain production under Rule 34 or physical examination under Rule 35 before action or pending appeal.

RULE 28. PERSONS BEFORE WHOM  
DEPOSITIONS MAY BE TAKEN

Rule 28 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 28, which provides for the taking of depositions within the state before a Justice of the Peace, notary, or court-appointed person and outside the state by a person authorized to administer an oath there, by a court-appointed commissioner, or under a letter rogatory.

RULE 29. STIPUTLATIONS REGARDING  
DISCOVERY PROCEDURE

Rule 29 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 29, which permits the parties by written stipulation to modify provisions of the rules concerning all forms of discovery.

RULE 30. DEPOSITIONS UPON  
ORAL EXAMINATION

Rule 30 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 30, which provides for the timing, manner of notice, manner of taking, and the manner of submission and certification of oral depositions. The rule also covers the consequences of participation by either party and provides a procedure for taking depositions for use in foreign jurisdictions.

RULE 31. DEPOSITIONS UPON  
WRITTEN QUESTIONS

Rule 31 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 31 which provides a procedure similar to that of Rule 30 for depositions upon written questions.

RULE 32. USE OF DEPOSITIONS  
IN COURT PROCEEDINGS

Rule 32 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 32, which sets forth the circumstances in which depositions may be used instead of live testimony, as well as the timing of objections and the effect of errors and irregularities.

RULE 33. INTERROGATORIES TO PARTIES

Rule 33 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 33, which provides the procedure and conditions for the use of written interrogatories addressed to parties.

RULE 34. PRODUCTION OF DOCUMENTS  
AND THINGS AND ENTRY UPON LAND FOR  
INSPECTION AND OTHER PURPOSES

Rule 34 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 34, which establishes the scope of and procedure for discovery by production or entry upon land.

RULE 35. PHYSICAL AND MENTAL  
EXAMINATION OF PERSONS

Rule 35 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 35, which provides the procedure for court-ordered physical and mental examinations of parties or persons under the custody or control of a party.

RULE 36. REQUESTS FOR ADMISSION

Rule 36 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 36, which provides that a party may request of another party admission of matters in issue. Matters admitted are established, unless amendment or withdrawal is permitted. Rule 37(c) provides that on failure to admit a party may have to pay the costs of proof if the opposing party prevails.

RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS

Rule 37 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 37, which provides procedures for compelling discovery and sanctions for failure to permit discovery.

VI. HEARINGS

RULE 38.

Reserved



Comment

Because there is no jury in the Probate Courts, MRCP 38, covering jury trial of right, is obviously unnecessary in these Rule. See MPC §1-306(a). A party who claims the right to trial by jury on an issue within the jurisdiction of the Probate Courts may bring an original action in the Superior Court or under Rule 71A may remove to that court an action commenced in a probate court. See MPC §103-6(b).

RULE 39.

Reserved

Comment

Because there is no jury in the Probate Courts, MRCP 39, covering the mechanics of trial by jury and providing for trial to an advisory jury or jury trial by consent, is obviously unnecessary in these rules. See Comment to Rule 38.

RULE 40. ASSIGNMENT OF CASES FOR  
HEARING: CONTINUANCES

(a) Hearing Calendar. Each judge of probate shall provide by order for the setting by the register of proceedings for hearing upon a calendar or separate probate and civil calendars. Such orders shall be collected and published annually by the Court Administrator.

(b) Continuances. Rule 40(b) of the Maine Rules of Civil Procedure governs procedure in all proceedings in the Probate Courts.

(c) Affidavit in Support of Motion. Rule 40(c) of the Maine Rules of Civil Procedure governs procedure in all proceedings in

the Probate Courts.

Comment

Rule 40(a) permits each judge of probate to adopt a practice concerning the calendar suited to conditions in his county. For the convenience of lawyers and others throughout the state all such local orders are to be published by the Court Administrator.

Rules 40(b) and (c) incorporate MRCP 40(b) and (c) providing that, if possible, continuances must be sought at least 4 days before hearing and requiring an affidavit in support of a continuance based on the absence of material evidence.

RULE 41. DISMISSAL OF PROCEEDINGS

(a) Voluntary Dismissal: Effect Thereof.

