

# **FOR DISCUSSION ONLY UNIFORM PROBATE CODE**

Third Working Draft  
Uniform Probate Code  
With Comments

National Conference of  
Commissioners on  
Uniform State Laws

1155 East 60th Street  
Chicago, Illinois 60637

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# UNIFORM PROBATE CODE

## Prefatory Note

This draft, as the title page indicates, is a working draft. It was prepared for preliminary consideration by the Commissioners on Uniform State Laws at their 1967 meeting in Honolulu. The introductory remarks of the Reporters for that meeting are reprinted as an Introduction to this draft to help the reader understand the structure of the Code. Also printed as part of the Introduction is a description prepared by the Chief Reporter showing the flexible nature of the system proposed in this draft and the choices available to the claimants under a will, creditors, the personal representative and to the lawyer advising a client concerning an estate.

The Table of Contents of the draft legislation appears at page . The membership of the drafting committee of the Conference, the list of reporters and the advisors from the Real Property, Probate and Trust Law Section of the American Bar Association and from the Trust Division of the American Bankers Association follows this preface.

The Commissioners on Uniform State Laws are soliciting your help in refining and improving this Code, prior to its consideration by the Conference in July 1968. Please send written comments to the National Office of the Conference, 1155 East 60th Street, Chicago, Illinois, 60637 and, if you wish, to the Bar and Bankers Association representatives with whom we are working.

Allison Dunham  
Executive Director  
National Conference of Commissioners  
on Uniform State Laws

Remarks by Richard V. Wellman, Project Director, Uniform Probate Code Project, Before Committee of the Whole, National Conference of Commissioners on Uniform State Laws, Honolulu, Hawaii, on Friday, August 4, 1967. (With notes pointing up certain changes in the draft Code made in October, 1967)

Members of the National Conference -

After more than five years of preliminary work, the Reporters for the Uniform Probate Code project are pleased to introduce a comprehensive draft of a complete code dealing with estates of deceased and disabled persons and with transfers effective at death.

Let me retrace some of the history of the project.

The work began in 1962 when it was jointly agreed by representatives of the National Conference and members of a special subcommittee of the Real Property, Probate and Trust Law Section of the American Bar Association that effort should be made to update and revise the Model Probate Code. The Model Probate Code, as many of you know, was the product of work extending from 1940 to 1946 by a subcommittee of the American Bar Association working in cooperation with research facilities of the University of Michigan Law School. The Model Probate Code was never considered by this Conference. Indeed, it was not designed as a uniform Act. Possibly as a consequence, it has not been adopted in total by any state, although several states have made very considerable use of its ideas and provisions.

By 1964, a committee of Reporters for this project had been assembled. Portions of preliminary drafts were presented at your meetings in 1964, 1965 and 1966. Last year at Montreal, I reported to you that a preliminary draft of new provisions covering all of the subject matter of the Model Probate Code had been written by two of the Reporters. A limited supply of this preliminary draft was circulated to the

Special Committee there at and after the Montreal meetings.

In the spring of 1967, following several meetings of all Reporters, at which intensive discussion was had about portions of the preliminary draft, redrafts were prepared for the books on your desks. Finally, all Reporters recently met for a continuous five-week session extending from June 10, at Boulder, Colorado. The Code which is being distributed to you at this meeting is the product of that meeting.

The recent draft contains six articles. Articles, II, III and IV cover all facets of the substantive and procedural rules relating to decedents' estates. These provisions were fully considered by all Reporters at Boulder and you will notice that we label each of these Articles "Reporters' Boulder Drafts". Article I deals with definitions, organizations of the court assigned to handle estate matters and certain procedural matters. Article V deals with protective proceedings concerning the persons and estates of persons under disabilities. Article VI is an umbrella article in which various provisions concerning non-probate transfers may be accumulated. At the moment, its single part deals with multiple-party accounts.

Time at Boulder ran out before all Reporters could fully consider and approve Articles, I, V and VI. Hence, these portions of the draft are labeled "Boulder Subcommittee Drafts" rather than "Reporters' Boulder Drafts". In each case, however, these articles were extensively rewritten at Boulder, and represent the work of three or more of the Reporters.<sup>1</sup>

Last year at Montreal, we announced to you that the Special Committee had approved the Reporters' proposal to broaden the project to include some coverage of the law of trusts. One specific objective is to provide a common pattern of procedures for inter vivos and testamentary trusts. While we have not abandoned

this undertaking, we have not yet prepared any drafts dealing with this subject.

Perhaps it is evident from the history of the project that a very determined attempt has been made to get as broad a base as possible for the drafts being distributed here. We started with the benefit of the very careful research and excellent thinking that went into the 1946 Model Probate Code. The Reporters for this project, whose names appear on one of the preliminary sheets of the package you have received, were selected with an eye toward obtaining geographic diversity, as well as experience in the teaching and practice of estates law. In the person of Reporter Paul Basye, we secured the expertise of a practitioner familiar with California procedures and community property problems, as well as of a scholar-author who worked closely with Professor Simes on the Model Probate Code. The seven other Reporters represent many decades of teaching and practical experience with the law of estates.

Moreover, we have had the benefit of a good deal of contact with state and other efforts to improve probate law. Professors Effland and MacDonald are the principal draftsmen of a new probate code recently proposed in Wisconsin. Professor Vestal has had a close relationship with Iowa's new probate code. Professor Scoles has worked closely with Illinois Bar Association committees on probate legislation there. Professor Fratcher worked with the New York Commission on Estates. Moreover, he was supported by a Ford Foundation Fellowship in a year's study of modern English probate law and practice and has written extensively of his observations. Incident to a proposed revision of the Michigan Probate Code, I have worked for about a year with a group of Michigan lawyers and judges in an intensive study of the draft which the national project spawned last summer. As a result of all of these contacts, many of the ideas that have found their way into the

draft you are receiving today were first suggested by practicing lawyers, experienced trustmen, and probate judges.

Moreover, copies of last summer's draft were distributed to more than a hundred ABA committee members. Two very active subcommittees of the Real Property, Probate and Trust Law Section of the ABA have made projects of study of portions of last summer's preliminary draft. Another group of ABA advisors have commented to us on the entire draft. Thus, literally hundreds of interested persons have contributed very significantly to this new draft by their oral and written reactions to some of the major ideas as well as the detail of what you are receiving today. We have sought the broadest possible base for this draft and I believe we may have achieved it.

I want to comment briefly on the need for probate reform and the overall philosophy and approach of the draft you have received. Then we'll take a closer look at the document and begin the process of becoming acquainted with its general content and specific provisions.

During the early years of this project, many questioned the practicality of effort to produce a uniform probate code. Knowledgeable lawyers conceded the obsolescence of much of existing probate law, but expressed doubt that legislatures could be interested in the heavy work involved in recasting so formidably large an area of law. In many states, well-entrenched political establishments have grown about the existing probate structure and it seemed unlikely that the public or the bar could be sufficiently interested in probate innovation to mount the drive needed for new legislation.

But, in 1966, Mr. Dacey's controversial book, How To Avoid Probate, became a best seller. At about the same time, a Reader's Digest article "The Mess in our

Probate Courts" attracted wide attention. Newspaper and magazine articles about the archaic and irrelevant character of probate law and procedure have proliferated. Those of us like Messrs. Dunham, Pierce and myself, whose names have been publicly associated with the possibility of probate reform, can attest to the fact of widespread public interest in the subject. Clearly the public will now support and encourage legislators in considering a different approach to many ancient probate problems. Indeed, I would hazard the guess that there is no area of private law that is more concerning to the public. This is not surprising. Relatively fewer people are involved in divorce or auto accidents or commercial swindles than are concerned with inheritance at some time or another. Moreover, it's the reading and thinking part of our affluent public who are concerned with probate matters.

