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FOREWORD

This Pamphlet edition contains the Official Text of the Uniform Probate Code together with the official comments.

The Uniform Probate Code was approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in August 1969.

The text is made available in this convenient and compact form for ready reference by members of the Bar, the Judiciary, Legislators, and Teachers and Students of the law.

THE PUBLISHER

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UNIFORM PROBATE CODE

Official Text Approved by the National Conference of
Commissioners on Uniform State Laws

AN ACT

Relating to affairs of decedents, missing persons, protected persons, minors, incapacitated persons and certain others and constituting the Uniform Probate Code; consolidating and revising aspects of the law relating to wills and intestacy and the administration and distribution of estates of decedents, missing persons, protected persons, minors, incapacitated persons and certain others; ordering the powers and procedures of the Court concerned with the affairs of decedents and certain others; providing for the validity and effect of certain non-testamentary transfers, contracts and deposits which relate to death and appear to have testamentary effect; providing certain procedures to facilitate enforcement of testamentary and other trusts; making uniform the law with respect to decedents and certain others; and repealing inconsistent legislation.

COMMENT

The long title of the Code should be adapted to the constitutional, statutory requirements and practices of the enacting state. The concept of the Code is that the "affairs of decedents, missing persons, disabled persons, minors, and certain others" is a single subject of the law notwithstanding its many facets.

ARTICLE I

GENERAL PROVISIONS, DEFINITIONS
AND PROBATE JURISDICTION
OF COURT

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SHORT TITLE, CONSTRUCTION, GENERAL
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PART 1

SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

Section 1-101. [Short Title.]

This Act shall be known and may be cited as the Uniform Probate Code.

Section 1-102. [Purposes; Rule of Construction.]

(a) This Code shall be liberally construed and applied to promote its underlying purposes and policies.

(b) The underlying purposes and policies of this Code are:

(1) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons;

(2) to discover and make effective the intent of a decedent in distribution of his property;

(3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to its successors;

(4) to facilitate use and enforcement of certain trusts;

(5) to make uniform the law among the various jurisdictions.

Section 1-103. [Supplementary General Principles of Law Applicable.]

Unless displaced by the particular provisions of this Code, the principles of law and equity supplement its provisions.

Section 1-104. [Severability.]

If any provision of this Code or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the Code which can be given effect without the invalid provision or application, and to this end the provisions of this Code are declared to be severable.

Section 1-105. [Construction Against Implied Repeal.]

This Code is a general act intended as a unified coverage of its subject matter and no part of it shall be deemed impliedly

repealed by subsequent legislation if it can reasonably be avoided.

Section 1-106. [Effect of Fraud and Evasion.]

Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud including restitution from any person (other than a bona fide purchaser) benefitting from the fraud, whether innocent or not. Any proceeding must be commenced within 2 years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than 5 years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

COMMENT

This is an overriding provision that provides an exception to the procedures and limitations provided in the Code. The remedy of a party wronged by fraud is intended to be supplementary to other protections provided in the Code and can be maintained outside the process of settlement of the estate. Thus, if a will which is known to be forgery is probated informally, and the forgery is not discovered until after the period for contest has run, the defrauded heirs still could bring a fraud action under this section. Or if a will is fraudulently concealed after the testator's death and its existence not discovered until after the basic three year period (section 3-108) has elapsed, there still may be an action under this section. Similarly, a closing statement normally provides binding protection for the personal representative after six months from filing (section 3-1005). However, if there is fraudulent mis-

representation or concealment in the preparation of the claim, a later suit may be brought under this section against the personal representative for damages; or restitution may be obtained from those distributees who benefit by the fraud. In any case innocent purchasers for value are protected.

Any action under this section is subject to usual rules of res judicata; thus, if a forged will has been informally probated, an heir discovers the forgery, and then there is a formal proceeding under section 3-1001 of which the heir is given notice, followed by an order of complete settlement of the estate, the heir could not bring a subsequent action under section 1-106 but would be bound by the litigation in which the issue could have been raised.

The usual rules for securing relief for fraud on a court would govern, however.

The final limitation in this section is designed to protect innocent distributees after a reasonable period of time. There is no limit (other than the 2 years from discovery of the fraud) against the wrongdoer. But there ought to be some limit after which innocent persons who have built up expectations in good faith cannot be deprived of the property by a restitution action.

The time of "discovery" of a fraud is a fact question to be

determined in the individual case. In some situations persons may not actually know that a fraud has been perpetrated but have such strong suspicion and evidence that a court may conclude there has been a discovery of the fraud at that stage. On the other hand there is no duty to exercise reasonable care to discover fraud; the burden should not be on the heirs and devisees to check on the honesty of the other interested persons or the fiduciary.

Section 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;

(3) a person who is absent for a continuous period of 5 years, during which he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry is presumed to be dead. His death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

COMMENT

Subsection (3) is inconsistent with Section 1 of Uniform Absentees' Property Act (1938).

Proceedings to secure protection of property interests of an absent person may be commenced as provided in 5-401.

The preliminary paragraph is designed to accommodate the Uniform Simultaneous Death Act, if it is a part of a state's law.

Section 1-108. [Acts by Holder of General Power.]

For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative or trustee, including relief from liability or penalty for failure to post bond, to register a trust, or to perform other duties, and for purposes of consenting to modification or termination of a trust or to deviation from its terms, the sole holder or all co-holders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

COMMENT

The status of a holder of a general power in estate litigation is dealt with by section 1-403.

This section permits the settlor of a revocable trust to prevent the trustee from registering the trust so long as the power of revocation continues.

"General power," as used in this section, is intended to refer to the common law concept, rather than to tax or other statutory meanings. A general power, as used herein, is one which enables the power holder to draw absolute ownership to himself.

PART 2

DEFINITIONS

Section 1-201. [General Definitions.]

Subject to additional definitions contained in the subsequent Articles which are applicable to specific Articles or parts, and unless the context otherwise requires, in this Code:

(1) "Application" means a written request to the Registrar for an order of informal probate or appointment under Part 3 of Article III.

(2) "Beneficiary", as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer and as it relates to a charitable trust, includes any person entitled to enforce the trust.

(3) "Child" includes any individual entitled to take as a child under this Code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild or any more remote descendant.

(4) "Claims", in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

(5) "Court" means the Court or branch having jurisdiction in matters relating to the affairs of decedents. This Court in this state is known as [_____].

(6) "Conservator" means a person who is appointed by a Court to manage the estate of a protected person.

(7) "Devise", when used as a noun, means a testamentary disposition of real or personal property and when used as a verb, means to dispose of real or personal property by will.

(8) "Devisee" means any person designated in a will to receive a devise. In the case of a devise to an existing trust or trustee, or to a trustee on trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

(9) "Disability" means cause for a protective order as described by Section 5-401(1).

(10) "Distributee" means any person who has received property of a decedent from his personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in his hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative.

(11) "Estate" means all of the property of the decedent, trust, or other person whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration.

(12) "Exempt property" means that property of a decedent's estate which is described in Section 2-402.

(13) "Fiduciary" includes personal representative, guardian, conservator and trustee.

(14) "Foreign personal representative" means a personal representative of another jurisdiction.

(15) "Formal proceedings" means those conducted before a judge with notice to interested persons.

(16) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem.

(17) "Heirs" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

(18) "Incapacitated person" is as defined in Section 5-101.

(19) "Informal proceedings" mean those conducted without notice to interested persons by an officer of the Court acting as a registrar for probate of a will or appointment of a personal representative.

(20) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent, ward or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be

determined according to the particular purposes of, and matter involved in, any proceeding.

(21) "Issue" of a person means all his lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this Code.

(22) "Lease" includes an oil, gas, or other mineral lease.

(23) "Letters" includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(24) "Minor" means a person who is under [21] years of age.

(25) "Mortgage" means any conveyance, agreement or arrangement in which property is used as security.

(26) "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of his death.

(27) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, 2 or more persons having a joint or common interest, or any other legal entity.

(28) "Parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this Code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

(29) "Person" means an individual, a corporation, an organization, or other legal entity.

(30) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special administrator.

(31) "Petition" means a written request to the Court for an order after notice.

(32) "Proceeding" includes action at law and suit in equity.

(33) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(34) "Protected person" is as defined in Section 5-101.

(35) "Protective proceeding" is as defined in Section 5-101.

(36) "Registrar" refers to the official of the Court designated to perform the functions of Registrar as provided in Section 1-307.

(37) "Security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

(38) "Settlement," in reference to a decedent's estate, includes the full process of administration, distribution and closing.

(39) "Special administrator" means a personal representative as described by Sections 3-614 through 3-618.

(40) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

(41) "Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

(42) "Successors" means those persons, other than creditors, who are entitled to property of a decedent under his will or this Code.

(43) "Supervised administration" refers to the proceedings described in Article III, Part 5.

(44) "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

(45) "Trust" includes any express trust, private or charitable, with additions thereto, wherever and however created. It also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts, and it excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in Article VI, custodial arrangements pursuant to [each state should list its legislation, including that relating to gifts to minors, dealing with special custodial situations], business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries.

wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

(46) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

(47) "Ward" is as defined in Section 5-101.

(48) "Will" includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will.

[FOR ADOPTION IN COMMUNITY PROPERTY STATES]

[(49) "Separate property" (if necessary, to be defined locally in accordance with existing concept in adopting state).]

(50) "Community property" (if necessary, to be defined locally in accordance with existing concept in adopting state).]

COMMENT

Additional sections with special definitions for Articles V and VI are 5-101 and 6-101. Except as controlled by special definitions applicable to these particular Articles, the definitions in 1-201 apply to the entire Code.

The definition of "trust" and the use of the term in Article VII eliminate procedural distinctions between testamentary and inter vivos trusts. Article VII does not deal with questions of substantive validity of trusts where a difference between inter vivos and testamentary trusts will continue to be important.

The exclusions from the definition of "trust" are modelled basically after those in Section 1, Uniform Trustees' Powers Act. The exclusions in the Act for "a trust created in deposits in any financial institution, or other trust the nature of which does not admit of general trust administration" are omitted above. The first of these is inappropriate

because of Article VI's treatment of "Totten Trusts". Moreover, the probate court remedies and procedures being established by Article VII would seem suitable to unclassified trustee-beneficiary relationships that are in the nature of express trusts. Perhaps many controversies involving "hold and deliver" trusts or other dubious arrangements will involve the issue of whether there is a trust, but there would seem to be no harm in conferring jurisdiction on the probate court for these controversies.

The meanings of "child", "issue" and "parent" are related to Section 2-109.

See Comment, Section 7-101, concerning the definition of "trustee".

No definition of "community property" and "separate property" is made here because these are defined in other statutes in every community property state.

PART 3

SCOPE, JURISDICTION AND COURTS

Section 1-301. [Territorial Application.]

Except as otherwise provided in this Code, this Code applies to (1) the affairs and estates of decedents, missing persons, and persons to be protected, domiciled in this state, (2) the property of nonresidents located in this state or property coming into the control of a fiduciary who is subject to the laws of this state, (3) incapacitated persons and minors in this state, (4) survivorship and related accounts in this state, and (5) trusts subject to administration in this state.

Section 1-302. [Subject Matter Jurisdiction.]

(a) To the full extent permitted by the constitution, the Court has jurisdiction over all subject matter relating to (1) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; (2) protection of minors and incapacitated persons; and (3) trusts.

(b) The Court has full power to make orders, judgments and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

Section 1-303. [Venue; Multiple Proceedings; Transfer.]

(a) Where a proceeding under this Code could be maintained in more than one place in this state, the Court in which the proceeding is first commenced has the exclusive right to proceed.

(b) If proceedings concerning the same estate, protected person, ward, or trust are commenced in more than one Court of this state, the Court in which the proceeding was first commenced shall continue to hear the matter, and the other courts shall hold the matter in abeyance until the question of venue is decided, and if the ruling Court determines that venue is properly in another Court, it shall transfer the proceeding to the other Court.

(c) If a Court finds that in the interest of justice a proceeding or a file should be located in another Court of this state, the Court making the finding may transfer the proceeding or file to the other Court.

Section 1-304. [Practice in Court.]

Unless specifically provided to the contrary in this Code or unless inconsistent with its provisions, the rules of civil procedure including the rules concerning vacation of orders and appellate review govern formal proceedings under this Code.

Section 1-305. [Records and Certified Copies.]

The [Clerk of Court] shall keep a record for each decedent, ward, protected person or trust involved in any document which may be filed with the Court under this Code, including petitions and applications, demands for notices or bonds, trust registrations, and of any orders or responses relating thereto by the Registrar or Court, and establish and maintain a system for indexing, filing or recording which is sufficient to enable users of the records to obtain adequate information. Upon payment of the fees required by law the clerk must issue certified copies of any probated wills, letters issued to personal representatives, or any other record or paper filed or recorded. Certificates relating to probated wills must indicate whether the decedent was domiciled in this state and whether the probate was formal or informal. Certificates relating to letters must show the date of appointment.

Section 1-306. [Jury Trial.]

(a) If duly demanded, a party is entitled to trial by jury in [a formal testacy proceeding and] any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury.

(b) If there is no right to trial by jury under subsection (a) or the right is waived, the Court in its discretion may call a jury to decide any issue of fact, in which case the verdict is advisory only.

Section 1-307. [Registrar; Powers.]

The acts and orders which this Code specifies as performable by the Registrar may be performed either by a judge of the Court or by a person, including the clerk, designated by the Court by a written order filed and recorded in the office of the Court.

Section 1-308. [Appeals.]

Appellate review, including the right to appellate review, interlocutory appeal, provisions as to time, manner, notice,

appeal bond, stays, scope of review, record on appeal, briefs, arguments and power of the appellate court, is governed by the rules applicable to the appeals to the [Supreme Court] in equity cases from the [court of general jurisdiction], except that in proceedings where jury trial has been had as a matter of right, the rules applicable to the scope of review in jury cases apply.

Section 1-309. [Qualifications of Judge.]

A judge of the Court must have the same qualifications as a judge of the [court of general jurisdiction.]

COMMENT

In Article VIII, Section 8-101 continuation in service of a sitting judge not qualified for initial selection.
on transition from old law to new law, provision is made for the

Section 1-310. [Oath or Affirmation on Filed Documents.]

Except as otherwise specifically provided in this Code or by rule, every document filed with the Court under this Code including applications, petitions, and demands for notice, shall be deemed to include an oath, affirmation, or statement to the effect that its representations are true as far as the person executing or filing it knows or is informed, and penalties for perjury may follow deliberate falsification therein.

PART 4

NOTICE, PARTIES AND REPRESENTATION IN ESTATE LITIGATION AND OTHER MATTERS

Section 1-401. [Notice; Method and Time of Giving.]

(a) If notice of a hearing on any petition is required and except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or his attorney if he has appeared by attorney or requested that notice be sent to his attorney. Notice shall be given:

(1) by mailing a copy thereof at least 14 days before the time set for the hearing by certified, registered or ordinary first class mail addressed to the person being notified at the post office address given in his demand for notice, if any, or at his office or place of residence, if known;

(2) by delivering a copy thereof to the person being notified personally at least 14 days before the time set for the hearing; or

(3) if the address, or identity of any person is not known and cannot be ascertained with reasonable diligence, by publishing at least once a week for 3 consecutive weeks, a copy thereof in a newspaper having general circulation in the county where the hearing is to be held, the last publication of which is to be at least 10 days before the time set for the hearing.

(b) The Court for good cause shown may provide for a different method or time of giving notice for any hearing.

(c) Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding.

Section 1-402. [Notice; Waiver.]

A person, including a guardian ad litem, conservator, or other fiduciary, may waive notice by a writing signed by him or his attorney and filed in the proceeding.

COMMENT

The subject of appearance is covered by Section 1-304.

Section 1-403. [Pleadings; When Parties Bound by Others; Notice.]

In judicial proceedings involving trusts or estates of decedents, minors, protected persons, or incapacitated persons, and in judicially supervised settlements, the following apply:

(1) Interests to be affected shall be described in pleadings which give reasonable information to owners by name or class, by reference to the instrument creating the interests, or in other appropriate manner.

(2) Persons are bound by orders binding others in the following cases:

(i) Orders binding the sole holder or all co-holders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

(ii) To the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate he controls; orders binding a guardian bind the ward if no conservator of his estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties; and orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate. If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent his minor child.

(iii) An unborn or unascertained person who is not otherwise represented is bound by an order to the extent his interest is adequately represented by another party having a substantially identical interest in the proceeding.

(3) Notice is required as follows:

(i) Notice as prescribed by Section 1-401 shall be given to every interested person or to one who can bind an interested person as described in (2) (i) or (2) (ii) above. Notice may be given both to a person and to another who may bind him.

(ii) Notice is given to unborn or unascertained persons, who are not represented under (2) (i) or (2) (ii) above, by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons.

(4) At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the Court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The Court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

COMMENT

A general power, as used here and in Section 1-108, is one which enables the power holder to draw absolute ownership to himself. The section assumes a valid general power. If the validity of the power itself were in issue, the power holder could not represent others, as for example, the takers in default.

The general rules of civil procedure are applicable where not replaced by specific provision, see Section 1-304. Those rules would determine the mode of giving notice or serving process on a minor or the mode of notice in class suits involving large groups of persons made party to a suit.

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PART 1
INTESTATE SUCCESSION

GENERAL COMMENT

Part 1 of Article II contains the basic pattern of intestate succession historically called descent and distribution. It is no longer meaningful to have different patterns for real and personal property, and under the proposed statute all property not disposed of by a decedent's will passes to his heirs in the same manner. The existing statutes on descent and distribution in the United States vary from state to state. The most common pattern for the immediate family retains the imprint of history, giving the widow a third of realty (sometimes only for life by her dower right) and a third of the personalty, with the balance passing to issue. Where the decedent is survived by no issue, but leaves a spouse and collateral blood relatives, there is wide variation in disposition of the intestate estate, some states giving all to the surviving spouse, some giving substantial shares to the blood relatives. The Code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death, and for this purpose the prevailing patterns in wills are useful in determining what the owner who fails to execute a will would probably want.

A principal purpose of this Article and Article III of the Code is to provide suitable rules and procedures for the person of modest means who relies on the estate plan provided by law. For

a discussion of this important aspect of the Code, see 3 Real Property, Probate and Trust Journal (Fall 1968) p. 199.

The principal features of Part 1 are:

(1) A larger share is given to the surviving spouse, if there are issue, and the whole estate if there are no issue or parent.

(2) Inheritance by collateral relatives is limited to grandparents and those descended from grandparents. This simplifies proof of heirship and eliminates will contests by remote relatives.

(3) An heir must survive the decedent for five days in order to take under the statute. This is an extension of the reasoning behind the Uniform Simultaneous Death Act and is similar to provisions found in many wills.

(4) Adopted children are treated as children of the adopting parents for all inheritance purposes and cease to be children of natural parents; this reflects modern policy of recent statutes and court decisions.

(5) In an era when inter vivos gifts are frequently made within the family, it is unrealistic to preserve concepts of advancement developed when such gifts were rare. The statute provides that gifts during lifetime are not advancements unless declared or acknowledged in writing.

While the prescribed patterns may strike some as rules of law which may in some cases defeat intent of a decedent, this is true of every statute of this type. In assessing the changes it must therefore be borne in mind that the decedent may always choose a different rule by executing a will.

Section 2-101. [Intestate Estate.]

Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed in the following sections of this Code.

Section 2-102. [Share of the Spouse.]

The intestate share of the surviving spouse is:

- (1) if there is no surviving issue or parent of the decedent, the entire intestate estate;
- (2) if there is no surviving issue but the decedent is survived by a parent or parents, the first [\$50,000], plus one-half of the balance of the intestate estate;
- (3) if there are surviving issue all of whom are issue of the surviving spouse also, the first [\$50,000], plus one-half of the balance of the intestate estate;
- (4) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

COMMENT

This section gives the surviving spouse a larger share than most existing statutes on descent and distribution. In doing so, it reflects the desires of most married persons, who almost always leave all of a moderate estate or at least one-half of a larger estate to the surviving spouse when a will is executed. A husband or wife who desires to leave the surviving spouse less than the share provided by this section may do so by executing a will, subject of course to possible election by the surviving spouse to take an elective share of one-

third under Part 2 of this Article. Moreover, in the small estate (less than \$50,000 after homestead allowance, exempt property, and allowances) the surviving spouse is given the entire estate if there are only children who are issue of both the decedent and the surviving spouse; the result is to avoid protective proceedings as to property otherwise passing to their minor children.

See Section 2-802 for the definition of spouse which controls for purposes of intestate succession.

ALTERNATIVE PROVISION FOR COMMUNITY PROPERTY STATES

[Section 2-102A. [Share of the Spouse.]]

The intestate share of the surviving spouse is as follows:

- (1) as to separate property
 - (i) if there is no surviving issue or parent of the decedent, the entire intestate estate;
 - (ii) if there is no surviving issue but the decedent is survived by a parent or parents, the first [\$50,000], plus one-half of the balance of the intestate estate;
 - (iii) if there are surviving issue all of whom are issue of the surviving spouse also, the first [\$50,000], plus one-half of the balance of the intestate estate;
 - (iv) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.
- (2) as to community property
 - (i) The one-half of community property which belongs to the decedent passes to the [surviving spouse].

Section 2-103. [Share of Heirs Other Than Surviving Spouse.]

The part of the intestate estate not passing to the surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes as follows:

- (1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;
- (2) if there is no surviving issue, to his parent or parents equally;
- (3) if there is no surviving issue or parent, to the brothers and sisters and the issue of each deceased brother or sister by representation; if there is no surviving brother or sister, the issue of brothers and sisters take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree then those of more remote degree take by representation;
- (4) if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal

grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.

COMMENT

This section provides for inheritance by lineal descendants of the decedent, parents and their descendants, and grandparents and collateral relatives descended from grandparents; in line with modern policy, it eliminates more remote relatives tracing through great-grandparents.

In general the principle of representation (which is defined in

Section 2-106) is adopted as the pattern which most decedents would prefer.

If the pattern of this section is not desired, it may be avoided by a properly executed will or, after the decedent's death, by renunciation by particular heirs under Section 2-801.

Section 2-104. [Requirement That Heir Survive Decedent For 120 Hours.]

Any person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property and intestate succession, and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. This section is not to be applied where its application would result in a taking of intestate estate by the state under Section 2-105.

COMMENT

This section is a limited version of the type of clause frequently found in wills to take care of the common accident situation, in which several members of the same family are injured and die

within a few days of each other. The Uniform Simultaneous Death Act provides only a partial solution, since it applies only if there is no proof that the parties died otherwise than simultane-

ously. This section requires an heir to survive by five days in order to succeed to decedent's intestate property; for a comparable provision as to wills, see Section 2-601. This section avoids multiple administrations and in some instances prevents the property from passing to persons not desired by the decedent. The five-day period will not hold up administration of a decedent's estate because sections 3-302 and 3-307 prevent informal probate of a will or informal issuance of letters for a period of five days from death. The last sentence prevents the survivorship requirement from affecting inheritances by the last eligible relative of the intestate who survives him for any period.

I.R.C. § 2056(b) (3) makes it clear that an interest passing to a surviving spouse is *not* made a

"terminable interest" and thereby disqualified for inclusion in the marital deduction by its being conditioned on failure of the spouse to survive a period not exceeding six months after the decedent's death, if the spouse in fact lives for the required period. Thus, the intestate share of a spouse who survives the decedent by five days is available for the marital deduction. To assure a marital deduction in cases where one spouse fails to survive the other by the required period, the decedent must leave a will. The marital deduction is not a problem in the typical intestate estate. The draftsmen and Special Committee concluded that the statute should accommodate the typical estate to which it applies, rather than the unusual case of an unplanned estate involving large sums of money.

Section 2-105. [No Taker.]

If there is no taker under the provisions of this Article, the intestate estate passes to the [state].

Section 2-106. [Representation.]

If representation is called for by this Code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.

COMMENT

Under the system of intestate succession in effect in some states, property is directed to be divided "per stirpes" among issue or descendants of identified ancestors. Applying a meaning commonly associated with the quoted

words, the estate is first divided into the number indicated by the number of children of the ancestor who survive, or who leave issue who survive. If, for example, the property is directed to issue "per stirpes" of the in-

testate's parents, the first division would be by the number of children of parents (other than the intestate) who left issue surviving even though no person of this generation survives. Thus, if the survivors are a child and a grandchild of a deceased brother of the intestate and five children of his deceased sister, the brother's descendants would divide one-half and the five children of the sister would divide the other half. Yet, if the parent of the brother's

grandchild also had survived, most statutes would give the seven nephews and nieces equal shares because it is commonly provided that if all surviving kin are in equal degree, they take per capita.

The draft rejects this pattern and keys to a system which assures that the first and principal division of the estate will be with reference to a generation which includes one or more living members.

Section 2-107. [Kindred of Half Blood.]

Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.

Section 2-108. [Afterborn Heirs.]

Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.

Section 2-109. [Meaning of Child and Related Terms.]

If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person,

(1) an adopted person is the child of an adopting parent and not of the natural parents except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and that natural parent.

(2) In cases not covered by (1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:

(i) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

(ii) the paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, except that the paternity established under this subparagraph (ii) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has

openly treated the child as his, and has not refused to support the child.

COMMENT

The definition of "child" and tending them for all purposes of "parent" in Section 1-201 in the Code. See Section 2-802 for the definition of "spouse" for purposes of intestate succession.

Section 2-110. [Advancements.]

If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue, unless the declaration or acknowledgment provides otherwise.

COMMENT

This section alters the common law relating to advancements by requiring written evidence of the intent that an inter vivos gift be an advancement. The statute is phrased in terms of the donee being an "heir" because the transaction is regarded as of decedent's death; of course, the donee is only a prospective heir at the time of the transfer during lifetime. Most inter vivos transfers today are intended to be absolute gifts or are carefully integrated into a total estate plan. If the donor intends that any transfer during lifetime be deducted from the donee's share of his estate,

the donor may either execute a will so providing or, if he intends to die intestate, charge the gift as an advance by a writing within the present section. The present section applies only when the decedent died intestate and not when he leaves a will.

This section applies to advances to collaterals (such as nephews and nieces) as well as to lineal descendants. The statute does not spell out the method of taking account of the advance, since this process is well settled by the common law and is not a source of litigation.

Section 2-111. [Debts to Decedent.]

A debt owed to the decedent is not charged against the intestate share of any person except the debtor. If the debtor

fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's issue.

COMMENT

This supplements the content of Section 3-903, *infra*.

Section 2-112. [Alienage.]

No person is disqualified to take as an heir because he or a person through whom he claims is or has been an alien.

COMMENT

The purpose of this section is to eliminate the ancient rule that an alien cannot acquire or transmit land by descent, a rule based on the feudal notions of the obligations of the tenant to the King. Although there never was a corresponding rule as to personalty, the present section is phrased in light of the basic premise of the Code that distinctions between real and personal property should be abolished.

This section has broader vitality in light of the recent decision of the United States Supreme Court in *Zschernig v. Miller*, 88 S.Ct. 664, 389 U.S. 429, 19 L.Ed.2d 683 (1968) holding unconstitutional a state statute providing for escheat if a nonresident alien cannot meet three requirements: the existence of a

reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country, the right of United States citizens to receive payment here of funds from estates in the foreign country, and the right of the foreign heirs to receive the proceeds of the local estate without confiscation by the foreign government. The rationale was that such a statute involved the local probate court in matters which essentially involve United States foreign policy, whether or not there is a governing treaty with the foreign country. Hence, the statute is "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress".

[Section 2-113. [Dower and Curtesy Abolished.]]

The estates of dower and curtesy are abolished.

COMMENT

The provisions of this Code replace the common law concepts of dower and curtesy and their statutory counterparts. Those estates provided both a share in intestacy and a protection against disinheritance.

In states which have previously abolished dower and curtesy, or where those estates have never existed, the above section should be omitted.

PART 2

ELECTIVE SHARE OF SURVIVING SPOUSE

GENERAL COMMENT

The sections of this Part describe a system for common law states designed to protect a spouse of a decedent who was a domiciliary against donative transfers by will and will substitutes which would deprive the survivor of a "fair share" of the decedent's estate. Optional sections adapting the elective share system to community property jurisdictions were contained in preliminary drafts, but were dropped from the final Code. Problems of disherison of spouses in community states are limited to situations involving assets acquired by domiciliaries of common law states who later become domiciliaries of a community property state, and to instances where substantially all of a deceased spouse's property is separate property. Representatives of community property states differ in regard to whether either of these problem areas warrant statutory solution.

Almost every feature of the system described herein is or may be controversial. Some have questioned the need for any legislation checking the power of married persons to transfer their property as they please. See Plager, "The Spouse's Nonbarrable Share: A Solution in Search of a Problem", 33 Chi.L.Rev. 681 (1966). Still, all common law states except the Dakotas appear to impose some restriction on the power of a spouse to disinherit the other. In some, the ancient

concept of dower continues to prevent free transfer of land by a married person. In most states, including many which have abolished dower, a spouse's protection is found in statutes which give a surviving spouse the power to take a share of the decedent's probate estate upon election rejecting the provisions of the decedent's will. These statutes expand the spouse's protection to all real and personal assets owned by the decedent at death, but usually take no account of various will substitutes which permit an owner to transfer ownership at his death without use of a will. Judicial doctrines identifying certain transfers to be "illusory" or to be in "fraud" of the spouse's share have been evolved in some jurisdictions to offset the problems caused by will substitutes, and in New York and Pennsylvania, statutes have extended the elective share of a surviving spouse to certain non-testamentary transfers.

Questions relating to the proper size of a spouse's protected interest may be raised in addition to those concerning the need for, and method of assuring, any protection. The traditions in both common law and community property states point toward some capital sum related to the size of the deceased spouse's holdings rather than to the needs of the surviving spouse. The community property pattern produces one-half for the surviving spouse, but is somewhat

misleading as an analogy, for it takes no account of the decedent's separate property. The fraction of one-third, which is stated in Section 2-201, has the advantage of familiarity, for it is used in many forced share statutes.

Although the system described herein may seem complex, it should not complicate administration of a married person's estate in any but very unusual cases. The surviving spouse rather than the executor or the probate court has the burden of asserting an election, as well as the burden of proving the matters which must be shown in order to make a successful claim to more than he or she has received. Some of the apparent complexity arises from Section 2-202, which has the effect of compelling an electing spouse to

allow credit for all funds attributable to the decedent when the spouse, by electing, is claiming that more is due. This feature should serve to reduce the number of instances in which an elective share will be asserted. Finally, Section 2-204 expands the effectiveness of attempted waivers and releases of rights to claim an elective share. Thus, means by which estate planners can assure clients that their estates will not become embroiled in election litigation are provided.

Uniformity of law on the problems covered by this Part is much to be desired. It is especially important that states limit the applicability of rules protecting spouses so that only estates of domiciliary decedents are involved.

Section 2-201. [Right to Elective Share.]

(a) If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated.

(b) If a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in property in this state is governed by the law of the decedent's domicile at death.

COMMENT

See Section 2-802 for the definition of "spouse" which controls in this Part.

Under the common law a widow was entitled to dower, which was a life estate in a fraction of lands of which her husband was seized of an estate of inheritance at any time during the marriage. Dower encumbers titles and provides inadequate protection for widows in a society which clas-

sifies most wealth as personal property. Hence the states have tended to substitute a forced share in the whole estate for dower and the widower's comparable common law right of curtesy. Few existing forced share statutes make adequate provisions for transfers by means other than succession to the surviving spouse and others. This and the following sections are

designed to do so. The theory of these sections is discussed in Fratcher, "Toward Uniform Succession Legislation," 41 N.Y.U. L.Rev. 1037, 1050-1064 (1966). The existing law is discussed in

MacDonald, *Fraud on the Widow's Share* (1960). Legislation comparable to that suggested here became effective in New York on Sept. 1, 1966. See Decedent Estate Law, § 18.

Section 2-202. [Augmented Estate.]

The augmented estate means the estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims, to which is added the sum of the following amounts:

(1) The value of property transferred by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

(i) any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;

(ii) any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

(iii) any transfer whereby property is held at the time of decedent's death by decedent and another with right of survivorship;

(iv) any transfer made within two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed \$3,000.

(2) Any transfer is excluded if made with the written consent or joinder of the surviving spouse. Property is valued as of the decedent's death except that property given irrevocably to a donee during lifetime of the decedent is valued as of the date the donee came into possession or enjoyment if that occurs first. Nothing herein shall cause to be included in the augmented estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.