(1) Probate Proceedings. No probate proceeding may be dismissed at the instance of the applicant or petitioner save upon the order of the court and upon such terms or conditions, including notice of a proposed dismissal to all interested persons, as the court deems proper. A counterclaim pleaded as provided in Rule 13(a)(1) prior to service of the motion to dismiss shall remain pending for independent adjudication by the court. Unless otherwise specified in the order a dismissal under this paragraph is without prejudice.

(2) Civil Proceedings. Rule 41(a) of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

(b) Involuntary Dismissal: Effect Thereof. Rule 41(b) of the Maine Rules of Civil Procedure governs procedure.

in all formal probate and civil proceedings in the Probate Courts.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. Rule 41(c) of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

(d) Costs of Previously Dismissed Proceeding. Rule 41(d) of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

Rule 41(a)(1) adapts MRCP 41(a)(2) to probate proceedings, requiring a court order for any voluntary dismissal. The principal purpose of this provision is to protect the interests of others who may be relying on the petitioner's initiative. Accordingly, the provision of MRCP 23(c) for notice in the court's discretion to all interested persons, has been adopted here. Cf. MPC, §3-1102(3).

Rule 41(a)(2) incorporates MRCP 41(a) in its entirety for civil proceedings. The latter provision allows voluntary dismissal without court order prior to trial, or on stipulation, but otherwise requires a court order.

Rule 41(b) incorporates MRCP 41(b) allowing involuntary dismissal on the court's motion after two years, or on an opposing party's motion for nonprosecution within two years or non-compliance with the rules, or after the close of petitioner's evidence.

Rule 41(c) incorporates MRCP 41(c) making the rule applicable to all forms of claim.

Rule 41(d) incorporates MRCP 41(d), allowing the costs of a previously dismissed proceeding to be levied against a party who starts a similar proceeding.

RULE 42. CONSOLIDATION;  
SEPARATE HEARINGS

(a) Consolidation. When proceedings involving a common question of law or fact are pending before a probate court, the court may order a joint hearing of any or all of the matters in issue in the proceedings, whether those proceedings are formal probate or civil or both and may order proceedings of the same form consolidated. The court may make such orders concerning the procedure therein as may tend to avoid unnecessary costs or delay.

(b) Separate Hearings. Rule 42(b) of the Maine Rules of Civil Procedure governs procedure in all proceedings in the Probate Courts.

(c) Convenience and Justice. In making any order under this rule, the court shall give due regard to the convenience of parties and witnesses and the interests of justice.

Comment

Rule 42(a) adapts MRCP 42(a) to probate and civil proceedings. The rule, like the Civil Rule, recognizes two different actions that the court may order: joinder of proceedings for hearing and formal consolidation for all procedural purposes including final disposition. See 1 Field, McKusick & Wroth, Maine Civil Practice §42.3 (2d edn. 1970). Where a common question is present, joint hearing may be ordered even if one of the proceedings is probate and the other civil. The purpose of this

provision is to give the court discretion to avoid multiple hearings of the same issue. Full consolidation may be ordered, however, only when the proceedings are of the same form. There are too many procedural differences to permit a probate and civil proceeding to be combined so that a single judgment results. Cf. Comment to Rule 18(a).

The rule on its face is limited to proceedings pending in the same court. Under MPC §1-303(c), a court may transfer a proceeding to another court "in the interest of justice." One of the purposes of such a transfer should be to permit joint hearing or consolidation under this rule. Although the transferee court retains discretion, it should ordinarily take such action when the transfer is ordered. Cf. 1 Field, McKusick & Wroth, supra, §42.2.

Rule 42(b), by incorporating MRCP 42(b), provides for separate hearings in the same or a different county of any claim or issue "in furtherance of convenience or to avoid prejudice." Transfer to a different county for this purpose may be effectuated under MPC §1-303. Rule 42(b) makes possible a liberal interpretation of the joinder provisions of Rule 18. See Comment to that rule; cf. Rule 20(b).

Rule 42(c) repeats verbatim the language of MRCP 42(c). It emphasizes the practical purpose of this rule to prefer convenience and justice over mere form.

#### RULE 43. TAKING OF TESTIMONY

Rule 43 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 43, which generally makes applicable the Maine Rules of Evidence and other statutory evidence rules and adds a few additional provisions. The rule is consistent with MPC §1-107.