Practicing lawyers have many, completely professional, reasons for being interested in probate reform. Under present assumptions, clients are under pressure to turn to bankers, trust companies, life insurance salesmen, and a variety of other kinds of sellers of services for assistance in estate planning, and they are doing so in thousands and thousands of cases. Lawyers, whose stock in trade has been the will, cannot, in good conscience, describe the will as competitive from the standpoint of post-death expense and delay, with the host of will substitutes that are available. But, there is no totally satisfactory substitute for the will. The revocable trust comes closest, perhaps, and may be recommended to some as a satisfactory will substitute, but the trust device is, at best, awkwardly applied to situations where the parties in interest want to retain full ownership until death. Moreover, the trust is unsuited to modest estates ranging up to say \$50,000 in value. Various forms of joint ownership supply useful answers for some small estate situations, but joint ownership does not offer the flexibility of testamentary schemes. In sum, modern emphasis on total estate planning has made lawyers increasingly

aware that the will is of unique utility, but that it is also uniquely encumbered by post-death costs. They are also aware that the public associates the will with lawyers and compares them unfavorably with other sellers of services whose specialties are more efficient. Lawyers would like to make the will as efficient a device in estate planning as possible and reform of probate codes is necessary to that end.

Moreover, of course, the day when we can afford to have different probate laws in fifty states has passed. People no longer live and die in one location of the country with the frequency of former times. Estates are more likely than not to involve assets or survivors located in several states. Lawyers need to be able to predict the state laws and procedures of other states and clients need to be relieved of the necessity to recast estate plans with every change of domicile or new acquisition of out-of-state land. The present variance in state laws which requires replanning of wills with each inter-state move or acquisition is not only a nuisance; it's probably a positive hindrance to the free mobility of capital among the several states.

The overall approach of the draft you are receiving is to shift probate and estate laws away from their present historical orientation toward what people want and need. We have attempted to implement this purpose on all fronts. For instance, the law's plan for persons who die intestate should be rational and as uncomplicated in respect to administrative detail as a statute can make it. We should not make intestacy a chamber of horrors so that people will be driven to write wills. Lawyers cannot afford the public irritation with the law that retention of obsolete patterns and practices respecting intestate estates generates. The formality required for wills must be rational, rather than ritualistic. The settlement of estates should be stream-

lined so that if there are no problems, there will be no need for involved court procedures. Procedures relating to settlement of estates should start from the assumption that estates belong to the survivors, and that the office of the law and rules is to assist, rather than impede the natural desire to accelerate the transfer from dead to living. Guardianship also should be moved away from cumbersome historic assumptions. The law should cease to terrorize persons approaching old age and possible senility with the prospect that they may need to be adjudicated incompetent simply because assets may need to be sold to secure their support. Transfers serving as will substitutes should not be condemned nor discouraged. Rather, the office of the law should be to define transactions with a view to implementing, rather than discouraging, what people want.

We offer this draft as responsive to these purposes.

Let's get down to specifics. I want to take you through the organization of the entire Code and explain briefly what I'll call the high spots of the several articles. When we've done this, we propose to concentrate today on Article III dealing with probate procedures.

As can be seen from the Summary Table of Contents, and as previously mentioned, the draft is divided into six Articles. Sections are numbered, with four digits, with the first signifying the Article, the second the Part, or Article subdivision, and the last two signifying the location of the Section in the Part. A similar system was used in the Commercial Code.

Article I, entitled General Provisions, is devoted to the subjects indicated by the titles on its three Parts; e. g., Definitions, the Organization and Status of the Probate Court and Provisions Relating to Appeals. Perhaps the most important section in this Article is Section 1-201 which expresses the fundamental assumption

(on which the entire Code rests) that the court, whatever its name might be, that is assigned jurisdiction to handle the judicial matters arising under the Code is to be a court having the full power of a court of general jurisdiction. We are aware, of course, that the probate courts in many states lack this kind of power, but we are convinced, and all of our advisors are clear on this, that an estates court needs to be provided which can deal fully with any question that may come before it.

Elsewhere in the Code, particularly in Article III, some non-judicial functions are assigned to a non-judicial officer of the probate court, who may be called Registrar, or clerk, or whatever. If any particular state finds constitutional amendment is necessary to increase the power of the judicial side of the probate court, it might sidestep the difficulty by assigning the judicial functions described to a division of the general trial bench, and the non-judicial functions to existing, inferior probate officers. The important point, however, is that the judicial assignments contemplated by the draft call for a fully equipped court with appeals therefrom being handled just like appeals from other equity causes.

Article I also contains an important Section, #1-214, dealing with proof of death which improves, very substantially, the solution to the problem of proving death by long absence. It, with other provisions of the draft dealing with simultaneous and successive deaths, make the Uniform Absence as Evidence of Death Act obsolete.

Article I, as is true of other relevant portions of the Code, contains bracketed provisions which are designed to accommodate community property states. One of these is Section 1-104 ee,<sup>2</sup> in the definitions on page I-7, which deals with property moved from a common law state to a community state. Its counterpart, designed for enactment in common law states, is 1-105 which deals with property which, when acquired, is community, and which is later moved to a new common law domicile.

Finally, Section 1-218<sup>3</sup> is very important. It expresses the idea that the various time limitations and other regulations relating to administration contained in the Code are inapplicable when fraud has been used to circumvent the provisions of the Act. Rather, a special time limit of two years from discovery of the fraud is stated.

Article II covers much of the substantive law of intestate succession and wills. The highspots of Part I on Intestate Succession include the following:

- (1) The historic distinction between real and personal property for purposes of succession is abolished. Dower and curtesy are also abolished.
- (2) The common pattern of intestate devolution that causes estates to be split in halves or other fractions between surviving spouse and issue of the decedent is altered in ways that we believe make the law's plan under this draft far closer to the wishes of the average property owner. Under Section 2-102, a surviving spouse takes all when there is no child or issue, unless he or she has been married less than a year to the decedent in which case the estate is equally divided between the spouse and the immediate family of the decedent. If there are issue who are also issue of the spouse, the spouse takes all of the first \$50,000 and one-half of the balance. Thus, in what may be the normal situation, the Code moves toward the common desire of spouses who routinely write wills leaving everything to the other but also reflects the split estate notion for large estates. If there are issue of another marriage who survive, the surviving spouse and issue divide the intestate estate.

(3) Section 2-104 states that an heir must survive the ancestor by five days in order to take. This short, required period of survival means that persons need not write wills simply to hedge against the possibility that they and their heirs may be killed in a common disaster. The other provisions respecting intestacy are fairly standard, except that no relative who is of more remote kinship than descendant of a grandparent is included as an heir.

(4) In Sections 2-109 and 2-110, we have tried to box in all facets of the meaning of adoption in respect to heirship. Adoption terminates the relationship for purposes of inheritance with the adopted person's blood relatives, and makes the adopted person a member of the family of the adopting parents for all purposes of intestate succession. Section 2-111 is the other important section dealing with family definition. It deals with the inheritance rights of illegitimates and contains needed, liberal provisions relating to the issue of void marriages and with the subject of legitimation.

Let's move on to Part 2 of Article II. It deals with the elective share of a surviving spouse -- the subject of a spouse's right to take against a will. The highspots here are these: a) Both male and female surviving spouses are protected. We saw no reason in this age of equal opportunity and female capitalists to perpetuate ancient discriminations against spouses who are males. Secondly, the elective right relates to what we call an augmented estate which is the probate estate plus property transferred during or in contemplation of marriage as a gift to take effect at death, or so that the decedent retained a right of survivorship, power to revoke or consume, or general power to appoint to others, and certain

gifts in contemplation of death. A spouse's rights are defined by, and may affect these transactions. Though possibly appearing to enlarge the threat of disruptive election by spouses, our drafts are really intended to reduce the prospect. Thus, a spouse cannot gain anything by election if, after taking account of life insurance he or she has received, the value of annuity and pension rights, and the value received in testamentary, or testamentary-in-effect transfers, she has received as much as a third of the estate. That is to say, the fraction protected is only a third and the spouse must take credit for all properties which have come to her from the decedent as a result of his death in order to disrupt any of his planning.