(3) The value of property owned by the surviving spouse at the decedent's death, plus the value of property transferred by

the spouse at any time during marriage to any person other than the decedent which would have been includible in the spouse's augmented estate if the surviving spouse had predeceased the decedent, to the extent the owned or transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth. For purposes of this subsection:

(i) Property derived from the decedent includes, but is not limited to, any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime, any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of others than the spouse, any proceeds of insurance (including accidental death benefits) on the life of the decedent attributable to premiums paid by him, any lump sum immediately payable and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant attributable to premiums paid by him, the commuted value of amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan, exclusive of the Federal Social Security system, by reason of service performed or disabilities incurred by the decedent, and the value of the share of the surviving spouse resulting from rights in community property in this or any other state formerly owned with the decedent. Premiums paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent.

(ii) Property owned by the spouse at the decedent's death is valued as of the date of death. Property transferred by the spouse is valued at the time the transfer became irrevocable, or at the decedent's death, whichever occurred first. Income earned by included property prior to the decedent's death is not treated as property derived from the decedent.

(iii) Property owned by the surviving spouse as of the decedent's death, or previously transferred by the surviving spouse, is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source.

COMMENT

The purpose of the concept of augmenting the probate estate in computing the elective share is twofold: (1) to prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share, and (2) to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death by life insurance, joint tenancy assets and other nonprobate arrangements. Thus essentially two separate groups of property are added to the net probate estate to arrive at the augmented net estate which is the basis for computing the one-third share of the surviving spouse. In the first category are transfers by the decedent during his lifetime which are essentially will substitutes, arrangements which give him continued benefits or controls over the property. However, only transfers during the marriage are included in this category. This makes it possible for a person to provide for children by a prior marriage, as by a revocable living trust, without concern that such provisions will be upset by later marriage. The limitation to transfers during marriage reflects some of the policy underlying community property. What kinds of transfers should be included here is a matter of reasonable difference of opinion. The fine-spun tests of the Federal Estate

Tax Law might be utilized, of course. However, the objectives of a tax law are different from those involved here in the Probate Code, and the present section is therefore more limited. It is intended to reach the kinds of transfers readily usable to defeat an elective share in only the probate estate.

In the second category of assets, property of the surviving spouse derived from the decedent and property derived from the decedent which the spouse has, in turn, given away in a transaction that is will-like in effect or purpose, the scope is much broader. Thus a person can during his lifetime make outright gifts to relatives and they are not included in this first category unless they are made within two years of death (the exception being designed to prevent a person from depleting his estate in contemplation of death). But the time when the surviving spouse derives her wealth from the decedent is immaterial; thus if a husband has purchased a home in the wife's name and made systematic gifts to the wife over many years, the home and accumulated wealth she owns at his death as a result of such gifts ought to, and under this section do, reduce her share of the augmented estate. Likewise, for policy reasons life insurance is not included in the first category of transfers to other persons, because it is not ordinarily purchased as a way of depleting the probate estate and avoiding the elective share of the spouse; but life insurance proceeds payable to

the surviving spouse are included in the second category, because it seems unfair to allow a surviving spouse to disturb the decedent's estate plan if the spouse has received ample provision from life insurance. In this category no distinction is drawn as to whether the transfers are made before or after marriage.

Depending on the circumstances it is obvious that this section will operate in the long run to decrease substantially the number of elections. This is because the statute will encourage and provide a legal base for counseling of testators against schemes to disinherit the spouse, and because the spouse can no longer elect in cases where substantial provision is made by joint tenancy, life insurance, lifetime gifts, living trusts set up by the decedent, and the other numerous nonprobate arrangements by which wealth is today transferred. On the other hand the section should provide realistic protection against disinheritance of the spouse in the rare case where decedent tries to achieve that purpose by depleting his probate estate.

The augmented net estate approach embodied in this section is relatively complex and assumes that litigation may be required in cases in which the right to an elective share is asserted. The proposed scheme should not complicate administration in well-planned or routine cases, however, because the spouse's rights are freely releasable under Section 2-204 and because of the time limits in Section 2-205. Some legislatures may wish to consider a simpler approach along

the lines of the Pennsylvania Estates Act provision reading:

"A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved, but the right of the surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor. The provisions of this subsection shall not apply to any contract of life insurance purchased by a decedent, whether payable in trust or otherwise."

In passing, it is to be noted that a Pennsylvania widow apparently may claim against a revocable trust or will even though she has been amply provided for by life insurance or other means arranged by the decedent. Penn. Stats. Annot. title 20, § 301.11(a).

The New York Estates, Powers and Trusts Law § 5-1.1(b) also may be suggested as a model. It treats as testamentary dispositions all gifts causa mortis, money on deposit by the decedent in trust for another, money deposited in the decedent's name payable on death to another, joint tenancy property, and transfers by decedent over which he has a power to revoke or invade. The New York law also expressly excludes life insurance, pension plans, and United States savings bonds payable to a designated

person. One of the drawbacks of the New York legislation is its complexity, much of which is attributable to the effort to prevent a spouse from taking an elective share when the deceased spouse has followed certain prescribed procedures. The scheme described by Sections 2-201 et seq. of this draft, like that of all states except New York, leaves

the question of whether a spouse may or may not elect to be controlled by the economics of the situation, rather than by conditions on the statutory right. Further, the New York system gives the spouse election rights in spite of the possibility that the spouse has been well provided for by insurance or other gifts from the decedent.

Section 2-203. [Right of Election Personal to Surviving Spouse.]

The right of election of the surviving spouse may be exercised only during his lifetime by him. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending, after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy.

COMMENT

See Section 5-101 for definitions of protected person and protective proceedings.

Section 2-204. [Waiver of Right to Elect and of Other Rights.]

The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

COMMENT

The right to homestead allowance is conferred by Section 2-401, that to exempt property by Section 2-402, and that to family allowance by Section 2-403. The right to renounce interests passing by testate or intestate succession is recognized by Section 2-801. The provisions of this section, permitting a spouse or prospective spouse to waive all statutory rights in the other spouse's property seem desirable in view of the common and commendable desire of parties to second and later marriages to insure that property derived from prior spouses passes at death to the issue of the prior spouses instead of to the newly acquired spouse. The operation of a property settlement as a waiver and renunciation takes care of the situation which arises when a spouse dies while a divorce suit is pending.

Section 2-205. [Proceeding for Elective Share; Time Limit.]

(a) The surviving spouse may elect to take his elective share in the augmented net estate by filing in the Court and mailing or delivering to the personal representative a petition for the elective share within 6 months after the publication of notice to creditors for filing claims which arose before the death of the decedent. The Court may extend the time for election as it sees fit for cause shown by the surviving spouse before the time for election has expired.

(b) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented net estate whose interests will be adversely affected by the taking of the elective share.

(c) The surviving spouse may withdraw his demand for an elective share at any time before entry of a final determination by the Court.

(d) After notice and hearing, the Court shall determine the amount of the elective share and shall order its payment from the assets of the augmented net estate or by contribution as appears appropriate under Section 2-207. If it appears that a fund or property included in the augmented net estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the Court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any

greater amount than he would have been if relief had been secured against all persons subject to contribution.

(e) The order or judgment of the Court may be enforced as necessary in suit for contribution or payment in other courts of this state or other jurisdictions.

Section 2-206. [Effect of Election on Benefits by Will or Statute.]

(a) The surviving spouse's election of his elective share does not affect the share of the surviving spouse under the provisions of the decedent's will or intestate succession unless the surviving spouse also expressly renounces in the petition for an elective share the benefit of all or any of the provisions. If any provision is so renounced, the property or other benefit which would otherwise have passed to the surviving spouse thereunder is treated, subject to contribution under subsection 2-207(b), as if the surviving spouse had predeceased the testator.

(b) A surviving spouse is entitled to homestead allowance, exempt property and family allowance whether or not he elects to take an elective share and whether or not he renounces the benefits conferred upon him by the will except that, if it clearly appears from the will that a provision therein made for the surviving spouse was intended to be in lieu of these rights, he is not so entitled if he does not renounce the provision so made for him in the will.

COMMENT

The election does not result in a loss of benefits under the will (in the absence of renunciation) because those benefits are charged against the elective share under Sections 2-201, 2-202 and 2-207(a).

Section 2-207. [Charging Spouse With Gifts Received; Liability of Others For Balance of Elective Share.]

(a) In the proceeding for an elective share, property which is part of the augmented estate which passes or has passed to the surviving spouse by testate or intestate succession or other means and which has not been renounced, including that described in Section 2-202(3), is applied first to satisfy the elective share and to reduce the amount due from other recipients of portions of the augmented estate.

(b) Remaining property of the augmented estate is so applied that liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein.

(c) Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate.

COMMENT

Sections 2-401, 2-402 and 2-403 have the effect of giving a spouse certain exempt property and allowances in addition to the amount of the elective share.

PART 3

SPOUSE AND CHILDREN UNPROVIDED FOR IN WILLS

Section 2-301. [Omitted Spouse.]

(a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 3-902.

COMMENT

Section 2-508 provides that the spouse to have if he had a will is not revoked by a change of circumstances occurring subsequent to its execution other than as described by that section. This section reflects the view that the intestate share of the spouse is what the decedent would want the spouse to have if he had thought about the relationship of his old will to the new situation. The effect of this section should be to reduce the number of instances where a spouse will claim an elective share.

Section 2-302. [Pretermitted Children.]

(a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

(1) it appears from the will that the omission was intentional;

(2) when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or

(3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate

equal in value to that which he would have received if the testator had died intestate.

(c) In satisfying a share provided by this section, the devise made by the will abate as provided in Section 3-902.

COMMENT

This section provides for both the case where a child was born or adopted after the execution of the will and not foreseen at the time and thus not provided for in the will, and the rare case where a testator omits one of his existing children because of mistaken belief that the child is dead.

Although the sections dealing with advancement and ademption by satisfaction (2-110 and 2-612) provide that a gift during lifetime is not an advancement or satisfaction unless the testator's intent is evidenced in writing, this section permits oral evidence to establish a testator's intent that lifetime gifts or nonprobate transfers such as life insurance or joint accounts are in lieu of a testamentary provision for a child born or adopted after the will. Here

there is no real contradiction of testamentary intent, since there is no provision in the will itself for the omitted child.

To preclude operation of this section it is not necessary to make any provision, even nominal in amount, for a testator's present or future children; a simple recital in the will that the testator intends to make no provision for then living children or any the testator thereafter may have would meet the requirement of (a) (1).

Under subsection (c) and Section 3-902, any intestate estate would first be applied to satisfy the share of a pretermitted child.

This section is not intended to alter the rules of evidence applicable to statements of a decedent.

PART 4

EXEMPT PROPERTY AND ALLOWANCES

GENERAL COMMENT

This part describes certain rights and values to which a surviving spouse and certain children of a deceased *domiciliary* are entitled in preference over unsecured creditors of the estate and persons to whom the estate may be devised by will. If there is a surviving spouse, all of the values described in this Part, which total \$8,500 plus whatever is allowed to the spouse for support during administration, pass to the spouse. Minor or dependent children become entitled to the homestead exemption of \$5,000 and to support allowances if there is no spouse, and may receive some of the support allowance if they live apart from the surviving spouse. The exempt property section confers rights on the spouse, if any, or on all children, to \$3,500 in certain chattels, or funds if the unencumbered value of chattels is below the \$3,500 level. This provision is designed in part to relieve a personal representative of the duty to sell household chattels when there are children who will have them.

These family protection provisions supply the basis for the important small estate provisions of Article III, Part 12.

States adopting the Code may see fit to alter the dollar amounts suggested in these sections, or to vary the terms and conditions in other ways so as to accommodate existing traditions. Although creditors of estates would be aided somewhat if all family exemption provisions relating to probate estates were the same throughout the country, there is relatively less need for uniformity of law regarding these provisions than is true of any of the other parts of this article. Still, it is quite important for all states to limit their homestead, allowance and exempt property provisions, if any, so that they apply only to estates of decedents who were domiciliaries of the state.

Notice that Section 2-104 imposes a requirement of survival of the decedent for 120 hours on any spouse or child claiming under this Part.

Section 2-401. [Homestead Allowance.]

A surviving spouse of a decedent who was domiciled in this state is entitled to a homestead allowance of [\$5,000]. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to [\$5,000] divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share

passing to the surviving spouse or minor or dependent child by the will of the decedent unless otherwise provided, by intestate succession or by way of elective share.

COMMENT

See Section 2-802 for the definition of "spouse" which controls in this Part. Also, see Section 2-104. Waiver of homestead is covered by Section 2-204. "Election" between the provision of a will and homestead is covered by Section 2-206.

A set dollar amount for homestead allowance was dictated by the desirability of having a certain level below which administration may be dispensed with or be handled summarily, without regard to the size of allowances under Section 2-402. The "small estate" line is controlled largely, though not entirely, by the size of

the homestead allowance. This is because Part 12 of Article III dealing with small estates rests on the assumption that the only justification for keeping a decedent's assets from his creditors is to benefit the decedent's spouse and children.

Another reason for a set amount is related to the fact that homestead allowance may prefer a decedent's minor or dependent children over his other children. It was felt desirable to minimize the consequence of application of an arbitrary age line among children of the testator.

[Section 2-401A. [Constitutional Homestead.]]

The value of any constitutional right of homestead in the family home received by a surviving spouse or child shall be charged against that spouse or child's homestead allowance to the extent that the family home is part of the decedent's estate or would have been but for the homestead provision of the constitution.]

COMMENT

This optional section is designed for adoption only in states with a constitutional homestead provision. The value of the surviving spouse's constitutional right of homestead may be con-

siderably less than the full value of the family home if the constitution gives her only a terminable life estate enjoyable in common with minor children.

Section 2-402. [Exempt Property.]

In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding \$3,500 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances and personal effects. If there is no

surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than \$3,500, or if there is not \$3,500 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the \$3,500 value. Rights to exempt property have priority over all claims against the estate, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share.

COMMENT

Unlike the exempt values described in Sections 2-401 and 2-403, the exempt values described in this section are available in a case where the decedent left no spouse but left only adult children. The possible difference between beneficiaries of the exemptions described by Sections 2-401 and

2-403, and this section, explain the provision in this section which establishes priorities.

Section 2-204 covers waiver of exempt property rights, and Section 2-206 covers the question of whether a decedent's will may put a spouse to an election with reference to exemptions.

Section 2-403. [Family Allowance.]

In addition to the right to homestead allowance and exempt property, if the decedent was domiciled in this state, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody; but in case any minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his guardian or other person having his care and custody, and partially to the spouse, as

their needs may appear. The family allowance is exempt from and has priority over all claims but not over the homestead allowance.

The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates his right to allowances not yet paid.

COMMENT

The allowance provided by this section does not qualify for the marital deduction under the Federal Estate Tax Act because the interest is terminable. A broad code must provide the best possible protection for the family in all cases, even though this may not provide desired tax advantages for certain larger estates. In estates falling in the federal estate tax bracket where careful planning may be expected, it is important to the operation of formula clauses that the family allowance be clearly terminable or clearly nonterminable. With the proposed section clearly creating a terminable interest, estate planners can create a plan which will operate with certainty. Finally, in order to facilitate administration of this allowance without court supervision it is necessary to provide a fairly simple and definite framework.

In determining the amount of the family allowance, account should be taken of both the previous standard of living and the nature of other resources available to the family to meet current living expenses until the estate can be administered and

assets distributed. While the death of the principal income producer may necessitate some change in the standard of living, there must also be a period of adjustment. If the surviving spouse has a substantial income, this may be taken into account. Whether life insurance proceeds payable in a lump sum or periodic installments were intended by the decedent to be used for the period of adjustment or to be conserved as capital may be considered. A living trust may provide the needed income without resorting to the probate estate. If a husband has been the principal source of family support, a wife should not be expected to use her capital to support the family.

Obviously, need is relative to the circumstances, and what is reasonable must be decided on the basis of the facts of each individual case. Note, however, that under the next section the personal representative may not determine an allowance of more than \$500 per month for one year; a Court order would be necessary if a greater allowance is reasonably necessary.

Section 2-404. [Source, Determination and Documentation.]

If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to homestead and exempt property. Subject to this restriction, the surviving spouse, the guardians of the minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make these selections if the surviving-spouse, the children or the guardians of the minor children are unable or fail to do so within a reasonable time or if there are no guardians of the minor children. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. He may determine the family allowance in a lump sum not exceeding \$6,000 or periodic installments not exceeding \$500 per month for one year, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the Court for appropriate relief, which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined.

COMMENT

See Section 3-902, 3-906 and 3-907.

PART 5 WILLS

GENERAL COMMENT

Part 5 of Article II deals with capacity and formalities for execution and revocation of wills. If the will is to be restored to its role as the major instrument for disposition of wealth at death, its execution must be kept simple. The basic intent of these sections is to validate the will whenever possible. To this end, the age for making wills is lowered to eighteen, formalities for a written and attested will are kept to a min-

imum, holographic wills written and signed by the testator are authorized, choice of law as to validity of execution is broadened, and revocation by operation of law is limited to divorce or annulment. However, the statute also provides for a more formal method of execution with acknowledgment before a public officer (the self-proved will).

Section 2-501. [Who May Make a Will.]

Any person 18 or more years of age who is of sound mind may make a will.

COMMENT

This section states a uniform minimum age of eighteen for capacity to execute a will. "Mi-

nor" is defined in Section 1-201, and may involve a different age than that prescribed here.

Section 2-502. [Execution.]

Except as provided for holographic wills, writings within Section 2-513, and wills within Section 2-506, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least 2 persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

COMMENT

The formalities for execution of a witnessed will have been reduced to a minimum. Execution under this section normally would be accomplished by signature of the testator and of two witnesses; each of the persons signing as

witnesses must "witness" any of the following: the signing of the will by the testator, an acknowledgment by the testator that the signature is his, or an acknowledgment by the testator that the document is his will. Signing by

the testator may be by mark under general rules relating to what constitutes a signature; or the will may be signed on behalf of the testator by another person signing the testator's name at his direction and in his presence. There is no requirement that the testator publish the document as his will, or that he request the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other. The testator may sign the will outside the presence of the witnesses if he later acknowledges to the witnesses that the signature is his or

that the document is his will, and they sign as witnesses. There is no requirement that the testator's signature be at the end of the will; thus, if he writes his name in the body of the will and intends it to be his signature, this would satisfy the statute. The intent is to validate wills which meet the minimal formalities of the statute.

A will which does not meet these requirements may be valid under Section 2-503 as a holograph.

Section 2-503. [Holographic Will.]

A will which does not comply with Section 2-502 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator.

COMMENT

This section enables a testator to write his own will in his handwriting. There need be no witnesses. The only requirement is that the signature and the material provisions of the will be in the testator's handwriting. By requiring only the "material provisions" to be in the testator's handwriting (rather than requiring, as some existing statutes do, that the will be "entirely" in the testator's handwriting) a holo-

graph may be valid even though immaterial parts such as date or introductory wording be printed or stamped. A valid holograph might even be executed on some printed will forms if the printed portion could be eliminated and the handwritten portion could evidence the testator's will. For persons unable to obtain legal assistance, the holographic will may be adequate.

Section 2-504. [Self-proved Will.]

An attested will may at the time of its execution or at any subsequent date be made self-proved, by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of this State, and evidenced by the officer's certificate,

under official seal, attached or annexed to the will in form and content substantially as follows:

THE STATE OF _____
COUNTY OF _____

We, _____, _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time 18 or more years of age, of sound mind and under no constraint or undue influence.

Testator

Witness

Witness

Subscribed, sworn to and acknowledged before me by _____,
the testator, and subscribed and sworn to before me by _____
and _____, witnesses, this _____ day of _____,

(SEAL)

(Signed) _____

(Official capacity of officer)

COMMENT

A self-proved will may be admitted to probate as provided in Sections 3-303, 3-405 and 3-406 without the testimony of any subscribing witness, but otherwise it is treated no differently than a will not self-proved. Thus, a self-proved will may be contested (except in regard to signature requirements), revoked, or amended by a codicil in exactly the

same fashion as a will not self-proved. The significance of the procedural advantage for a self-proved will is limited to formal testacy proceedings because Section 3-303 dealing with informal probate dispenses with the necessity of testimony of witnesses even though the instrument is not self-proved under this section.

Section 2-505. [Who May Witness.]

(a) Any person generally competent to be a witness may act as a witness to a will.

(b) A will or any provision thereof is not invalid because the will is signed by an interested witness.

COMMENT

This section simplifies the law relating to interested witnesses. Interest no longer disqualifies a person as a witness, nor does it invalidate or forfeit a gift under the will. Of course, the purpose of this change is not to foster use of interested witnesses, and attorneys will continue to use disinterested witnesses in execution of wills. But the rare and innocent use of a member of the testator's family on a home-drawn will would no longer be penalized. This change does not increase appreciably the opportunity for fraud or undue influence. A substantial gift by

will to a person who is one of the witnesses to the execution of the will would itself be a suspicious circumstance, and the gift could be challenged on grounds of undue influence. The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as witness but to use disinterested witnesses.

An interested witness is competent to testify to prove execution of the will, under Section 3-406.

Section 2-506. [Choice of Law as to Execution.]

A written will is valid if executed in compliance with Section 2-502 or 2-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.

COMMENT

This section permits probate of wills in this state under certain conditions even if they are not executed in accordance with the formalities of Section 2-502. Such wills must be in writing but otherwise are valid if they meet the requirements for execution of the law of the place where the will is executed (when

it is executed in another state or country) or the law of testator's domicile, abode or nationality at either the time of execution or at the time of death. Thus, if testator is domiciled in state 1 and executes a typed will merely by signing it without witnesses in state 2 while on vacation there, the Court of this state would rec-

ognize the will as valid if the law of either state 1 or state 2 permits execution by signature alone. Or if a national of Mexico executes a written will in this state which does not meet the requirements of Section 2-502 but meets the requirements of Mexican law, the will would be recognized as validly executed under this section. The purpose of this section is to provide a wide opportunity for validation of expectations of testators. When the Uniform

Probate Code is widely adopted, the impact of this section will become minimal.

A similar provision relating to choice of law as to revocation was considered but was not included. Revocation by subsequent instruments are covered. Revocations by act, other than partial revocations, do not cause much difficulty in regard to choice of laws.

Section 2-507. [Revocation by Writing or by Act.]

A will or any part thereof is revoked

(1) by a subsequent will which revokes the prior will or part expressly or by inconsistency; or

(2) by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction.

COMMENT

Revocation of a will may be by either a subsequent will or an act done to the document. If revocation is by a subsequent will, it must be properly executed. This section employs the traditional language which has been interpreted by the courts in many cases. It leaves to the Court the determination of whether a subsequent will which has no express revocation clause is inconsistent with the prior will so as to revoke it wholly or partially, and in the case of an act done to the document the determination of whether the act is a sufficient burning, tearing, can-

celing, obliteration or destruction and was done with the intent and for the purpose of revoking. The latter necessarily involves exploration of extrinsic evidence, including statements of testator as to intent.

The section specifically permits partial revocation. Each Court is free to apply its own doctrine of dependent relative revocation.

The section does not affect present law in regard to the case of accidental destruction which is later confirmed by revocatory intention.

Section 2-508. [Revocation by Divorce; No Revocation by Other Changes of Circumstances.]

If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of Section 2-802(b). A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of circumstances other than as described in this section revokes a will.

COMMENT

The section deals with what is sometimes called revocation by operation of law. It provides for revocation by a divorce or annulment only. No other change in circumstances operate to revoke the will; this is intended to change the rule in some states that subsequent marriage or marriage plus birth of issue operate to revoke a will. Of course, a specific devise may be adeemed by transfer of the property during the testator's lifetime except as otherwise provided in this Code; although this is occasionally called revocation, it is not within the present section. The provisions with regard to invalid divorce decrees parallel those in

Section 2-802. Neither this section nor 2-802 includes "divorce from bed and board" as an event which affects devises or marital rights on death.

But see Section 2-204 providing that a complete property settlement entered into after or in anticipation of separation or divorce constitutes a renunciation of all benefits under a prior will, unless the settlement provides otherwise.

Although this Section does not provide for revocation of a will by subsequent marriage of the testator, the spouse may be protected by Section 2-301 or an elective share under Section 2-201.

Section 2-509. [Revival of Revoked Will.]

(a) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by acts under Section 2-507, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed.

(b) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect.

COMMENT

This section adopts a limited revival doctrine. If testator executes will no. 1 and later executes will no. 2, there is a question as to whether testator intended to die intestate or have will no. 1 revived as his last will. Under this section will no. 1 can be probated as testator's last will if his intent to that effect can be established. For this purpose testimony as to his statements at the time he revokes will no. 2 or at a later date can be admitted. If will no. 2 is revoked by a third will, will no. 1 would remain revoked except to the extent that will no. 3 showed an intent to have will no. 1 effective.

Section 2-510. [Incorporation by Reference.]

Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

Section 2-511. [Testamentary Additions to Trusts.]

A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will to the trustee of a trust established or to be established by the testator or by the testator and some other person or by some other person (including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts) if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will or in the valid last will of a person who

has predeceased the testator (regardless of the existence, size, or character of the corpus of the trust). The devise is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised (1) is not deemed to be held under a testamentary trust of the testator but becomes a part of the trust to which it is given and (2) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator (regardless of whether made before or after the execution of the testator's will), and, if the testator's will so provides, including any amendments to the trust made after the death of the testator. A revocation or termination of the trust before the death of the testator causes the devise to lapse.

COMMENT

This is Section 1 of the Uniform Testamentary Additions to Trusts Act.

Section 2-512. [Events of Independent Significance.]

A will may dispose of property by reference to acts and events which have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of a will of another person is such an event.

Section 2-513. [Separate Writing Identifying Bequest of Tangible Property.]

Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, and securities, and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by him and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be

altered by the testator after its preparation; and it may be a writing which has no significance apart from its effect upon the dispositions made by the will.

COMMENT

As part of the broader policy of effectuating a testator's intent and of relaxing formalities of execution, this section permits a testator to refer in his will to a separate document disposing of certain tangible personalty. The separate document may be prepared after execution of the will, so

would not come within Section 2-510 on incorporation by reference. It may even be altered from time to time. It need only be either in the testator's handwriting or signed by him. The typical case would be a list of personal effects and the persons whom the testator desired to take specified items.

PART 6

RULES OF CONSTRUCTION

GENERAL COMMENT

Part 6 deals with a variety of construction problems which commonly occur in wills. All of the "rules" set forth in this part yield to a contrary intent expressed in the will and are therefore merely presumptions. Some of the sections are found in all states, with some variation in wording; others are relatively new. The sections deal with such problems as death before the testator (lapse), the inclusiveness of the will as to

property of the testator, effect of failure of a gift in the will, change in form of securities specifically devised, ademption by reason of fire, sale and the like, exoneration, exercise of power of appointment by general language in the will, and the kinds of persons deemed to be included within various class gifts which are expressed in terms of family relationships.

Section 2-601. [Requirement That Devisee Survive Testator by 120 Hours.]

A devisee who does not survive the testator by 120 hours is treated as if he predeceased the testator, unless the will of decedent contains some language dealing explicitly with simultaneous deaths or deaths in a common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will.

COMMENT

This parallels Section 2-104 requiring an heir to survive by 120 hours in order to inherit.

Section 2-602. [Choice of Law as to Meaning and Effect of Wills.]

The meaning and legal effect of a disposition in a will shall be determined by the local law of a particular state selected by the testator in his instrument unless the application of that law is contrary to the public policy of this state otherwise applicable to the disposition.

COMMENT

New York Estates, Powers & Trusts Law Sec. 3-5.1(h) and Illinois Probate Act Sec. 896(b) direct respect for a testator's

choice of local law with reference to personal and intangible property situated in the enacting state. This provision goes further and enables a testator to select the law of a particular state for purposes of interpreting his will without regard to the location of property covered thereby. So

long as local public policy is accommodated, the section should be accepted as necessary and desirable to add to the utility of wills. Choice of law regarding formal validity of a will is in Sec. 2-506. See also Sections 3-202 and 3-408.

Section 2-603. [Rules of Construction and Intention.]

The intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this Part apply unless a contrary intention is indicated by the will.

Section 2-604. [Construction That Will Passes All Property; After-Acquired Property.]

A will is construed to pass all property which the testator owns at his death including property acquired after the execution of the will.

Section 2-605. [Anti-lapse; Deceased Devisee; Class Gifts.]

If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will.

COMMENT

This section prevents lapse by death of a devisee before the testator if the devisee is a relative and leaves issue who survives the testator. A relative is one related to the testator by kinship and is limited to those who can inherit under Section 2-103 (through grandparents); it does not include persons related

by marriage. Issue include adopted persons and illegitimates to the extent they would inherit from the devisee; see Section 1-201 and 2-109. Note that the section is broader than some existing anti-lapse statutes which apply only to devises to children and other descendants, but is narrower than those which apply

to devises to any person. The section is expressly applicable to class gifts, thereby eliminating a frequent source of litigation. It also applies to the so-called "void" gift, where the devisee is dead at the time of execution of the will. This, though contrary to some decisions, seems justified. It still seems likely that the testator would want the issue of a person included in a class term but dead when the will is made to be treated like the issue of another

member of the class who was alive at the time the will was executed but who died before the testator.

The five day survival requirement stated in Section 2-601 does not require issue who would be substituted for their parent by this section to survive *their parent* by any set period.

Section 2-106 describes the method of division when a taking by representation is directed by the Code.

Section 2-606. [Failure of Testamentary Provision.]

(a) Except as provided in Section 2-605 if a devise other than a residuary devise fails for any reason, it becomes a part of the residue.

(b) Except as provided in Section 2-605 if the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, his share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue.

COMMENT

If a devise fails by reason of lapse and the conditions of Section 2-605 are met, the latter section governs rather than this section. There is also a special rule for renunciation contained in

Section 2-801; a renounced devise may be governed by either Section 2-605 or the present section, depending on the circumstances.

Section 2-607. [Change in Securities; Accessions; Nonademption.]

(a) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

(1) as much of the devised securities as is a part of the estate at time of the testator's death;

(2) any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity excluding any acquired by exercise of purchase options;

(3) securities of another entity owned by the testator as a result of a merger, consolidation, reorganization or other similar action initiated by the entity; and

(4) any additional securities of the entity owned by the testator as a result of a plan of reinvestment if it is a regulated investment company.

(b) Distributions prior to death with respect to a specifically devised security not provided for in subsection (a) are not part of the specific devise.

COMMENT

Subsection (b) is intended to do not pass as a part of the specific devise even though paid after that cash dividends declared and death. See Section 4, Revised Uniform Principal and Income Act.

Section 2-608. [Nonademption of Specific Devises in Certain Cases; Sale by Conservator; Unpaid Proceeds of Sale, Condemnation or Insurance.]

(a) If specifically devised property is sold by a conservator, or if a condemnation award or insurance proceeds are paid to a conservator as a result of condemnation, fire, or casualty, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the condemnation award, or the insurance proceeds. This subsection does not apply if subsequent to the sale, condemnation, or casualty, it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by one year. The right of the specific devisee under this subsection is reduced by any right he has under subsection (b).

(b) A specific devisee has the right to the remaining specifically devised property and:

(1) any balance of the purchase price (together with any security interest) owing from a purchaser to the testator at death by reason of sale of the property;

(2) any amount of a condemnation award for the taking of the property unpaid at death;

(3) any proceeds unpaid at death on fire or casualty insurance on the property; and

(4) property owned by testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation.

Section 2-609. [Non-Exoneration.]

A specific devise passes subject to any security interest existing at the date of death, without right of exoneration; regardless of a general directive in the will to pay debts.

COMMENT

See Section 3-814 empowering the personal representative to pay an encumbrance under some circumstances; the last sentence of that section makes it clear that such payment does not increase the right of the specific devisee. The present section governs the

substantive rights of the devisee. The common law rule of exoneration of the specific devise is abolished by this section, and the contrary rule is adopted.

For the rule as to exempt property, see Section 2-402.

Section 2-610. [Exercise of Power of Appointment.]

A general residuary clause in a will, or a will making general disposition of all of the testator's property, does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other indication of intention to include the property subject to the power.

COMMENT

Although there is some indication that more states will adopt special legislation on powers of appointment, and this Code has therefore generally avoided any provisions relating to powers of appointment, there is great need for uniformity on the subject of exercise by a will purporting to dispose of all of the donee's property, whether by a standard residuary clause or a general recital of property passing under the will. Although a substantial number of states have legislation to the effect that a will with a general residuary clause does manifest an intent to exercise a power, the contrary rule is stated in the present section for two reasons: (1) this is still the majority rule in the United States, and (2) most powers of appoint-

ment are created in marital deduction trusts and the donor would prefer to have the property pass under his trust instrument unless the donee affirmatively manifests an intent to exercise the power.

Under this section and Section 2-603 the intent to exercise the power is effective if it is "indicated by the will." This wording permits a Court to find the manifest intent if the language of the will interpreted in light of all the surrounding circumstances shows that the donee intended an exercise, except, of course, if the donor has conditioned exercise on an express reference to the original creating instrument. In other words, the modern liberal rule on interpretation of the donee's will would be available.

Section 2-611. [Construction of Generic Terms to Accord with Relationships as Defined for Intestate Succession.]