The Maine Rules of Evidence by their own terms apply in the Probate Courts. See Me. R. Ev. 1101(a). The power to make rules of evidence for the Probate Courts is, by MPC §1-304, continued subject to the proviso that in the event of inconsistency the Code prevails.

RULE 44. PROOF OF OFFICIAL RECORD

Rule 44 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 44 providing various means of proving the authenticity or absence of an official record. See also Me. R. Ev. 902.

RULE 44A. DETERMINATION OF FOREIGN LAW

Rule 44A of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 44A, which provides a simplified notice procedure for raising an issue of foreign law and treats such issues as questions of law.

RULE 45. SUBPOENA

Rule 45 of the Maine Rules of Civil Procedure governs

procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 45, which details provisions for the issuance and service of subpoenas for witnesses and tangible evidence both for hearings and for deposition takings.

RULE 46. EXCEPTIONS UNNECESSARY

Rule 46 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 46, which eliminates the need for formal exceptions to preserve error, provided the ground of objection is made known.

RULE 47.

Reserved

Comment

Because there is no jury in the Probate Courts, MRCP 47, covering examination and challenge of jurors, is obviously unnecessary in these Rules. See Comment to Rule 38.

RULE 48.

Reserved

Comment

Because there is no jury in the Probate Courts, MRCP 48, covering majority verdicts, is obviously unnecessary in these Rules. See Comment to Rule 38.

RULE 49.

Reserved

Comment

Because there is no jury in the Probate Courts, Rule 49, covering special verdicts, is obviously unnecessary in these Rules. See Comment to Rule 38.

RULE 50. MOTION FOR JUDGMENT

Rule 50 of the Maine District Court Civil Rules governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates DCCR 50 providing for a motion for judgment by either party at the close of all the evidence. (MRCP 50, dealing with the motions for directed verdict and judgment n.o.v., is obviously inappropriate in view of the absence of a jury in the Probate Courts. See Comment to Rule 38.) The rule partially overlaps Rule 41(b)(2), which provides for a similar motion by a defendant. See 2 Field, McKusick & Wroth, Maine Civil Practice §150.1 (2d edn. 1970).

RULE 51. ARGUMENT OF COUNSEL

Rule 51 of the Maine District Court Civil Rules governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates DCCR 51 providing in general terms for the order of argument. (MRCP 51 is inappropriate for these rules because of its greater complexity and



references to the jury.)

RULE 52. FINDINGS BY THE COURT

Rule 52 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts, so far as applicable.

Comment

This rule incorporates MRCP 52, requiring the court to make findings of fact and conclusions of law upon the timely request of a party or upon its own motion. The only inapplicable provisions are the references to the jury and advisory jury, which are superfluous.

RULE 53. REFEREES

Rule 53 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts, so far as applicable.

Comment

This rule incorporates MRCP 53, providing a detailed procedure and conditions for reference of a proceeding with or without agreement to a referee, master, or auditor. The only inapplicable provisions are those pertaining to jury trials.

VII. JUDGMENT

RULE 54. JUDGMENT; COSTS

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings or the record of prior proceedings.

(b) Judgment upon Multiple Claims or Involving Multiple Parties. Rule 54(b) of the Maine Rules of Civil Procedure governs procedure in all proceedings in the Probate Courts.

(c) Demand for Judgment. Rule 54(c) of the Maine Rules of Civil Procedure governs procedure in all proceedings in the Probate Court.

(d) Allowance of Costs.

(1) Probate Proceedings. In all contested formal probate proceedings, costs may be allowed to either party out of the estate in controversy as provided by statute and these rules, or in the discretion of the court may be allowed against a losing party in the event of a frivolous or malicious claim or objection.

(2) Civil Proceedings. In all civil proceedings, costs shall be allowed to the prevailing party as provided for civil actions in Rule 54(d) of the Maine Rules of Civil Procedure.

(e) Taxation of Costs.

(1) Probate Proceedings. In formal probate proceedings, costs shall be taxed by the court upon a statement presented by each party claiming them. Taxation of costs shall be conducted at a hearing in open court upon notice to all parties who have appeared in the proceeding.

(2) Civil Proceedings. Rule 54(e) of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

(f) Schedule of Fees.

(1) Probate Proceedings. The following schedule of fees shall be taxable as costs:

(A) Attorneys and Witnesses. As provided by statute.

(B) Register for the Use of Counties. As provided by statute.