The draft does not attempt to block all means by which a determined and well-advised husband or wife might seek to dispose of personal wealth so that the surviving spouse will take little or nothing. It seems impractical to attempt to do so, for the resulting complexity impedes understanding, and likely will not gain much. Thus, life insurance payable to third persons is not touched. With some exceptions, our scheme is like legislation recently enacted in New York on the subject.

Part 3 is a short part dealing with the problem of children who are not provided for in wills. There is no forced share here; rather the provisions seek only to accomplish what a testator presumably would want done in respect to a child who was not in mind when the will was prepared.

Part 4 deals with family succession rights which are preferred over creditors' claims. We have provided for what we call a "homestead allowance" for surviving spouse and minor children, if any. We suggest that it be \$10,000 or some such arbitrary amount, or one-half of the estate, whichever is the smaller.<sup>4</sup> This sum, and certain exempt property, comes "off the top" of an estate, ahead of creditors'

claims, for the benefit of spouse and children. By shifting to a dollar allowance, we move away from the age-old meaning of homestead as a right in a decedent's real estate which was used as a home. We felt that survivors of apartment dwellers or other renters also should be given some preference to creditors of the decedent in respect to some portion of estates. Exempt property consists of one automobile and up to \$2,000 of household goods. The practical effect of these provisions for homestead and exempt property is to create a right in a surviving spouse which comes ahead of the terms of any will and of creditors. The values involved may range up to as much as \$10,000 to \$15,000. Provisions in Article III provide very simple procedures by which such rights can be implemented without full administration.

The highspots of Part 5, on Wills, are these:

(2) We have stuck with the idea that two witnesses are required for execution, though a bracketed section for use by states wishing to continue a holographic will tradition is provided. But interest by witnesses is irrelevant to mere execution unless someone seeks to prove undue influence, or intimidation, and witnesses do not need to know they are acting with respect to a will or sign in each other's presence. Hence, we have reduced existing formal requirements very considerably.

(b) A form of pre-proved will executed with the assistance of a notary is provided, and, in Part 9 dealing with Custody, Deposit and Verification of Wills, we provide a procedure for securing an adjudication before a testator's death that a given will is validly executed and is good subject only to revocation.

Part 6 expresses many several rules of construction and related ideas that we think need to be provided for wills. In parallel with the provision in intestacy, a person named in a will must survive five days in order to take, unless, of course,

the will provides otherwise. Section 2-609 is especially important for it imports the standards for intestate transfer applicable to adoption and illegitimacy into the construction of various class gifts by will or other instrument.

Part 7 is only half a page long. It requires that contracts to make, or to refrain from revoking, wills be in writing. It also validates contracts which provide for benefits payable on death.

Part 8, called "General Provisions" deals with renunciation, effect of divorce and the effect of homicide on various transfers effective at death.

Before considering Article III, which we would like to describe in somewhat greater detail, I'll ask fellow Reporters Vestal and Fratcher to tell you a little about Articles IV and V of the Code. [Summaries of remarks by Vestal and Fratcher describing Article IV (Foreign Personal Representatives; Ancillary Administration) and Article V (Protection of Persons Under Disability and Their Property) precede Articles IV and V.]<sup>5</sup>

Article VI should be briefly introduced. It deals with joint accounts and Totten or bank deposit trusts. It proceeds from these assumptions:

- (1) These common transactions, whether or not testamentary, should be validated and made reliable.
- (2) As between living depositors, funds in joint accounts and Totten Trusts belong to those who provided the funds to the account. That is, no real change of ownership occurs on deposit in joint name.
- (3) The bank must be protected in following the terms of the account, irrespective of the rights between the parties.
- (4) Every joint deposit should be deemed to involve survivorship rights unless it's a business account, or is stated to be without survivorship feature.

We have postponed comment about Article III because we wanted to suggest the philosophy and breadth of the entire draft before turning to the portion we have chosen for particular concentration today.

We want especially to emphasize Article III because we believe that its provisions relating to probate of wills and administration of decedents' estates may represent the most important steps in the effort to move probate matters closer to the needs of the people. It represents our effort to modernize probate procedures; e. g., the way estates are handled after death. Many of the other antiquities applicable to probate matters can be neutralized by well drawn wills. Thus, it is quite possible today for a well advised person to obtain a will which moves his affairs away from archaic rules concerning intestacy and from ancient traps that highlight such subjects as lapse, ademption and abatement of legacies, and exoneration, to mention a few. But, a will draftsman is virtually helpless when it comes to his ability to free an estate from unnecessary and expensive involvement by the probate court. Whatever the will may say, it must be proved after death. In a large number of states, proof of the will may be obtained only by commencing a court proceeding, after full notice to all possibly interested persons. Attesting witnesses must trudge to the courthouse to testify on matters that no one questions. Worst, perhaps, the court proceedings thus commenced may tend to entangle the estate for some time, for out of it comes the appointment of one who is technically an officer of the court and who is charged by law with pursuing a formidable number of steps, most of which must be culminated by an order of the court approving what the representative proposes to do. The result has been called the "probate deep-freeze" for assets are rather effectively frozen for a year or more after death while the archaic machinery of another era cranks through its process. There are, of

course, exceptions to this dreary situation in the multitude of procedural patterns available in the several states. But, it remains true of a very great part of modern probate procedure that the process of proving a will after death, securing the appointment of a personal representative and administering the estate is characterized by required court proceedings which have tended to become more and more cumbersome and complex as we lawyers have sought to make the system provide meaningful protections and also to reshape statutes and procedures to meet the modern demands of procedural due process.

The major change we propose is not novel or dramatic. We simply propose that the relationship of probate courts to estates be made more like the normal relationship that courts bear toward persons in respect to civil matters. Thus, we have designed a system under which the judge occupies a passive, supportive relationship to every estate. We have sought to give every interested person easy access to a judge capable of fully handling any kind of question relating to an estate. But, we have sought to have the ultimate question of whether and when a judge will be involved determined by the interested persons, rather than by a system which denies survivors their assets until they have paid their homage to the probate court. We have sought also to keep the scope of necessary judicial matters to the dimensions dictated by questions raised in pleadings. Hence, unless someone with an interest in an estate wants a judicial order for the resolution of a question, or the elimination of a risk, no judicial order will be required by the state code.

It might be thought that we are making it difficult for persons interested in estates to gain the protection presently available or supposedly available, in probate proceedings. But this is not the case. We assume the continuation of a special

court to handle estate problems. We continue the present ease with which persons interested in estates may be bound after fair notice in respect to their interests in a decedent's property. And, as suggested earlier, we provide easy access to the judge for those with problems.

Nor are we recommending a complete switch from common law assumptions about probate of wills and designation of representatives of decedents, to the civil law assumptions where succession may be a completely private, non-court affair centered around the heir who takes assets and liabilities of the decedent. We have retained the idea that a will is unavailable for proof of succession until it is officially validated, e. g., probated, after death. Also, a personal representative still derives authority from appointment by a public agency, rather than from will or relationship.