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 relationships for purposes of intestate succession, but a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father.

COMMENT

The purpose of this section is to of gifts, usually class gifts, in facilitate a modern construction wills.

Section 2-612. [Ademption by Satisfaction.]

Property which a testator gave in his lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part, only if the will provides for deduction of the lifetime gift, or the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in writing that the gift is in satisfaction. For purpose of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first.

COMMENT

This section parallels Section 2-110 on advancements and follows the same policy of requiring written evidence that lifetime gifts are to be taken into account in distribution of an estate, whether testate or intestate. Although Courts traditionally call this "ademption by satisfaction" when a will is involved, and "advancement" when the estate is intestate, the difference in terminology is not significant. Some wills expressly provide for lifetime advances by a hotchpot clause. Where the will is silent, the above section would require either the testator to declare in writing that the gift is an advance or satisfaction or the devisee to acknowledge the same in

writing. The second sentence on value accords with Section 2-110 and would apply if property such as stock is given. If the devise is specific, a gift of the specific property during lifetime would adeem the devise by extinction rather than by satisfaction, and this section would be inapplicable. If a devisee to whom an advancement is made predeceases the testator and his issue take under 2-605, they take the same devise as their ancestor; if the devise is reduced by reason of this section as to the ancestor, it is automatically reduced as to his issue. In this respect the rule in testacy differs from that in intestacy; see Section 2-110.

PART 7

CONTRACTUAL ARRANGEMENTS RELATING TO DEATH

(See also Article VI)

Section 2-701. [Contracts Concerning Succession.]

A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this Act, can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

COMMENT

It is the purpose of this section to tighten the methods by which contracts concerning succession may be proved. Oral contracts not to revoke wills have given rise to much litigation in a number of states; and in many states if two persons execute a single document as their joint will, this gives rise to a presumption that the parties had contracted not to revoke the will except by consent of both.

This section requires that either the will must set forth the ma-

terial provisions of the contract, or the will must make express reference to the contract and extrinsic evidence prove the terms of the contract, or there must be a separate writing signed by the decedent evidencing the contract. Oral testimony regarding the contract is permitted if the will makes reference to the contract, but this provision of the statute is not intended to affect normal rules regarding admissibility of evidence.

PART 8
GENERAL PROVISIONS

GENERAL COMMENT

Part 8 contains three general provisions which cut across both testate and intestate succession. The first section permits renunciation; the existing law in most states permits renunciation of gifts by will but not by intestate succession, a distinction which cannot be defended on policy grounds. The second section deals with the effect of divorce and separation on the right to elect against a will, exempt property and allowances, and an intestate share. The last section, an optional provision, spells out the legal consequence of murder on the right of the murderer to take as heir, devisee, joint tenant or life insurance beneficiary.

Section 2-801. [Renunciation of Succession.]

(a) A person (or his personal representative) who is an heir, devisee, person succeeding to a renounced interest, beneficiary under a testamentary instrument or person designated to take pursuant to a power of appointment exercised by a testamentary instrument may renounce in whole or in part the succession to any property or interest therein by filing a written instrument within the time and at the place hereinafter provided. The instrument shall (i) describe the property or part thereof or interest therein renounced, (ii) be signed by the person renouncing and (iii) declare the renunciation and the extent thereof.

(b) The writing specified in (a) must be filed within [6] months after the death of the decedent or the donee of the power, or if the taker of the property is not then finally ascertained not later than [6] months after the event by which the taker or the interest is finally ascertained. The writing must be filed in the Court of the county where proceedings concerning the decedent's estate are pending, or where they would be pending if commenced. A copy of the writing also shall be mailed to the personal representative of the decedent.

(c) Unless the decedent or donee of the power has otherwise indicated by his will, the interest renounced, and any future interest which is to take effect in possession or enjoyment at or after the termination of the interest renounced, passes as if the person renouncing had predeceased the decedent, or if the person renouncing is one designated to take pursuant to a power of appointment exercised by a testamentary instrument, as if the person renouncing had predeceased the donee of the

power. In every case the renunciation relates back for all purposes to the date of death of the decedent or the donee, as the case may be.

(d) Any (1) assignment, conveyance, encumbrance, pledge or transfer of property therein or any contract therefor, (2) written waiver of the right to renounce or any acceptance of property by an heir, devisee, person succeeding to a renounced interest, beneficiary or person designated to take pursuant to a power of appointment exercised by testamentary instrument, or (3) sale or other disposition of property pursuant to judicial process, made before the expiration of the period in which he is permitted to renounce, bars the right to renounce as to the property.

(e) The right to renounce granted by this section exists irrespective of any limitation on the interest of the person renouncing in the nature of a spendthrift provision or similar restriction.

(f) This section does not abridge the right of any person to assign, convey, release, or renounce any property arising under any other section of this Code or other statute.

(g) Any interest in property which exists on the effective date of this section, but which has not then become indefeasibly fixed both in quality and quantity, or the taker of which has not then become finally ascertained, may be renounced after the effective date of this section as provided herein. An interest which has arisen prior to the effective date of this section in any person other than the person renouncing is not destroyed or diminished by any action of the person renouncing taken under this section.

COMMENT

This section is designed to facilitate renunciation in order to aid postmortem planning. Although present law in all states permits renunciation of a devise under a will, the common law did not permit renunciation of an intestate share. There is no reason for such a distinction, and some states have already adopted legislation permitting renunciation of an intestate share. Renunciation may be made for a variety of reasons, including carrying out the decedent's wishes

not expressed in a properly executed will.

Under the rule of this section, renounced property passes as if the renouncing person had failed to survive the decedent. In the case of intestate property, the heir who would be next in line in succession would take; often this will be the issue of the renouncing person, taking by representation. For consistency the same rule is adopted for renunciation by a devisee; if the devisee is a relative who leaves

issue surviving the testator, the issue will take under Section 2-605; otherwise disposition will be governed by Section 2-606 and general rules of law.

The section limits renunciation to six months after the death of the decedent or if the taker of the property is not ascertained at that time, then six months after he is ascertained. If the personal representative is concerned about

closing the estate within that six months period in order to make distribution, he can obtain a waiver of the right to renounce. Normally this should be no problem, since the heir or devisee cannot renounce once he has taken possession of the property.

The presence of a spendthrift clause does not prevent renunciation under this section.

Section 2-802. [Effect of Divorce, Annulment, and Decree of Separation.]

(a) A person who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he is married to the decedent at the time of death. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section.

(b) For purposes of Parts 1, 2, 3 & 4 of this Article, a surviving spouse does not include:

(1) a person who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each to the other, or subsequently live together as man and wife;

(2) a person who, following a decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third person; or

(3) a person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

COMMENT

See Section 2-508 for similar provisions relating to the effect of divorce to revoke devises to a spouse.

Although some existing statutes bar the surviving spouse for desertion or adultery, the present section requires some definitive

legal act to bar the surviving spouse. Normally, this is divorce. Subsection (a) states an obvious proposition, but subsection (b) deals with the difficult problem of invalid divorce or annulment, which is particularly frequent as to foreign divorce decrees but may arise as to a local decree

where there is some defect in jurisdiction; the basic principle underlying these provisions is estoppel against the surviving spouse. Where there is only a legal separation, rather than a divorce, succession patterns are not affected; but if the separation is accompanied by a complete property settlement, this may operate under Section 2-204 as a renunciation of benefits under a prior will and by intestate succession.

[Section 2-803. [Effect of Homicide on Intestate Succession, Wills, Joint Assets, Life Insurance and Beneficiary Designations.]]

(a) A surviving spouse, heir or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the will or under this Article, and the estate of decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

(b) Any joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and the killer has no rights by survivorship. This provision applies to joint tenancies [and tenancies by the entirety] in real and personal property, joint accounts in banks, savings and loan associations, credit unions and other institutions, and any other form of co-ownership with survivorship incidents.

(c) A named beneficiary of a bond, life insurance policy, or other contractual arrangement who feloniously and intentionally kills the principal obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent.

(d) Any other acquisition of property or interest by the killer shall be treated in accordance with the principles of this section.

(e) A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this section. In the absence of a conviction of felonious and intentional killing the Court may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of this section.

(f) This section does not affect the rights of any person who, before rights under this section have been adjudicated, purchases from the killer for value and without notice property which the killer would have acquired except for this section,

but the killer is liable for the amount of the proceeds or the value of the property. Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this section unless prior to payment it has received at its home office or principal address written notice of a claim under this section.]

COMMENT

This section is bracketed to indicate that it may be omitted by an enacting state without difficulty.

A growing group of states have enacted statutes dealing with the problems covered by this section, and uniformity appears desirable. The section is confined to intentional and felonious homicide and excludes the accidental manslaughter killing.

At first it may appear that the matter dealt with is criminal in nature and not a proper matter for probate courts. However, the concept that a wrongdoer may not profit by his own wrong is a civil concept, and the probate court is the proper forum to determine the effect of killing on succession to property of the decedent. There are numerous situations where the same conduct gives rise to both criminal and civil consequences. A killing may result in criminal prosecution for murder and civil litigation by the murdered person's family under wrongful death statutes. While conviction in the criminal

prosecution under this section treated as conclusive on the matter of succession to the murdered person's property, acquittal does not have the same consequences. This is because different considerations as well as a different burden of proof enter into the finding of guilty in the criminal prosecution. Hence it is possible that the defendant on a murder charge may be found not guilty and acquitted, but if the same person claims as an heir or devisee of the decedent, he may in the probate court be found to have feloniously and intentionally killed the decedent and thus be barred under this section from sharing in the estate. An analogy exists in the tax field, where a taxpayer may be acquitted of tax fraud in a criminal prosecution but found to have committed the fraud in a civil proceeding. In many of the cases arising under this section there may be no criminal prosecution because the murderer has committed suicide.

PART 9

CUSTODY AND DEPOSIT OF WILLS

Section 2-901. [Deposit of Will With Court in Testator's Lifetime.]

A will may be deposited by the testator or his agent with any Court for safekeeping, under rules of the Court. The will shall be kept confidential. During the testator's lifetime a deposited will shall be delivered only to him or to a person authorized in writing signed by him to receive the will. A conservator may be allowed to examine a deposited will of a protected testator under procedures designed to maintain the confidential character of the document to the extent possible, and to assure that it will be resealed and left on deposit after the examination. Upon being informed of the testator's death, the Court shall notify any person designated to receive the will and deliver it to him on request; or the Court may deliver the will to the appropriate Court.

COMMENT

Many states already have statutes permitting deposit of wills during a testator's lifetime. Most of these statutes have elaborate provisions governing purely administrative matters: how the will is to be enclosed in a sealed wrapper, what is to be endorsed on the wrapper, the form of receipt or certificate given to the testator, the fee to be charged, how the will is to be opened after testator's death and who is to be notified. Under this section, details have been left to Court rule, except as other relevant statutes such as one governing fees may apply.

It is, of course, vital to maintain the confidential nature of deposited wills. However, this obviously does not prevent the opening of the will after the death of the testator if necessary in order to determine the executor or other interested persons to be notified. Nor should it

prevent opening the will to microfilm for confidential record storage, for example. These matters could again be regulated by Court rule.

It is suggested that in the near future it may be desirable to develop a central filing system regarding the presence of deposited wills, because the mobility of our modern population makes it probable that the testator will not die in the county where his will is deposited. Thus a statute might require that the local registrar notify an appropriate official, that the will is on file; the state official would in effect provide a clearing-house for information on location of deposited wills without disrupting the local administration.

The provision permitting examination of a will of a protected person by the conservator supplements Section 5-427.

Section 2-902. [Duty of Custodian of Will; Liability.]

After the death of a testator and on request of an interested person, any person having custody of a will of the testator shall deliver it with reasonable promptness to a person able to secure its probate and if none is known, to an appropriate Court. Any person who wilfully fails to deliver a will is liable to any person aggrieved for the damages which may be sustained by the failure. Any person who wilfully refuses or fails to deliver a will after being ordered by the Court in a proceeding brought for the purpose of compelling delivery is subject to penalty for contempt of Court.

COMMENT

Model Probate Code Section 63, registrar or clerk, be a universal successor or other person authorized by a Court to accept delivery of a will from a custodian may, in addition to a will.

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PROBATE OF WILLS AND ADMINISTRATION

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GENERAL COMMENT

The provisions of this Article describe the Flexible System of Administration of Decedents' Estates. Designed to be applicable to both intestate and testate estates and to provide persons interested in decedents' estates with as little or as much by way of procedural and adjudicative safeguards as may be suitable under varying circumstances, this system is the heart of the Uniform Probate Code.

The organization and detail of the system here described may be expressed in varying ways and some states may see fit to reframe parts of this Article to better accommodate local institutions. Variations in language from state to state can be tolerated without loss of the essential purposes of procedural uniformity and flexibility, if the following essential characteristics are carefully protected in the re-drafting process:

(1) Post-mortem probate of a will must occur to make a will effective and appointment of a personal representative by a public official after the decedent's death is required in order to create the duties and powers attending the office of personal representative. Neither are compelled, however, but are left to be obtained by persons having an interest in the consequence of probate or appointment. Estates descend at death to successors identified by any probated will, or to heirs if no will is probated, subject to rights which may be implemented through administration.

(2) Two methods of securing probate of wills which include a non-adjudicative determination (informal probate) on the one hand, and a judicial determination after notice to all interested persons (formal probate) on the other, are provided.

(3) Two methods of securing appointment of a personal representative which include appointment without notice and without final adjudication of matters relevant to priority for appointment (informal appointment), on the one hand, and appointment by judicial order after notice to interested persons (formal appointment) on the other, are provided.

(4) A five day waiting period from death preventing informal probate or informal appointment of any but a special administrator is required.

(5) Probate of a will by informal or formal proceedings or an adjudication of intestacy may occur without any attendant requirement of appointment of a personal representative.

(6) One judicial, in rem, proceeding encompassing formal probate of any wills (or a determination after notice that the decedent left no will), appointment of a personal representative and complete settlement of an estate under continuing supervision of the Court (supervised administration)

tion) is provided for testators and persons interested in a decedent's estate, whether testate or intestate, who desire to use it.

(7) Unless supervised administration is sought and ordered, persons interested in estates (including personal representatives, whether appointed informally or after notice) may use an "in and out" relationship to the Court so that any question or assumption relating to the estate, including the status of an estate as testate or intestate, matters relating to one or more claims, disputed titles, accounts of personal representatives, and distribution, may be resolved or established by adjudication after notice without necessarily subjecting the estate to the necessity of judicial orders in regard to other or further questions or assumptions.

(8) The status of a decedent in regard to whether he left a valid will or died intestate must be resolved by adjudication after notice in proceedings commenced within three years after his death. If not so resolved, any will probated informally becomes final, and if there is no such probate, the status of the decedent as intestate is finally determined, by a statute of limitations which bars probate and appointment unless requested within three years after death.

(9) Personal representatives appointed informally or after notice, and whether supervised or not, have statutory powers enabling them to collect, protect, sell, distribute and otherwise handle all steps in administration

without further order of the Court, except that supervised personal representatives may be subjected to special restrictions on power as endorsed on their letters.

(10) Purchasers from personal representatives and from distributees of personal representatives are protected so that adjudications regarding the testacy status of a decedent or any other question going to the propriety of a sale are not required in order to protect purchasers.

(11) Provisions protecting a personal representative who distributes without adjudication are included to make nonadjudicated settlements feasible.

(12) Statutes of limitation bar creditors of the decedent who fail to present claims within four months after legal advertising of the administration and unsecured claims not previously barred by non-claim statutes are barred after three years from the decedent's death.

Overall, the system accepts the premise that the Court's role in regard to probate and administration, and its relationship to personal representatives who derive their power from public appointment, is wholly passive until some interested person invokes its power to secure resolution of a matter. The state, through the Court, should provide remedies which are suitable and efficient to protect any and all rights regarding succession, but should refrain from intruding into family affairs unless relief is requested, and limit its relief to that sought.

PART 1

GENERAL PROVISIONS

Section 3-101. [Devolution of Estate at Death; Restrictions.]

The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this Code to facilitate the prompt settlement of estates. Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estate, or in the absence of testamentary disposition, to his heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to homestead allowance, exempt property and family allowance, to rights of creditors, elective share of the surviving spouse, and to administration.

ALTERNATIVE SECTION FOR COMMUNITY
PROPERTY STATES

[Section 3-101A. [Devolution of Estate at Death; Restrictions.]]

The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this Code to facilitate the prompt settlement of estates. Upon the death of a person, his separate property devolves to the persons to whom it is devised by his last will, or to those indicated as substitutes for them in cases involving lapse, renunciation or other circumstances affecting the devolution of testate estates, or in the absence of testamentary disposition to his heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting the devolution of intestate estates, and upon the death of a husband or wife, the decedent's share of their community property devolves to the persons to whom it is devised by his last will, or in the absence of testamentary disposition, to his heirs, but all of their community property which is under the management and control of the decedent is subject to his debts and administration, and that portion of their community property which is not under the management and control of the decedent but which is necessary to carry out the provisions of his will is

subject to administration; but the devolution of all the above described property is subject to rights to homestead allowance, exempt property and family allowances, to renunciation to rights of creditors, [elective share of the surviving spouse] and to administration.]

COMMENT

In its present form, this section will not fit existing concepts concerning community property in all states recognizing community ownership. States differ in respect to how much testamentary power a decedent has over the community. Also, some changes of language may be necessary to reflect differing views concerning what estate is subject to "sep-

arate" and "community" debts. The reference to certain family rights is not intended to suggest that such rights relate to the survivor's interest in any community property. Rather, the assumption is that such rights relate only to property passing from the decedent at his death; e. g., his half of community property and his separate property.

Section 3-102. [Necessity of Order of Probate For Will.]

Except as provided in Section 3-1201, to be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of informal probate by the Registrar, or an adjudication of probate by the Court, except that a duly executed and unrevoked will which has not been probated may be admitted as evidence of a devise if (1) no Court proceeding concerning the succession or administration of the estate has occurred, and (2) either the devisee or his successors and assigns possessed the property devised in accordance with the provisions of the will, or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings.

COMMENT

The basic idea of this section follows Section 85 of the Model Probate Code. The exception referring to Section 3-1201 relates to affidavit procedures which are authorized for collection of estates worth less than \$5,000.

Section 3-107 and various sections in Parts 3 and 4 of this Article make it clear that a will may be probated without appointment of a personal repre-

sentative, including any nominated by the will.

The requirement of probate stated here and the limitations on probate provided in 3-108 mean that questions as to testacy may be eliminated simply by the running of time. Under these sections, an informally probated will cannot be questioned after the later of three years from the decedent's death or one year from

the probate whether or not an executor was appointed, or, if an executor was appointed, without regard to whether the estate has been distributed. If the decedent is believed to have died without a will, the running of three years from death bars probate of a late-discovered will and so makes the assumption of intestacy conclusive.

The exceptions to the section (other than the exception relevant to small estates) are not intended to accommodate cases of late-discovered wills. Rather, they are designed to make the probate requirement inapplicable where circumstances led survivors of a decedent to believe that there was no point to probating a will of which they may have had knowledge. If any will was probated within three years of death, or if letters of administration were issued in this period, the exceptions to the section are inapplicable. If there has been no proceeding in probate, persons seeking to establish title by an unprobated will must show, with *reference to the estate they claim*, either that it has been possessed by those to whom it was devised or that it has been

unknown to the decedent's heirs or devisees and not possessed by any.

It is to be noted, also, that devisees who are able to claim under one of the exceptions to this section may not obtain probate of the will or administration of the estate to assist them in their efforts to obtain the estate in question. The exceptions are to a rule which bars admission of a will into evidence, rather than to the section barring late probate and late appointment of personal representatives. Still, the exceptions should serve to prevent two "hard" cases which can be imagined readily. In one, a surviving spouse fails to seek probate of a will, giving her the entire estate of the decedent because she is informed or believes that all of her husband's property was held by them jointly, with right of survivorship. Later, it is discovered that she was mistaken as to the nature of her husband's title. The other case involves a devisee who sees no point to securing probate of a will in his favor because he is unaware of any estate. Subsequently, valuable rights of the decedent are discovered.

Section 3-103. [Necessity of Appointment For Administration.]

Except as otherwise provided in Article IV, to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the Court or Registrar, qualify and be issued letters. Administration of an estate is commenced by the issuance of letters.

COMMENT

This section makes it clear that the status of personal representative. "Qualification" is dealt with in Section 3-601. "Letters"

are the subject of Section 1-305. Section 3-701 is also related, since it deals with the time of accrual of duties and powers of personal representatives.

See 3-108 for the time limit on requests for appointment of personal representatives.

Section 3-104. [Claims Against Decedent; Necessity of Administration.]

No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this Article. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in Section 3-1004 or from a former personal representative individually liable as provided in Section 3-1005. This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.

COMMENT

This and sections of Part 8, the estate under circumstances which leave a creditor's claim unbarred, the creditor is permitted to enforce his claims against distributees, as well as against the personal representative if any duty owed to creditors under 3-807 or 3-1003 has been breached. The methods for closing estates are outlined in Sections 3-1001 through 3-1003. Termination of appointment under Sections 3-608 et seq. may occur though the estate is *not* closed and so may be irrelevant to the question of whether creditors may pursue distributees.

Section 3-105. [Proceedings Affecting Devolution and Administration; Jurisdiction of Subject Matter.]

Persons interested in decedents' estates may apply to the Registrar for determination in the informal proceedings provided in this Article, and may petition the Court for orders in formal proceedings within the Court's jurisdiction including but not limited to those described in this Article. The Court has exclusive jurisdiction of formal proceedings to determine how decedents' estates subject to the laws of this state are to be administered, expended and distributed. The Court has concurrent jurisdiction of any other action or proceeding concerning a succession or to which an estate, through a personal representative, may be a party, including actions to determine title to property alleged to belong to the estate, and of any action or proceeding in which property distributed by a personal representative or its value is sought to be subjected to rights of creditors or successors of the decedent.

COMMENT

This and other sections of Article III contemplate a non-judicial officer who will act on informal application and a judge who will hear and decide formal petitions. See Section 1-307 which permits the judge to perform or delegate the functions of the Registrar. *However, the primary purpose of Article III is to describe functions to be performed by various public officials, rather than to prescribe how these responsibilities should be assigned within a given state or county.* Hence, any of several alternatives to the organizational scheme assumed for purposes of this draft would be acceptable.

For example, a state might assign responsibility for maintenance of probate files and records, and for receiving and acting upon informal applications, to existing, limited power probate offices. Responsibility for hearing and deciding formal petitions would then be assigned to the

court of general jurisdiction of each county or district.

If separate courts or offices are not feasible, it may be preferable to concentrate authority for allocating responsibility respecting formal and informal proceedings in the judge. To do so helps fix responsibility for the total operation of the office. This is the assumption of this draft.

It will be up to each adopting state to select the organizational arrangement which best meets its needs.

If the office with jurisdiction to hear and decide formal petitions is the county or district court of general jurisdiction, there will be little basis for objection to the broad statement of concurrent jurisdiction of this section. However, if a more specialized "estates" court is used, there may be pressure to prevent it from hearing negligence and other actions involving jury trials,

even though it may be given unlimited power to decide other cases to which a personal representative is a party. A system for certifying matters involving jury trials to the general trial court could be provided, although the alternative of permitting the estates court to empanel juries where necessary might not be unworkable. In any event, the jurisdiction of the "estates" or "probate" court in regard to negligence litigation would only be concurrent with that of the gen-

eral trial court. The important point is that the estates court, whatever it is called, should have unlimited power to hear and finally dispose of all matters relevant to determination of the extent of the decedent's estate and of the claims against it. The jury trial question is peripheral.

See the comment to the next section regarding adjustments which might be made in the Code by a state with a single court of general jurisdiction for each county or district.

Section 3-106. [Proceedings Within the Exclusive Jurisdiction of Court; Service; Jurisdiction Over Persons.]

In proceedings within the exclusive jurisdiction of the Court where notice is required by this Code or by rule, interested persons may be bound by the orders of the Court in respect to property in or subject to the laws of this state by notice in conformity with Section 1-401. An order is binding as to all who are given notice of the proceeding though less than all interested persons are notified.

COMMENT

The language in this and the preceding section which divides matters coming before the probate court between those within the court's "exclusive" jurisdiction and those within its "concurrent" jurisdiction would be inappropriate if probate matters were assigned to a branch of a single court of general jurisdiction. The Code could be adjusted to an assumption of a single court in various ways. Any adjusted version should contain a provision permitting the court to hear and settle certain kinds of matters after notice as provided in 1-401. It might be suitable to combine the second sentence of 3-105 and

3-106 into a single section as follows:

"The Court may hear and determine formal proceedings involving administration and distribution of decedents' estates after notice to interested persons in conformity with Section 1-401. Persons notified are bound though less than all interested persons may have been given notice."

An adjusted version also might provide:

"Subject to general rules concerning the proper location of civil litigation and jurisdiction of persons, the Court (meaning

the probate division) may hear and determine any other controversy concerning a succession or to which an estate, through a personal representative, may be a party."

The propriety of this sort of statement would depend upon

whether questions of docketing and assignment, including the division of matters between coordinate branches of the Court, should be dealt with by legislation.

Section 3-107. [Scope of Proceedings; Proceedings Independent; Exception.]

Unless supervised administration as described in Part 5 is involved, (1) each proceeding before the Court or Registrar is independent of any other proceeding involving the same estate; (2) petitions for formal orders of the Court may combine various requests for relief in a single proceeding if the orders sought may be finally granted without delay. Except as required for proceedings which are particularly described by other sections of this Article, no petition is defective because it fails to embrace all matters which might then be the subject of a final order; (3) proceedings for probate of wills or adjudications of no will may be combined with proceedings for appointment of personal representatives; and (4) a proceeding for appointment of a personal representative is concluded by an order making or declining the appointment.

COMMENT

This section and others in Article III describe a system of administration of decedents' estates which gives interested persons control of whether matters relating to estates will become occasions for judicial orders. Sections 3-501 through 3-505 describe supervised administration, a judicial proceeding which is continuous throughout administration. It corresponds with the theory of administration of decedents' estates which prevails in many states. See, section 62, Model Probate Code. If supervised administration is not requested, persons interested in an estate may use combinations of

the formal proceedings (order by judge after notice to persons concerned with the relief sought), informal proceedings (request for the limited response that non-judicial personnel of the probate court are authorized to make in response to verified application) and filings provided in the remaining Parts of Article III to secure authority and protection needed to administer the estate. Nothing except self-interest will compel resort to the judge. When resort to the judge is necessary or desirable to resolve a dispute or to gain protection, the scope of the proceeding if not otherwise prescribed by the Code

is framed by the petition. The securing of necessary jurisdiction over interested persons in a formal proceeding is facilitated by Sections 3-106 and 3-602. 3-201 locates venue for all proceedings at the place where the first proceeding occurred.

Section 3-108. [Probate, Testacy and Appointment Proceedings; Ultimate Time Limit.]

No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than 3 years after the decedent's death, except (1) if a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding; (2) appropriate probate, appointment or testacy proceedings may be maintained in relation to the estate of an absent, disappeared or missing person for whose estate a conservator has been appointed, at any time within three years after the conservator becomes able to establish the death of the protected person; and (3) a proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful, may be commenced within the later of twelve months from the informal probate or three years from the decedent's death. These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate. In cases under (1) or (2) above, the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitations provisions of this Code which relate to the date of death.

COMMENT

This section establishes a basic limitation period of three years within which it may be determined whether a decedent left a will and to commence administration of his estate. But, an exception assures that heirs will have at least one year after an informal probate to initiate a

contest and to secure administration of the estate as intestate.

If no will is probated within three years from death, the section has the effect of making the assumption of intestacy final. If a will has been informally probated within the period, the sec-

tion has the effect of making the informal probate conclusive after three years or within twelve months from informal probate, if later. Heirs or devisees can protect themselves against change within the three years of assumption concerning whether the decedent left a will or died intestate by bringing a formal proceeding shortening the period to that described in Sections 3-412 and 3-413.

A personal representative who has been appointed under an assumption concerning testacy which may be reversed in the three-year period if there has been no formal proceeding, is protected by Section 3-703. It relieves a personal representative of liability for surcharge for certain distributions made pursuant to an informally probated will, or under authority of informally issued letters of administration. Distributees who receive an estate distributed before the three-year period expires where there has been no formal determination accelerating the time for certainty, remain potentially liable to persons determined to be entitled by formal proceedings instituted within the basic period under Sections 3-909 and 3-1006.

Purchasers from personal representatives and distributees may be protected without regard to whether the three-year period has run. See Sections 3-715 and 3-910.

All creditors' claims are barred after three years from death. See Section 3-803(a) (2). Because of this, and since any possibility that letters may be issued

at any time would be seen as a "cloud" on the title of heirs or devisees otherwise secure under 3-101, the three year statute of limitations applies to bar appointment of a personal representative after the basic period has passed. Section 83 of the Model Probate Code barred probate and administration after five years, and other statutes imposing time limits on these proceedings are cited at pp. 307-310 of Model Probate Code. A qualification covers the situation where a closed administration is sought to be re-opened to administer after discovered assets. See Section 3-1008. If there has been no probate or appointment within three years, and if either exception to Section 3-102 applies, devisees under a late-discovered will may use a will to establish their title. But, they may not secure probate of the will, nor may they obtain appointment of a personal representative. The same pattern applies to heirs who, in a case where there has been no administration discover assets after the three year period has run. Such persons will not be able to protect purchasers with the ease of those interested in an estate where a personal representative has been appointed.

The basic premise underlying all of these time provisions is that interested persons who want to assume the risks implicit in the three-year period of limitations should be provided legitimate means by which they can do so. At the same time, parties should be afforded ample opportunity for earlier protection if they want it.

Section 3-109. [Statutes of Limitation on Decedent's Cause of Action.]

No statute of limitation running on a cause of action belonging to a decedent which had not been barred as of the date of his death, shall apply to bar a cause of action surviving the decedent's death sooner than four months after death. A cause of action which, but for this section, would have been barred less than four months after death, is barred after four months unless tolled.

PART 2

VENUE FOR PROBATE AND ADMINISTRATION; PRIORITY TO ADMINISTER; DEMAND FOR NOTICE

Section 3-201. [Venue for First and Subsequent Estate Proceedings; Location of Property.]

(a) Venue for the first informal or formal testacy or appointment proceedings after a decedent's death is:

(1) in the [county] where the decedent had his domicile at the time of his death; or

(2) if the decedent was not domiciled in this state, in any [county] where property of the decedent was located at the time of his death.

(b) Venue for all subsequent proceedings within the exclusive jurisdiction of the Court is in the place where the initial proceeding occurred, unless the initial proceeding has been transferred as provided in Section 1-303 or (c) of this section.

(c) If the first proceeding was informal, on application of an interested person and after notice to the proponent in the first proceeding, the Court, upon finding that venue is elsewhere, may transfer the proceeding and the file to the other court.

(d) For the purpose of aiding determinations concerning location of assets which may be relevant in cases involving non-domiciliaries, a debt, other than one evidenced by investment or commercial paper or other instrument in favor of a non-domiciliary, is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its principal office. Commercial paper, investment paper and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued.

COMMENT

Sections 1-303 and 3-201 cover the subject of venue for estate proceedings. Sections 3-202, 3-301, 3-303 and 3-309 also may be relevant.

Provisions for transfer of venue appear in Section 1-303.

The interplay of these several sections may be illustrated best by examples:

(1) A formal probate or appointment proceeding is initiated in A County. Interested persons who believe that venue is in B County rather than A County must raise their question about venue in A County, because 1-303 gives the Court in which the proceeding is first commenced authority to resolve disputes over venue. If the Court in A County

erroneously determines that it has venue, the remedy is by appeal.

(2) An informal probate or appointment application is filed and granted without notice in A County. If interested persons wish to challenge the registrar's determination of venue, they may not simply file a formal proceeding in the county of their choice and thus force the proponent in the prior proceeding to debate the question of venue in their county, 3-201(b) locates the venue of any subsequent proceeding where the first proceeding occurred. The function of (b) is obvious when one thinks of subsequent proceedings as those which relate to claims, or accounts, or to efforts to control a personal representative. It is less obvious when it seems to locate the forum for squabbles over venue at the place accepting the first informal application. Still, the applicant seeking an informal order must be careful about the statements he makes in his application because he may be charged with perjury under Section 1-310 if he is deliberately inaccurate. Moreover, the registrar must be satisfied that the allegations in the application support a finding of venue. 3-201(c) provides a remedy for one who is upset about the venue-locating impact of a prior order in an informal proceeding and who does not wish to

engage in full litigation about venue in the forum chosen by the other interested person unless he is forced to do so. Using it, he may succeed in getting the A County Court to transfer the proceedings to the county of his choice. He would be well advised to initiate formal proceedings if he gets the chance, for if he relies on informal proceedings, he, too, may be "bumped" if the judge in B County agrees with some movant that venue was not in B County.