(C) Miscellaneous.

Service as taxed by the officer, subject to correction.

Surveyors, commissioners, and other officers

appointed by the court, fees as charged by them subject to correction.

Costs of reference as reported by the referee and allowed by the court.

For hearings on default, the register or referee appointed by the court shall have such reasonable compensation, paid by the county, as the court may allow.

(2) Civil Proceedings. Rule 54(f) of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

(g) Costs on Depositions. Rule 54(g) of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

Rule 54(a) sets forth verbatim the definition of "judgment" found in MRCP 54(a). Use of the term "judgment" in these Rules departs from the usage of the Code, where "order" is the term commonly used. The departure is necessary for simplicity in dealing with both exclusive and concurrent jurisdiction in the same rules and for consistency with the Maine Rules of Civil Procedure.

The entry of judgment is an important term keying the running of appellate and other time periods, and use of a single term avoids confusion. See Comment to Rule 58.

Rule 54(b) incorporates MRCP 54(b) providing that in cases of multiple claims or parties, final judgment may be entered as to less than all only on express order.

Rule 54(c) incorporates MRCP 54(c) which provides that a default judgment must not depart from the relief demanded in the complaint but that other kinds of judgments should give whatever relief the party is entitled to. Cf. MPC §3-405.

Rule 54(d) (1) incorporates MPC §1-601 providing for allowance of a broad range of actual costs, including attorneys' fees, reasonable witness fees, costs of depositions, and hospital and medical records, out of the estate to either party. The rule adds discretion in the court to tax such costs directly against a losing party in the event of malicious or frivolous proceedings. Rule 54(d) (2) makes the statutory and other costs appropriate for ordinary civil actions applicable in civil proceedings.

Rule 54(e) (1) provides that in probate proceedings, because of the broad discretion involved, costs shall be taxed by the court. Rule 54(e) (2) incorporates for civil proceedings the procedure for taxation of costs by the register contained in MRCP 54(e).

Rule 54(f) (1) establishes for probate proceedings the fees of individuals that may be taxed as costs. This schedule does not include other costs such as medical

records and depositions allowable under Rule 54(c)(1). The present paragraph is based on MRCP 54(f) which has been incorporated in Rule 54(f)(2) for civil proceedings.

Rule 54(g) incorporates for all proceedings MRCP 54(g) providing for allowance of various actual, reasonable costs on depositions in the court's discretion. It is consistent with MPC §1-601. See Rule 54(c)(1) and comment above.

#### RULE 55. DEFAULT

Rule 55 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

#### Comment

This rule incorporates MRCP 55, providing a procedure for entry of judgment by default. Rule 55(b)(1) will apply only in civil proceedings and in those probate proceedings such as creditors' claims in which the relief sought is a single monetary amount. The language of Rule 55(b)(2) is of sufficient breadth to apply not only in civil proceedings analogous to those civil actions (e.g., for unliquidated damages or equitable relief) where the rule applies but in probate proceedings where the petition is unopposed. For example, MPC §3-405 provides that, in an unopposed petition in a formal testacy proceeding, the court may grant the relief either from the face of the pleadings or after hearing. Rule 55(b)(2) broadly provides for hearings where necessary "to take an account or to

determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter."

RULE 56. SUMMARY JUDGMENT

Rule 56 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 56 by which, on a motion with or without affidavits, the court may grant judgment before trial if it finds "that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law."

RULE 57. DECLARATORY JUDGMENTS

Rule 57 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts, so far as applicable.

Comment

This rule incorporates MRCP 57 which imports the statutory declaratory judgment procedure, 14 M.R.S.A. §§5951-5963, into the rules. References in the rule to the right to trial by jury are inapplicable in the Probate Courts. See Comment to Rule 38.

RULE 58. ENTRY OF JUDGMENT

Rule 58 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings, so far as applicable.

Comment

This rule incorporates MRCP 58 providing for the entry of judgment forthwith. Provisions concerning entry of judgment after a jury verdict are inapplicable in the Probate Courts.

Note that under Rule 54(a) "judgment" includes any appealable order, so that the rule is appropriately applied in probate proceedings.

The time of entry of judgment is of critical importance, because the times for filing of post-hearing motions and for appeal run from it. See 2 Field, McKusick & Wroth, Maine Civil Practice §58.1 (2d edn. 1970).

RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS

Rule 59 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 59, which provides time limits and procedure for the granting of new trials, or rehearings, "for any of the reasons for which new trials have heretofore been granted in actions at law or suits in equity in the courts of this state." These grounds include inadequate or excessive damages, newly discovered evidence, error in the conduct of the trial, and death or disability of a court reporter or judge. See 2 Field, McKusick & Wroth, Maine Civil Practice §59.2 (2d. edn. 1970).

The motion must be made within 10 days after entry of judgment.

RULE 60. RELIEF FROM JUDGMENT OR ORDER

Rule 60 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 60, which provides for correction of clerical mistakes at any time and for relief at a later date than permitted under Rule 59 on a variety of grounds such as mistake, newly discovered evidence, fraud, infirmity in the judgment, "or any other reason for justifying relief."

The rule provides a medium for the proceedings to vacate orders provided by MPC §§3-412, 3-413. The time limits in those provisions control. See MPC §1-304.

RULE 61. HARMLESS ERROR

Rule 61 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 61 which sets forth the harmless error rule that no error "which does not affect the substantial rights of the parties" shall vitiate the proceedings.

RULE 62. STAY OF PROCEEDINGS  
TO ENFORCE A JUDGMENT

Rule 62 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts, so far as applicable.



Comment

This rule incorporates MRCP 62, which provides that all judgments except those granting injunctions are stayed pending the time for appeal and pending appeal unless the court, on motion for cause, otherwise orders. The rule is consistent with MPC §3-412 providing that formal testacy orders are binding, "subject to appeal."

Provisions of the rule concerning domestic relations actions are inapplicable.

RULE 63. DISABILITY OF A JUDGE

Rule 63 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 63 providing for substitution of another judge or new trial in the event of disability of a judge.

VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

RULE 64. REPLEVIN

Rule 64 of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 64, providing procedure for replevin of goods wrongfully taken or detained. Although 14 M.R.S.A. §7302 limits jurisdiction in replevin to the District and Superior Courts, the broad mandate of MPC §§1-302, 3-105, and other jurisdictional provisions should be read as according replevin jurisdiction to the

Probate Courts.

RULE 65. INJUNCTIONS

Rule 65 of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 65, providing a procedure for temporary restraining orders and injunctions. Note that Rule 65 applies not only to prohibitory but to mandatory injunctions *i.e.*, those which order an act to be done. See 2 Field, McKusick & Wroth, Maine Civil Practice §§65.2, n. 5; 81.9 (2d edn. 1970).

RULE 66. RECEIVERSHIPS

A proceeding wherein a receiver has been appointed shall not be dismissed except by order of the court. Except as otherwise provided by statute, the practice in proceedings for receiverships and in actions brought by or against a receiver shall be governed by these rules and the Maine Rules of Civil Procedure or District Court Civil Rules as appropriate.

Comment

This rule implements the provisions for probate jurisdiction of receiverships of the property of absent or missing persons found in MPC §§8-101-8-114. There is no comparable Civil Rule, so the rule is based on Fed. R. Civ. P. 66. See also Vt. R. Civ. P. 66.

RULE 67. DEPOSIT IN COURT

Rule 67 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 67 permitting deposit in court of any sum of money or thing in controversy.

RULE 68. OFFER OF JUDGMENT

Rule 68 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 68, providing a procedure by which one party may offer to accept judgment on stated terms and impose costs on an offeree who refuses the offer and does not then obtain a more favorable judgment.

RULE 69. EXECUTION

Rule 69 of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 69, which imports the statutory execution and post-judgment disclosure procedure into the rules.

RULE 70. JUDGMENT FOR SPECIFIC ACTS

Rule 70 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 70, which provides that, if a party fails to perform an act ordered by the court, an appointee of the court may perform the act and the disobedient party may be held in contempt.

RULE 71. PROCESS IN BEHALF  
OF AND AGAINST PERSONS NOT PARTIES

Rule 71 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 71 providing that non-parties affected by an order may enforce it or be proceeded against by the same forms of process available to parties.

VIIIA. REMOVAL

RULE 71A. REMOVAL TO THE SUPERIOR COURT

(a) Who May Remove; Time. Any party to a civil proceeding may, within 20 days after service of the last required pleading or within 10 days after service of any amendment to the pleadings or any responsive pleading permitted thereto, remove the proceeding to the Superior Court in the county in which the Probate Court where the proceeding was commenced sits.