The key to our drafts is this: where there is no dispute, or wish for total protection, a will may be probated, and a personal representative may be appointed in what we call "informal proceedings". Informal proceedings may be handled by non-judicial persons who are employees of the estates court. Perhaps they will be called Registrars, which is the bracketed term suggested in our draft. The name is unimportant. The important thing is that they can probate a will without adjudicating rights by making an administrative determination concerning certain necessary matters that are clearly defined by the Code. At the same time we do not make any set of survivors take the risks implicit in informal probate. The Code does not impose informal probate on survivors or attorneys who fear the risks involved. As indicated earlier, any interested party can get the judge to pass on the issue of will or no will, or to resolve disputes concerning who may be appointed. The important change is that he does not have to do so. Thus, the Code gives him a legitimate way to take risks.

So far I've only suggested how estates may be started informally -- how are they handled thereafter? An equally important additional concept involved in our drafts is that a personal representative, though appointed by a public agency, acquires the status of trustee for the interested persons from appointment. Whether he is an executor under a will, or an administrator in intestacy makes no difference. The Code gives him a very broad set of powers which are designed to permit him to handle any problem of administration without recourse to the judge. But, consistently with our purpose to offer a completely flexible pattern of procedures, a personal representative has easy access to the judge if problems require solution or judicial approval of his accounts is desired. Also, a procedure is provided which will permit interested persons to secure supervision by a court of a personal representative which, in a sense, gives them the option of administering estates much as they are handled today. This feature will permit the Code to descend gently onto existing practice in any given state or community. Thus, if a community's lawyers are either unfamiliar with, or suspicious of, the new provisions, they may advise use of present procedures rather than make use of the new options. We believe also that this approach will permit uniformity of law in dissimilar communities or states.

The bulk of Article III is concerned with providing means for protecting all kinds of persons with interests, or potential interests, in an estate and with spelling out how executors and administrators should discharge the duties they owe survivors. Perhaps some new perspectives can be gained if we approach the Code from the viewpoint of various kinds of persons whom we'll invent for the purpose.

Take the case of the surviving widow whose husband left a will leaving his estate to her and to one adult son by a prior marriage. Let's suppose that other adult

children are disinherited by the will. The widow, of course, is interested in speedy settlement with as little publicity as possible. Under the draft, she may present the will to the probate clerk along with her verified application in which she must state that she believes the will is valid, that she knows of no other testamentary instrument, and describing the decedent's survivors known to her. She is not required to estimate values or otherwise describe estate so that some privacy is possible. In a similar, or possibly combined application, she may seek appointment as executrix. If five days from death have passed, the clerk can enter a statement probating the will. No notices need to be given in advance unless someone has demanded notice. No bond is required unless the will requires it or some person with an apparent interest in the estate demands it. Immediately upon appointment, the executrix has full power to sell, exchange, or otherwise deal in and with the assets of the estate, including any land. She must send information of her appointment to the persons apparently entitled to the estate -- in this case, the requirement would be to inform the son with whom she divides the estate of her appointment. She runs a publication for creditors if she is interested in gaining protection for herself and her son against unknown claims. She is under a duty to prepare an inventory of the estate but she may select any appraisers who may be necessary where values are not obvious without reference to the court or judge. She may send a copy of the inventory to the son as the other known interested party, and so prevent any public record indicating the nature or value of the estate from being created. If she has advertised for claims, unfiled claims are barred in four months and the devisees are fully entitled to receive the property. If the executrix is interested in protection against the son's later complaints about the way she handled the estate and cannot, or does not, get a release from the son,

she can file a closing statement with the court. Six months thereafter, a statute of limitation bars the son from starting litigation on account of her administration. The Code lets her collect assets as soon as five days from death. It tells her what her duties as executrix are. Whether she carries them out is a matter for her concern and that of creditors and interested persons. The probate court has no responsibility in the matter unless and until some person with an interest requests it to make an order.

What about the disinherited children of the testator? Let's look at the situation from their perspective. Presumably, they will know of the death of their father. If they are apprehensive that something may occur without their knowledge, they may file a demand for notice of any probate proceeding with the probate clerk at their father's domicile. This will not block the widow from securing informal probate, but it will hold up informal probate until the widow has given them at least a week's notice of her application. This enables them to bring proceedings to block any informal moves. Or, the disinherited children can do more. Without waiting for any other move, they can initiate a lawsuit in the probate court to have it declared that their father left no will. They may also wait and see if any will is probated informally and bring their contest against it. Allowing informal probate to occur in no way prejudices their contest, for the Code is clear that informal probate does not establish any new presumptions against later contestants.

Whether or not the children learn about their father's death in time to demand notice or take some early step to block the widow, they are not helpless by any means, nor particularly prejudiced by informal probate. Unless they are made parties by good notice complying with the requirements of due process to some formal proceedings in which it is adjudicated that they are disinherited, they have

three years from the date of the decedent's death to contest an informal probate. If the estate has been distributed under the informal probate, they are entitled to have the property or its value re-collected from the distributees and properly divided, assuming, of course, that they succeed in establishing that the will was invalid. If they learn of an informal probate before the estate is distributed, they can tie up the executrix so that she will be guilty of a contempt if she distributes without a court order. This may be done quickly and on preliminary hearing if the tie-up is sought in conjunction with their effort to knock out the will.

Let's try another perspective. Is the adult son who shares the estate with the widow adequately protected against her possible dishonesty, or bad management? He can demand notice of probate proceedings and assure himself of an opportunity to oppose her appointment in the first instance. If he allows this opportunity to go by, he will receive information of her appointment if she follows the law. If she does not, he is no worse off than the disinherited children in respect to finding out what's going on. That is to say, if the will has been probated, and letters have been issued, the probate court at the decedent's domicile will have the file for his information. Using it, or the information he receives from the executrix, he can demand that the widow be bonded. Or he has the assurance that a restraining order is quickly available to tie up the widow if developments cause him concern. Also, he is assured that the executrix cannot dodge the sting of contempt proceedings if she tries to avoid court proceedings by hiding from process servers or skipping from the state, for, by accepting appointment, the executrix has consented that she may be sued on mailed notice in respect to estate matters. If he does nothing until the estate is distributed because he does not learn until then of bad management, he has six months after he receives an account and a copy of the closing statement

before he is barred from surcharging the executrix for bad management. If she moves to the judge for an order that might cut his rights down sooner, he is assured of notice of the particular proceeding and an opportunity to be heard.

What about the decedent's creditors? Their claims are not barred until four months from first publication, and not then if they are secured, or seek to sue the decedent's personal representative for the sole purpose of establishing liability of an insurer of the decedent. In the meantime, the widow as executrix may properly pay them even though no valid claim is filed, subject, of course, to surcharge by the other distributee if he can show that an invalid claim has been recognized. If assets are distributed by the widow without advertising for claims, or if claims are ignored though filed, the creditors can sue the widow for breach of fiduciary duty owed to them, or assert their rights against the widow and son as distributees.

What about title to real estate? If an informal probate is subject to contest for three years, can an executrix create good title in purchasers? Can the widow and son convey a good title as distributees when it is possible that the estate may have to be divided with other heirs in the event of successful contest? The answer in both cases is yes. The draft contains elaborate provisions protecting purchasers from personal representatives and distributees. The market place is protected if the personal representative was acting under a valid appointment when he sold or distributed. Sworn applications and appearances support letters and the prospect, or fact, that letters are later terminated because a will is successfully contested does not serve to invalidate what was good in the meantime.

Is the draft fine for widows, but impractical or dangerous for professional fiduciaries handling estates? We don't think so. A fiduciary who believes the

chance of will contest is significant, can precipitate the matter by seeking formal judicial consideration of the will in the first instance. Or, he may administer the estate under informal probate and appointment and then before distributing assets, initiate a judicial proceeding to have the will adjudicated and to secure approval of his management and proposed distribution. If no formal proceedings are pursued, the draft nonetheless protects the fiduciary by relieving him for surcharge for authorized acts or distributions. Hence, if an executor distributes an estate to A because the informally probated will under which he was appointed so directs, he is not liable even if the will is subsequently contested successfully. Rather, the heir's remedy is to get the property or its value back from the distributee.