(3) If the decedent's domicile was not in the state, venue is proper under 3-201 and 1-303 in any county where he had assets.

One contemplating starting administration because of the presence of local assets should have several other sections of the Code in mind. First, by use of the recognition provisions in Article IV, it may be possible to avoid administration in any state other than that in which the decedent was domiciled. Second, Section 3-203 may apply to give priority for local appointment to the representative appointed at domicile. Third, under Section 3-309, informal appointment proceedings in this state will be dismissed if it is known that a personal representative has been previously appointed at domicile.

Section 3-202. [Appointment or Testacy Proceedings; Conflicting Claim of Domicile in Another State.]

If conflicting claims as to the domicile of a decedent are made in a formal testacy or appointment proceeding commenced in this state, and in a testacy or appointment proceeding after notice pending at the same time in another state, the Court of this state must stay, dismiss, or permit

suitable amendment in, the proceeding here unless it is determined that the local proceeding was commenced before the proceeding elsewhere. The determination of domicile in the proceeding first commenced must be accepted as determinative in the proceeding in this state.

COMMENT

This section is designed to reduce the possibility that conflicting findings of domicile in two or more states may result in inconsistent administration and distribution of parts of the same estate. Section 3-408 dealing with the effect of adjudications in other states concerning testacy supports the same general purpose to use domiciliary law to unify succession of property located in different states.

Whether testate or intestate, succession should follow the presumed wishes of the decedent whenever possible. Unless a decedent leaves a separate will for the portion of his estate located in each different state, it is highly unlikely that he would want different portions of his estate subject to different rules simply because courts reach conflicting conclusions concerning his domicile. It is pointless to debate whether he would prefer one or the other of the conflicting rules, when the paramount inference is that the decedent would prefer that his estate be unified under either rule rather than wasted in litigation.

The section adds very little to existing law. If a previous estate proceeding in State A has determined that the decedent was a domiciliary of A, persons who were personally before the court in A would be precluded by the principles of *res judicata* or col-

lateral estoppel (and full faith and credit) from relitigating the issue of domicile in a later proceeding in State B. Probably, it would not matter in this setting that domicile was a jurisdictional fact. *Stoll v. Gottlieb*, 59 S.Ct. 134, 305 U.S. 165, 83 L.Ed. 104 (1938). Even if the parties to a present proceeding were not personally before the Court in an earlier proceeding in State A involving the same decedent, the prior judgment would be binding as to property subject to the power of the courts in A, on persons to whom due notice of the proceeding was given. *Riley v. New York Trust Co.*, 62 S.Ct. 608, 315 U.S. 343, 86 L.Ed. 885 (1942); *Mullane v. Central Hanover Bank and Trust Co.*, 70 S.Ct. 652, 339 U.S. 306, 94 L.Ed. 865 (1950).

Where a court learns that parties before it are also parties to previously initiated litigation involving a common question, traditional judicial reluctance to deciding unnecessary questions, as well as considerations of comity, are likely to lead it to delay the local proceedings to await the result in the other court. A somewhat more troublesome question is involved when one of the parties before the local court manifests a determination not to appear personally in the prior initiated proceedings so that he can preserve his ability to litigate

contested points in a more friendly, or convenient, forum. But, the need to preserve all possible advantages available to particular litigants should be subordinated to the decedent's probable wish that his estate not be wasted in unnecessary litigation. Thus, the section requires that the local claimant either initiate litigation in the forum of his choice before litigation is started somewhere else, or accept the necessity of contesting unwanted views concerning the decedent's domicile offered in litigation pending elsewhere.

It is to be noted, in this connection, that the local suitor always will have a chance to contest the question of domicile in the other

state. His locally initiated proceedings may proceed to a valid judgment accepting his theory of the case unless parties who would oppose him appear and defend on the theory that the domicile question is currently being litigated elsewhere. If the litigation in the other state has proceeded to judgment, Section 3-408 rather than the instant section will govern. If this section applies, it will mean that the foreign proceedings are still pending, so that the local person's contention concerning domicile can be made therein even though until the defense of litigation elsewhere is offered in the local proceedings, he may not have been notified of the foreign proceeding.

Section 3-203. [Priority Among Persons Seeking Appointment as Personal Representative.]

(a) Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

- (1) the person with priority as determined by a probated will including a person nominated by a power conferred in a will;
- (2) the surviving spouse of the decedent who is a devisee of the decedent;
- (3) other devisees of the decedent;
- (4) the surviving spouse of the decedent;
- (5) other heirs of the decedent;
- (6) 45 days after the death of the decedent, any creditor.

(b) An objection to an appointment can be made only in formal proceedings. In case of objection the priorities stated in (a) apply except that

- (1) if the estate appears to be more than adequate to meet exemptions and costs of administration but inadequate to discharge anticipated unsecured claims, the Court, on petition of creditors, may appoint any qualified person;

(2) in case of objection to appointment of a person other than one whose priority is determined by will by an heir or devisee appearing to have a substantial interest in the estate, the Court may appoint a person who is acceptable to heirs and devisees whose interests in the estate appear to be worth in total more than half of the probable distributable value, or, in default of this accord any suitable person.

(c) A person entitled to letters under (2) through (5) of (a) above, and a person aged [18] and over who would be entitled to letters but for his age, may nominate a qualified person to act as personal representative. Any person aged [18] and over may renounce his right to nominate or to an appointment by appropriate writing filed with the Court. When two or more persons share a priority, those of them who do not renounce must concur in nominating another to act for them, or in applying for appointment.

(d) Conservators of the estates of protected persons, or if there is no conservator, any guardian except a guardian ad litem of a minor or incapacitated person, may exercise the same right to nominate, to object to another's appointment, or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person or ward would have if qualified for appointment.

(e) Appointment of one who does not have priority, including priority resulting from renunciation or nomination determined pursuant to this section, may be made only in formal proceedings. Before appointing one without priority, the Court must determine that those having priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment, and that administration is necessary.

(f) No person is qualified to serve as a personal representative who is:

(1) under the age of [21];

(2) a person whom the Court finds unsuitable in formal proceedings;

(g) A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates different persons to be personal representative in this state and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

(h) This section governs priority for appointment of a successor personal representative but does not apply to the selection of a special administrator.

COMMENT

The priorities applicable to informal proceedings are applicable to formal proceedings. However, if the proceedings are formal, a person with a substantial interest may object to the selection of one having priority other than because of will provisions. The provision for majority approval which is triggered by such a protest can be handled in a formal proceeding since all interested persons will be before the court, and a judge capable of handling discretionary matters, will be involved.

In considering this section as it relates to a devise to a trustee for various beneficiaries, it is to be noted that "interested persons" is defined by 1-201(20) to include fiduciaries. Also, 1-403(2) and 3-912 show a purpose to make trustees serve as representatives of all beneficiaries. The provision in (d) is consistent.

If a state's statutes recognize a public administrator or public trustee as the appropriate agency to

seek administration of estates in which the state may have an interest, it would be appropriate to indicate in this section the circumstances under which such an officer may seek administration. If no officer is recognized locally, the state could claim as heir by virtue of 2-105.

Subsection (g) was inserted in connection with the decision to abandon the effort to describe ancillary administration in Article IV. Other provisions in Article III which are relevant to administration of assets in a state other than that of the decedent's domicile are 1-301 (territorial effect), 3-201 (venue), 3-308 (informal appointment for non-resident decedent delayed 30 days), 3-309 (no informal appointment here if a representative has been appointed at domicile), 3-815 (duty of personal representative where administration is more than one state) and 4-201-4-205 (local recognition of foreign personal representatives).

Section 3-204. [Demand for Notice of Order or Filing Concerning Decedent's Estate.]

Any person desiring notice of any order or filing pertaining to a decedent's estate in which he has a financial or property interest, may file a demand for notice with the Court at any time after the death of the decedent stating the name of the decedent, the nature of his interest in the estate, and the demandant's address or that of his attorney. The clerk shall mail a copy of the demand to the personal representative if one has been appointed. After filing of a demand, no order or filing to which the demand relates shall be made or accepted without notice as prescribed in Section 1-401 to the demandant

or his attorney. The validity of an order which is issued or filing which is accepted without compliance with this requirement shall not be affected by the error, but the petitioner receiving the order or the person making the filing may be liable for any damage caused by the absence of notice. The requirement of notice arising from a demand under this provision may be waived in writing by the demandant and shall cease upon the termination of his interest in the estate.

COMMENT

The notice required as the result of demand under this section is regulated as far as time and manner requirements are concerned by Section 1-401.

This section would apply to any order which might be made in a supervised administration proceeding.

PART 3

INFORMAL PROBATE AND APPOINTMENT PROCEEDINGS

Section 3-301. [Informal Probate or Appointment Proceedings; Application; Contents.]

Applications for informal probate or informal appointment shall be directed to the Registrar, and verified by the applicant to be accurate and complete to the best of his knowledge and belief as to the following information:

(1) Every application for informal probate of a will or for informal appointment of a personal representative, other than a special, ancillary or successor representative, shall contain the following:

(i) a statement of the interest of the applicant;

(ii) the name, and date of death of the decedent, his age, and the county and state of his domicile at the time of death, and the names and addresses of the spouse, children, heirs and devisees and the ages of any who are minors so far as known or ascertainable with reasonable diligence by the applicant;

(iii) if the decedent was not domiciled in the state at the time of his death, a statement showing venue;

(iv) a statement identifying and indicating the address of any personal representative of the decedent appointed in this state or elsewhere whose appointment has not been terminated;

(v) a statement indicating whether the applicant has received a demand for notice, or is aware of any demand for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere.

(2) An application for informal probate of a will shall state the following in addition to the statements required by (1):

(i) that the original of the decedent's last will is in the possession of the court, or accompanies the application, or that an authenticated copy of a will probated in another jurisdiction accompanies the application;

(ii) that the applicant, to the best of his knowledge, believes the will to have been validly executed;

(iii) that after the exercise of reasonable diligence, the applicant is unaware of any instrument revoking the will,

and that the applicant believes that the instrument which is the subject of the application is the decedent's last will;

(iv) that the time limit for informal probate as provided in this Article has not expired either because 3 years or less have passed since the decedent's death, or, if more than 3 years from death have passed, that circumstances as described by Section 3-108 authorizing tardy probate have occurred.

(3) An application for informal appointment of a personal representative to administer an estate under a will shall describe the will by date of execution and state the time and place of probate or the pending application or petition for probate. The application for appointment shall adopt the statements in the application or petition for probate and state the name, address and priority for appointment of the person whose appointment is sought.

(4) An application for informal appointment of an administrator in intestacy shall state in addition to the statements required by (1):

(i) that after the exercise of reasonable diligence, the applicant is unaware of any unrevoked testamentary instrument relating to property having a situs in this state under Section 1-301, or, a statement why any such instrument of which he may be aware is not being probated;

(ii) the priority of the person whose appointment is sought and the names of any other persons having a prior or equal right to the appointment under Section 3-203.

(5) An application for appointment of a personal representative to succeed a personal representative appointed under a different testacy status shall refer to the order in the most recent testacy proceeding, state the name and address of the person whose appointment is sought and of the person whose appointment will be terminated if the application is granted, and describe the priority of the applicant.

(6) An application for appointment of a personal representative to succeed a personal representative who has tendered a resignation as provided in Section 3-610(c), or whose appointment has been terminated by death or removal, shall adopt the statements in the application or petition which led to the appointment of the person being succeeded except as specifically changed or corrected, state the name and address of the person who seeks appointment as successor, and describe the priority of the applicant.

COMMENT

Forcing one who seeks informal probate or informal appointment to make oath before a public official concerning the details required of applications should deter persons who might otherwise misuse the no-notice feature of informal proceedings. The application is available as a part of the public record. If deliberately false representation is made, remedies for fraud will be available to injured persons without specified time limit (see Article I). The section is believed to provide important safeguards that may extend well beyond those presently available under supervised administration for persons damaged by deliberate wrong doing.

Section 1-310 deals with verification.

Section 3-302. [Informal Probate; Duty of Registrar; Effect of Informal Probate.]

Upon receipt of an application requesting informal probate of a will, the Registrar, upon making the findings required by Section 3-303 shall issue a written statement of informal probate if at least 120 hours have elapsed since the decedent's death. Informal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding. No defect in the application or procedure relating thereto which leads to informal probate of a will renders the probate void.

COMMENT

Model Probate Code Sections 68 and 70 contemplate probate by judicial order as the only method of validating a will. This "umbrella" section and the sections it refers to describe an alternative procedure called "informal probate". It is a statement of probate by the Registrar. A succeeding section describes cases in which informal probate is to be denied. "Informal probate" is subjected to safeguards which

seem appropriate to a transaction which has the effect of making a will operative and which *may* be the only official reaction concerning its validity. "Informal probate", it is hoped, will serve to keep the simple will which generates no controversy from becoming involved in *truly* judicial proceedings. The procedure is very much like "probate in common form" as it is known in England and some states.

Section 3-303. [Informal Probate; Proof and Findings Required.]

(a) In an informal proceeding for original probate of a will, the Registrar shall determine whether:

(1) the application is complete;

(2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;

(3) the applicant appears from the application to be an interested person as defined in Section 1-201(20);

(4) on the basis of the statements in the application, venue is proper;

(5) an original, duly executed and apparently unrevoked will is in the Registrar's possession;

(6) any notice required by Section 3-204 has been given and that the application is not within Section 3-304; and

(7) it appears from the application that the time limit for original probate has not expired.

(b) The application shall be denied if it indicates that a personal representative has been appointed in another [county] of this state or except as provided in subsection (d) below, if it appears that this or another will of the decedent has been the subject of a previous probate order.

(c) A will which appears to have the required signatures and which contains an attestation clause showing that requirements of execution under Section 2-502, 2-503 or 2-506 have been met shall be probated without further proof. In other cases, the Registrar may assume execution if the will appears to have been properly executed, or he may accept a sworn statement or affidavit of any person having knowledge of the circumstances of execution, whether or not the person was a witness to the will.

(d) Informal probate of a will which has been previously probated elsewhere may be granted at any time upon written application by any interested person, together with deposit of an authenticated copy of the will and of the statement probating it from the office or court where it was first probated.

(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.

COMMENT

The purpose of this section is to permit informal probate of a will which, from a simple attestation clause, appears to have been executed properly. It is not necessary that the will be notarized

as is the case with "pre-proved" wills in some states. If a will is "pre-proved" as provided in Article II, it will, of course, "appear" to be well executed and include the recital necessary for easy probate here. If the instrument does not contain a proper recital by attesting witnesses, it may be probated informally on the strength of an affidavit by a person who can say what occurred at the time of execution.

Except where probate or its equivalent has occurred previously in another state, informal probate is available only where an original will exists and is available to be filed. Lost or destroyed wills must be established in formal proceedings. See Section 3-402. Pendency of formal probate proceedings blocks under Section 3-401.

Section 3-304. [Informal Probate; Unavailable in Certain Cases.]

Applications for informal probate which relate to one or more of a known series of testamentary instruments (other than wills and codicils), the latest of which does not expressly revoke the earlier, shall be declined.

COMMENT

The Registrar handles the informal proceeding, but is required to decline applications in certain cases where circumstances suggest that formal probate would provide desirable safeguards.

Section 3-305. [Informal Probate; Registrar Not Satisfied.]

If the Registrar is not satisfied that a will is entitled to be probated in informal proceedings because of failure to meet the requirements of Sections 3-303 and 3-304 or any other reason, he may decline the application. A declination of informal probate is not an adjudication and does not preclude formal probate proceedings.

COMMENT

The purpose of this section is to recognize that the Registrar should have some authority to deny probate to an instrument even though all stated statutory requirements may be said to have been met. Denial of an application for informal probate cannot be appealed. Rather, the proponent may initiate a formal proceeding so that the matter may be brought before the judge in the normal way for contested matters.

Section 3-306. [Informal Probate; Notice Requirements.]

The moving party must give notice as described by Section 1-401 of his application for informal probate (1) to any person demanding it pursuant to Section 3-204; and (2) to any personal representative of the decedent whose appointment has

not been terminated. No other notice of informal probate is required.

COMMENT

This provision assumes that there will be a single office within each county or other area of jurisdiction of the probate court which can be checked for demands for notice relating to estates in that area. If there are or may be several registrars with in a given area, provision would need to be made so that information concerning demands for notice might be obtained from the chief registrar's place of business.

Section 3-307. [Informal Appointment Proceedings; Delay in Order; Duty of Registrar; Effect of Appointment.]

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

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

COMMENT

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

Section 3-308. [Informal Appointment Proceedings; Proof and Findings Required.]

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

(1) the application for informal appointment of a personal representative is complete;

(2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;

(3) the applicant appears from the application to be an interested person as defined in Section 1-201.(20);

(4) on the basis of the statements in the application, venue is proper;

(5) any will to which the requested appointment relates has been formally or informally probated; but this requirement does not apply to the appointment of a special administrator;

(6) any notice required by Section 3-204 has been given;

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

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

COMMENT

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

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

Section 3-309. [Informal Appointment Proceedings; Registrar Not Satisfied.]

If the Registrar is not satisfied that a requested informal appointment of a personal representative should be made because of failure to meet the requirements of Sections 3-307 and 3-308, or for any other reason, he may decline the applica-

tion. A declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings.

COMMENT

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

Section 3-310. [Informal Appointment Proceedings; Notice Requirements.]

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

Section 3-311. [Informal Appointment Unavailable in Certain Cases.]

If an application for informal appointment indicates the existence of a possible unrevoked testamentary instrument which may relate to property subject to the laws of this state, and which is not filed for probate in this court, the Registrar shall decline the application.

PART 4

FORMAL TESTACY AND APPOINTMENT PROCEEDINGS

Section 3-401. [Formal Testacy Proceedings; Nature; When Commenced.]

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

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

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

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

COMMENT

The word "testacy" is used to refer to the general status of a decedent in regard to wills. Thus, it embraces the possibility that he left no will, any question of which of several instruments is his valid will, and the possibility that he died intestate as to a part

of his estate, and testate as to the balance. See Section 1-201 (44).

The formal proceedings described by this section may be: (i) an original proceeding to secure "solemn form" probate of a will; (ii) a proceeding to secure "solemn form" probate to corroborate a previous informal probate; (iii) a proceeding to block a pending application for informal probate, or to prevent an informal application from occurring thereafter; (iv) a proceeding to contradict a previous order of informal probate; (v) a proceeding to secure a declaratory judgment of intestacy and a determination of heirs in a case where no will has been offered. If a pending informal application for probate is blocked by a formal proceeding, the applicant may withdraw his application and avoid the obligation of going forward with prima facie proof of due execution. See Section 3-407. The petitioner in the formal proceedings may be content to let mat-

ters stop there, or he can frame his petition, or amend, so that he may secure an adjudication of intestacy which would prevent further activity concerning the will.

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

Section 3-402. [Formal Testacy or Appointment Proceedings; Petition; Contents.]

(a) Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal representative, must be directed to the Court, request a judicial order after notice and hearing and contain further statements as indicated in this section. A petition for formal probate of a will

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

(2) contains the statements required for informal applications as stated in the five subparagraphs under Section 3-301(1), the statements required by subparagraphs (ii) and (iii) of Section 3-301(2), and

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

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

(c) A petition for adjudication of intestacy and appointment of an administrator in intestacy must request a judicial finding and order that the decedent left no will and determining the heirs, contain the statements required by (1) and (4) of Section 3-301 and indicate whether supervised administration is sought. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case, the statements required by subparagraph (ii) of Section 3-301 (4) above may be omitted.

COMMENT

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

Unless an order of supervised administration is sought, there will be little occasion for a formal

order concerning appointment of a personal representative which does not also adjudicate the testacy status of the decedent. If a formal order of appointment is sought because of disagreement over who should serve, Section 3-414 describes the appropriate procedure.

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

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

Section 3-403. [Formal Testacy Proceeding; Notice of Hearing on Petition.]

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

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

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

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

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

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

COMMENT

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

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

Testacy proceedings involve adjudications that no will exists. Unknown wills as well as any which are brought to the at-

tention of the Court are affected. Persons with potential interests under unknown wills have the notice afforded by death and by publication. Notice requirements extend also to persons named in a will that is known to the petitioners to exist, irrespective of whether it has been probated or offered for formal or informal probate, if their position may be affected adversely by granting of the petition. But, a rigid statutory re-

quirement relating to such persons might cause undue difficulty. Hence, the statute merely provides that the petitioner may notify other persons.

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

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

Section 3-404. [Formal Testacy Proceedings; Written Objections to Probate.]

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

COMMENT

Model Probate Code section 72 requires a contestant to file written objections to any will he would oppose. The provision prevents potential confusion as to who must file what pleading that

can arise from the notion that the probate of a will is in rem. The petition for probate of a revoking will is sufficient warning to proponents of the revoked will.

Section 3-405. [Formal Testacy Proceedings; Uncontested Cases; Hearings and Proof.]

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

COMMENT

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

If no hearing is required, uncontested formal probates can be completed on the strength of the

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

Section 3-406. [Formal Testacy Proceedings; Contested Cases; Testimony of Attesting Witnesses.]

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

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

COMMENT

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

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

Section 3-407. [Formal Testacy Proceedings; Burdens in Contested Cases.]

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

COMMENT

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

Section 3-408. [Formal Testacy Proceedings; Will Construction; Effect of Final Order in Another Jurisdiction.]

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

COMMENT

This section is designed to extend the effect of final orders of another jurisdiction of the United States. It should not be read to restrict the obligation of the local court to respect the judgment of another court when parties who were personally before the other court also are personally before the local court. An "authenticated copy" includes copies

properly certified under the full faith and credit statute. If conflicting claims of domicile are made in proceedings which are commenced in different jurisdictions, Section 3-202 applies. This section is framed to apply where a formal proceeding elsewhere has been previously concluded. Hence, if a local proceeding is concluded before formal proceed-

ings at domicile are concluded, local law will control.

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

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

This section adds nothing to existing law as applied to cases where the parties before the local court were also personally before the foreign court, or where the property involved was subject to the power of the foreign court. It extends present law so that, for some purposes, the law of

another state may become binding in regard to due execution or revocation of wills controlling local land, and to questions concerning the meaning of ambiguous words in wills involving local land. But, choice of law rules frequently produce a similar result. See § 240 Restatement of the Law, Second: Conflict of Laws, p. 73, Proposed Official Draft III, 1969.

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

Section 3-409. [Formal Testacy Proceedings; Order; Foreign Will.]

After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, if the Court finds that the testator is dead, venue is proper and that the proceeding was commenced within the limitation prescribed by Section 3-108, it shall determine the decedent's domicile at death, his heirs and his state of testacy. Any will found to be valid and unrevoked shall be formally probated. Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by Section 3-612. The petition shall be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead. A will from a 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.

COMMENT

Model Probate Code section court is not satisfied that the 80(a), slightly changed. If the alleged decedent is dead, it may

permit amendment of the proceeding so that it would become a proceeding to protect the estate of a missing and therefore "disabled" person. See Article V of this Code.

Section 3-410. [Formal Testacy Proceedings; Probate of More Than One Instrument.]

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

COMMENT

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

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

Section 3-411. [Formal Testacy Proceedings; Partial Intestacy.]

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

Section 3-412. [Formal Testacy Proceedings; Effect of Order; Vacation.]

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

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

(2) If intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered if it is shown that one or more persons were omitted from the determination and it is also shown that the persons were unaware of their relationship to the decedent, were unaware of his death or were given no notice of any proceeding concerning his estate, except by publication.

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

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

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

(iii) 12 months after the entry of the order sought to be vacated.

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

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

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

COMMENT

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

If an alleged decedent turns out to have been alive, heirs and distributees are liable to restore the "estate or its proceeds". If neither can be identified through the normal process of tracing assets, their liability depends upon the circumstances. The liability of distributees to claimants whose claims have not been barred, or to persons shown to be entitled to distribution when a formal proceeding changes a previous assumption informally established which guided an earlier distribution, is different. See Sections 3-909 and 3-1004.

Section 3-413. [Formal Testacy Proceedings; Vacation of Order For Other Cause.]

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

COMMENT

See Sections 1-304 and 1-308.

Section 3-414. [Formal Proceedings Concerning Appointment of Personal Representative.]

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

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

COMMENT

A petition raising a controversy concerning the priority or qualifications of a personal representative may be combined with a petition in a formal testacy proceeding. However, it is not necessary to petition formally for the appointment of a personal representative as a part of a formal testacy proceeding. A personal representative may be appointed on informal application either before or after formal proceedings which establish whether the decedent died testate or intestate or no appointment may be desired. See Sections 3-107, 3-301 (3), (4) and 3-307. Furthermore, procedures for securing the appointment of a new personal representative after a previous assumption as to testacy has been changed are provided by Section 3-612. These may be informal, or related to pending formal proceedings concerning testacy. A formal order relating to appointment may be desired when there

is a dispute concerning priority or qualification to serve but no dispute concerning testacy. It is important to distinguish formal proceedings concerning appointment from "supervised administration". The former includes any proceeding after notice involving a request for an appointment. The latter originates in a "formal proceeding" and may be requested in addition to a ruling concerning testacy or priority or qualifications of a personal representative, but is descriptive of a special proceeding with a different scope and pur-

pose than those concerned merely with establishing the bases for an administration. In other words, a personal representative appointed in a "formal" proceeding may or may not be "supervised".

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

PART 5

SUPERVISED ADMINISTRATION

Section 3-501. [Supervised Administration; Nature of Proceeding.]

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

COMMENT

This and the following sections of this Part describe an optional procedure for settling an estate in one continuous proceeding in the Court. The proceeding is characterized as "in rem" to align it with the concepts described by the Model Probate Code. See Section 62, M.P.C. In cases where supervised administration is not requested or ordered, no compulsion other than self-interest exists to compel use of a formal testacy proceeding to secure an adjudication of a will or no will, because informal probate or appointment of an administrator in intestacy may be used. Similarly, unless administration is supervised, there is no compulsion

other than self-interest to use a formal closing proceeding. Thus, even though an estate administration may be begun by use of a *formal* testacy proceeding which may involve an order concerning who is to be appointed personal representative, the proceeding is over when the order concerning testacy and appointment is entered. See Section 3-107. Supervised administration, therefore, is appropriate when an interested person desires assurance that the essential steps regarding opening and closing of an estate will be adjudicated. See the Comment following the next section.

Section 3-502. [Supervised Administration; Petition; Order.]

A petition for supervised administration may be filed by any interested person or by a personal representative at any time or

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

COMMENT

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

Since supervised administration normally will result in an adjudicated distribution of the estate, the issue of will or no will must be adjudicated. This section achieves this by forcing a petition for supervised administration to include matters necessary to put the issue of testacy

before the Court. It is possible, however, that supervised administration will be requested because administrative complexities warranting it develop after the issue of will or no will has been resolved in a previously concluded formal testacy proceeding.

It should be noted that supervised administration, though it compels a judicial settlement of an estate, is not the only route to obtaining judicial review and settlement at the close of an administration. The procedures described in Sections 3-1101 and 3-1102 are available for use by or against personal representatives who are not supervised. Also efficient remedies for breach of

duty by a personal representative who is not supervised are available under Part 6 of this Article. Finally, each personal representative consents to jurisdiction of the Court as invoked by mailed notice of any proceeding relating to the estate which may be initiated by an interested person. Also, persons interested in the estate may be subjected to orders of the Court following mailed

notices made in proceedings initiated by the personal representative. In combination, these possibilities mean that supervised administration will be valuable principally to persons who see some advantage in a single judicial proceeding which will produce adjudications on all major points involved in an estate settlement.

Section 3-503. [Supervised Administration; Effect on Other Proceedings.]

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

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

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

COMMENT

The duties and powers of personal representative are described in Part 7 of this Article. The ability of a personal representative to create a good title in a purchaser of estate assets is not hampered by the fact that the personal representative may breach a duty created by statute, court order or other circumstances in making the sale. See Section 3-715. However, formal proceedings against a personal representative may involve requests

for qualification of the power normally possessed by personal representatives which, if granted, would subject the personal representative to the penalties for contempt of Court if he disregarded the restriction. See Section 3-607. If a proceeding also involved a demand that particular real estate be kept in the estate pending determination of a petitioner's claim thereto, notice of the pendency of the proceeding could be recorded as is usual

under the jurisdiction's system for the *lis pendens* concept.

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

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

Section 3-504. [Supervised Administration; Powers of Personal Representative.]

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

COMMENT

This section provides authority to issue letters showing restrictions of power of supervised administrators. In general, persons dealing with personal representatives are not bound to inquire concerning the authority of a personal representative, and are not affected by provisions in a will or judicial order unless they know of it. But, it is expected

that persons dealing with personal representatives will want to see the personal representative's letters, and this section has the practical effect of requiring them to do so. No provision is made for noting restrictions in letters except in the case of supervised representatives. See Section 3-715.

Section 3-505. [Supervised Administration; Interim Orders; Distribution and Closing Orders.]

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

supervised administration on the application of the personal representative or any interested person.

COMMENT

Since supervised administration is a single proceeding, the notice requirement contained in 3-106 relates to the notice of institution of the proceedings which is described with particularity by Section 3-502. The above section makes it clear that an additional notice is required for a closing order. It was discussed whether provision for notice of interim orders should be included. It was decided to leave the point to be covered by court order or rule. There was a suggestion for a rule as follows: "Unless otherwise re-

quired by order, notice of interim orders in supervised administration need be given only to interested persons who request notice of all orders entered in the proceeding." 1-402 permits any person to waive notice by a writing filed in the proceeding.

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

PART 6

PERSONAL REPRESENTATIVE; APPOINTMENT, CONTROL AND TERMINATION OF AUTHORITY

Section 3-601. [Qualification.]

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

COMMENT

This and related sections of this Part describe details and conditions of appointment which apply to all personal representatives without regard to whether the appointment proceeding involved is formal or informal, or whether the personal representative is su-

pervised. Section 1-305 authorizes issuance of copies of letters and prescribes their content. The section should be read with Section 3-504 which directs endorsement on letters of any restrictions of power of a supervised administrator.

Section 3-602. [Acceptance of Appointment; Consent to Jurisdiction.]

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

COMMENT

Except for personal representatives appointed pursuant to Section 3-502, appointees are not deemed to be "officers" of the appointing court or to be parties in one continuous judicial proceeding that extends until final settlement. See Section 3-107. Yet, it is desirable to continue present patterns which prevent a personal representative who might make himself unavailable to service within the state from affecting the power of the ap-

pointing court to enter valid orders affecting him. See *Michigan Trust Co. v. Ferry*, 33 S.Ct. 550, 228 U.S. 346, 57 L.Ed. 867 (1912). The concept employed to accomplish this is that of requiring each appointee to consent in advance to the personal jurisdiction of the Court in any proceeding relating to the estate that may be instituted against him. The section requires that he be given notice of any such proceeding, which, when considered in the light of

the responsibility he has undertaken, should make the procedure sufficient to meet the requirements of due process.

Section 3-603. [Bond Not Required Without Court Order, Exceptions.]

No bond is required of a personal representative appointed in informal proceedings, except (1) upon the appointment of a special administrator; (2) when an executor or other personal representative is appointed to administer an estate under a will containing an express requirement of bond or (3) when bond is required under Section 3-605. Bond may be required by court order at the time of appointment of a personal representative appointed in any formal proceeding except that bond is not required of a personal representative appointed in formal proceedings if the will relieves the personal representative of bond, unless bond has been requested by an interested party and the Court is satisfied that it is desirable. Bond required by any will may be dispensed with in formal proceedings upon determination by the Court that it is not necessary. No bond is required of any personal representative who, pursuant to statute, has deposited cash or collateral with an agency of this state to secure performance of his duties.

COMMENT

This section must be read with the next three sections. The purpose of these provisions is to move away from the idea that bond always should be required of a probate fiduciary, or required unless a will excuses it. Also, it is designed to keep the registrar acting pursuant to 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 (Section 3-204), to contest a requested

appointment by use of a formal testacy proceeding or by use of a formal proceeding seeking the appointment of another person. Section 3-105 gives general authority to the court in a formal proceeding to make appropriate orders as desirable incident to estate administration. This should be sufficient to make it clear that an informal application may be blocked by a formal petition which disputes the matters stated in the petition. Furthermore, an interested person has the remedies provided in Sections 3-605 and 3-607. Finally, interested persons have assurance under this Code that their rights in respect to the values of a decedent's estate cannot be terminated without a judicial order after notice or before the passage

of three years from the decedent's death.

It is believed that the total package of protection thus afforded may represent more real protection than a blanket re-

quirement 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.

Section 3-604. [Bond Amount; Security; Procedure; Reduction.]