(b) Procedure for Removal. Removal shall be effected by filing notice thereof, serving a copy thereof upon all other parties, and paying to the register the required fees, including the entry fee in and the cost of forwarding the proceeding to the Superior Court. The register shall thereupon file a copy of the record and all papers in the proceeding in the Superior Court, provided that the Probate Court shall first determine any motion for approval of attachment, trustee process or replevin pending at the time of removal. If prior to removal a pleading required of the removing party has not been filed, it

shall be filed forthwith in the Superior Court. Thereafter, the action shall be prosecuted in the Superior Court as if originally commenced therein. If the party giving notice of removal does not comply with the requirements of this subdivision, the proceeding shall be heard and determined in the Probate Court as if no notice of removal had been given.

(c) Effect of Orders. Any order of the Probate Court entered prior to removal shall remain in force until modified by the Superior Court.

(d) Joint or Several Removal. Parties interested jointly, severally, or otherwise in any civil proceeding may join in removal thereof; or any one or more of them may remove separately or any two or more of them may join in removal.

Comment

Rule 71A(a) implements the provision of MPC §1-306(b), permitting any party to remove to the Superior Court any proceeding not within the exclusive jurisdiction of the Probate Courts. Under this provision all civil proceedings are removable. See Rule 2(b). The statute requires a "timely demand" for removal. The rule interprets "timely" to mean within 20 days after the pleadings are completed or within 10 days after any amended pleadings are completed. These limits allow a party to remove within a reasonable time after ascertaining that there is an issue present as to which he wishes to assert a right to trial by jury or which he wishes to have tried in the Superior Court for other reasons.

Rules 71A(b), (c) and (d) are based on D.C.C.R. 73(b), 74(b), providing for removal from the District to the Superior Court.

IX. APPEALS

RULE 72. REPORT OF CASES

Rule 72 of the Maine Rules of Civil Procedure governs procedure in all formal probate and civil proceedings in the Probate Courts and the Law Court.

Comment

This rule incorporates MRCP 72, providing for the report of cases to the Law Court by agreement or on motion. The rule carries forward the procedure for report previously available under 4 M.R.S.A. §401. See 2 Field, McKusick & Wroth, Maine Civil Practice §72.4a (2d edn. 1970).

This rule and Rules 74 and 76A are adopted for the Probate Courts by virtue of MPC §1-308, which provides for direct appeals from the Probate Courts to the Law Court as in other civil actions.

RULE 73. APPEAL TO THE LAW COURT

Rule 73 of the Maine Rules of Civil Procedure governs procedure in all appeals from the Probate Courts to the Law Court.

Comment

This rule incorporates MRCP 73, which provides generally for the time and notice of appeal, and other procedural matters.

RULE 74. THE RECORD ON APPEAL

Rule 74 of the Maine Rules of Civil Procedure governs

procedure in all appeals from the Probate Courts to the Law Court.

Comment

This rule incorporates MRCP 74, which provides for the composition of the record on appeal, including the ordering of the transcript. For provisions concerning reporters and transcripts in the Probate Courts, see 4 M.R.S.A. §§751-756 (superseded to the extent inconsistent with this rule) and MPC §§1-605, 1-606.

RULE 74A. TRANSMISSION OF THE RECORD

Rule 74A of the Maine Rules of Civil Procedure governs procedure in all appeals from the Probate Courts to the Law Court.

Comment

This rule incorporates MRCP 74A, providing for the mechanics of transmitting the record.

RULE 74B. DOCKETING THE APPEAL;  
FILING OF THE RECORD

Rule 74B of the Maine Rules of Civil Procedure governs procedure in all appeals from the Probate Courts to the Law Court.

Comment

This rule incorporates MRCP 74B, which provides that the Clerk of the Law Court docket the appeal and files the record, notifying counsel of the schedule to be followed thereafter.

RULE 74C. APPENDIX TO THE BRIEFS

Rule 74C of the Maine Rules of Civil Procedure governs procedure in all appeals from the Probate Courts to the Law Court.

Comment

This rule incorporates MRCP 74C, which provides for a record appendix to the briefs.

RULE 75. TIME FOR BRIEFS AND ORAL ARGUMENT

Rule 75 of the Maine Rules of Civil Procedure governs procedure in all appeals from the Probate Courts to the Law Court.