We have done nothing for tax collectors. We think they can take pretty good care of themselves.

What about probate judges? Are they being put out of business? The Code confers authority on the estates court to handle any kind of question that may involve an estate. We think that the increased power in probate will mean that much litigation concerning estates that is presently handled in superior courts will shift to probate. We think also probate judges will welcome relief from senseless requirements of existing law that cause public resentment, as well as the opportunity to become true specialist jurists.

What will the Code do to fees and costs of probate? In a nutshell, it eliminates much of the make-work aspects of probate administration. In time, as lawyers become acquainted with its potential, there will be a move toward charges based on the time spent on the estate, rather than a set percentage fee. The Code does nothing of a direct sort about this, however. Its only mention of fees relates to those of personal representatives who are stated to be entitled to "reasonable compensation".

We believe, however, that the professional interest on the part of good lawyers to give service as needed and wanted by clients will lead the way toward a new approach to probate fees.

Overall, the procedural philosophy and techniques expressed in Article III are not novel or original with us. In a sense, what we have done is to pick the features of existing probate codes and practices which appear useful to provide needed protection to legitimate interests and offer them in combination. Probate by a clerk or registrar without notice is well-known in some of our states as is informal appointment. But, the familiar "probate after notice" may well serve a purpose and should be available, though not required. Perhaps in a particular estate a personal representative should not pay debts or distribute assets without court approval. If so, this familiar pattern is available under the option of supervised administration. On the other hand, the circumstances may make it obvious that no disputes will arise or that the family will do what's right if there are disputes, so that a minimum of formal protections are in order. The Texas and Washington pattern of independent administration (non-intervention probate) is available to meet the need. It's applicable in those states only if wills so direct. But we think it should be available to heirs in intestacy as well. Creditors are protected as is presently the case in Ohio by a short period after publication to file, after which it's too late. Rather than innovate with new terms and ideas, we have sought to rearrange the familiar. In short, we simply have provided means by which our existing basic approach to probate administration can be made to work efficiently and flexibly.

Perhaps we can now look at the details of Article III and read some of its key provisions.

First, let me comment on the organization of Article III. We call Part 1 "General Provisions". It introduces the procedural side of probate matters, gives the probate court subject-matter jurisdiction and expresses the idea that probate litigation is like any other litigation in that it occurs only when initiated by some interested person. Also it expresses the option to appoint supervised fiduciaries as is done today.

Part 2, called "Probate of Wills and Appointment Proceedings" sets forth details concerning the proceedings leading to formal and informal probate or appointment. It also contains the important statute of limitation of three years from death for probate or contest.

Part 3, called "Personal Representative; Appointment, Control and Termination" covers the issuance of testate and intestate letters, and includes provisions about bond, removal, resignation and successor representatives.

Part 4 is the important part which gives every personal representative the status of a trustee and expresses the idea that he is to proceed without further order where feasible. The part also expresses the duties of such fiduciaries in respect to giving information to those they represent, inventory and appraisal and their obligation in respect to a decedent's assets. The critically important sections protecting members of the commercial community who deal with personal representatives is here.

Part 5 covers creditors' claims. Part 6 is a statutory charter enabling the personal representative to distribute without court order. Part 7 provides judicial and non-judicial methods for ending an administration and expresses periods of limitation in respect to possible liability of distributees to creditors and others. Part 8 outlines procedures for informal and formal compromise of controversies. Part

9 relates to collection of small estates by affidavit, and gives some rules for use by personal representatives of estates which do not exceed sums needed for expenses, exemptions and allowances.

END

## Notes

1. The Reporters gave full consideration to Articles I and VI at a meeting in Chicago held October 20-22, 1967. The Boulder subcommittee drafts of these Articles were amended somewhat and approved as changed. Article V was discussed and changed. However, all Reporters have not yet approved the exact content of Article V as it appears in this Third Working Draft.

2. Section 1-104 (ee) of the Boulder draft now appears as 1-106 of the Third Working Draft.

3. Section 1-218 of the Boulder draft now appears as 1-214 of the Third Working Draft.

4. The Reporters reconsidered the homestead allowance provision at the October, 1967, meeting in light of a recommendation that some set minimum amount be provided so that a certain, small estate exemption would be provided. As redrafted, 2-401 provides for a flat \$5,000 homestead allowance.

5. It was agreed at the October meeting of the Reporters that the provisions relating to court-appointed guardians of the person of minors and adult incompetents would be dropped. Provisions on appointment by will of a surviving parent or a guardian of the person of minor children will be retained, however, The feeling was that the subject of court-appointed guardians to control minors was more appropriate to comprehensive juvenile court legislation. Similarly, it was concluded that provisions permitting personal restraints for adult incompetents should be part of comprehensive legislation dealing with problems of persons who are mentally ill or deficient.

Those portions of Professor Fratcher's comments which related to provisions not appearing in the Third Working Draft have been deleted.

## A Flexible System for Administering Decedents' Estates

American probate procedures rest on assumptions inherited from the English that wills must be proved after death in order to be effective, and that personal property of a decedent passes to a state appointed personal representative who is to collect it and use it to satisfy the decedent's creditors before distributing to successors. Jurisdiction to handle these essential steps has been concentrated, in the main, in a probate court. Over the years procedures in probate have become more and more formal because lawyers and judges have sought to build meaningful protective features into the inherited requirements. Thus, notice requirements have proliferated. Also, the idea that a formal court proceeding, once initiated, should continue to assure valid accomplishment of the purpose of the proceeding has flourished in probate matters. And probate judges and the draftsmen of probate codes have accepted instances of careful practice, in respect to particular estates, as models of procedure from which mandatory statutory routines have evolved.

As a result, in many states, the local code recognizes only one way of handling the various steps or problems relating to settlement of decedents' estates. It is that all facets of administration are part of one continuous court proceeding of which the probate judge has ultimate control. Attorneys counselling executors must take each estate through essentially the same routine without regard for whether the parties are contentious or friendly, or whether the estate is worth \$15,000 or \$150,000. The necessity for the routine is hard to explain; and fees, possibly justified by the required work, are not understood nor accepted by clients.

The "Flexible System for Administering Decedents' Estates" that the attached charts, lists and examples describe was designed by the draftsmen of

the Uniform Probate Code to meet the problem of inflexibility of present procedures. It seeks to provide most of the advantages of existing methods of handling decedents' estates. At the same time, by leaving the various procedures available as options, the system is designed to permit great variety in the way particular estates may be handled.

It also proceeds on the assumption that the state code should not attempt to supervise successors in an attempt to prevent persons from taking risks or to protect others who may be injured thereby. Rather, control of these private matters should be like that applicable to other private matters. That is, control should lie in the ability of other interested persons to use clearly stated rights and remedies that they may have to check the risk-taker, or to charge him with the consequences of his conduct.

But, the proposed system does not leave persons, including fiduciaries, who would like assurance defining or eliminating risk, from gaining the protection they want and are entitled to. All that is required is that they make a request to the judge and give notice to interested persons concerning the relief they seek.

In studying these materials, try to put present assumptions about probate procedures to one side. Table I illustrates what might be called the tools which are provided for use by the Uniform Probate Code. Formal proceedings, as you'll see, are lawsuits. But, the methods for securing jurisdiction over interested persons under the Code reduce the problems of initiating a proceeding to the point where it should not be much more difficult than that presently involved in matters which are brought before a probate judge on motion. Estates may be administered and settled without a formal proceeding, because the other tools available are designed to permit the job to be done without any adjudication. But, the Code

offers more than an option between formal and informal methods of settling estates. Rather, it offers an option between formal and informal methods at just about every step from first application for approval of a will to final settlement. Hence, there are a very great number of routes through estate settlement under the Code.