If bond is required and the provisions of the will or order do not specify the amount, unless stated in his application or petition, the person qualifying shall file a statement under oath with the Registrar indicating his best estimate of the value of the personal estate of the decedent and of the income expected from the personal and real estate during the next year, and he shall execute and file a bond with the Registrar, or give other suitable security, in an amount not less than the estimate. The Registrar shall determine that the bond is duly executed by a corporate surety, or one or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property or other adequate security. The Registrar may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic financial institution (as defined in Section 6-101) in a manner that prevents their unauthorized disposition. On petition of the personal representative or another interested person the Court may excuse a requirement of bond, increase or reduce the amount of the bond, release sureties, or permit the substitution of another bond with the same or different sureties.

COMMENT

This section permits estimates of value needed to fix the amount of required bond to be filed when it becomes necessary. A consequence of this procedure is that estimates of value of estates no longer need appear in the petitions and applications

which will attend every administered estate. Hence, a measure of privacy that is not possible under most existing procedures may be achieved. A co-signature arrangement might constitute adequate security within the meaning of this section.

Section 3-605. [Demand For Bond by Interested Person.]

Any person apparently having an interest in the estate worth in excess of [\$1000], or any creditor having a claim in excess of [\$1000], may make a written demand that a personal representative give bond. The demand must be filed with the

Registrar and a copy mailed to the personal representative, if appointment and qualification have occurred. Thereupon, bond is required, but the requirement ceases if the person demanding bond ceases to be interested in the estate, or if bond is excused as provided in Section 3-603 or 3-604. After he has received notice and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of his office except as necessary to preserve the estate. Failure of the personal representative to meet a requirement of bond by giving suitable bond within 30 days after receipt of notice is cause for his removal and appointment of a successor personal representative.

COMMENT

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

Section 3-606. [Terms and Conditions of Bonds.]

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

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

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

(3) By executing an approved bond of a personal representative, the surety consents to the jurisdiction of the probate court which issued letters to the primary obligor in

any proceedings pertaining to the fiduciary duties of the personal representative and naming the surety as a party. Notice of any proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the court where the bond is filed and to his address as then known to the petitioner.

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

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

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

COMMENT

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

Section 3-607. [Order Restraining Personal Representative.]

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

(b) The matter shall be set for hearing within 10 days unless the parties otherwise agree. Notice as the Court directs shall be given to the personal representative and his attorney of record, if any, and to any other parties named defendant in the petition.

COMMENT

Cf. Section 3-401 which provides for a restraining order against a previously appointed personal representative incident to a formal testacy proceeding. The above section describes a remedy which is available for any cause against a previously appointed personal representative, whether appointed formally or informally.

This remedy, in combination with the safeguards relating to the process for appointment of a personal representative, permit

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

Section 3-608. [Termination of Appointment; General.]

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

COMMENT

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

It is to be noted that this section does not relate to jurisdiction over the estate in proceedings which may have been commenced against the personal representative prior to termina-

tion. In such cases, a substitution of successor or special representative should occur if the plaintiff desires to maintain his action against the estate.

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

Section 3-609. [Termination of Appointment; Death or Disability.]

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

Section 3-610. [Termination of Appointment; Voluntary.]

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

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

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

COMMENT

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

Section 3-611. [Termination of Appointment by Removal; Cause; Procedure.]

(a) A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the Court shall fix a time and place

for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the Court may order. Except as otherwise ordered as provided in Section 3-607, after receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration or preserve the estate. If removal is ordered, the Court also shall direct by order the disposition of the assets remaining in the name of, or under the control of, the personal representative being removed.

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

COMMENT

Thought was given to qualifying (a) above so that no formal removal proceedings could be commenced until after a set period from entry of any previous order reflecting judicial consideration of

the qualifications of the personal representative. It was decided, however, that the matter should be left to the judgment of interested persons and the Court.

Section 3-612. [Termination of Appointment; Change of Testacy Status.]

Except as otherwise ordered in formal proceedings, the probate of a will subsequent to the appointment of a personal representative in intestacy or under a will which is superseded by formal probate of another will, or the vacation of an informal probate of a will subsequent to the appointment of the personal representative thereunder, does not terminate the appointment of the personal representative although his powers may be reduced as provided in Section 3-401. Termination occurs upon appointment in informal or formal appointment proceedings of a person entitled to appointment under the later assumption concerning testacy. If no request for new ap-

pointment is made within 30 days after expiration of time for appeal from the order in formal testacy proceedings, or from the informal probate, changing the assumption concerning testacy, the previously appointed personal representative upon request may be appointed personal representative under the subsequently probated will, or as in intestacy as the case may be.

COMMENT

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

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

Section 3-613. [Successor Personal Representative.]

Parts 3 and 4 of this Article govern proceedings for appointment of a personal representative to succeed one whose appointment has been terminated. After appointment and qualification, a successor personal representative may be substituted in all actions and proceedings to which the former personal representative was a party, and no notice, process or claim which was given or served upon the former personal representative need be given to or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative.

Except as otherwise ordered by the Court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated.

Section 3-614. [Special Administrator; Appointment.]

A special administrator may be appointed:

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

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

COMMENT

The appointment of a special administrator other than one appointed pending original appointment of a general personal representative must be handled by the Court. Appointment of a special administrator would enable the estate to participate in a transaction which the general personal representative could not, or should not, handle because of

conflict of interest. If a need arises because of temporary absence or anticipated incapacity for delegation of the authority of a personal representative, the problem may be handled without judicial intervention by use of the delegation powers granted to personal representatives by Section 3-716.

Section 3-615. [Special Administrator; Who May Be Appointed.]

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

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

COMMENT

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

Section 3-616. [Special Administrator; Appointed Informally; Powers and Duties.]

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

Section 3-617. [Special Administrator; Formal Proceedings; Power and Duties.]

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

Section 3-618. [Termination of Appointment; Special Administrator.]

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

PART 7

DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

Section 3-701. [Time of Accrual of Duties and Powers.]

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

COMMENT

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

Section 3-702. [Priority Among Different Letters.]

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

COMMENT

The qualification relating to "modification" of an appointment is intended to refer to the change that may occur in respect to the exclusive authority of one with letters upon later appointment of a co-representative or of a special administrator. The sentence con-

cerning erroneous dual appointment is derived from recent New York legislation. See Section 704, Surrogate's Court Procedure Act [McKinney's SCPA 704].

Erroneous appointment of a second personal representative is possible if formal proceedings after notice are employed. It might be desirable for a state to promulgate a system whereby a

notation of letters issued by each county probate office would be relayed to a central record keeping office which, in turn could indicate to any other office whether letters for a particular decedent, perhaps identified by social security number, had been issued previously. The problem can arise even though notice to known interested persons and by publication is involved.

Section 3-703. [General Duties; Relation and Liability to Persons Interested in Estate; Standing to Sue.]

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

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

(c) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent

domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death.

COMMENT

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

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

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

Section 3-704. [Personal Representative to Proceed Without Court Order; Exception.]

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

COMMENT

This section is intended to confer authority on the personal representative to initiate a proceeding at any time when it is necessary to resolve a question relating to administration. Section 3-105 grants broad subject matter jurisdiction to the probate court which covers a proceeding

initiated for any purpose other than those covered by more explicit provisions dealing with testacy proceedings, proceedings for supervised administration, proceedings concerning disputed claims and proceedings to close estates.

Section 3-705. [Duty of Personal Representative; Information to Heirs and Devisees.]

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

inform other persons of his appointment by delivery or ordinary first class mail.

COMMENT

This section requires the personal representative to inform persons who appear to have an interest in the estate as it is being administered, of his appointment. Also, it requires the personal representative to give notice to persons who appear to be disinherited by the assumption concerning testacy under which the personal representative was appointed. The communication involved is not to be confused with the notice requirements relating to litigation. The duty applies even though there may have been a prior testacy proceeding after notice, except that persons who have been adjudicated to be without interest in the estate are excluded. The rights, if any, of persons in regard to estates cannot be cut off completely except by the running of the three year statute of limitations provided in Section 3-108, or by a formal

judicial proceeding which will include full notice to all interested persons. The interests of some persons may be shifted from rights to specific property of the decedent to the proceeds from sale thereof, or to rights to values received by distributees. However, such a shift of protected interest from one thing to another, or to funds or obligations, is not new in relation to trust beneficiaries. A personal representative may initiate formal proceedings to determine whether persons, other than those appearing to have interests, may be interested in the estate, under Section 3-401 or, in connection with a formal closing, as provided by Section 3-1001.

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

Section 3-706. [Duty of Personal Representative; Inventory and Appraisal.]

Within 3 months after his appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall prepare and file or mail an inventory of property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item.

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

COMMENT

This and the following sections eliminate the practice now required by many probate statutes under which the judge is involved in the selection of appraisers. If the personal representative breaches his duty concerning the inventory, he may be removed. Section 3-611. Or, an interested person seeking to surcharge a personal representative for losses incurred as a result of his administration might be able to take advantage of any breach of duty concerning inventory. The section provides two ways in which a personal representative may handle an inventory. If the personal representative elects to send copies to all interested per-

sons who request it, information concerning the assets of the estate need not become a part of the records of the probate court. The alternative procedure is to file the inventory with the court. This procedure would be indicated in estates with large numbers of interested persons, where the burden of sending copies to all would be substantial. The Court's role in respect to the second alternative is simply to receive and file the inventory with the file relating to the estate. See 3-204, which permits any interested person to demand notice of any document relating to an estate which may be filed with the Court.

Section 3-707. [Employment of Appraisers.]

The personal representative may employ a qualified and disinterested appraiser to assist him in ascertaining the fair market value as of the date of the decedent's death of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate. The names and addresses of any appraiser shall be indicated on the inventory with the item or items he appraised.

Section 3-708. [Duty of Personal Representative; Supplementary Inventory.]

If any property not included in the original inventory comes to the knowledge of a personal representative or if the personal representative learns that the value or description indicated in the original inventory for any item is erroneous or misleading, he shall make a supplementary inventory or appraisal showing the market value as of the date of the decedent's death of the new item or the revised market value or descriptions, and the appraisers or other data relied upon, if

any, and file it with the Court if the original inventory was filed, or furnish copies thereof or information thereof to persons interested in the new information.

Section 3-709. [Duty of Personal Representative; Possession of Estate.]

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

COMMENT

Section 3-101 provides for the devolution of title on death. Section 3-712 defines the status of the personal representative with reference to "title" and "power" in a way that should make it unnecessary to discuss the "title" to decedent's assets which his personal representative acquires. This section deals with the personal representative's duty and right to possess assets. It proceeds from the assumption that it is desirable whenever possible to avoid disruption of possession of the decedent's assets by his devisees or heirs. But, if the personal representative decides that possession of an asset is necessary or desirable for purposes of administration, his judgment is made conclusive in any action for pos-

session that he may need to institute against an heir or devisee. It may be possible for an heir or devisee to question the judgment of the personal representative in later action for surcharge for breach of fiduciary duty, but this possibility should not interfere with the personal representative's administrative authority as it relates to possession of the estate.

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

"No provisions for the administration of partnership estates when a partner dies have

been included. Several states have statutes providing that unless the surviving partner files a bond with the probate court, the personal representative of the deceased partner may administer the partnership estate upon giving an additional bond. Kan.Gen.Stat. (Supp.1943) §§ 59-1001 to 59-1005; Mo.Rev.Stat. Ann. (1942) §§ 81 to 93 [V.A.M.S. §§ 473.220 to 473.230]. In these states the administration of partnership estates upon the death of a partner is brought more or less completely under the jurisdiction of the probate court. While the provisions afford security to parties in interest, they have caused complications in the settlement of

partnership estates and have produced much litigation. Woe-ner, Administration (3rd ed., 1923) §§ 128 to 130; annotation, 121 A.L.R. 860. These statutes have been held to be inconsistent with section 37 of the Uniform Partnership Act providing for winding up by the surviving partner. Davis v. Hutchinson C.C.A. 9th, 1929) 36 F.(2d) 309. Hence the Model Probate Code contains no provision regarding partnership property except for inclusion in the inventory of the decedent's proportionate share of any partnership. See § 120. However, it is suggested that the Uniform Partnership Act should be included in the statutes of the states which have not already enacted it."

Section 3-710. [Power to Avoid Transfers.]

The property liable for the payment of unsecured debts of a decedent includes all property transferred by him by any means which is in law void or voidable as against his creditors, and subject to prior liens, the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative.

COMMENT

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

Section 3-711. [Powers of Personal Representatives; In General.]

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

COMMENT

The personal representative is given the broadest possible "power over title". He receives a "power", rather than title, because the power concept eases the succession of assets which are not possessed by the personal representative. Thus, if the power is unexercised prior to its termination, its lapse clears the title of devisees and heirs. Purchasers from devisees or heirs who are "distributees" may be protected also by Section 3-910. The power over title of an absolute owner is conceived to embrace all possible transactions which might result in a conveyance or encumbrance of assets, or in a

change of rights of possession. The relationship of the personal representative to the estate is that of a trustee. Hence, personal creditors or successors of a personal representative cannot avail themselves of his title to any greater extent than is true generally of creditors and successors of trustees. Interested persons who are apprehensive of possible misuse of power by a personal representative may secure themselves by use of the devices implicit in the several sections of Parts 1 and 3 of this Article. See especially Sections 3-501, 3-605, 3-607 and 3-611.

Section 3-712. [Improper Exercise of Power; Breach of Fiduciary Duty.]

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

COMMENT

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

Evidence of a proceeding, or order, restraining a personal representative from selling, leasing,

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

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

Section 3-713. [Sale, Encumbrance or Transaction Involving Conflict of Interest; Voidable; Exceptions.]

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

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

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

COMMENT

If a personal representative violates the duty against self-dealing described by this section, a voidable title to assets sold results. Other breaches of duty relating to sales of assets will not cloud titles except as to pur-

chasers with actual knowledge of the breach. See Section 3-714. The principles of bona fide purchase would protect a purchaser for value without notice of defect in the seller's title arising from conflict of interest.

Section 3-714. [Persons Dealing with Personal Representative; Protection.]

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

actions and laws simplifying transfers of securities by fiduciaries.

COMMENT

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

ternal Revenue Code [26 U.S.C.A. § 6324].

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

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

Section 3-715. [Transactions Authorized for Personal Representatives; Exceptions.]

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

(1) retain assets owned by the decedent pending distribution or liquidation including those in which the representative is

personally interested or which are otherwise improper for trust investment;

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

(3) perform, compromise or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(18) pay taxes, assessments, compensation of the personal representative, and other expenses incident to the administration of the estate;

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

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

(21) employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the

personal representative, to advise or assist the personal representative in the performance of his administrative duties; act without independent investigation upon their recommendations; and instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary;

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

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

(24) continue any unincorporated business or venture in which the decedent was engaged at the time of his death (i) in the same business form for a period of not more than 4 months from the date of appointment of a general personal representative if continuation is a reasonable means of preserving the value of the business including good will, (ii) in the same business form for any additional period of time that may be approved by order of the Court in a formal proceeding to which the persons interested in the estate are parties; or (iii) throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate;

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

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

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

COMMENT

This section accepts the assumption of the Uniform Trustee's Powers Act that it is desirable to equip fiduciaries with the authority required for the prudent handling of assets and extends it to personal representatives. The section requires that a personal representative act reasonably and for the benefit of

the interested person. Subject to this and to the other qualifications described by the preliminary statement, the enumerated transactions are made authorized transactions for personal representatives. Sub-paragraphs (27) and (18) support the other provisions of the Code, particularly Section 3-704, which contem-

plates that personal representatives will proceed with all of the business of administration without court orders.

In part, sub-paragraph (4) involves a substantive question of whether noncontractual charitable pledges of a decedent can be honored by his personal representative. It is believed, however, that it is not desirable from a practical standpoint to make much turn on whether a charitable pledge is, or is not, contractual. Pledges are rarely made the subject of claims. The effect of sub-paragraph (4) is to permit the personal representative to discharge pledges where he believes the decedent would have wanted him to do so without exposing himself to surcharge. The holder of a contractual

pledge may, of course, pursue the remedies of a creditor. If a pledge provides that the obligation ceases on the death of the pledgor, no personal representative would be safe in assuming that the decedent would want the pledge completed under the circumstances.

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

Section 3-716. [Powers and Duties of Successor Personal Representative.]

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

Section 3-717. [Co-representatives; When Joint Action Required.]

If two or more persons are appointed co-representatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate. This restriction does not apply when any co-representative receives and receipts for property due the estate, when the concurrence of all cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate, or when a co-representative has been delegated to act for the others. Persons dealing with a co-representative if actually unaware that another has been appointed to serve with him or if advised by the personal representative with whom

they deal that he has authority to act alone for any of the reasons mentioned herein, are as fully protected as if the person with whom they dealt had been the sole personal representative.

COMMENT

With certain qualifications, this section is designed to compel co-representatives to agree on all matters relating to administration when circumstances permit. Delegation by one to another representative is a form of concurrence in acts that may result from the delegation. A co-rep-

resentative who abdicates his responsibility to co-administer the estate by a blanket delegation breaches his duty to interested persons as described by Section 3-703. Section 3-716(21) authorizes some limited delegations, which are reasonable and for the benefit of interested persons.

Section 3-718. [Powers of Surviving Personal Representative.]

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

COMMENT

Source, Model Probate Code section 102. This section applies where one of two or more co-representatives dies, becomes disabled or is removed. In regard to co-executors, it is based on the assumption that the decedent would not consider the powers of

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

Section 3-719. [Compensation of Personal Representative.]

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

COMMENT

This section has no bearing on a personal representative who also serves as attorney for the estate

may receive compensation in as a condition on the nomination both capacities. If a will provision concerning a fee is framed as personal representative, it could not be renounced.

Section 3-720. [Expenses in Estate Litigation.]

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

COMMENT

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

A personal representative is a fiduciary for successors of the estate (Section 3-703). Though the will naming him may not yet be probated, the priority for appointment conferred by Section 3-203 on one named executor in a probated will means that the person named has an interest, as a fiduciary, in seeking the probate of the will. Hence, he is an interested person within the meaning of Sections 3-301 and 3-401. Section 3-912 gives the successors of an estate control over the executor, provided all are com-

petent adults. So, if all persons possibly interested in the probate of a will, including trustees of any trusts created thereby, concur in directing the named executor to refrain from efforts to probate the instrument, he would lose standing to proceed. All of these observations apply with equal force to the case where the named executor of one instrument seeks to contest the probate of another instrument. Thus, the Code changes the idea followed in some jurisdictions that an executor lacks standing to contest other wills which, if valid, would supersede the will naming him, and standing to oppose other contests that may be mounted against the instrument nominating him.

Section 3-721. [Proceedings for Review of Employment of Agents and Compensation of Personal Representatives and Employees of Estate.]

After notice to all interested persons or on petition of an interested person or on appropriate motion if administration is supervised, the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed

by the Court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

COMMENT

In view of the broad jurisdiction conferred on the probate court by Section 3-105, description of the special proceeding authorized by this section might be unnecessary. But, the Code's theory that personal representatives may fix their own fees and those of estate attorneys marks an important departure from

much existing practice under which fees are determined by the court in the first instance. Hence, it seemed wise to emphasize that any interested person can get judicial review of fees if he desires it. Also, if excessive fees have been paid, this section provides a quick and efficient remedy.

PART 8

CREDITORS' CLAIMS

GENERAL COMMENT

The need for uniformity of law regarding creditors' claims against estates is especially strong. Commercial and consumer credit depends upon efficient collection procedures. The cost of credit is pushed up by the cost of credit life insurance which becomes a practical necessity for lenders unwilling to bear the expense of understanding or using the cumbersome and provincial collection procedures found in 50 codes of probate.

The sections which follow facilitate collection of claims against decedents in several ways. First,

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

Section 3-801. [Notice to Creditors.]

Unless notice has already been given under this section, a personal representative upon his appointment shall publish a notice once a week for 3 successive weeks in a newspaper of general circulation in the [county] announcing his appointment and address and notifying creditors of the estate to present their claims within 4 months after the date of the first publication of the notice or be forever barred.

COMMENT

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

Failure to advertise for claims would involve a breach of duty on the part of the personal representative. If, as a result of such breach, a claim is later asserted against a distributee under Section 3-1004, the personal representative may be liable to the distributee for costs related to discharge of the claim and the recovery of contribution from other distributees. The protection

afforded personal representatives under Section 3-1003 would not be available, for that section applies only if the personal representative truthfully recites that he has advertised for claims as required by this section.

It would be appropriate, by court rule, to channel publications through the personnel of the probate court. See Section 1-401. If notices are controlled by a centralized authority, some assurance could be gained against publication in newspapers of

small circulation. Also, the form of notices could be made uniform and certain efficiencies could be achieved. For example, it would be compatible with this section for the Court to publish a single

notice each day or each week listing the names of personal representatives appointed since the last publication, with addresses and dates of non-claim.

Section 3-802. [Statutes of Limitations.]

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

COMMENT

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

It should be noted that under Sections 3-803 and 3-804 it is

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

Section 3-803. [Limitations on Presentation of Claims.]

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

representative, and the heirs and devisees of the decedent, unless presented as follows:

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

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

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

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

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

(c) Nothing in this section affects or prevents:

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

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

COMMENT

There was some disagreement among the Reporters over whether a short period of limitations, or of non-claim, should be provided for claims arising at or after death. Sub-paragraph (b) was finally inserted because most felt it was desirable to accelerate the time when unadjudicated distributions would be final. The time limits stated would not, of course, affect any personal liability in contract, tort, or by statute, of the personal representative. Under Section 3-808 a personal rep-

ception of subparagraph (c). If a personal representative is personally at fault in respect to a tort claim arising after the decedent's death, his personal liability would not be affected by the running of the special short period provided here.

The limitation stated in subparagraph (2) of (a) dove-tails

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

Section 3-804. [Manner of Presentation of Claims.]

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

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

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

(3) If a claim is presented under subsection (1), no proceeding thereon may be commenced more than 60 days after the personal representative has mailed a notice of disallowance; but, in the case of a claim which is not presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the

60-day period, or to avoid injustice the Court, on petition, may order an extension of the 60-day period, but in no event shall the extension run beyond the applicable statute of limitations.

COMMENT

The filing of a claim with the probate court under (2) of this section does not serve to initiate a proceeding concerning the claim. Rather, it serves merely to protect the claimant who may anticipate some need for evidence to show that his claim is not barred. The probate court acts simply as a depository of the

statement of claim, as is true of its responsibility for an inventory filed with it under Section 3-706.

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

Section 3-805. [Classification of Claims.]

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

- (1) costs and expenses of administration;
- (2) reasonable funeral expenses and reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him;
- (3) debts and taxes with preference under federal law or the laws of this state;
- (4) all other claims.

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

Section 3-806. [Allowance of Claims.]

(a) As to claims presented in the manner described in Section 3-804 within the time limit prescribed in 3-803, the personal representative may mail a notice to any claimant stating that the claim has been disallowed. If, after allowing or disallowing a claim, the personal representative changes his decision concerning the claim, he shall notify the claimant. The personal representative may not change a disallowance of a claim after the time for the claimant to file a petition for allowance or to commence a proceeding on the claim has run

and the claim has been barred. Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the Court or commences a proceeding against the personal representative not later than 60 days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar. Failure of the personal representative to mail notice to a claimant of action on his claim for 60 days after the time for original presentation of the claim has expired has the effect of a notice of allowance.

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

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

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

Section 3-807. [Payment of Claims.]

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

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

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

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

Section 3-808. [Individual Liability of Personal Representative.]

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

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

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

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

COMMENT

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. This and the following sections are designed to make the estate a quasi-corporation for purposes of such liabilities. The personal representative would be personally liable only if an agent for a corporation would be under the same circumstances, and the claimant has a direct remedy against the quasi-corporate property.

Section 3-809. [Secured Claims.]

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

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

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

Section 3-810. [Claims Not Due and Contingent or Unliquidated Claims.]

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

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

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

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

Section 3-811. [Counterclaims.]

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

Section 3-812. [Execution and Levies Prohibited.]

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

Section 3-813. [Compromise of Claims.]

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

Section 3-814. [Encumbered Assets.]

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

COMMENT

Section 2-609 establishes a rule of construction against exoneration. Thus, unless the will indicates to the contrary, a specific devisee of mortgaged property

Section 3-815. [Administration in More Than One State; Duty of Personal Representative.]

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

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

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

COMMENT

Under Section 3-803(a) (1), if a local (property only) administration is commenced and proceeds to advertisement for claims before non-claim statutes have run at domicile, claimants may prove claims in the local administration at any time before the local non-claim period expires. Section 3-815 has the effect of subjecting all assets of the decedent, where

ever they may be located and administered, to claims properly presented in any local administration. It is necessary, however, that the personal representative of any portion of the estate be aware of other administrations in order for him to become responsible for claims and charges established against other administrations.

Section 3-816. [Final Distribution to Domiciliary Representative.]

The estate of a non-resident decedent being administered by a personal representative appointed in this state shall, if there is a personal representative of the decedent's domicile willing to receive it, be distributed to the domiciliary personal representative for the benefit of the successors of the decedent unless (1) by virtue of the decedent's will, if any, and applicable choice of law rules, the successors are identified pursuant to the local law of this state without reference to the local law of the decedent's domicile; (2) the personal representative of this state, after reasonable inquiry, is unaware of the existence or identity of a domiciliary personal representative; or (3) the Court orders otherwise in a proceeding for a closing order under Section 3-1001 or incident to the closing of a supervised administration. In other cases, distribution of the estate of a decedent shall be made in accordance with the other Parts of this Article.

PART 9

SPECIAL PROVISIONS RELATING TO DISTRIBUTION**Section 3-901. [Successors' Rights if No Administration.]**

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

COMMENT

Title to a decedent's property passes to his heirs and devisees at the time of his death. See Section 3-101. This section adds	little to Section 3-101 except to indicate how successors may establish record title in the absence of administration.
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Section 3-902. [Distribution; Order in Which Assets Appropriated; Abatement.]

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

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

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

COMMENT

A testator may determine the order in which the assets of his estate are applied to the payment of his debts. If he does not, then the provisions of this section express rules which may be regarded as approximating what testators generally want. The statutory order of abatement is designed to aid in resolving doubts concerning the intention of a particular testator, rather than to defeat his purpose.

Hence, subsection (b) directs that consideration be given to the purpose of a testator. This may be revealed in many ways. Thus, it is commonly held that, even in the absence of statute, general legacies to a wife, or to persons with respect to which the testator is in loco parentis, are to be preferred to other legacies in the same class because this accords with the probable purpose of the legacies.

[Section 3-902A. [Distribution; Order in Which Assets Appropriated; Abatement.]

(addendum for adoption in community property states)

[(a) and (b) as above.]

(c) If an estate of a decedent consists partly of separate property and partly of community property, the debts and expenses of administration shall be apportioned and charged against the different kinds of property in proportion to the relative value thereof.

[(d) same as (c) in common law state.]]

COMMENT

(c) is suggested for inclusion in Section 3-902 in a community property state. Its inclusion causes (c) as drafted for common law states to be redesignated (d). As is the case with other insertions

suggested in the Code for community property states, the specific language of this draft is to be taken as illustrative of coverage that is desirable.

Section 3-903. [Right of Retainer.]

The amount of a non-contingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest; but the successor has the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt.

Section 3-904. [Interest on General Pecuniary Devise.]

General pecuniary devises bear interest at the legal rate beginning one year after the first appointment of a personal representative until payment, unless a contrary intent is indicated by the will.

COMMENT

Unlike the common law, this section provides that a general pecuniary devisee's right to interest begins one year from the time when administration was commenced, rather than one year from death. The rule provided here is similar to the common law rule in that the right to interest for delayed payment does not

depend on whether the estate in fact realized income during the period of delay. The section is consistent with Section 5(b) of the Revised Uniform Principal and Income Act which allocates realized net income of an estate between various categories of successors.

Section 3-905. [Penalty Clause for Contest.]

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

Section 3-906. [Distribution in Kind; Valuation; Method.]

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

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

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

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

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

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

(3) For the purpose of valuation under paragraph (2) securities regularly traded on recognized exchanges, if distributed in kind, are valued at the price for the last sale of like securities traded on the business day prior to distribu-

tion, or if there was no sale on that day, at the median between amounts bid and offered at the close of that day. Assets consisting of sums owed the decedent or the estate by solvent debtors as to which there is no known dispute or defense are valued at the sum due with accrued interest or discounted to the date of distribution. For assets which do not have readily ascertainable values, a valuation as of a date not more than 30 days prior to the date of distribution, if otherwise reasonable, controls. For purposes of facilitating distribution, the personal representative may ascertain the value of the assets as of the time of the proposed distribution in any reasonable way, including the employment of qualified appraisers, even if the assets may have been previously appraised.

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

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

COMMENT

This section establishes a preference for distribution in kind. It directs a personal representative to make distribution in kind whenever feasible and to convert assets to cash only where there is a special reason for doing so. It provides a reasonable means for

determining value of assets distributed in kind. It is implicit in Sections 3-101, 3-901 and this section that each residuary beneficiary's basic right is to his proportionate share of each asset constituting the residue.

Section 3-907. [Distribution in Kind; Evidence.]

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

COMMENT

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

Under Section 3-711, a personal representative's relationship to as-

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

Section 3-908. [Distribution; Right or Title of Distributee.]

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

COMMENT

The purpose of this section is to channel controversies which may arise among successors of a decedent because of improper distributions through the personal representative who made the distribution, or a successor personal

representative. Section 3-108 does not bar appointment proceedings initiated to secure appointment of a personal representative to correct an erroneous distribution made by a prior representative. But see Section 3-1006.

Section 3-909. [Improper Distribution; Liability of Distributee.]

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

COMMENT

The term "improperly" as used in this section must be read in light of Section 3-703 and the manifest purpose of this and other sections of the Code to shift questions concerning the propriety of various distributions from the fiduciary to the distributees in order to prevent every administration from becoming an adjudicated matter. Thus, a distribution may be "authorized at the time" as contemplated by Section 3-703, and still be "improper" under this section. Section 3-703 is designed to permit a personal representative to distribute without risk in some cases, even though there has been no adjudication. When an unadjudicated distribution has occurred, the rights of persons to show that the basis for the distribution (e.

g., an informally probated will, or informally issued letters of administration) is incorrect, or that the basis was improperly applied (erroneous interpretation, for example) is preserved against distributees by this section.

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

Section 3-910. [Purchasers from Distributees Protected.]

If property distributed in kind or a security interest therein is acquired by a purchaser, or lender, for value from a distributee who has received an instrument or deed of distribution from the personal representative, the purchaser or lender takes title free of any claims of the estate and incurs no personal liability to the estate, whether or not the distribution was proper. To be protected under this provision, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind.

COMMENT

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

Section 3-911. [Partition for Purpose of Distribution.]

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 partition. After notice to the interested heirs or devisees, the Court shall partition the property in the same manner as provided by the law for civil actions of partition. The Court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party.

COMMENT

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

Section 3-912. [Private Agreements Among Successors to Decedent Binding on Personal Representative.]

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

COMMENT

It may be asserted that this section is only a restatement of the obvious and should be omitted. Its purpose, however, is to make it clear that the successors to an estate have residual control over the way it is to be distributed. Hence, they may compel a personal representative to administer and distribute as they may agree and direct. Successors should compare the consequences and possible advantages of careful use of the power to renounce as described by Section 2-801 with the effect of agreement under this

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

Differing from a pattern that is familiar in many states, this Code does not subject testamentary trusts and trustees to special

statutory provisions, or supervisory jurisdiction. A testamentary trustee is treated as a devisee with special duties which are of no particular concern to the personal representative. Article VII contains optional procedures extending the safeguards available to personal representatives to trustees of both inter vivos and testamentary trusts.

Section 3-913. [Distributions to Trustee.]

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

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

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

COMMENT

This section is concerned with the fiduciary responsibility of the executor to beneficiaries of trusts to which he may deliver. Normally, the trustee represents beneficiaries in matters involving third persons, including prior fiduciaries. Yet, the executor may apprehend that delivery to the trustee may involve risks for the safety of the fund and for him. For example, he may be anxious to see that there is no equivocation about the devisee's willingness to accept the trust, and no problem of preserving evidence of the acceptance. He may have

doubts about the integrity of the trustee, or about his ability to function satisfactorily. The testator's selection of the trustee may have been based on facts which are still current, or which are of doubtful relevance at the time of distribution. If the risks relate to the question of the trustee's intention to handle the fund without profit for himself, a conflict of interest problem is involved. If the risk relates to the ability of the trustee to manage prudently, a more troublesome question is posed for the executor.

Is he, as executor, not bound to act in the best interests of the beneficiaries?

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

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

Status of testamentary trustees under the Uniform Probate Code. Under the Uniform Probate Code, the testamentary trustee by construction would be considered a devisee, distributee, and successor to whom title passes at time of the testator's death even though the will must be probated to prove the transfer. The informally probated will is conclusive until set aside and the personal representative may distribute to the trustee under the informally probated will or settlement agreement and the title of the trustee as distributee represented by the instrument or deed of distribution is conclusive until set aside on showing

that it is improper. Should the informally probated will be set aside or the distribution to the trustee be shown to be improper, the trustee as distributee would be liable for value received but purchasers for value from the trustee as distributee under an instrument of distribution would be protected. Section 1-201's definition of "distributee" limits the distributee liability of the trustee and substitutes that of the trust beneficiaries to the extent of distributions by the trustee.