Comment

This rule incorporates MRCP 75 establishing the times for briefs and oral argument.

RULE 75A. BRIEFS

Rule 75A of the Maine Rules of Civil Procedure governs procedure in all appeals from the Probate Courts to the Law Court.

Comment

This rule incorporates MRCP 75A, covering the content and form of briefs.

RULE 75B. MOTIONS AND OTHER PAPERS

Rule 75B of the Maine Rules of Civil Procedure governs procedure in all appeals from the Probate Courts to the Law Court.

Comment

This rule incorporates MRCP 75B, which provides for the procedure for and form of motions.

RULE 75C. ORAL ARGUMENT

Rule 75C of the Maine Rules of Civil Procedure governs procedure in all appeals from the Probate Courts to the Law Court.

Comment

This rule incorporates MRCP 75C covering the time and order of argument.



RULE 75D. COMPOSITION, CONCURRENCE,  
AND SESSIONS OF THE LAW COURT

Rule 75D of the Maine Rules of Civil Procedure governs procedure in all appeals from the Probate Courts to the Law Court.

Comment

This rule incorporates MRCP 75D governing the constitution of the Law Court.

RULE 76. COSTS AND INTEREST ON JUDGMENTS

Rule 76 of the Maine Rules of Civil Procedure governs procedure in all appeals from the Probate Courts to the Law Court.

Comment

This rule incorporates MRCP 76, which sets out specific provisions for costs in the Law Court and provides for interest after Law Court disposition. See 14 M.R.S.A. §1602; 2 Field, McKusick & Wroth, Maine Civil Practice §76.2 (2d edn. 1970, Supp. 1977).

RULE 76A. STIPULATED ENLARGEMENT OF TIME;  
DISMISSAL FOR WANT OF PROSECUTION;  
AND SUSPENSION OF THE RULES

Rule 76A of the Maine Rules of Civil Procedure governs procedure in all appeals from the Probate Courts to the Law Court.

Comment

This rule incorporates MRCP 76A, which covers the subjects indicated by its title.

X. PROBATE COURTS AND REGISTERS

RULE 77. PROBATE COURTS AND REGISTERS

(a) Probate Courts Always Open. The Probate Courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final

process, and of making and directing all interlocutory motions, orders, and rules.

(b) Trials and Hearings; Orders in Chambers. Rule 77(b) of the Maine Rules of Civil Procedure governs procedure in the Probate Courts.

(c) Register's Office. The register's office with the register or a deputy in attendance shall be open during such hours as the Chief Justice of the Supreme Judicial Court may designate, on all days except Saturdays, Sundays, and legal holidays, and except such other days as the Chief Justice may designate.

(d) Notice of Orders or Judgments. Rule 77(d) of the Maine Rules of Civil Procedure governs procedure in the Probate Courts.

(e) Facsimile Signature of the Register. A facsimile signature of the register imprinted at his direction upon any summons, writ, subpoena, judgment, order, or notice, except executions shall have the same validity as his signature.

Comment

This rule is based on MRCP 77, with appropriate changes. For provisions concerning the register, see MPC §§1-501-1-511.

RULE 78.

Reserved

Comment

MRCP 78, providing for a regular motion day, is not adopted at this time, pending more experience with motion practice under the Code and these rules.

RULE 79.

Reserved

Comment

MRCP 79, covering the docket and other record-keeping functions of the clerk, is not adopted at this time, pending more experience with the work of the register under the Code and these rules. See MPC §§1-305, 1-501-1-511.

XI. SPECIAL RULES FOR CERTAIN ACTIONS

RULE 80.

Reserved

Comment

No rule concerning divorce and annulment is needed.

RULE 81A. REAL ACTIONS

Rule 80A of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 80A, which provides a specific procedure for real actions.

XII. GENERAL PROVISIONS

RULE 81. APPLICABILITY

(a) To What Proceedings Fully Applicable. These rules apply to all proceedings in the Probate Courts, [with the exceptions set forth in subdivision (b) of this rule]. They apply to proceedings on removal to the Superior Court and on appeal to the Supreme Judicial Court sitting as the Law Court. A civil proceeding under these rules is appropriate whether the matter

was one formerly cognizable at law or in equity and irrespective of any statutory provisions as to the form of action.