The system also offers, in the form of supervised administration, a remedy permitting persons interested in a particular estate to secure control by the judge over a personal representative. Supervised administration is a special kind of formal proceeding. Once it is granted, the options otherwise available as to the need for future judicial orders concerning the activities of a personal representative are substantially reduced.

Tables I and II are considerably expanded by the appendices. Some may prefer to work with the appendices at the same time first study is being given to the Tables. Others will prefer to work through all five Tables before getting into the detail offered by the appendices.

Flexible System for Administering Decedents' Estates

Table I

Major Procedural Techniques

FORMAL PROCEEDINGS

- . Notice, hearing, order by judge, final subject to vacation and appeal
- . Initiated by petition
- . Interested persons determined by question raised

INFORMAL PROCEEDINGS

- . Involves statement under penalty of perjury to non-judicial official
- . Statement and easily proved facts support admin. order of probate and app't. of rep.
- . No notice; no delay; no adjudication

FILINGS

- . Statement under penalty of perjury
- . No official response except receipt and filing
- . Starts statute of limitations only

TRUSTEE STATUS OF REPRESENTATIVE

- . Follows app't of executor or administrator
- . Confers power over assets like that of an inter vivos trustee
- . Statute prescribes duties

STATUTES OF LIMITATION

- . May run from death, publication or filing
- . Short periods
- . Integral part of state's system of succession

SUPERVISED ADMINISTRATION

- . Like bankruptcy or today's probate system
- . Rep. is officer of court
- . Required reports and closing

As drafted, the Uniform Probate Code contemplates a probate court which will be a court of general jurisdiction, with appeals going to an appellate court for reconsideration on the record. The court will include a clerk or registrar of probate who need not be a judge or lawyer. "Formal proceedings" are proceedings before the judge after notice which result in adjudications. "Informal proceedings," handled by the registrar, are subject to contradiction in formal proceedings and do not involve adjudication. States having constitutional limitations on the power of existing probate courts could use the Code by reorganizing the various provisions so that existing probate judges would handle matters allocated by the draft to the non-judicial official, including maintaining the office where necessary and permitted non-judicial filings occur. The formal proceedings would be routed to the court of general civil jurisdiction in such a state.

Flexible System for Administering Decedents' Estates

Table II

Proceedings Available; Keyed to Steps in Typical Estates

INITIATION

Informal Probate (1)

(Will or No Will?)

- . Makes will effective without delay or notice

Informal Appointment (2)

- . Initial Step in intestacy
- . Second step, or combined with 1 if there is a will
- . But, separate from 1 so that may probate will and not appt. a rep.

Formal Testacy (3)

- . Adjudicates question of will or no will and determines heirs if intestacy
- . Can corroborate informal probate, be original proceeding, or be a contest

Formal Appointment (3a)

- . Same as 3, if intestate, except that an order appointing rep. is also involved
- . Appropriate if no contest over will, but fight over appointment
- . May involve a request for supervised administration

ADMINISTRATION

(Only after 2 or 3a)

Duties and Powers of Rep.

- . Enables full admin. without further order
- . Purchasers protected though breach of duty involved
- . Distributees protected through ability to demand bond, quick restraining order, special admin.

Statute of Limitations on Claims

- . Runs from advertising by rep.
- . Rejected claims are barred unless proceeding between creditor and rep. started

Misc. Formal Proceedings

- . Include dispute with claimant
- . Interpret will re whether land should be sold, or as to burden of taxes, for example
- . Covers any dispute that might arise

CLOSING

(Only after 2 or 3a)

Formal Accounting & Closing

- . May be started by rep. or distributee
- . May be combined with other requests for judicial ruling; e.g., with formal testacy proceeding, or proceeding to construe will

Closing Via Filing and Statute of Limitations

- . Filing statement must be complete and true
- . If so, questions as to propriety of rep.'s actions must be sued within 6 mos.
- . Requirements include copy of acct. to each distributee
- . Relates only to rights and duties between rep. and persons receiving estate via his administration

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Supervised Administration

- . Court assumes control through continuing jurisdiction of personal rep.
- . Supervised rep. has same powers of collection and management as non-supervised rep., but may not pay claims or distribute without court order
- . Relates only to control of rep. Hence, may follow informal probate, or may be combined with formal testacy proceeding

Flexible System for Administering Decedents' Estates

Table III

Some Proposed Time Limitations

From death:

1. Three years is time limit for informal or formal probate proceedings to establish will. (3-233)
2. Three years is time limit for assertion of unsecured claim. (3-504(a) 2)

Comment:

- a. A will probated informally becomes indisputable after the later of three years from death or one year from probate (3-233).
- b. If no will probated within period, then claim of heirs is perfect. Proceeding to determine heirs possible, however. (3-233)
- c. No need for administration after three years except to facilitate collection and division of property.

From advertisement for claims after appointment:

1. Four months from first published notice to creditors is time limit for proof of claim. (3-504 (a))

Comment:

- a. Appointment and advertising required. (3-202; 3-502; 3-504)
- b. Expenses of administration subject to special non-claim (3-504 (b)) and secured claims excepted (3-504 (c)).

From filing of complete closing statement:

1. Six months is time limit for complaint against personal representative by distributees. (3-705)

Comment:

- a. If will probated informally, and three years for contest has not run, heirs not precluded by six months' limit, but heirs' rights are against distributees (3-403; 3-609; 3-706)
- b. Similarly, if estate distributed as intestate after informal appointment, a later-discovered will probated within three years from death would give takers under will rights against heirs. (3-403; 3-609; 3-706)
- c. In any case like a. or b., purchaser from duly appointed personal representative, or from distributee, protected. (3-412; 3-415; 3-610)

Fraud?

The Code would provide that regular time limits would not bar an action in tort or for constructive trust against one who intentionally misrepresented, or concealed, a material fact to the detriment of another. Rather, two years from discovery of fraud is the limit. (1-218)

Table IV

Major Protective Devices and Provisions

<u>Kind of Risk</u>	<u>Protection Available</u>
1. <u>Fraud</u> in form of misrepresentation in statement required for informal proceeding or filing.	a. Person guilty of fraud and persons enriched via fraud liable to persons damaged in tort or restitution for two years from discovery, irrespective of other limits. (1-218)
2. Omission of relevant information in statement relating to informal proceeding, or filing.	a. In "Informal proceedings", clerk to check content of statement against statutory list before issuing letters or statement of informal probate (3-208; 3-209; 3-210) b. Intentional omission of required statement is fraud. c. Normal duty of fiduciary and to fully inform provides additional remedy.
3. Disinheritance of real heir via informal probate of will.	a. Cannot happen until at least three years have run from death. This period, plus the natural notice provided by death of relative, plus the probability that wills meeting checklist are okay, should make risk tolerable. (3-233)
4. Omission to identify proper heirs in distribution of intestate estate.	a. True heirs not barred of right to recover value wrongfully received by distributees, unless there has been a formal proceeding after full notice or until the later of three years from death, or one year from distribution. (3-233; 3-609; 3-706)
5. Appointment of person lacking needed business skills in no-notice proceedings	a. Caveat proceeding permits any interested person to have special notice before appointment. (3-207) b. No appointment possible for five [5] days after death. (3-216) c. Appointment made informally may be attacked in formal proceedings. Incident to such proceedings, prior appointee loses all but emergency powers. Also, court may appoint a special administrator. (3-221; 3-234; 3-314)