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

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

The general fiduciary responsibilities of the testamentary trustee are not altered by the Uniform Probate Code and the trus-

tee continues to have the duty to collect and reduce to possession within a reasonable time the assets of the trust estate including the enforcement of any claims on behalf of the trust against prior fiduciaries, including the personal representative, and third parties.

[Section 3-914. [Disposition of Unclaimed Assets.]]

(a) If an heir, devisee or claimant cannot be found, the personal representative shall distribute the share of the missing person to his conservator, if any, otherwise to the [state treasurer] to become a part of the [state escheat fund].

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

COMMENT

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

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

Section 3-915. [Distribution to Person Under Disability.]

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

COMMENT

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

Section 3-916. [Apportionment of Estate Taxes.]

(a) For purposes of this section:

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

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

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

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

(5) "tax" means the federal estate tax and the additional inheritance tax imposed by _____ and interest and penalties imposed in addition to the tax;

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

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

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

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

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

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

(d) (1) The personal representative or other person in possession of the property of the decedent required to pay the tax may withhold from any property distributable to any person interested in the estate, upon its distribution to him, the amount of tax attributable to his interest. If the property in possession of the personal representative or other person required to pay the tax and distributable to any person interested in the estate is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative or other person required to pay the tax may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative or the other person required to pay the tax, the personal representative or the other person required to pay the tax may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this Act.

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

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

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

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

(4) Any credit for inheritance, succession or estate taxes or taxes in the nature thereof applicable to property or interests includable in the estate, inures to the benefit of the persons or

interests chargeable with the payment thereof to the extent proportionately that the credit reduces the tax.

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

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

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

(h) A personal representative acting in another state or a person required to pay the tax domiciled in another state may institute an action in the courts of this state and may recover a proportionate amount of the federal estate tax, of an estate tax payable to another state or of a death duty due by a decedent's

estate to another state, from a person interested in the estate who is either domiciled in this state or who owns property in this state subject to attachment or execution. For the purposes of the action the determination of apportionment by the Court having jurisdiction of the administration of the decedent's estate in the other state is prima facie correct.

COMMENT

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

PART 10

CLOSING ESTATES

Section 3-1001. [Formal Proceedings Terminating Administration; Testate or Intestate; Order of General Protection.]

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

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

COMMENT

Subsection (b) is derived from § 64(b) of the Illinois Probate Act (1967) [S.H.A. ch. 3, § 64(b)]. Section 3-106 specifies that an order is binding as to all who are given notice even though less than all interested persons were notified. This section provides a method of curing an oversight in regard to notice which may come to light before the estate is finally settled. If the person who

failed to receive notice of the earlier proceeding succeeds in obtaining entry of a different order from that previously made, others who received notice of the earlier proceeding may be benefitted. Still, they are not entitled to notice of the curative proceeding, nor should they be permitted to appear.

See, also, Comment following Section 3-1002.

Section 3-1002. [Formal Proceedings Terminating Testate Administration; Order Construing Will Without Adjudicating Testacy.]

A personal representative administering an estate under an informally probated will or any devisee under an informally probated will may petition for an order of settlement of the estate which will not adjudicate the testacy status of the decedent. The personal representative may petition at any time, and a devisee may petition after one year, from the appointment of the original personal representative, except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the Court to consider the final account or compel or approve an accounting and distribution, to construe the will and adjudicate final settlement and distribution of the estate. After notice to all devisees and the personal representative and hearing, the Court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate under the will, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any devisee who is a party to the proceeding and those he represents. If it appears that a part of the estate is intestate, the proceedings shall be dismissed or amendments made to meet the provisions of Section 3-1001.

COMMENT

Section 3-1002 permits a final determination of the rights between each other and against the personal representative of the devisees under a will when there has been no formal proceeding in

regard to testacy. Hence, the heirs in intestacy need not be made parties. Section 3-1001 permits a final determination of the rights between each other and against the personal representative of all persons interested in an estate. If supervised admin-

istration is used, Section 3-505 directs that the estate be closed by use of procedures like those described in 3-1001. Of course, testacy will have been adjudicated before time for the closing proceeding if supervised administration is used.

Section 3-1003. [Closing Estates; By Sworn Statement of Personal Representative.]

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

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

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

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

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

COMMENT

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

From a slightly different viewpoint, a personal representative may obtain a complete discharge of his fiduciary obligations through a judicial proceeding af-

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

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

Section 3-1004. [Liability of Distributees to Claimants.]

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

COMMENT

This section creates a ceiling on the liability of a distributee of "the value of his distribution" as of the time of distribution. The section indicates that each distributee is liable for all that a claimant may prove to be due, provided the claim does not exceed the value of the defendant's distri-

bution from the estate. But, each distributee may preserve a right of contribution against other distributees. The risk of insolvency of one or more, but less than all distributees is on the distributee rather than on the claimant.

Section 3-1005. [Limitations on Proceedings Against Personal Representative.]

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

COMMENT

This and the preceding section make it clear that a claimant whose claim has not been barred may have alternative remedies when an estate has been distributed subject to his claim. Under this section, he has six

months to prosecute an action against the personal representative if the latter breached any duty to the claimant. For example, the personal representative may be liable to a creditor if he violated the provisions of Sec-

tion 3-807. The preceding section describes the fundamental liability of the distributees to unbarred claimants to the extent of the value received. The last sentence emphasizes that a personal representative who fails to disclose matters relevant to his liability in his closing statement

and in the account of administration he furnished to distributees, gains no protection from the period described here. A personal representative may, however, use Section 3-1001, or, where appropriate, 3-1002 to secure greater protection.

Section 3-1006. [Limitations on Actions and Proceedings Against Distributees.]

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

COMMENT

This section describes an ultimate time limit for recovery by creditors, heirs and devisees of a decedent from distributees. It is to be noted: (1) Section 3-108 imposes a general limit of three years from death on one who must set aside an informal probate in order to establish his rights, or who must secure probate of a late-discovered will after an estate has been administered as intestate. Hence the time limit of 3-108 may bar one who would claim as an heir or devisee sooner than this section, although it would never cause a bar prior to three years from the decedent's death. (2) This section would not bar recovery by a supposed decedent whose estate has been probated. See Section 3-412. (3) The lim-

itation of this section ends the possibility of appointment of a personal representative to correct an erroneous distribution as mentioned in Sections 3-1005 and 3-1008. If there have been no adjudications under Section 3-409, or possibly 3-1001 or 3-1002, estate of the decedent which is discovered after administration has been closed may be the subject of different distribution than that attending the estate originally administered.

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

Section 3-1007. [Certificate Discharging Liens Securing Fiduciary Performance.]

After his appointment has terminated, the personal representative, his sureties, or any successor of either, upon the filing of a verified application showing, so far as is known by the applicant, that no action concerning the estate is pending in any court, is entitled to receive a certificate from the Registrar that the personal representative appears to have fully administered the estate in question. The certificate evidences discharge of any lien on any property given to secure the obligation of the personal representative in lieu of bond or any surety, but does not preclude action against the personal representative or the surety.

COMMENT

This section does not affect the liability of the personal representative, or of any surety, but merely permits a release of security given by a personal representative, or his surety, when,

from the passage of time and other conditions, it seems highly unlikely that there will be any liability remaining undischarged. See Section 3-607.

Section 3-1008. [Subsequent Administration.]

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

COMMENT

This section is consistent with Section 3-108 which provides a general period of limitations of three years from death for ap-

pointment proceedings, but makes appropriate exception for subsequent administrations.

PART 11

COMPROMISE OF CONTROVERSIES

Section 3-1101. [Effect of Approval of Agreements Involving Trusts, Inalienable Interests, or Interests of Third Persons.]

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

Section 3-1102. [Procedure for Securing Court Approval of Compromise.]

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

(1) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise. Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.

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

(3) After notice to all interested persons or their representatives, including the personal representative of the estate and all affected trustees of trusts, the Court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the

agreement and directing all fiduciaries under its supervision to execute the agreement. Minor children represented only by their parents may be bound only if their parents join with other competent persons in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

COMMENT

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

The thrust of the procedure is to put the authority for initiating settlement proposals with the persons who have beneficial interests in the estate, and to prevent executors and testamentary trustees from vetoing any such proposal. The only reason for approving a scheme of devolution

which differs from that framed by the testator or the statutes governing intestacy is to prevent dissipation of the estate in wasteful litigation. Because executors and trustees may have an interest in fees and commissions which they might earn through efforts to carry out testator's intention, the judgment of the court is substituted for that of such fiduciaries in appropriate cases. A controversy which the court may find to be in good faith, as well as concurrence of all beneficially interested and competent persons and parent-representatives provide prerequisites which should prevent the procedure from being abused. Thus, the procedure does not threaten the planning of a testator who plans and drafts with sufficient clarity and completeness to eliminate the possibility of good faith controversy concerning the meaning and legality of his plan.

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

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

PART 12

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

GENERAL COMMENT

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

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

Indeed, transfers via letters of administration may prove to be

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

Figures gleaned from a recent authoritative report of a major survey of probated estates in Cleveland, Ohio, demonstrate that more than one-half of all estates in probate had a gross value of less than \$15,000. This means that the principal measure of the relevance of any legislation dealing with probate procedures is to be found in its impact on very small and moderate sized estates. Here is the area where probate affects most people.

Section 3-1201. [Collection of Personal Property by Affidavit.]

(a) Thirty days after the death of a decedent, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action to a person claiming to be the suc-

cessor of the decedent upon being presented an affidavit made by or on behalf of the successor stating that:

(1) the value of the entire estate, wherever located, less liens and encumbrances, does not exceed \$5,000;

(2) 30 days have elapsed since the death of the decedent;

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

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

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

COMMENT

This section provides for an easy method for collecting the personal property of a decedent by affidavit prior to any formal disposition. Existing legislation generally permits the surviving widow or children to collect wages and other small amounts of liquid funds. Section 3-1201 goes further in that it allows the

collection of personal property as well as money and permits any devisee or heir to make the collection. Since the appointment of a personal representative may be obtained easily under the Code, it is unnecessary to make the provisions regarding small estates applicable to realty.

Section 3-1202. [Effect of Affidavit.]

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

COMMENT

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

Section 3-1203. [Small Estates; Summary Administrative Procedure.]

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

COMMENT

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

Section 3-1204. [Small Estates; Closing by Sworn Statement of Personal Representative.]

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

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

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

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

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

(c) A closing statement filed under this section has the same effect as one filed under Section 3-1004.

COMMENT

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

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

ARTICLE IV
FOREIGN PERSONAL REPRESENTA-
TIVES; ANCILLARY
ADMINISTRATION

PART 1
DEFINITIONS

Section

4-101. [Definitions.]

PART 2
POWERS OF FOREIGN PERSONAL REPRESENTATIVES

- 4-201. [Payment of Debt and Delivery of Property to Domiciliary Foreign Representative Without Local Administration.]
- 4-202. [Payment or Delivery Discharges.]
- 4-203. [Resident Creditor Notice.]
- 4-204. [Proof of Authority-Bond.]
- 4-205. [Powers.]
- 4-206. [Power of Representatives in Transition.]
- 4-207. [Ancillary and Other Local Administrations; Provisions Governing.]

PART 3
JURISDICTION OVER FOREIGN REPRESENTATIVES

- 4-301. [Jurisdiction by Act of Foreign Personal Representative.]
- 4-302. [Jurisdiction by Act of Decedent.]
- 4-303. [Service on Foreign Personal Representative.]

PART 4
JUDGMENTS AND PERSONAL REPRESENTATIVE

- 4-401. [Effect of Adjudication for or Against Personal Representative.]

GENERAL COMMENT

This Article concerns the law state of personal representatives applicable in estate problems appointed in other states. which involve more than a single state. It covers the powers and Some provisions of the Code responsibilities in the adopting covering local appointment of per-

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

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

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

The second part of Article IV deals with the powers of foreign personal representatives in a jurisdiction adopting the Uniform Probate Code. There are different types of power which may be exercised. First, a foreign personal representative has the power under Section 4-201 to receive payments of debts owed to the decedent or to accept delivery of property belonging to the decedent. The foreign per-

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

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

The third type of power which may be obtained by a foreign personal representative is conferred by the priority the domiciliary personal representative enjoys in respect to local appointment. This is covered by Section 3-203. Also, see Section 3.611 (b).

Part 3 provides for power in the local court over foreign per-

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

Finally, Section 4-303 provides that the foreign personal representative is subject to the jurisdiction of the local court "to the same extent that his decedent

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

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

PART 1
DEFINITIONS

Section 4-101. [Definitions.]

In this Article

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

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

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

COMMENT

Section 4-201 includes definitions of "foreign personal representative", "personal representative" and "non-resident decedent".

PART 2
POWERS OF FOREIGN PERSONAL REPRESENTATIVES

Section 4-201. [Payment of Debt and Delivery of Property to Domiciliary Foreign Personal Representative Without Local Administration.]

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

- (1) the date of the death of the nonresident decedent,
- (2) that no local administration, or application or petition therefor, is pending in this state,
- (3) that the domiciliary foreign personal representative is entitled to payment or delivery.

COMMENT

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

Section 4-202. [Payment or Delivery Discharges.]

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

Section 4-203. [Resident Creditor Notice.]

Payment or delivery under Section 4-201 may not be made if a resident creditor of the nonresident decedent has notified the debtor of the nonresident decedent or the person having possession of the personal property belonging to the nonresident

decedent that the debt should not be paid nor the property delivered to the domiciliary foreign personal representative.

COMMENT

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

Section 4-204. [Proof of Authority-Bond.]

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

Section 4-205. [Powers.]

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

Section 4-206. [Power of Representatives in Transition.]

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

Section 4-207. [Ancillary and Other Local Administrations; Provisions Governing.]

In respect to a non-resident decedent, the provisions of Article III of this Code govern (1) proceedings, if any, in a

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

COMMENT

The purpose of this section is to direct attention to Article III for sections controlling local probates and administrations. See in par-

ticular, 1-301, 3-201, 3-202, 3-203, 3-307(a), 3-308, 3-611(b), 3-803(a), 3-815 and 3-816.

PART 3

JURISDICTION OVER FOREIGN REPRESENTATIVES

Section 4-301. [Jurisdiction by Act of Foreign Personal Representative.]

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

COMMENT

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

A foreign personal representative appointed at the decedent's

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

Section 4-302. [Jurisdiction by Act of Decedent.]

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

Section 4-303. [Service on Foreign Personal Representative.]

(a) Service of process may be made upon the foreign personal representative by registered or certified mail, addressed to his last reasonably ascertainable address, requesting a return receipt signed by addressee only. Notice by ordinary first class mail is sufficient if registered or certified mail service to the addressee is unavailable. Service may be made upon a foreign personal representative in the manner in which service could have been made under other laws of this state on either the foreign personal representative or his decedent immediately prior to death.

(b) If service is made upon a foreign personal representative as provided in subsection (a), he shall be allowed at least [30] days within which to appear or respond.

COMMENT

The provision for ordinary mail as a substitute for registered or certified mail is provided because, under the present postal regulations, registered mail may not be available to reach certain addresses, 39 C.F.R. Sec. 51.3(c),

and also certified mail may not be available as a process for service because of the method of delivery used, 39 C.F.R. Sec. 58.5(c) (rural delivery) and (d) (star route delivery.)

PART 4

JUDGMENTS AND PERSONAL REPRESENTATIVE

Section 4-401. [Effect of Adjudication for or Against Personal Representative.]

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

COMMENT

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

ARTICLE V

PROTECTION OF PERSONS UNDER
DISABILITY AND THEIR
PROPERTY

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PART 3

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- 5-301. [Testamentary Appointment of Guardian for Incapacitated Person.]
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Section

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DISABILITY AND MINORS

- 5-401. [Protective Proceedings.]
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- 5-403. [Venue.]
- 5-404. [Original Petition for Appointment or Protective Order.]
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- 5-408. [Permissible Court Orders.]
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- 5-411. [Bond.]
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- 5-414. [Compensation and Expenses.]
- 5-415. [Death, Resignation or Removal of Conservator.]
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- 5-430. [Termination of Proceeding.]
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PART 5

POWERS OF ATTORNEY

- 5-501. [When Power of Attorney Not Affected by Disability.]
- 5-502. [Other Powers of Attorney Not Revoked Until Notice of Death or Disability.]

GENERAL COMMENT

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

It should be emphasized that the Article contains many provisions designed to minimize or avoid the necessity of guardianship and protective proceedings, as well as provisions designed to simplify and minimize arrangements which become necessary for care of persons or their property. The power of attorney which confers authority notwith-

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

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

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

(b) A provision in Part 2 permits the surviving parent of a

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

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

erty-protection order if other management is needed.

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

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

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

ceeds, which is recommended in respect to the affairs of a protected person directly by its orders rather than through the appointment of a conservator.

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

(f) Other provisions in Part 4 round out the relationship of protective proceedings to creditors of the protected person and persons who deal with a conservator. Claims are handled by the conservator who is given a fiduciary responsibility to claimants and suitable discretion concerning allowance. If questions arise, the appointing court has all needed power to deal with disputes with creditors. The draft changes the common law rule that contracts of a guardian are his personal responsibility. A con-

servator is not liable personally on contracts made for the estate unless he agrees to such liability. A section buttresses the managerial powers given to conservator by protecting all persons who deal with them.

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

(h) The many states which have adopted the Uniform Veterans Guardianship Act now have two systems for protection of the property of minors and mental incompetents, one of which applies if the property was derived, in whole or in part, from benefits paid by the Veterans Administration and its minor or incompetent owner is or has been a beneficiary of the Veterans Administration, and the other of which applies to all other property. It is sometimes difficult to ascertain whether a person has ever received a benefit from the Veterans Administration and commonly impossible to determine whether property was derived in part from benefits paid by the Veterans Administration. Part 4 would provide a single system for the protection of property of minors and others unable to manage their own property, thus superseding the Uniform Veterans Guard-

ianship Act. It would preserve the right of the Veterans Administration to appear in protective proceedings involving the property of its beneficiaries and

would permit the imposition of the same safeguards provided by the superseded Uniform Veterans Guardianship Act.

PART 1

GENERAL PROVISIONS

Section 5-101. [Definitions and Use of Terms.]

Unless otherwise apparent from the context, in this Code:

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

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

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

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

COMMENT

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

Section 5-102. [Jurisdiction of Subject Matter; Consolidation of Proceedings.]

(a) The Court has jurisdiction over protective proceedings and guardianship proceedings.

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

Section 5-103. [Facility of Payment or Delivery.]

Any person under a duty to pay or deliver money or personal property to a minor may perform this duty, in amounts not exceeding \$5,000 per annum, by paying or delivering the money or property to: (1) the minor, if he has attained the age of 18 years or is married; (2) any person having the care and custody of the minor with whom the minor resides; (3) a guardian of the minor; or (4) a financial institution incident to a deposit in a federally insured savings account in the sole name of the minor and giving notice of the deposit to the minor. This section does not apply if the person making payment or delivery has actual knowledge that a conservator has been appointed or proceedings for appointment of a conservator of the estate of the minor are pending. The persons, other than the minor or any financial institution under (4) above, receiving money or property for a minor, are obligated to apply the money to the support and education of the minor, but may not pay themselves except by way of reimbursement for out-of-pocket expenses for goods and services necessary for the minor's support. Any excess sums shall be preserved for future support of the minor and any balance not so used and any property received for the minor must be turned over to the minor when he attains majority. Persons who pay or deliver in accordance with provisions of this section are not responsible for the proper application thereof.

COMMENT

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

This section does not go as far as many facility of payment provisions found in trust instrument

Section 5-104. [Delegation of Powers by Parent or Guardian.]

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

COMMENT

This section permits a temporary delegation of parental powers. For example, parents (or guardian) of a minor plan to be out of the country for several months. They wish to empower a close relative (an uncle, e.g.) to take any necessary action regarding the child while they are away. Using this section, they could execute an appropriate pow-

er of attorney giving the uncle custody and power to consent. Then if an emergency operation were required, the uncle could consent on behalf of the child; as a practical matter he would of course attempt to communicate with the parents before acting. The section is designed to reduce problems relating to consents for emergency treatment.

PART 2
GUARDIANS OF MINORS

Section 5-201. [Status of Guardian of Minor; General.]

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

Section 5-202. [Testamentary Appointment of Guardian of Minor.]

The parent of a minor may appoint by will a guardian of an unmarried minor. Subject to the right of the minor under Section 5-203, a testamentary appointment becomes effective upon filing the guardian's acceptance in the Court in which the will is probated, if before acceptance, both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority. This state recognizes a testamentary appointment effected by filing the guardian's acceptance under a will probated in another state which is the testator's domicile.

Section 5-203. [Objection by Minor of Fourteen or Older to Testamentary Appointment.]

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

Section 5-204. [Court Appointment of Guardian of Minor; Conditions for Appointment.]

The Court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated or suspended by circumstances or prior Court order. A guardian appointed by will as provided in Section 5-202 whose appointment has not been prevented or nullified under 5-203 has priority over any guardian who may be appointed by the Court

but the Court may proceed with an appointment upon a finding that the testamentary guardian has failed to accept the testamentary appointment within 30 days after notice of the guardianship proceeding.

COMMENT

The words "all parental rights of custody" are to be read with Sections 5-201 and 5-209 which give testamentary and court-appointed guardians of minors certain parental rights respecting the minor. Hence, no authority to appoint a guardian for a minor exists if a testamentary guardian has accepted an effective appointment by will. The purpose

of this restriction is to support and encourage testamentary appointments which may occur without judicial act. If a testamentary guardian proves to be unsatisfactory, removal proceedings as provided in Section 5-211 may be used if the objection device of Section 5-203 is unavailable.

Section 5-205. [Court Appointment of Guardian of Minor; Venue.]

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

COMMENT

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

Section 5-206. [Court Appointment of Guardian of Minor; Qualifications; Priority of Minor's Nominee.]

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

COMMENT

Rather than provide for priorities among various classes of relatives, it was felt that the only priority should be for the person nominated by the minor. The important point is to locate someone whose appointment will be in the

best interests of the minor. If there is contention among relatives over who should be named, it is not likely that a statutory priority keyed to degrees of kinship would help resolve the matter. For example, if the ar-

gument involved a squabble between relatives of the child's father and relatives of its mother, priority in terms of degrees of kinship would be useless.

Guardianships under this Code are not likely to be attractive positions for persons who are more interested in handling a minor's estate than in his personal well being. An order of a

court having equity power is necessary if the guardian is to receive payment for services where there is no conservator for the minor's estate. Also, the powers of management of a ward's estate conferred on a guardian are restricted so that if a substantial estate is involved, a conservator will be needed to handle the financial matters.

Section 5-207. [Court Appointment of Guardian of Minor; Procedure.]

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

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

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

(3) any living parent of the minor.

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

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

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

Section 5-208. [Consent to Service by Acceptance of Appointment; Notice.]

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

COMMENT

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

Section 5-209. [Powers and Duties of Guardian of Minor.]

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

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

(b) He may receive money payable for the support of the ward to the ward's parent, guardian or custodian under the terms of any statutory benefit or insurance system, or any private contract, devise, trust, conservatorship or custodianship. He also may receive money or property of the ward paid or delivered by virtue of Section 5-103. Any sums so received shall be applied to the ward's current needs for support, care and education. He must exercise due care to conserve any excess for the ward's future needs unless a conservator has been appointed for the estate of the ward, in which case excess shall be paid over at least annually to the conservator. Sums so

received by the guardian are not to be used for compensation for his services except as approved by order of court or as determined by a duly appointed conservator other than the guardian. A guardian may institute proceedings to compel the performance by any person of a duty to support the ward or to pay sums for the welfare of the ward.

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

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

COMMENT

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

Section 5-210. [Termination of Appointment of Guardian; General.]

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

Section 5-211. [Proceedings Subsequent to Appointment; Venue.]

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

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

COMMENT

Under Section 1-302, the Court is designated as the proper court to handle matters relating to guardianship. The present section is intended to give jurisdiction to the forum where the ward resides as well as to the one where appointment initiated. This has primary importance where the ward's residence has

been moved from the appointing state. Because the Court where acceptance of appointment is filed may as a practical matter be the only forum where jurisdiction over the person of the guardian may be obtained (by reason of Section 5-208), that Court is given concurrent jurisdiction.

Section 5-212. [Resignation or Removal Proceedings.]

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

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

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

PART 3

GUARDIANS OF INCAPACITATED PERSONS

Section 5-301. [Testamentary Appointment of Guardian For Incapacitated Person.]

(a) The parent of an incapacitated person may by will appoint a guardian of the incapacitated person. A testamentary appointment by a parent becomes effective when, after having given 7 days prior written notice of his intention to do so to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is informally or formally probated, if prior thereto, both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority unless it is terminated by the denial of probate in formal proceedings.

(b) The spouse of a married incapacitated person may by will appoint a guardian of the incapacitated person. The appointment becomes effective when, after having given 7 days prior written notice of his intention to do so to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the Court in which the will is informally or formally probated. An effective appointment by a spouse has priority over an appointment by a parent unless it is terminated by the denial of probate in formal proceedings.

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

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

COMMENT

This section, modelled after Section 5-205, is designed to give the surviving parent, or the spouse, ability to confer the authority of a guardian on a person designated by will. This opportunity of an incapacitated person, the may be most useful in cases

where parents, during their lifetime, have arranged an informal or voluntary commitment of an incompetent child, and are anxious to designate another who can maintain contact with the patient and act on his behalf without the necessity of a sanity hearing. The person designated by will must act by filing acceptance of the appointment. This provides a check against will directions

which might prove to be unwise or unnecessary after the parents' death. Moreover, the testamentary designee will have the risk of the possibility that the ward is not in fact incapacitated to prevent him from using the authority conferred to restrain the liberty of the ward. In cases of doubt, the testamentary appointee should petition for a Court appointment under Section 5-303.

Section 5-302. [Venue.]

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

COMMENT

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

quests for guardianship proceedings relating to him. In protective proceedings, venue is normally in the county of residence. See Section 5-403. See Section 1-303 for disposition when venue is in two counties, and for transfer of venue.

Section 5-303. [Procedure For Court Appointment of a Guardian of an Incapacitated Person.]

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

(b) Upon the filing of a petition, the Court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his own choice, it shall appoint an appropriate official or attorney to represent him in the proceeding, who shall have the powers and duties of a guardian ad litem. The person alleged to be incapacitated shall be examined by a physician appointed by the Court who shall submit his report in writing to the Court and be interviewed by a visitor sent by the Court. The visitor also shall interview the person seeking appointment as guardian, and visit the present place of abode of the person alleged to be incapacitated and the

place it is proposed that he will be detained or reside if the requested appointment is made and submit his report in writing to the Court. The person alleged to be incapacitated is entitled to be present at the hearing in person, and to see or hear all evidence bearing upon his condition. He is entitled to be present by counsel, to present evidence, to cross-examine witnesses, including the Court-appointed physician and the visitor [, and to trial by jury]. The issue may be determined at a closed hearing [without a jury] if the person alleged to be incapacitated or his counsel so requests.

COMMENT

The procedure here is similar to, but not precisely the same as, protective proceedings for certain disabled persons. It is not required that the visitor be a lawyer. In urban areas, the visitor may be a social worker capable of

determining the needs of the person for whom the appointment is sought. By brackets, the National Conference indicates that enacting states should decide whether it is appropriate to create a right to jury trial.

Section 5-304. [Findings; Order of Appointment.]

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

COMMENT

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

It is assumed that the standards suggested by the definition in Section 5-101 for the "incapacitated" person are different from those which will determine when a person may be committed

as mentally ill. For example, involuntary commitment proceedings may well be inappropriate unless it is determined that the patient is or probably will become *dangerous* to himself or the person or property of others. As indicated in 5-101, the meaning of "incapacitated" turns on whether the subject lacks "understanding or capacity to make or communicate responsible decisions concerning his person." There is overlap between the two sets of standards, but they are different. Hence, a finding that a person is

"incapacitated" does not amount to a finding that he is mentally ill, or can be committed. In the reverse situation, if a person has been committed to institutional care and custody because of mental illness, it may be unnecessary to appoint a guardian for him. Nonetheless, it may be desirable to have a personal guardian for one who is or may be committed or who will be cared for by an institution. For one thing, a guardian, having custody, might arrange for a voluntary care arrangement like that which a parent for a minor and incapacitated

child could establish. Moreover, the limited authority of a guardian over property of his ward may be appropriate in cases where the ward is committed. Because of the relationship between existing guardianship legislation and the handling of committed persons appears to vary considerably from state to state, the Code was deliberately left rather general on points relevant to the relationship. Section 5-312 qualifies the power of a guardian to determine the place of residence of a ward who has been committed.

Section 5-305. [Acceptance of Appointment; Consent to Jurisdiction.]

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

COMMENT

The proceedings under Article V are flexible. The Court should not appoint a guardian unless one is necessary or desirable for the care of the person. If it develops that the needs of the person who is alleged to be incapacitated are not those which would call for a

guardian, the Court may adjust the proceeding accordingly. By acceptance of the appointment, the guardian submits to the Court's jurisdiction in much the same way as a personal representative. Cf. Sec. 3-602.

Section 5-306. [Termination of Guardianship for Incapacitated Person.]

The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation as provided in Section 5-307. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding.

Section 5-307. [Removal or Resignation of Guardian; Termination of Incapacity.]

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

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

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

COMMENT

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

Section 5-308. [Visitor in Guardianship Proceeding.]

A visitor is, with respect to guardianship proceedings, 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.

COMMENT

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

Section 5-309. [Notices in Guardianship Proceedings.]

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

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

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

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

(b) Notice shall be served personally on the alleged incapacitated person, and his spouse and parents if they can be found within the state. Notice to the spouse and parents, if they cannot be found within the state, and to all other persons except the alleged incapacitated person shall be given as provided in Section 1-401. Waiver of notice by the person alleged to be incapacitated is not effective unless he attends the hearing or his waiver of notice is confirmed in an interview with the visitor. Representation of the alleged incapacitated person by a guardian ad litem is not necessary.

COMMENT

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

Section 5-310. [Temporary Guardians.]

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

provisions of this Code concerning guardians apply to temporary guardians.

COMMENT

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

Section 5-311. [Who May Be Guardian; Priorities.]

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

(b) Persons who are not disqualified have priority for appointment as guardian in the following order:

- (1) the spouse of the incapacitated person;
- (2) an adult child of the incapacitated person;
- (3) a parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;
- (4) any relative of the incapacitated person with whom he has resided for more than 6 months prior to the filing of the petition;
- (5) a person nominated by the person who is caring for him or paying benefits to him.

Section 5-312. [General Powers and Duties of Guardian.]

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

- (1) to the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of abode within or without this state.
- (2) If entitled to custody of his ward he shall make provision for the care, comfort and maintenance of his ward and, whenever appropriate, arrange for his training

and education. Without regard to custodial rights of the ward's person, he shall take reasonable care of his ward's clothing, furniture, vehicles and other personal effects and commence protective proceedings if other property of his ward is in need of protection.

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

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

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

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

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

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

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

COMMENT

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

Section 5-313. [Proceedings Subsequent to Appointment; Venue.]

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

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

PART 4

PROTECTION OF PROPERTY OF PERSONS UNDER DISABILITY AND MINORS

Section 5-401. [Protective Proceedings.]

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

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

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

COMMENT

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

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

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

Section 5-402. [Protective Proceedings; Jurisdiction of Affairs of Protected Persons.]

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

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

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

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

COMMENT

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

Section 5-403. [Venue.]

Venue for proceedings under this Part is:

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

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

COMMENT

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

Section 5-404. [Original Petition for Appointment or Protective Order.]

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

(b) The petition shall set forth to the extent known, the interest of the petitioner; the name, age, residence and address of the person to be protected; the name and address of his guardian, if any; the name and address of his nearest relative known to the petitioner; a general statement of his property with an estimate of the value thereof, including any compensation, insurance, pension or allowance to which he is entitled; and the reason why appointment of a conservator or other protective order is necessary. If the appointment of a conservator is requested, the petition also shall set forth the name and address of the person whose appointment is sought and the basis of his priority for appointment.

Section 5-405. [Notice.]

(a) On a petition for appointment of a conservator or other protective order, the person to be protected and his spouse or, if none, his parents, must be served personally with notice of the proceeding at least 14 days before the date of hearing if they can be found within the state, or, if they cannot be found within the state, they must be given notice in accordance with Section 1-401. Waiver by the person to be protected is not effective unless he attends the hearing or, unless minority is the reason for the proceeding, waiver is confirmed in an interview with the visitor.