(b) Limited Applicability. [Reserved]

(c) [Reserved]

(d) Writs Abolished. Rule 81(d) of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

(e) Terminology in Statutes and Rules of Civil Procedure.

In applying these rules to any proceeding to which they are applicable, the terminology of any statute or Rule of Civil Procedure which is also applicable, where inconsistent with that in these rules or inappropriate under these rules, shall be taken to mean the individual, term, device, or procedure proper under these rules.

(f) When Procedure Is Not Specifically Prescribed. When no procedure is specifically prescribed, the court shall proceed in any lawful manner not inconsistent with the Constitutions of the United States or the State of Maine, these rules, the Maine Probate Code, or any other applicable statute.

Comment.

This rule is similar to MRCP 81.

Rule 81(a) is based on MRCP 81(a).

Rule 81(b) is not yet drafted, pending further study of the jurisdiction of the Probate Court. For a limitation that could be brought within this subdivision, see Comment to Rule 66.

Rule 81(c) is reserved, because the extraordinary writs referred to in MRCP 81(c) were not within the probate jurisdiction.

Rule 81(d) incorporates MRCP 81(d) dealing with the former writs of waste, dower, partition and account.

Rule 81(e) is of particular importance because of the frequent incorporation of provisions of the Maine Rules of Civil Procedure in these rules. In particular, "clerk" means "register", "District Judge" or "Superior Court Judge" means "Judge of Probate", and "action" means "proceeding."

Rule 81(f) is based on MRCP 81(f).

RULE 82. JURISDICTION AND VENUE UNAFFECTED

These rules shall not be construed to extend or limit the jurisdiction of the Probate Courts, the Superior Court, or the Supreme Judicial Court or the venue of actions therein.

Comment

This rule is similar to MRCP 82.

RULE 83. DEFINITIONS

Unless specified to the contrary, the following words whenever used in these rules shall have the following meanings:

(1) The word "court" shall include the judge of any one of the several courts of probate of this state.

(2) The words "petitioner" and "petition" shall include "applicant" and "application" where appropriate in context.

(3) The term "plaintiff's attorney" or "defendant's attorney" or any like term shall include the party appearing without counsel.

(4) The word "register" shall mean the register of the court of probate in which the action is pending.

Comment

This rule is based on MRCP 83. See also MPC §1-201(5), (21A), (31), (36).

RULE 84. FORMS

The forms contained in the Appendix of Forms are sufficient under the Rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

Comment

This rule is similar to MRCP 84. Forms will be drafted at a later date.

RULE 85. TITLE

These Rules may be known and cited as the Maine Rules of Probate Procedure.

Comment

This rule is similar to MRCP 85.

RULE 86. EFFECTIVE DATE

(a) Effective Date of Original Rules. These rules will take effect on \_\_\_\_\_, \_\_\_\_\_. They govern all proceedings brought after they take effect and also all proceedings then pending, except to the extent that in the opinion of the court their application in a particular proceeding pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

(b) Effective Date of Amendments. Amendments to these rules will take effect on the day specified in the order adopting them. They govern all proceedings brought after they take effect and also all proceedings then pending, except to the extent that in the opinion of the court their application in a particular proceeding pending when they take effect would not be feasible or would work injustice, in which event the former procedure applies.

Comment

This rule is similar to MRCP 86.

RULE 87.

Reserved

Comment

There is no need to adopt MRCP 87, covering admission to the bar.

RULE 88. CONTINGENT FEES

Rule 88 of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 88, which regulates contingent fee arrangements in detail. By virtue of Rule 88(c)(3), making the rule inapplicable where there is statutory provision concerning fees, the rule applies only to civil proceedings. See MPC §1-601.

RULE 89. WITHDRAWAL OF ATTORNEYS;  
VISITING LAWYERS

Rule 89 of the Maine Rules of Civil Procedure governs procedure in all proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 89, which provides for notice of withdrawal and admission of visiting attorneys pro hac vice.

RULE 90. LEGAL ASSISTANCE BY LAW STUDENTS

Rule 90 of the Maine Rules of Civil Procedure governs procedure in all proceedings in the Probate Courts.

Comment

This rule incorporates MRCP 90, regulating practice

by law students

APPENDIX OF FORMS

(See Rule 84)

[To be drafted at a later date.]