6. After appointment, protection against bad judgment or other default of personal representative.
  - a. Any person with substantial interest in estate as creditor or probable distributee can compel bond at any time. (3-306)
  - b. Also, any such person may move to court for a restraining order which subjects personal representative to penalty of contempt if disregarded. (3-308)
  - c. Clear remedy to surcharge for breach of duty. (3-403)
  - d. Person interested in specific property may restrain sale, request court order that asset be sold to him or secure other relief. (3-308)
  
7. Protection for children and other persons under disability.
  - a. As now, through guardian ad litem, in respect to interests affected by litigation. (1-201)
  - b. By three year period after death providing chance for questions to be raised if there are no formal proceedings. (3-233)
  - c. Fiduciary obligation of personal representative remains open in respect to misrepresentation or non-disclosure in accounts furnished to persons who should recover estate. (1-218; 3-403; 3-705)
  - d. Erroneous distribution leaves distributees liable in restitution until the later of one year from distribution or three years from death, except where the distribution is approved by court after hearing featuring guardians ad litem for incompetents. (3-609; 3-706)
  - e. Personal representative authorized to distribute to person under disability only by distributing to one able to give valid discharge; e. g., a conservator-trustee, or one described by 5-103 (3-613)

### In General

- a. By eliminating much of the need for routine court orders, the matters which are brought before a judge after full notice should be better considered, with attendant increase in the likelihood of ultimate accuracy and fairness, than is true at the present.
- b. Interests cut short by a statute of limitations may be seen as not warranting full protection. Persons who do nothing by way of inquiry about the affairs of a relative for more than three years after his death will usually not be the close kindred to whom such decedent's property should pass. A will that is discovered more than three years after death should be suspect, per se.
- c. Acceptance of the concept that a personal representative is a fiduciary with clear lines of responsibility to the interested persons will more surely bring protection cut to fit the interests and inclinations of the property owners involved, than the system of making the court some sort of watchdog to see that total propriety attends each estate.

## Flexible System for Administering Decedents' Estates

### Table V

#### Illustrations

##### Case 1

#### Hypothetical facts :

Testator's estate consists of personal and intangible property estimated to be worth \$50,000. His survivors are his widow and two adult sons. He left an apparently well executed will of recent date which leaves his entire estate to his widow. His sons want nothing and are willing to cooperate in every way.

#### A Possible Approach (Cheap and risky)

- . Informal probate of will  
[Available five days after death; no notice; no hearing; original will, death certificate and detailed sworn statement are required.]
- . Informal appointment  
[Named executor may be appointed as soon as will probated; no bond unless requested; application may be combined with application for probate.]

At this point, the executor has accepted responsibility and is liable to all persons interested in estate to complete administration via powers conferred. But, unless a creditor or devisee complains, or unless someone challenges the will, or the executor wants protection, there is no compulsion from the court to do more. Assuming the executor pays all known bills and taxes, and causes estate to be transferred from decedent's name to devisee's name, the matters left open are as follows:

- a. Other possible creditors not barred without advertising. Three years from death is statute of limitation on risk of executor and devisee.
- b. Because will probate was informal only, basic period of three years from death is risk period for will contest, later-discovered will, claim by persons who may turn up as prior spouse, forgotten children, or with various claims for service and the like.
- c. Executor takes risk of change of mind by family. Devisee may blame executor for failing to pursue salary claim, etc.

Case 2

Hypothetical facts : [Same as Case 1]

A Better Approach  
(One hearing at beginning)

- . Informal probate  
[To permit early appointment]
- . Informal appointment  
[Takes the place of special administrator; quick sale of assets possible.]
- . Formal probate  
[Executor starts formal proceeding to get adjudication on will. Shortens time for question to time for vacation of order or appeal. Notice to known and unknown heirs bars later claim.]

At this point estate is just like first example, except that risk of later will or contest is limited very substantially.

- . Advertisement for claims; payment of all known claims; four months pass.  
[Now risk of further claims against decedent is eliminated.]
- . Executor distributes without order and files closing statement prescribed by Code; six months pass without question being raised.  
[Filing requires statement under oath that required steps taken and that account was sent to distributees.]

At this point all parties are virtually assured of full protection. The risks still open would include any question as to whether the personal representative made full disclosure, any question as to the competency of distributees to consent and release, and any question about the truth of assertions in the closing statement.

Case 3

Hypothetical facts : [Same as Case 1]

The Best Approach  
(One hearing at conclusion)

- . Informal probate
- . Informal appointment
- . Advertisement for claims
- . Formal proceeding to adjudicate validity of will (heirs joined), and to approve accounts (distributees interested)

This approach involves postponing the formal probate proceeding until the end of administration and is indicated only when the risk of successful contest or of a later will being discovered is very small. The hearing at the close of administration should seal off any questions that might come up between representative and distributee.

#### Case 4

#### Hypothetical facts :

Testator's estate consists of stocks and notes worth \$50,000. His will, executed on his death bed, leaves everything to his third wife whom testator married six months earlier and nothing to his children by his first and second marriages. Everyone except the third wife is unhappy. It seems clear that some of the children, particularly a daughter who kept house for her father until his third marriage, will cause trouble.

#### One Approach (A practical combination)

- . Informal probate
- . Informal appointment  
[In combination, these steps enable executor named in last will to get started with administration. If a will contest is started, he ceases to have power to distribute until contest is ended. The angry daughter could sue to prevent his appointment, but she would have to move fast. Also, she could require bond and restrain powers on ex parte hearing.]
- . Formal probate  
[If daughter doesn't start contest, executor should precipitate matter or else the question of will or no will remains to impede administration.]
- . Advertises for claims  
[Daughter will have to show hand on claim, if she is going to do so.]
- . Executor distributes without order and files closing statement  
[This would be feasible only if daughter, having been eliminated on questions she can raise, is the only problem. Leaves executor with risks of settlement with widow.]

Hypothetical facts : [Same as Case 4]

Another Approach  
(One continuous proceeding)

- . Informal probate
- . Informal appointment  
[To start things.]
- . Formal proceeding to:
  - a. secure adjudication of will
  - b. secure order that executor proceed, under responsibility to court, in supervised administration  
[Request for supervised administration can be joined with any proceeding involving all interested parties.]

An order for supervised administration means that the representative, though he has the same powers of collection, sale and management of assets as a non-supervised representative, may not pay claims or distribute the estate without an order of the judge. Also, if the petitioner requests it, certain administrative powers ordinarily available to a personal representative may be curtailed, provided reference to the limitation is endorsed on the letters.

Supervised administration takes the executor and his attorney off the "hot seat" to a degree. It would reduce the burden of justifying various steps which the estate attorney may feel are inevitable, or desirable.

Case 6

Hypothetical facts : Decedent dies intestate survived by three minor children, owning farm worth \$75,000.

A Possible Approach  
(One hearing at end)

- . Informal appointment
- . Advertisement for claims; four months pass
- . Land sale via power in personal representative
- . Formal proceeding to
  - a. determine that there was no will
  - b. determine who were heirs
  - c. settle all questions that might be raised about sale and distribution
- . Distribution would be made to conservator-trustee appointed by court to manage assets of children

# Flexible System for Administering Decedents' Estates

## Table I - Appendix

### (Same Viewpoint and More Detail)

#### I. Formal proceedings

##### A. Characteristics

1. Order by judge after notice and hearing. Final order on question raised and decided; subject to appeal or vacation as on judgment. (3-220; 3-222; 3-231)
2. Venue and jurisdiction fixed in probate court where will might be probated. Appointing court has exclusive jurisdiction. (3-102; 3-204)
3. Often used proceedings and parties to be joined in each separately described; others described generally.
4. Several requests, each of which might be occasion for separate proceeding, may be joined provided persons affected by each request involved are also joined.
5. Personal representative always subject to proceeding via consent to suit involved in accepting letters. Other interested parties may be joined by process as in action to quiet title, unless proceeding does not concern question of who owns titles and rights conceded to have been decedent's. (3-303; 3-102; 3-103; 1-208)
6. Appeal to court of appeal on record. (1-201)

##### B. Function

1. To resolve disputes.
2. To gain protection of final order.
3. To accelerate time of certainty.

##### C. Necessity

1. Not mandatory as to all estates as informal alternatives available for required steps of probate and appointment.
2. Initiation occurs on request in petition by heir, devisee, creditor or personal representative.
3. On petition after notice, hearing and showing of necessity, court may order that administration be supervised, meaning that court order or approval of further steps in settlement would become required in that estate. Such order must be requested; however.