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

Section 5-406. [Protective Proceedings; Request for Notice; Interested Person.]

Any interested person who desires to be notified before any order is made in a protective proceeding may file with the Registrar a request for notice subsequent to payment of any

fee required by statute or Court rule. The clerk shall mail a copy of the demand to the conservator if one has been appointed. A request is not effective unless it contains a statement showing the interest of the person making it and his address, or that of his attorney, and is effective only as to matters occurring after the filing. Any governmental agency paying or planning to pay benefits to the person to be protected is an interested person in protective proceedings.

Section 5-407. [Procedure Concerning Hearing and Order on Original Petition.]

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

(b) Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the Court shall set a date for hearing.

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

COMMENT

The section establishes a framework within which professionals, including the judge, attorney and physician, if any, may be expected to exercise good judgment in regard to the minor or disabled person who is the subject of the proceeding. The National Confer-

ence accepts that it is desirable to rely on professionals rather than to attempt to draft detailed standards or conditions for appointment.

Section 5-408. [Permissible Court Orders.]

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

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

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

(3) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the Court has, for the benefit of the person and members of his household, all the powers over his estate and affairs which he could exercise if present and not under disability, except the power to make a will. These powers include, but are not limited to power to make gifts, to convey or release his contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety, to exercise or release his powers as trustee, personal representative, custodian for minors, conservator, or donee of a power of appointment, to enter into contracts, to create revocable or irrevocable trusts of property of the estate which may extend beyond his disability or life, to exercise options of the disabled person to purchase securities or other property, to exercise his rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value, to exercise his right to an elective share in the estate of his deceased spouse and to renounce any interest by testate or intestate succession or by inter vivos transfer.

(4) The Court may exercise or direct the exercise of, its authority to exercise or release powers of appointment of which the protected person is donee, to renounce interests, to make gifts in trust or otherwise exceeding 20 percent of any year's

income of the estate or to change beneficiaries under insurance and annuity policies, only if satisfied, after notice and hearing, that it is in the best interests of the protected person, and that he either is incapable of consenting or has consented to the proposed exercise of power.

(5) An order made pursuant to this section determining that a basis for appointment of a conservator or other protective order exists, has no effect on the capacity of the protected person.

COMMENT

The Court, which is supervising a conservatorship, is given all the powers which the individual would have if he were of full capacity. These powers are given to the Court that is managing the protected person's property since the exercise of these powers have important consequences with respect to the protected person's property.

Section 5-409. [Protective Arrangements and Single Transactions Authorized.]

(a) If it is established in a proper proceeding that a basis exists as described in Section 5-401 for affecting the property and affairs of a person the Court, without appointing a conservator, may authorize, direct or ratify any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person. Protective arrangements include, but are not limited to, payment, delivery, deposit or retention of funds or property, sale, mortgage, lease or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust.

(b) When it has been established in a proper proceeding that a basis exists as described in Section 5-401 for affecting the property and affairs of a person the Court, without appointing a conservator, may authorize, direct or ratify any contract, trust or other transaction relating to the protected person's financial affairs or involving his estate if the Court determines that the transaction is in the best interests of the protected person.

(c) Before approving a protective arrangement or other transaction under this section, the Court shall consider the interests of creditors and dependents of the protected person and, in view of his disability, whether the protected person needs the continuing protection of a conservator. The Court

may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the Court of all matters done pursuant to the order of appointment.

COMMENT

It is important that the provision be made for the approval of single transactions or the establishment of protective arrangements as alternatives to full conservatorship. Under present law, a guardianship often must be

established simply to make possible a valid transfer of land or securities. This section eliminates the necessity of the establishment of long-term arrangements in this situation.

Section 5-410. [Who May Be Appointed Conservator; Priorities.]

(a) The Court may appoint an individual, or a corporation with general power to serve as trustee, as conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed:

(1) a conservator, guardian of property or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;

(2) an individual or corporation nominated by the protected person if he is 14 or more years of age and has, in the opinion of the Court, sufficient mental capacity to make an intelligent choice;

(3) the spouse of the protected person;

(4) an adult child of the protected person;

(5) a parent of the protected person, or a person nominated by the will of a deceased parent;

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

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

(b) A person in priorities (1), (3), (4), (5), or (6) may nominate in writing a person to serve in his stead. With respect to persons having equal priority, the Court is to select the one who is best qualified of those willing to serve. The Court, for good

cause, may pass over a person having priority and appoint a person having less priority or no priority.

COMMENT

A flexible system of priorities may name a conservator for his for appointment as conservator minor children in his will if he has been provided. A parent deems this desirable.

Section 5-411. [Bond.]

The Court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the trust according to law, with sureties as it shall specify. Unless otherwise directed, the bond shall be in the amount of the aggregate capital value of the property of the estate in his control plus one year's estimated income minus the value of securities deposited under arrangements requiring an order of the Court for their removal and the value of any land which the fiduciary, by express limitation of power, lacks power to sell or convey without Court authorization. The Court in lieu of sureties on a bond, may accept other security for the performance of the bond, including a pledge of securities or a mortgage of land.

COMMENT

The bond requirements for personal representatives. Cf. Section 3-603. conservators are somewhat more strict than the requirements for

Section 5-412. [Terms and Requirements of Bonds.]

(a) The following requirements and provisions apply to any bond required under Section 5-411:

(1) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the conservator and with each other;

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

(3) On petition of a successor conservator or any interested person, a proceeding may be initiated against a

surety for breach of the obligation of the bond of the conservator;

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

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

Section 5-413. [Acceptance of Appointment; Consent to Jurisdiction.]

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

Section 5-414. [Compensation and Expenses.]

If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate.

Section 5-415. [Death, Resignation or Removal of Conservator.]

The Court may remove a conservator for good cause, upon notice and hearing, or accept the resignation of a conservator. After his death, resignation or removal, the Court may appoint another conservator. A conservator so appointed succeeds to the title and powers of his predecessor.

Section 5-416. [Petitions for Orders Subsequent to Appointment.]

(a) Any person interested in the welfare of a person for whom a conservator has been appointed may file a petition in the appointing court for an order (1) requiring bond or security or additional bond or security, or reducing bond, (2) requiring an accounting for the administration of the trust, (3) directing distribution, (4) removing the conservator and appointing a temporary or successor conservator, or (5) granting other appropriate relief.

(b) A conservator may petition the appointing court for instructions concerning his fiduciary responsibility.

(c) Upon notice and hearing, the Court may give appropriate instructions or make any appropriate order.

COMMENT

Once a conservator has been appointed, the Court supervising the trust acts only upon the request of some moving party.

Section 5-417. [General Duty of Conservator.]

In the exercise of his powers, a conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees as described by Section 7-302.

Section 5-418. [Inventory and Records.]

Within 90 days after his appointment, every conservator shall prepare and file with the appointing Court a complete inventory of the estate of the protected person together with his oath or affirmation that it is complete and accurate so far as he is informed. The conservator shall provide a copy thereof to the protected person if he can be located, has attained the age of 14 years, and has sufficient mental capacity to understand these matters, and to any parent or guardian with whom the protected person resides. The conservator shall keep suitable records of his administration and exhibit the same on request of any interested person.

Section 5-419. [Accounts.]

Every conservator must account to the Court for his administration of the trust upon his resignation or removal, and at other times as the Court may direct. On termination of the protected person's minority or disability, a conservator may account to the Court, or he may account to the former protected person or his personal representative. Subject to appeal or vacation within the time permitted, an order, made upon notice and hearing, allowing an intermediate account of a conservator, adjudicates as to his liabilities concerning the matters considered in connection therewith; and an order, made upon notice and hearing, allowing a final account adjudicates as to all previously unsettled liabilities of the conservator to the protected person or his successors relating to the conservatorship. In connection with any account, the Court may require a conservator to submit to a physical check of the estate in his control, to be made in any manner the Court may specify.

COMMENT

The persons who are to receive notice of intermediate and final accounts will be identified by Court order as provided in Section 5-405(b). Notice is given as described in 1-401. In other respects, procedures applicable to accountings will be as provided in court rule.

Section 5-420. [Conservators; Title by Appointment.]

The appointment of a conservator vests in him title as trustee to all property of the protected person, presently held or thereafter acquired, including title to any property theretofore held for the protected person by custodians or attorneys in fact. The appointment of a conservator is not a transfer or alienation within the meaning of general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will or trust instrument, imposing restrictions upon or penalties for transfer or alienation by the protected person of his rights or interest, but this section does not restrict the ability of persons to make specific provision by contract or dispositive instrument relating to a conservator.

COMMENT

This section permits independent administration of the property of protected persons once the appointment of a conservator had been obtained. Any interested person may require the conservator to account in accordance with Section 5-419. As a trustee, a conservator holds title to the property of the protected person. The appointment of a conservator is a serious matter and the Court must select him with great care.

Once appointed, he is free to carry on his fiduciary responsibilities. If he should default in these in any way, he may be made to account to the Court.

Unlike a situation involving appointment of a guardian, the appointment of a conservator has no bearing on the capacity of the disabled person to contract or engage in other transactions.

Section 5-421. [Recording of Conservator's Letters.]

Letters of conservatorship are evidence of transfer of all assets of a protected person to the conservator. An order terminating a conservatorship is evidence of transfer of all assets of the estate from the conservator to the protected person, or his successors. Subject to the requirements of general statutes governing the filing or recordation of documents of title to land or other property, letters of conservatorship, and orders terminating conservatorships, may be

filed or recorded to give record notice of title as between the conservator and the protected person.

Section 5-422. [Sale, Encumbrance or Transaction Involving Conflict of Interest; Voidable; Exceptions.]

Any sale or encumbrance to a conservator, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest is voidable unless the transaction is approved by the Court after notice to interested persons and others as directed by the Court.

Section 5-423. [Persons Dealing with Conservators; Protection.]

A person who in good faith either assists a conservator or deals with him for value in any transaction other than those requiring a Court order as provided in Section 5-408, is protected as if the conservator properly exercised the power. The fact that a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, except that restrictions on powers of conservators which are endorsed on letters as provided in Section 5-426 are effective as to third persons. A person is not bound to see to the proper application of estate assets paid or delivered to a conservator. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

Section 5-424. [Powers of Conservator in Administration.]

(a) A conservator has all of the powers conferred herein and any additional powers conferred by law on trustees in this state. In addition, a conservator of the estate of an unmarried minor under the age of 18 years, as to whom no one has parental rights, has the duties and powers of a guardian of a minor described in Section 5-209 until the minor attains the age of 18 or marries, but the parental rights so conferred on a conservator do not preclude appointment of a guardian as provided by Part 2.

(b) A conservator has power without Court authorization or confirmation, to invest and reinvest funds of the estate as would a trustee.

(c) A conservator, acting reasonably in efforts to accomplish the purpose for which he was appointed, may act without Court authorization or confirmation, to

(1) collect, hold and retain assets of the estate including land in another state, until, in his judgment, disposition of the assets should be made, and the assets may be retained even though they include an asset in which he is personally interested;

(2) receive additions to the estate;

(3) continue or participate in the operation of any business or other enterprise;

(4) acquire an undivided interest in an estate asset in which the conservator, in any fiduciary capacity, holds an undivided interest;

(5) invest and reinvest estate assets in accordance with subsection (b);

(6) deposit estate funds in a bank including a bank operated by the conservator;

(7) acquire or dispose of an estate asset including land in another state for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset for a term within or extending beyond the term of the conservatorship in connection with the exercise of any power vested in the conservator;

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

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

(10) enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the conservatorship;

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

(12) grant an option involving disposition of an estate asset, to take an option for the acquisition of any asset;

(13) vote a security, in person or by general or limited proxy;

(14) pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

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

(16) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery, but the conservator is liable for any act of the nominee in connection with the stock so held;

(17) insure the assets of the estate against damage or loss, and the conservator against liability with respect to third persons;

(18) borrow money to be repaid from estate assets or otherwise; to advance money for the protection of the estate or the protected person, and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any estate assets and the conservator has a lien on the estate as against the protected person for advances so made;

(19) pay or contest any claim; to settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible;

(20) pay taxes, assessments, compensation of the conservator, and other expenses incurred in the collection, care, administration and protection of the estate;

(21) allocate items of income or expense to either estate income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(22) pay any sum distributable to a protected person or a dependent of the person who is a minor or incompetent, without liability to the conservator, by paying the sum to the distributee or by paying the sum for the use of the distributee either to his guardian or if none, to a relative or other person with custody of his person;

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

(24) prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties; and

(25) execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the conservator.

Section 5-425. [Distributive Duties and Powers of Conservator.]

(a) A conservator may expend or distribute income or principal of the estate without Court authorization or confirmation for the support, education, care or benefit of the protected person and his dependents in accordance with the following principles:

(1) The conservator is to consider recommendations relating to the appropriate standard of support, education and benefit for the protected person made by a parent or guardian, if any. He may not be surcharged for sums paid to persons or organizations actually furnishing support, education or care to the protected person pursuant to the recommendations of a parent or guardian of the protected person unless he knows that the parent or guardian is deriving personal financial benefit therefrom, including relief from any personal duty of support, or unless the recommendations are clearly not in the best interests of the protected person.

(2) The conservator is to expend or distribute sums reasonably necessary for the support, education, care or benefit of the protected person with due regard to (i) the

size of the estate, the probable duration of the conservatorship and the likelihood that the protected person, at some future time, may be fully able to manage his affairs and the estate which has been conserved for him; (ii) the accustomed standard of living of the protected person and members of his household; (iii) other funds or sources used for the support of the protected person.

(3) The conservator may expend funds of the estate for the support of persons legally dependent on the protected person and others who are members of the protected person's household who are unable to support themselves, and who are in need of support.

(4) Funds expended under this subsection may be paid by the conservator to any person, including the protected person to reimburse for expenditures which the conservator might have made, or in advance for services to be rendered to the protected person when it is reasonable to expect that they will be performed and where advance payments are customary or reasonably necessary under the circumstances.

(b) If the estate is ample to provide for the purposes implicit in the distributions authorized by the preceding subsections, a conservator for a protected person other than a minor has power to make gifts to charity and other objects as the protected person might have been expected to make, in amounts which do not exceed in total for any year 20 percent of the income from the estate.

(c) When a minor who has not been adjudged disabled under Section 5-401(2) attains his majority, his conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

(d) When the conservator is satisfied that a protected person's disability (other than minority) has ceased, the conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

(e) If a protected person dies, the conservator shall deliver to the Court for safekeeping any will of the deceased protected person which may have come into his possession, inform the executor or a beneficiary named therein that he has done so, and retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto. If after [40] days from the death of the protected person no

other person has been appointed personal representative and no application or petition for appointment is before the Court, the conservator may apply to exercise the powers and duties of a personal representative so that he may proceed to administer and distribute the decedent's estate without additional or further appointment. Upon application for an order granting the powers of a personal representative to a conservator, after notice to any person demanding notice under Section 3-204 and to any person nominated executor in any will of which the applicant is aware, the Court may order the conferral of the power upon determining that there is no objection, and endorse the letters of the conservator to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative. The making and entry of an order under this section shall have the effect of an order of appointment of a personal representative as provided in Section 3-308 and Parts 6 through 10 of Article III except that estate in the name of the conservator, after administration, may be distributed to the decedent's successors without prior re-transfer to the conservator as personal representative.

COMMENT

This section sets out those situations wherein the conservator may distribute property or disburse funds during the continuance of or on termination of the trust. Section 5-416(b) makes it clear that a conservator may seek instructions from the Court on questions arising under this section. Subsection (e) is derived in part from § 11.80.150 Revised Code of Washington [RCWA 11.80.150].

Section 5-426. [Enlargement or Limitation of Powers of Conservator.]

Subject to the restrictions in Section 5-408(4), the Court may confer on a conservator at the time of appointment or later, in addition to the powers conferred on him by Sections 5-424 and 5-425, any power which the Court itself could exercise under Sections 5-408(2) and 5-408(3). The Court may, at the time of appointment or later, limit the powers of a conservator otherwise conferred by Sections 5-424 and 5-425, or previously conferred by the Court, and may at any time relieve him of any limitation. If the Court limits any power conferred on the conservator by Section 5-424 or Section 5-425, the limitation shall be endorsed upon his letters of appointment.

COMMENT

This section makes it possible to appoint a fiduciary whose powers are limited to part of the estate or who may conduct important transactions, such as sales and mortgages of land, only with special Court authorization. In the latter case, a conservator would be in much the position of a guardian of property under the law currently in force in most states, except that he would have title to the property. The purpose of giving conservators title as trustees is to ensure that the provisions for protection of third parties have full effect. The Veterans Administration may insist that, when it is paying benefits to a minor or disabled, the letters of conservatorship limit powers to those of a guardian under the Uniform Veteran's Guardianship Act and require the conservator to file annual accounts.

The Court may not only limit the powers of the conservator but may expand his powers so as to make it possible for him to act as the Court itself might act.

Section 5-427. [Preservation of Estate Plan.]

In investing the estate, and in selecting assets of the estate for distribution under subsections (a) and (b) of Section 5-425, in utilizing powers of revocation or withdrawal available for the support of the protected person, and exercisable by the conservator or the Court, the conservator and the Court should take into account any known estate plan of the protected person, including his will, any revocable trust of which he is settlor, and any contract, transfer or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his death to another or others which he may have originated. The conservator may examine the will of the protected person.

Section 5-428. [Claims Against Protected Person; Enforcement.]

(a) A conservator must pay from the estate all just claims against the estate and against the protected person arising before or after the conservatorship upon their presentation and allowance. A claim may be presented by either of the following methods: (1) the claimant may deliver or mail to the conservator a written statement of the claim indicating its basis, the name and address of the claimant and the amount claimed; (2) the claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of the Court and deliver or mail a copy of the statement to the conservator. A presented claim is allowed if it is not disallowed by written statement mailed by the conservator to

the claimant within 60 days after its presentation. The presentation of a claim tolls any statute of limitation relating to the claim until thirty days after its disallowance.

(b) A claimant whose claim has not been paid may petition the Court for determination of his claim at any time before it is barred by the applicable statute of limitation, and, upon due proof, procure an order for its allowance and payment from the estate. If a proceeding is pending against a protected person at the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party must give notice of the proceeding to the conservator if the outcome is to constitute a claim against the estate.

(c) If it appears that the estate in conservatorship is likely to be exhausted before all existing claims are paid, preference is to be given to prior claims for the care, maintenance and education of the protected person or his dependents and existing claims for expenses of administration.

Section 5-429. [Individual Liability of Conservator.]

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

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

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

(d) Any question of liability between the estate and the conservator individually may be determined in a proceeding for accounting, surcharge, or indemnification, or other appropriate proceeding or action.

Section 5-430. [Termination of Proceeding.]

The protected person, his personal representative, the conservator or any other interested person may petition the Court to terminate the conservatorship. A protected person seeking

termination is entitled to the same rights and procedures as in an original proceeding for a protective order. The Court, upon determining after notice and hearing that the minority or disability of the protected person has ceased, may terminate the conservatorship. Upon termination, title to assets of the estate passes to the former protected person or to his successors subject to provision in the order for expenses of administration or to conveyances from the conservator to the former protected persons or his successors, to evidence the transfer.

COMMENT

The persons entitled to notice of a petition to terminate a conservatorship are identified by Section 5-405.

(e. g., the individual who returns after being missing) it may be perfectly clear that he is no longer in need of a conservatorship.

Any interested person may seek the termination of a conservatorship when there is some question as to whether the trust is still needed. In some situations

An order terminating a conservatorship may be recorded as evidence of the transfer of title from the estate. See 5-421.

Section 5-431. [Payment of Debt and Delivery of Property to Foreign Conservator Without Local Proceedings.]

Any person indebted to a protected person, or having possession of property or of an instrument evidencing a debt, stock, or chose in action belonging to a protected person may pay or deliver to a conservator, guardian of the estate or other like fiduciary appointed by a court of the state or residence of the protected person, upon being presented with proof of his appointment and an affidavit made by him or on his behalf stating:

(1) that no protective proceeding relating to the protected person is pending in this state; and

(2) that the foreign conservator is entitled to payment or to receive delivery.

If the person to whom the affidavit is presented is not aware of any protective proceeding pending in this state, payment or delivery in response to the demand and affidavit discharges the debtor or possessor.

COMMENT

Section 5-410(a) (1) gives a foreign conservator or guardian of property, appointed by the state where the disabled person resides, first priority for appointment as conservator in this state. A foreign conservator may easily obtain any property in this state and take it to the residence of the protected person for management.

PART 5

POWERS OF ATTORNEY

Section 5-501. [When Power of Attorney Not Affected by Disability.]

Whenever a principal designates another his attorney in fact or agent by a power of attorney in writing and the writing contains the words "This power of attorney shall not be affected by disability of the principal," or "This power of attorney shall become effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability, the authority of the attorney in fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney in fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees and personal representative as if the principal were alive, competent and not disabled. If a conservator thereafter is appointed for the principal, the attorney in fact or agent, during the continuance of the appointment, shall account to the conservator rather than the principal. The conservator has the same power the principal would have had if he were not disabled or the principal would have had if he were not protected or the power of attorney or agency.

COMMENT

This section permits a person who is sui juris to execute a power of attorney which will become or remain effective in the event he should later become disabled. If the Court should subsequently appoint a conservator, the latter may either permit the attorney in fact to continue to act or revoke the power of attorney. The section is based in part on Code of Va. (1950), Sec. 11-9.1.

Section 5-502. [Other Powers of Attorney Not Revoked Until Notice of Death or Disability.]

(a) The death, disability, or incompetence of any principal who has executed a power of attorney in writing other than a power as described by Section 5-501, does not revoke or

terminate the agency as to the attorney in fact, agent or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his heirs, devisees, and personal representatives.

(b) An affidavit, executed by the attorney in fact or agent stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability or incompetence, is, in the absence of fraud, conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

(c) This section shall not be construed to alter or affect any provision for revocation or termination contained in the power of attorney.

COMMENT

This section adopts the civil law rule that powers of attorney are not revoked on death or disability until the attorney in fact has actual knowledge of the death or disability. Provision is made for proving lack of knowledge by

affidavit and the recordation of the affidavit to protect transactions that might otherwise be invalidated at common law. The section is based on Code of Va. (1950), Sec. 11-9-2.

ARTICLE VI
NON-PROBATE TRANSFERS

PART 1
MULTIPLE-PARTY ACCOUNTS

Section

- 6-101. [Definitions.]
- 6-102. [Ownership As Between Parties, and Others; Protection of Financial Institutions.]
- 6-103. [Ownership During Lifetime.]
- 6-104. [Right of Survivorship.]
- 6-105. [Effect of Written Notice to Financial Institution.]
- 6-106. [Accounts and Transfers Nontestamentary.]
- 6-107. [Rights of Creditors.]
- 6-108. [Financial Institution Protection; Payment on Signature of One Party.]
- 6-109. [Financial Institution Protection; Payment After Death or Disability; Joint Account.]
- 6-110. [Financial Institution Protection; Payment of P.O.D. Account.]
- 6-111. [Financial Institution Protection; Payment of Trust Account.]
- 6-112. [Financial Institution Protection; Discharge.]
- 6-113. [Financial Institution Protection; Set-off.]

PART 2
PROVISIONS RELATING TO EFFECT OF DEATH

- 6-201. [Provisions for Payment or Transfer at Death.]

PART 1

MULTIPLE-PARTY ACCOUNTS

Section 6-101. [Definitions.]

In this part, unless the context otherwise requires:

(1) "account" means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account and other like arrangement;

(2) "beneficiary" means a person named in a trust account as one for whom a party to the account is named as trustee;

(3) "financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations, and credit unions;

(4) "joint account" means an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship;

(5) A "multiple-party account" is any of the following types of account: (i) a joint account, (ii) a P.O.D. account, or (iii) a trust account. It does not include accounts established for deposit of funds of a partnership, joint venture, or other association for business purposes, or accounts controlled by one or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization or a regular fiduciary or trust account where the relationship is established other than by deposit agreement;

(6) "net contribution" of a party to a joint account as of any given time is the sum of all deposits thereto made by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance. The term includes, in addition, any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question;

(7) "party" means a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account. A P.O.D. payee or beneficiary of a trust account is a party only after the account becomes payable to him by reason of his surviving the original payee or trustee. Unless the context otherwise requires, it includes a guardian,

conservator, personal representative, or assignee, including an attaching creditor, of a party. It also includes a person identified as a trustee of an account for another whether or not a beneficiary is named, but it does not include any named beneficiary unless he has a present right of withdrawal;

(8) "payment" of sums on deposit includes withdrawal, payment on check or other directive of a party, and any pledge of sums on deposit by a party and any set-off, or reduction or other disposition of all or part of an account pursuant to a pledge;

(9) "proof of death" includes a death certificate or record or report which is prima facie proof of death under Section 1-107;

(10) "P.O.D. account" means an account payable on request to one person during lifetime and on his death to one or more P.O.D. payees, or to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees;

(11) "P.O.D. payee" means a person designated on a P.O.D. account as one to whom the account is payable on request after the death of one or more persons;

(12) "request" means a proper request for withdrawal, or a check or order for payment, which complies with all conditions of the account, including special requirements concerning necessary signatures and regulations of the financial institution; but if the financial institution conditions withdrawal or payment on advance notice, for purposes of this part the request for withdrawal or payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for withdrawal;

(13) "sums on deposit" means the balance payable on a multiple-party account including interest, dividends, and in addition any deposit life insurance proceeds added to the account by reason of the death of a party;

(14) "trust account" means an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account; it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relation such as attorney-client;

(15) "withdrawal" includes payment to a third person pursuant to check or other directive of a party.

COMMENT

This and the sections which follow are designed to reduce certain questions concerning many forms of joint accounts and the so-called Totten trust account. An account "payable on death" is also authorized.

As may be seen from examination of the sections that follow, "net contribution" as defined by subsection (f) has no application to the financial institution-depositor relationship. Rather, it is relevant only to

controversies that may arise between parties to a multiple-party account.

Various signature requirements may be involved in order to meet the withdrawal requirements of the account. A "request" involves compliance with these requirements. A "party" is one to whom an account is presently payable without regard for whose signature may be required for a "request."

Section 6-102. [Ownership As Between Parties, and Others; Protection of Financial Institutions.]

The provisions of Sections 6-103 to 6-105 concerning beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, are relevant only to controversies between these persons and their creditors and other successors, and have no bearing on the power of withdrawal of these persons as determined by the terms of account contracts. The provisions of Sections 6-108 to 6-113 govern the liability of financial institutions who make payments pursuant thereto, and their set-off rights.

COMMENT

This section organizes the sections which follow into those dealing with the relationship between parties to multiple-party accounts, on the one hand, and those relating to the financial institution-depositor (or party) relationship, on the other. By keeping these relationships separate, it is possible to achieve the degree of definiteness that financial institutions must have in order to be induced to offer multiple-party accounts for use by their customers, while preserving the opportunity for individuals involved in multiple-party accounts to

show various intentions that may have attended the original deposit, or any unusual transactions affecting the account thereafter. The separation thus permits individuals using accounts of the type dealt with by these sections to avoid unconsidered and unwanted definiteness in regard to their relationship with each other. In a sense, the approach is to implement a layman's wish to "trust" a co-depositor by leaving questions that may arise between them essentially unaffected by the form of the account.

Section 6-103. [Ownership During Lifetime.]

(a) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(b) A P.O.D. account belongs to the original payee during his lifetime and not to the P.O.D. payee or payees; if two or more parties are named as original payees, during their lifetimes rights as between them are governed by subsection (a) of this section.

(c) Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime, and if two or more parties are named as trustee on the account, during their lifetimes beneficial rights as between them are governed by subsection (a) of this section. If there is an irrevocable trust, the account belongs beneficially to the beneficiary.

COMMENT

This section reflects the assumption that a person who deposits funds in a multiple-party account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, he usually intends no present change of beneficial ownership. The assumption may be disproved by proof that a gift was intended. Read with Section 6-101(6) which defines "net contributions," the section permits parties to certain kinds of multiple-party accounts to be as definite, or as indefinite, as they wish in respect to the matter of how beneficial ownership should be apportioned between them. It is important to note that the section is limited to describe ownership of an account while original parties are alive. Section 6-104 prescribes what happens to beneficial ownership on the death of a party. The section does not undertake to describe

the situation between parties if one withdraws more than he is then entitled to as against the other party. Sections 6-108 and 6-112 protect a financial institution in such circumstances without reference to whether a withdrawing party may be entitled to less than he withdraws as against another party. Presumably, overwithdrawal leaves the party making the excessive withdrawal liable to the beneficial owner as a debtor or trustee. Of course, evidence of intention by one to make a gift to the other of any sums withdrawn by the other in excess of his ownership should be effective.

The final Code contains no provision dealing with division of the account when the parties fail to prove net contributions. The omission is deliberate. Undoubtedly a court would divide the account equally among the parties to the extent that net contribu-

tions cannot be proven; but a statutory section explicitly embodying the rule might undesirably narrow the possibility of proof of partial contributions and might suggest that gift tax consequences applicable to creation of a joint tenancy should attach to a joint account. The theory of these sections is that the basic relationship of the parties is that of individual ownership of values attributable

to their respective deposits and withdrawals; the right of survivorship which attaches unless negated by the form of the account really is a right to the values theretofore owned by another which the survivor receives for the first time at the death of the owner. That is to say, the account operates as a valid disposition at death rather than as a present joint tenancy.

Section 6-104. [Right of Survivorship.]

(a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. If there are two or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under Section 6-103 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his death; and the right of survivorship continues between the surviving parties.

(b) If the account is a P.O.D. account, on death of the original payee or of the survivor of two or more original payees, any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more die before the original payee; if two or more P.O.D. payees survive, there is no right of survivorship in event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(c) If the account is a trust account, on death of the trustee or the survivor of two or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a contrary intent; if two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(d) In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of his estate.

(e) A right of survivorship arising from the express terms of the account or under this section, a beneficiary designation in a trust account, or a P.O.D. payee designation, cannot be changed by will.

COMMENT

The effect of (a) of this section, when read with the definition of "joint account" in 6-101(4), is to make an account payable to one or more of two or more parties a survivorship arrangement unless "clear and convincing evidence of a different contention" is offered.

The underlying assumption is that most persons who use joint accounts want the survivor or survivors to have all balances remaining at death. This assumption may be questioned in states like Michigan where existing statutes and decisions do not provide any safe and wholly practical method of establishing a joint account which is not survivorship. See *Leib v. Genesee Merchants Bank*, 371 Mich. 89, 123 N.W.(2d) 140 (1962). But, use of a form negating survivorship would make (d) of this section applicable. Still, the financial institution which paid after the death of a party would be protected by 6-108 and 6-109. Thus, a safe nonsurvivorship account form is provided. Consequently, the presumption stated by this section should become increasingly defensible.

The section also is designed to apply to various forms of multiple-party accounts which may be in use at the effective date of the legislation. The risk that it may turn nonsurvivorship accounts into unwanted survivorship arrangements is meliorated by various considerations. First

of all, there is doubt that many persons using any form of multiple name account would not want survivorship rights to attach. Secondly, the survivorship incidents described by this section may be shown to have been against the intention of the parties. Finally, it would be wholly consistent with the purpose of the legislation to provide for a delayed effective date so that financial institutions could get notices to customers warning them of possible review of accounts which may be desirable because of the legislation.

Subsection (c) accepts the New York view that an account opened by "A" in his name as "trustee for B" usually is intended by A to be an informal will of any balance remaining on deposit at his death. The section is framed so that accounts with more than one "trustee," or more than one "beneficiary" can be accommodated. Section 6-103(c) would apply to such an account during the lifetimes of "all parties." "Party" is defined by 6-101 (7) so as to exclude a beneficiary who is not described by the account as having a present right of withdrawal.

In the case of a trust account for two or more beneficiaries, the section prescribes a presumption that all beneficiaries who survive the last "trustee" to die own equal and undivided interests in the account. This dovetails with Sections 6-111 and 6-112 which

give the financial institution protection only if it pays to all beneficiaries who show a right to withdraw by presenting appropriate proof of death. No further survivorship between surviving beneficiaries of a trust account is presumed because

these persons probably have had no control over the form of the account prior to the death of the trustee. The situation concerning further survivorship between two or more surviving parties to a joint account is different.

Section 6-105. [Effect of Written Notice to Financial Institution.]

The provisions of Section 6-104 as to rights of survivorship are determined by the form of the account at the death of a party. This form may be altered by written order given by a party to the financial institution to change the form of the account or to stop or vary payment under the terms of the account. The order or request must be signed by a party, received by the financial institution during the party's lifetime, and not countermanded by other written order of the same party during his lifetime.

COMMENT

It is to be noted that only a "party" may issue an order blocking the provisions of Section 6-104. "Party" is defined by Section 6-101(7). Thus if there is a trust account in the name of A or B in trust for C, C cannot change the right of survivorship because he has no present right of withdrawal and hence is not a party.

Section 6-106. [Accounts and Transfers Nontestamentary.]

Any transfers resulting from the application of Section 6-104 are effective by reason of the account contracts involved and this statute and are not to be considered as testamentary or subject to Articles I-IV of this Code.

COMMENT

The purpose of classifying the transactions contemplated by Article VI as nontestamentary is to bolster the explicit statement that their validity as effective modes

of transfers at death is not to be determined by the requirements for wills. The section is consistent with Part 2 of Article VI.

Section 6-107. [Rights of Creditors.]

No multiple-party account will be effective against an estate of a deceased party to transfer to a survivor sums needed to pay debts, taxes, and expenses of administration, including statutory allowances to the surviving spouse, minor children

and dependent children, if other assets of the estate are insufficient. A surviving party, P.O.D. payee, or beneficiary who receives payment from a multiple-party account after the death of a deceased party shall be liable to account to his personal representative for amounts the decedent owned beneficially immediately before his death to the extent necessary to discharge the claims and charges mentioned above remaining unpaid after application of the decedent's estate. No proceeding to assert this liability shall be commenced unless the personal representative has received a written demand by a surviving spouse, a creditor or one acting for a minor or dependent child of the decedent, and no proceeding shall be commenced later than two years following the death of the decedent. Sums recovered by the personal representative shall be administered as part of the decedent's estate. This section shall not affect the right of a financial institution to make payment on multiple-party accounts according to the terms thereof, or make it liable to the estate of a deceased party unless before payment the institution has been served with process in a proceeding by the personal representative.

COMMENT

The sections of this Article authorize transfers at death which reduce the estate to which the surviving spouse, creditors and minor children normally must look for protection against a decedent's gifts by will. Accordingly, it seemed desirable to provide a remedy to these classes of persons which should assure them that multiple-party accounts cannot be used to reduce the essential protection they would be entitled to if such accounts were deemed a special form of specific devise. Under this Section a surviving spouse is automatically assured of some protection against a multiple-party account if the probate estate is insolvent; rights

are limited, however, to sums needed for statutory allowances. The phrase "statutory allowances" includes the homestead allowance under Section 2-401, the family allowance under Section 2-403, and any allowance needed to make up the deficiency in exempt property under Section 2-402. In any case (including a solvent estate) the surviving spouse could proceed under Section 2-201 et seq. to claim an elective share in the account if the deposits by the decedent satisfy the requirements of Section 2-202 so that the account falls within the augmented net estate concept. In the latter situation the spouse is not proceeding as a creditor under this section.

Section 6-108. [Financial Institution Protection; Payment on Signature of One Party.]

Financial institutions may enter into multiple-party accounts to the same extent that they may enter into single-party

accounts. Any multiple-party account may be paid, on request, to any one or more of the parties. A financial institution shall not be required to inquire as to the source of funds received for deposit to a multiple-party account, or to inquire as to the proposed application of any sum withdrawn from an account, for purposes of establishing net contributions.

Section 6-109. [Financial Institution Protection; Payment After Death or Disability; Joint Account.]

Any sums in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded; but payment may not be made to the personal representative or heirs of a deceased party unless proofs of death are presented to the financial institution showing that the decedent was the last surviving party or unless there is no right of survivorship under Section 6-104.

Section 6-110. [Financial Institution Protection; Payment of P.O.D. Account.]

Any P.O.D. account may be paid, on request, to any original party to the account. Payment may be made, on request, to the P.O.D. payee or to the personal representative or heirs of a deceased P.O.D. payee upon presentation to the financial institution of proof of death showing that the P.O.D. payee survived all persons named as original payees. Payment may be made to the personal representative or heirs of a deceased original payee if proof of death is presented to the financial institution showing that his decedent was the survivor of all other persons named on the account either as an original payee or as P.O.D. payee.

Section 6-111. [Financial Institution Protection; Payment of Trust Account.]

Any trust account may be paid, on request, to any trustee. Unless the financial institution has received written notice that the beneficiary has a vested interest not dependent upon his surviving the trustee, payment may be made to the personal representative or heirs of a deceased trustee if proof of death is presented to the financial institution showing that his decedent was the survivor of all other persons named on the account either as trustee or beneficiary. Payment may be made, on request, to the beneficiary upon presentation to the financial institution of proof of death showing that the beneficiary or beneficiaries survived all persons named as trustees.

Section 6-112. [Financial Institution Protection; Discharge.]

Payment made pursuant to Sections 6-108, 6-109, 6-110 or 6-111 discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership of the account as between parties, P.O.D. payees, or beneficiaries, or their successors. The protection here given does not extend to payments made after a financial institution has received written notice from any party able to request present payment to the effect that withdrawals in accordance with the terms of the account should not be permitted. Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in any demand for withdrawal if the financial institution is to be protected under this section. No other notice or any other information shown to have been available to a financial institution shall affect its right to the protection provided here. The protection here provided shall have no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts.

Section 6-113. [Financial Institution Protection; Set-off.]

Without qualifying any other statutory right to set-off or lien and subject to any contractual provision, if a party to a multiple-party account is indebted to a financial institution, the financial institution has a right to set-off against the account in which the party has or had immediately before his death a present right of withdrawal. The amount of the account subject to set-off is that proportion to which the debtor is, or was immediately before his death, beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal.

PART 2

PROVISIONS RELATING TO EFFECT OF DEATH

Section 6-201. [Provisions for Payment or Transfer at Death.]

(a) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance or any other written instrument effective as a contract, gift, conveyance, or trust is deemed to be nontestamentary, and this Code does not invalidate the instrument or any provision:

(1) that money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently;

(2) that any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promissor before payment or demand; or

(3) that any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

(b) Nothing in this section limits the rights of creditors under other laws of this state.

COMMENT

This section authorizes a variety of contractual arrangements which have in the past been treated as testamentary. For example most courts treat as testamentary a provision in a promissory note that if the payee dies before payment is made the note shall be paid to another named person, or a provision in a land contract that if the seller dies before payment is completed the balance shall be cancelled and the property shall belong to the vendee. These provisions often occur in family arrangements. The result of holding the provisions testamentary is usually to invalidate them because not executed in accordance with the statute of wills. On the other hand the same courts have for years upheld beneficiary designations in life insurance contracts. Similar kinds of problems are arising in regard to beneficiary designations in pension funds and under annuity contracts. The analogy of the power of appointment provides some historical base for solving some of these problems aside from a validating statute. However, there appear to be no policy reasons for continuing to treat these varied arrangements as testamentary. The revocable living trust and the multiple-party bank accounts,

as well as the experience with United States government bonds payable on death to named beneficiaries, have demonstrated that the evils envisioned if the statute of wills is not rigidly enforced simply do not materialize. The fact that these provisions often are part of a business transaction and in any event are evidenced by a writing to eliminate the danger of "fraud."

Because the types of provisions described in the statute are characterized as nontestamentary, the instrument does not have to be executed in compliance with Section 2-502; nor does it have to be

probated, nor does the personal representative have any power or duty with respect to the assets involved.

The sole purpose of this section is to eliminate the testamentary characterization from the arrangements falling within the terms of the section. It does not invalidate other arrangements by negative implication. Thus it is not intended by this section to embrace oral trusts to hold property at death for named persons; such arrangements are already generally enforceable under trust law.

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ARTICLE VII
TRUST ADMINISTRATION

PART 1
TRUST REGISTRATION

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GENERAL COMMENT

Several considerations explain the presence in the Uniform Probate Code of procedures applicable to inter vivos and testament-

ary trusts. The most important is that the Court assumed by the Code is a full power court which appropriately may receive jurisdiction over trustees. Another is that personal representatives under Articles III and IV and conservators under Article V, have the status of trustees. It follows naturally that these fiduciaries and regular trustees should bear a similar relationship to the Court. Also, the general move of the Code away from the concept of supervisory jurisdiction over any fiduciary is compatible with the kinds of procedural provisions which are believed to be desirable for trustees.

The relevance of trust procedures to those relating to settlement of decedents' estates is apparent in many situations. Many trusts are created by will. In a substantial number of states, statutes now extend probate court control over decedents' estates to testamentary trustees, but the same procedures rarely apply to inter vivos trusts. For example, eleven states appear to require testamentary trustees to qualify and account in much the same manner as executors, though quite different requirements relate to trustees of inter vivos trusts in these same states. Twenty-four states impose some form of mandatory court accountings on testamentary trustees, while only three seem to have comparable requirements for inter vivos trustees.

From an estate planning viewpoint, probate court supervision of testamentary trustees causes many problems. In some states, testamentary trusts cannot be re-

leased to be administered in another state. This requires complicated planning if inconvenience to interested persons is to be avoided when the beneficiaries move elsewhere. Also, some states preclude foreign trust companies from serving as trustees of local testamentary trusts without complying with onerous or prohibitive qualification requirements. Regular accountings in court have proved to be more expensive than useful in relation to the vast majority of trusts and sometimes have led to the ill-advised use of legal life estates to avoid these burdens.

The various restrictions applicable to testamentary trusts have caused many planners to recommend use of revocable inter vivos trusts. The widely adopted Uniform Testamentary Addition to Trusts Act has accelerated this tendency by permitting testators to devise estates to trustees of previously established receptacle trusts which have and retain the characteristics of inter vivos trusts for purpose of procedural requirements.

The popularity of this legislation and the widespread use of pour-over wills indicates rather vividly the obsolescence and irrelevance of statutes contemplating supervisory jurisdiction.

One of the problems with inter vivos and receptacle trusts at the present time, however, is that persons interested in these arrangements as trustees or beneficiaries frequently discover that there are no simple and efficient statutory or judicial remedies available to them to meet the

special needs of the trust relationship. Proceedings in equity before courts of general jurisdiction are possible, of course, but the difficulties of obtaining jurisdiction over all interested persons on each occasion when a judicial order may be necessary or desirable are commonly formidable. A few states offer simplified procedures on a voluntary basis for inter vivos as well as testamentary trusts. In some of these, however, the legislation forces inter vivos trusts into unpopular patterns involving supervisory control. Nevertheless, it remains true of the legislation in most states that there is too little for inter vivos trusts and too much for trusts created by will.

Other developments suggest that enactment of useful, uniform legislation on trust procedures is a matter of considerable social importance. For one thing, accelerating mobility of persons and estates is steadily increasing the pressure on locally oriented property institutions. The drafting and technical problems created by lack of uniformity of trust procedures in the several states are quite serious. If people cannot obtain efficient trust service to preserve and direct wealth because of state property rules, they will turn in time to national arrangements that eliminate property law problems. A general shift away from local management of trustee wealth and increased reliance on various contractual claims against national funds seems the most likely consequence if the local law of trusts remains nonuniform and provincial.

Modestly endowed persons who are turning to inter vivos trusts to avoid probate are of more immediate concern. Lawyers in all parts of the country are aware of the trend toward reliance on revocable trusts as total substitutes for wills which recent controversies about probate procedures have stimulated. There would be little need for concern about this development if it could be assumed also that the people involved are seeking and getting competent advice and fiduciary assistance. But there are indications that many people are neither seeking nor receiving adequate information about trusts they are using. Moreover, professional fiduciaries are often not available as trustees for small estates. Consequently, neither settlers nor trustees of "do-it-yourself" trusts have much idea of what they are getting into. As a result, there are corresponding dangers to beneficiaries who are frequently uninformed or baffled by formidable difficulties in obtaining relief or information.

Enactment of clear statutory procedures creating simple remedies for persons involved in trust problems will not prevent disappointment for many of these persons but should help minimize their losses.

Several objectives of the Code are suggested by the preceding discussion. They may be summarized as follows:

1. To eliminate procedural distinctions between testamentary and inter vivos trusts.
2. To strengthen the ability of owners to select trustees by elim-

inating formal qualification of trustees and restrictions on the place of administration.

3. To locate nonmandatory judicial proceedings for trustees and beneficiaries in a convenient court fully competent to handle all problems that may arise.

4. To facilitate judicial proceedings concerning trusts by comprehensive provisions for obtaining jurisdiction over interested persons by notice.

5. To protect beneficiaries by having trustees file written statements of acceptance of trusts with suitable courts, thereby acknowledging jurisdiction and providing some evidence of the trust's existence for future beneficiaries.

6. To eliminate routinely required court accountings, substituting clear remedies and statutory duties to inform beneficiaries.

PART 1

TRUST REGISTRATION

GENERAL COMMENT

Registration of trusts is a new concept and differs importantly from common arrangements for retained supervisory jurisdiction of courts of probate over testamentary trusts. It applies alike to inter vivos and testamentary trusts, and is available to foreign-created trusts as well as those locally created. The place of registration is related not to the place where the trust was created, which may lose its significance to the parties concerned, but is related to the place where the trust is primarily administered, which in turn is required (Section 7-305) to be at a location appropriate to the purposes of the trust and the interests of its beneficiaries. Sections 7-102 and 7-305 provide for transfer of registration. The procedure is more flexible than the typical retained jurisdiction in that it permits registration or submission to other appropriate procedures at another place, even in another state, in order to accommodate relocation of the trust at a place which becomes more convenient for its administration. (Cf. 20 [Purdon's] Pa.Stat. § 2080.309.) In addition, the registration acknowledges that a particular court will be accessible to the parties on a permissive basis with-

out subjecting the trust to compulsory, continuing supervision by the court.

The process of registration requires no judicial action or determination but is accomplished routinely by simple acts on the part of the trustee which will place certain information on file with the court (Section 7-102). Although proceedings involving a registered trust will not be continuous but will be separate each time an interested party initiates a proceeding, it is contemplated that a court will maintain a single file for each registered trust as a record available to interested persons. Proceedings are facilitated by the broad jurisdiction of the court (Section 7-201) and the Code's representation and notice provisions (Section 1-403).

Section 7-201 provides complete jurisdiction over trust proceedings in the court of registration. Section 7-103 above provides for jurisdiction over parties. Section 7-104 should facilitate use of trusts involving assets in several states by providing for a single principal place of administration and reducing concern about qualification of foreign trust companies.

Section 7-101. [Duty to Register Trusts.]

The trustee of a trust having its principal place of administration in this state shall register the trust in the Court of this state at the principal place of administration. Unless otherwise designated in the trust instrument, the principal place

of administration of a trust is the trustee's usual place of business where the records pertaining to the trust are kept, or at the trustee's residence if he has no such place of business. In the case of co-trustees, the principal place of administration, if not otherwise designated in the trust instrument, is (1) the usual place of business of the corporate trustee if there is but one corporate co-trustee, or (2) the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate co-trustee, and otherwise (3) the usual place of business or residence of any of the co-trustees as agreed upon by them. The duty to register under this Part does not apply to the trustee of a trust if registration would be inconsistent with the retained jurisdiction of a foreign court from which the trustee cannot obtain release.

COMMENT

This section rests on the assumption that a central "filing office" will be designated in each county where the Court may sit in more than one place.

The scope of this section and of Article VII is tied to the definition of "trustee" in section 1-201. It was suggested that the definition should be expanded to include "land trusts." It was con-

cluded, however, that the inclusion of this term, which has special meaning principally in Illinois, should be left for decision by enacting states. Under the definition of "trust" in this Code, custodial arrangements as contemplated by legislation dealing with gifts to minors, are excluded, as are "trust accounts" as defined in Article VI.

Section 7-102. [Registration Procedures.]

Registration shall be accomplished by filing a statement indicating the name and address of the trustee in which it acknowledges the trusteeship. The statement shall indicate whether the trust has been registered elsewhere. The statement shall identify the trust: (1) in the case of a testamentary trust, by the name of the testator and the date and place of domiciliary probate; (2) in the case of a written inter vivos trust, by the name of each settlor and the original trustee and the date of the trust instrument; or (3) in the case of an oral trust, by information identifying the settlor or other source of funds and describing the time and manner of the trust's creation and the terms of the trust, including the subject matter, beneficiaries and time of performance. If a trust has been registered elsewhere, registration in this state is ineffective until the earlier registration is released by order of the Court where prior registration occurred, or an instrument

executed by the trustee and all beneficiaries, filed with the registration in this state.

COMMENT

Additional duties of the clerk register trusts is stated in Section 1-305. The duty to tion 7-101.

Section 7-103. [Effect of Registration.]

(a) By registering a trust, or accepting the trusteeship of a registered trust, the trustee submits personally to the jurisdiction of the Court in any proceeding under 7-201 of this Code relating to the trust that may be initiated by any interested person while the trust remains registered. Notice of any proceeding shall be delivered to the trustee, or mailed to him by ordinary first class mail at his address as listed in the registration or as thereafter reported to the Court and to his address as then known to the petitioner.

(b) To the extent of their interests in the trust, all beneficiaries of a trust properly registered in this state are subject to the jurisdiction of the court of registration for the purposes of proceedings under Section 7-201, provided notice is given pursuant to Section 1-401.

COMMENT

This section provides for jurisdiction over the parties. Subject matter jurisdiction for proceedings involving trusts is described in Section 7-201 and 7-202. The basic jurisdictional concept in Section 7-103 is that reflected in widely adopted long-arm statutes, that a state may properly entertain proceedings when it is a reasonable forum under all the circumstances, provided adequate notice is given. Clearly the trustee can be deemed to consent to jurisdiction by virtue of registration. This basis for consent jurisdiction is in addition to and not in lieu of other bases of jurisdiction during or after registration. Also, incident to an order releasing registration under Section 7-305, the Court could condition the release on

registration of the trust in another state or court. It also seems reasonable to require beneficiaries to go to the seat of the trust when litigation has been initiated there concerning a trust in which they claim beneficial interests, much as the rights of shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by his selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered. Although most cases will fit within traditional concepts of jurisdiction, this section goes beyond established doctrines of in personam or quasi in rem jurisdiction as regards a nonres-

ident beneficiary's interests in section affords due process and foreign land of chattels, but the represents a worthwhile step for- National Conference believes the ward in trust proceedings.

Section 7-104. [Effect of Failure to Register.]

A trustee who fails to register a trust in a proper place as required by this Part, for purposes of any proceedings initiated by a beneficiary of the trust prior to registration, is subject to the personal jurisdiction of any Court in which the trust could have been registered. In addition, any trustee who, within 30 days after receipt of a written demand by a settlor or beneficiary of the trust, fails to register a trust as required by this Part is subject to removal and denial of compensation or to surcharge as the Court may direct. A provision in the terms of the trust purporting to excuse the trustee from the duty to register, or directing that the trust or trustee shall not be subject to the jurisdiction of the Court, is ineffective.

COMMENT

Under Section 1-108, the holder of a presently exercisable general power of appointment can control all duties of a fiduciary to beneficiaries who may be changed by exercise of the power. Hence, if the settlor of a revocable inter vivos trust directs the trustee to

refrain from registering a trust, no liability would follow even though another beneficiary demanded registration. The ability of the general power holder to control the trustee ends when the power is terminated.

Section 7-105. [Registration, Qualification of Foreign Trustee.]

A foreign corporate trustee is required to qualify as a foreign corporation doing business in this state if it maintains the principal place of administration of any trust within the state. A foreign co-trustee is not required to qualify in this state solely because its co-trustee maintains the principal place of administration in this state. Unless otherwise doing business in this state, local qualification by a foreign trustee, corporate or individual, is not required in order for the trustee to receive distribution from a local estate or to hold, invest in, manage or acquire property located in this state, or maintain litigation. Nothing in this section affects a determination of what other acts require qualification as doing business in this state.

COMMENT

Section 7-105 deals with non-resident trustees in a fashion which should correct a widespread deficiency in present regulation of trust activity. Provisions limiting business of foreign corporate trustees constitute an unnecessary limitation on the ability of a trustee to function away from its principal place of business. These restrictions properly relate more to continuous pursuit of general trust business by foreign corporations than to isolated instances of litigation and management of the assets of a particular trust. The ease of avoiding foreign corporation qualifi-

cation statutes by the common use of local nominees or sub-trustees, and the acceptance of these practices, are evidence of the futility and undesirability of more restrictive legislation of the sort commonly existing today. The position embodied in this section has been recommended by important segments of the banking and trust industry through a proposed model statute, and the failure to adopt this reform has been characterized as unfortunate by a leading trust authority. See 5 Scott on Trusts § 558 (3rd ed. 1967).

PART 2

JURISDICTION OF COURT CONCERNING TRUSTS

Section 7-201. [Court; Exclusive Jurisdiction of Trusts.]

(a) The Court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts. Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts. These include, but are not limited to, proceedings to:

- (1) appoint or remove a trustee;
- (2) review trustees' fees and to review and settle interim or final accounts;
- (3) ascertain beneficiaries, to determine any question arising in the administration or distribution of any trust including questions of construction of trust instruments, to instruct trustees, and to determine the existence or nonexistence of any immunity, power, privilege, duty or right; and
- (4) release registration of a trust.

(b) Neither registration of a trust nor a proceeding under this section result in continuing supervisory proceedings. The management and distribution of a trust estate, submission of accounts and reports to beneficiaries, payment of trustee's fees and other obligations of a trust, acceptance and change of trusteeship, and other aspects of the administration of a trust shall proceed expeditiously consistent with the terms of the trust, free of judicial intervention and without order, approval or other action of any court, subject to the jurisdiction of the Court as invoked by interested parties or as otherwise exercised as provided by law.

COMMENT

Derived in small part from Statutes, (Purdon) 32080.101 et Florida Statutes 1965, Chapters seq. 737 and 87, and Title 20, Penna.

Section 7-202. [Trust Proceedings; Venue.]

Venue for proceedings under Section 7-201 involving registered trusts is in the place of registration. Venue for proceedings under Section 7-201 involving trusts not registered

in this state is in any place where the trust properly could have been registered, and otherwise by the rules of civil procedure.

Section 7-203. [Trust Proceedings; Dismissal of Matters Relating to Foreign Trusts.]

The Court will not, over the objection of a party, entertain proceedings under Section 7-201 involving a trust registered or having its principal place of administration in another state, unless (1) when all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration or (2) when the interests of justice otherwise would seriously be impaired. The Court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust is registered or has its principal place of business, or the Court may grant a continuance or enter any other appropriate order.

COMMENT

While recognizing that trusts which are essentially foreign can be the subject of proceedings in this state, this section employs the concept of forum non conveniens to center litigation involving the trustee and beneficiaries at the principal place of administration of the trust but leaves open the possibility of suit elsewhere when necessary in the interests of justice. It is assumed that under this section a court would refuse to entertain litigation involving the foreign registered trust unless for jurisdictional or other reasons, such as the nature and location of the property or unusual interests of the parties, it is manifest that substantial injustice would result if the parties were referred to the court of registration. As regards litigation involving third parties, the trustee may sue and be sued as any owner and manager of property under the usually applicable rules of civil procedure and also as provided in Section 7-203.

The concepts of res judicata and full faith and credit applicable to any managing owner of property have generally been applicable to trustees. Consequently, litigation by trustees has not involved the artificial problems historically found when personal representatives maintain litigation away from the state of their appointment, and a prior adjudication for or against a trustee rendered in a foreign court having jurisdiction is viewed as conclusive and entitled to full faith and credit. Because of this, provisions changing the law, analogous to those relating to personal representatives in Section 4-401 do not appear necessary. See also Section 3-408. In light of the foregoing, the issue is essentially only one of forum non conveniens in having litigation proceed in the most appropriate forum. This is the function of this section.

Section 7-204. [Court; Concurrent Jurisdiction of Litigation Involving Trusts and Third Parties.]

The Court of the place in which the trust is registered has concurrent jurisdiction with other courts of this state of actions and proceedings to determine the existence or nonexistence of trusts created other than by will, of actions by or against creditors or debtors of trusts, and of other actions and proceedings involving trustees and third parties. Venue is determined by the rules generally applicable to civil actions.

Section 7-205. [Proceedings for Review of Employment of Agents and Review of Compensation of Trustee and Employees of Trust.]

On petition of an interested person, after notice to all interested persons, the Court may review the propriety of employment of any person by a trustee including any attorney, auditor, investment advisor or other specialized agent or assistant, and the reasonableness of the compensation of any person so employed, and the reasonableness of the compensation determined by the trustee for his own services. Any person who has received excessive compensation from a trust may be ordered to make appropriate refunds.

COMMENT

In view of the broad jurisdiction conferred on the probate court, description of the special proceeding authorized by this section might be unnecessary. But the Code's theory that trustees may fix their own fees *and* those of their attorneys marks an important departure from much existing practice under which fees are determined by the Court in the first instance. Hence, it seems wise to emphasize that any interested person can get judicial review of fees if he desires it. Also, if excessive fees have been paid, this section provides a quick and efficient remedy. This review would meet in part the criticism of the broad powers given in the Uniform Trustees' Powers Act.

Section 7-206. [Trust Proceedings; Initiation by Notice; Necessary Parties.]

Proceedings under Section 7-201 are initiated by filing a petition in the Court and giving notice pursuant to Section 1-401 to interested parties. The Court may order notification of additional persons. A decree is valid as to all who are given notice of the proceeding though fewer than all interested parties are notified.

PART 3

DUTIES AND LIABILITIES OF TRUSTEES

Section 7-301. [General Duties Not Limited.]

Except as specifically provided, the general duty of the trustee to administer a trust expeditiously for the benefit of the beneficiaries is not altered by this Code.

Section 7-302. [Trustee's Standard of Care and Performance.]

Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

COMMENT

This is a new general provision designed to make clear the standard of skill expected from trustees both individual and corporate, nonprofessional and professional. It differs somewhat from the standard stated in § 174 of the Restatement of Trusts, Second, which is as follows:

"The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a rea-

sonable man of ordinary prudence, he is under a duty to exercise such skill."

By making the basic standard align to that observed by a prudent man in dealing with the property of another, the section accepts a standard as it has been articulated in some decisions regarding the duty of a trustee concerning investments. See *Estate of Cook*, (Del.Chanc.1934) 20 Del.Ch. 123, 171 A. 730. Also, the duty as described by the above section more clearly conveys the idea that a trustee must comply with an external, rather than with a personal, standard of care.

Section 7-303. [Duty to Inform and Account to Beneficiaries.]

The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. In addition:

(a) Within 30 days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible, one or more persons who under Section 1-403 may

represent beneficiaries with future interests, of the Court in which the trust is registered and of his name and address.

(b) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration.

(c) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

COMMENT

Analogous provisions are found in Section 3-705.

This provision does not require regular accounting to the Court nor are copies of statements furnished beneficiaries required to be filed with the Court. The parties are expected to assume the usual ownership responsibility for their interests including their own record keeping. Under Section 1-108, the holder of a general power of appointment or of revocation can negate the trustee's duties to any other person.

This section requires that a reasonable selection of beneficiaries is entitled to information so that the interests of the future beneficiaries may adequately be protected. After mandatory notification of registration by the trustee to the beneficiaries, further information may be obtained by the beneficiary upon request.

Section 7-304. [Duty to Provide Bond.]

A trustee need not provide bond to secure performance of his duties unless required by the terms of the trust, reasonably requested by a beneficiary or found by the Court to be necessary to protect the interests of the beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented. On petition of the trustee or other interested person the Court may excuse a requirement of

This is to avoid extensive mandatory formal accounts and yet provide the beneficiary with adequate protection and sources of information. In most instances, the trustee will provide beneficiaries with copies of annual tax returns or tax statements that must be filed. Usually this will be accompanied by a narrative explanation by the trustee. In the case of the charitable trust, notice need be given only to the attorney general or other state officer supervising charitable trusts and in the event that the charitable trust has, as its primary beneficiary, a charitable corporation or institution, notice should be given to that charitable corporation or institution. It is not contemplated that all of the individuals who may receive some benefit as a result of a charitable trust be informed.

bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties. If bond is required, it shall be filed in the Court of registration or other appropriate Court in amounts and with sureties and liabilities as provided in Sections 3-604 and 3-606 relating to bonds of personal representatives.

COMMENT

See Sections 3-603 and 3-604; 1949, § 390.911(b) [20 Purdon's 60 Okla.Stats.1961, § 175.24 [60 Pa.Stat. § 390.911(b)]]; cf. Tenn. Okl.St. Ann. § 175.24]; Pa.Fid.Act, Code Ann. § 35-113.

Section 7-305. [Trustee's Duties; Appropriate Place of Administration; Deviation.]

A trustee is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management. If the principal place of administration becomes inappropriate for any reason, the Court may enter any order furthering efficient administration and the interests of beneficiaries, including, if appropriate, release of registration, removal of the trustee and appointment of a trustee in another state. Trust provisions relating to the place of administration and to changes in the place of administration or of trustee control unless compliance would be contrary to efficient administration or the purposes of the trust. Views of adult beneficiaries shall be given weight in determining the suitability of the trustee and the place of administration.

COMMENT

This section and 7-102 are related. The latter section makes it clear that registration may be released without Court order if the trustee and beneficiaries can agree on the matter. Section 1-108 may be relevant, also.

The primary thrust of Article VII is to relate trust administration to the jurisdiction of courts, rather than to deal with substantive matters of trust law. An aspect of deviation, however, is touched here.

Section 7-306. [Personal Liability of Trustee to Third Parties.]

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

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

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

(d) The question of liability as between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding.

COMMENT

The purpose of this section is to make the liability of the trust and trustee the same as that of the decedent's estate and personal representative.

Ultimate liability as between the estate and the fiduciary need not necessarily be determined whenever there is doubt about this question. It should be permissible, and often it will be preferable, for judgment to be entered, for example, against the trustee individually for purposes

of determining the claimant's rights without the trustee placing that matter into controversy. The question of his right of reimbursement may be settled informally with beneficiaries or in a separate proceeding in the probate court involving reimbursement. The section does not preclude the possibility, however, that beneficiaries might be permitted to intervene in litigation between the trustee and a claimant and that all questions might be resolved in that action.

Section 7-307. [Limitations on Proceedings Against Trustees After Final Account.]

Unless previously barred by adjudication, consent or limitation, any claim against a trustee for breach of trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within [6 months] after receipt of the final account or statement. In any event and notwithstanding lack of full disclosure a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for his examination is protected after 3 years. A beneficiary is deemed to have

received a final account or statement if, being an adult, it is received by him personally or if, being a minor or disabled person, it is received by his representative as described in Section 1-403(1) and (2).

COMMENT

Final accounts terminating the trustee's obligations to the trust beneficiaries may be formal or informal. Formal judicial accountings may be initiated by the petition of any trustee or beneficiary. Informal accounts may be conclusive by consent or by limitation. This section provides a special limitation supporting informal accounts. With regard to facilitating distribution see Section 5-103.

Section 1-108 makes approval of an informal account or settlement with a trustee by the holder of a presently exercisable general power of appointment binding on all beneficiaries. In addition, the equitable principles of estoppel and laches, as well as general statutes of limitation, will apply in many cases to terminate trust liabilities.

PART 4
POWERS OF TRUSTEES

GENERAL COMMENT

There has been considerable interest in recent years in legislation giving trustees extensive powers. The Uniform Trustees' Powers Act, approved by the National Conference in 1964 has been adopted in Idaho, Kansas, Mississippi and Wyoming. New York and New Jersey have adopted similar statutes which differ somewhat from the Uniform Trustees' Powers Act, and Arkansas, California, Colorado, Florida, Iowa, Louisiana, Oklahoma, Penn-

sylvania, Virginia and Washington have comprehensive legislation which differ in various respects from other models. The legislation in Connecticut, North Carolina and Tennessee provides lists of powers to be incorporated by reference as draftsmen wish.

Comprehensive legislation dealing with trustees' powers appropriately may be included in the Code package at this point.

ARTICLE VIII
EFFECTIVE DATE AND REPEALER

Section

8-101. [Time of Taking Effect; Provisions for Transition.]

8-102. [Specific Repealer and Amendment.]

Section 8-101. [Time of Taking Effect; Provisions for Transition.]

- (a) This Code takes effect on January 1, 19____.
- (b) Except as provided elsewhere in this Code, on the effective date of this Code:

(1) the Code applies to any wills of decedents dying thereafter;

(2) the Code applies to any proceedings in Court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the Court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this Code;

(3) every personal representative including a person administering an estate of a minor or incompetent holding an appointment on that date, continues to hold the appointment but has only the powers conferred by this Code and is subject to the duties imposed with respect to any act occurring or done thereafter;

(4) an act done before the effective date in any proceeding and any accrued right is not impaired by this Code. If a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions shall remain in force with respect to that right;

(5) any rule of construction or presumption provided in this Code applies to instruments executed and multiple party accounts opened before the effective date unless there is a clear indication of a contrary intent;

(6) a person holding office as judge of the Court on the effective day of this Act may continue the office of judge of this Court and may be selected for additional terms

after the effective date of this Act even though he does not meet the qualifications of a judge as provided in Article I.

Section 8-102. [Specific Repealer and Amendments.]

(a) The following Acts and parts of Acts are repealed:

- (1)
- (2)
- (3)

(b) The following Acts and parts of Acts are amended:

- (1)
- (2)
- (3)

†