#### II. Informal proceedings

##### A. Characteristics

1. Involves statement under penalty of perjury and request for administrative, largely non-discretionary, determination based on statements in application and on matters made evident by the description of the proceeding. (3-208; 3-209; 3-215)
2. No requirement of notice; no requirement of hearing; no requirement that application be handled by judge. Rather, such applications will be addressed to and handled by the probate court, and sections dealing with court structure will enable such matters to be handled by an employee of the court known as probate clerk, or registrar or similar title. (1-205)

3. Produces an administrative response which is sufficient to make a will effective, subject to contest, or to appoint a representative, subject to suit objecting to such appointment. (3-209; 3-215)
4. Does not bar rights, though it may set administration via a personal representative in motion and rights to particular assets, though not to values, may be affected via administration.

B. Function

1. To permit undisputed matters to be handled simply and quickly, while continuing the useful concept that some post-death scrutiny of a will is required to make it operative, and that a personal representative should be officially recognized after death before beginning administration.
2. To separate routine matters not involving disputes or finality from the personal responsibility of a judge, and thus to upgrade the role of judge by keeping his function truly judicial.

C. Necessity

1. Either formal or informal probate is required for any will. Also, appointment of any personal representative must be accomplished in informal or formal proceedings, if an appointment is desired or necessary.

III. Filings

A. Characteristics

1. Involves filing documents meeting requirements of statute with probate court. (3-207; 3-306; 3-406; 3-505 (b); 3-703)
2. No responsive action by court (clerk or registrar) is called for except receipt and filing.

B. Purpose and effect

1. To permit a public notation that the office established by appointment has completed its main business.
2. Starts statute of limitation running on complaints against administrator.
3. Regularizes and controls administration by subjecting representative to requirement of statement, under penalty of perjury, that he has performed acts designed to assure proper administration.
4. Provides interested persons with method of protecting evidence of claim (3-505), demand for bond (3-306) and demand for notice of proceeding (3-207).

IV. Statutory duties and powers for personal representative.

A. Characteristics

1. Uses analogy of trustee.
2. Personal representative has duty to follow code steps re administration. Failure to perform means he may be replaced, held liable for losses or denied protection against later complaints.
3. Representative, through statutory powers, can collect, liquidate, pay claims and distribute without further court order.
4. Purchasers from personal representatives are protected though sale may have been a breach of duty and may make personal representatives liable to distributees.

5. Purchasers from distributee protected, though distribution may subject distributee to liability of restitution.
6. Will may deny power, or party interested in administration may bring proceeding to restrain a particular act. Also, a petition for supervised administration might be appropriate if personal representative is not trusted.

B. Source of power and duties; duration.

1. Appointment in formal or informal proceedings.
2. Various events terminate authority, though not liability.

C. Protection involved for parties.

1. Personal obligation of fiduciary.
2. Opportunity to prevent appointment.
3. Opportunity, through notice after appointment, to require bond.
4. Personal representative always subject to formal proceeding in appointing court.
5. Supervised administration may be sought at beginning of administration, or later.
6. On application of any interested person to judge, and showing that personal representative has breached duty to administer promptly, or is unable to carry out duties, special administrator may be appointed.

V. Supervised administration.

A. Characteristics

1. Results from proceeding, with notice and hearing, seeking continuing control by court of personal representative.
2. Resembles method by which a trustee in bankruptcy, or an executor or administrator under traditional U.S. probate law might be controlled.

B. Purpose

1. To permit one continuous proceeding where a series of controversies is contemplated.

VI. Statutes of limitation.

A. Characteristics

1. Arbitrary time limit within which rights of succession and rights of creditors must be asserted or otherwise recognized, or be barred.
2. Operates as a condition on testator's statutory right to make a will, and on devisee's statutory right to take under a will.
3. Time limits used are keyed to death of decedent, or to act of personal representative which will be known to parties affected by the limitation.

B. Function

1. To permit non-judicial termination of period of uncertainty as to succession.
2. To implement, by certainty of right, the assumption of the parties in non-contentious situations that "everything is all right".

Flexible System for Administering Decedents' Estates

Table II - Appendix

Alternatives for Various Requirements

of Administration

1. To probate a will
  - a) informal probate proceeding
  - b) formal testacy proceeding
2. To appoint an executor
  - a) informal appointment proceeding
  - b) formal testacy; additional request
3. To appoint an administrator in intestacy
  - a) informal appointment proceeding
  - b) formal testacy proceeding seeking order of intestacy and determination of heirs
4. To contest a will
  - a) executor or contestant may start formal proceedings to corroborate informal, contest informal, or to precipitate question as original matter
5. To challenge appointment of personal representative
  - a) if issue is will or no will, formal testacy proceeding
  - b) if issue is qualification of person appointed informally, a formal proceeding to question is available
6. To ascertain and bar creditors
  - a) advertise for claims and start four month period of limitations; pay claims after four months
  - b) disputed claims may be settled via fiduciary's power, or may be sued in probate proceeding between claimant and personal representative (either may start)
  - c) secured claims, including right against decedent's insurer, not barred but unenforceable against general estate assets
  - d) taxes are the problem of federal and state revenue authority; can't bar as practical matter
7. To collect assets
  - a) appointment gives representative right to possess all assets as needed
  - b) appointment confers power in representative so that disputes may be sued or settled in probate court if defendant subject to suit in county, or elsewhere
  - c) for complex question, may bring formal proceeding, joining interested persons, and get court order on this matter separately from other business of estate

- d) duty to insure, pay taxes and repair follows appointment and possession of assets and lasts until sale or distribution
8. To sell, exchange or deal with assets
- a) personal representative has full power by statute
  - b) purchasers protected even though sale is wrongful, unless purchasers act collusively with personal representative
9. To protect heirs or devisees from personal representative's behaviour
- a) "caveat" proceeding available permitting one to demand notice of any proceeding by request filed with court after death, thereby blocking informal proceedings unless notice is given as demanded
  - b) any interested person can have bond required via demand
  - c) any interested person can bring proceeding to prevent exercise of power and get restraining order on ex parte hearing
  - d) personal liability of personal representative for breach made meaningful by requirement that inventory and accounts be furnished to parties
10. To produce good title to realty
- a) purchasers from personal representatives protected
  - b) distribution by conveyance of personal representative. Title clear if no complaint within six months if question of will or no will has been litigated and creditors barred
  - c) purchasers from distributees protected even if distributees subject to liability
11. To gain protection for personal representative
- a) truthful closing statement, no overreaching of relationship, plus six months without complaint
  - b) formal accounting proceeding

ARTICLE I.

GENERAL PROVISIONS

Part 1.

Definitions; General

1 SECTION 1-101. [Short Title.] This Act shall be known and may be  
2 cited as the Uniform Probate Code.

1 SECTION 1-102. [Application of Act.]

2 (a) This Code shall take effect on January 1, 19\_\_.

3 (b) Except as specifically provided elsewhere in this Act, on the  
4 effective date of this Act

5 (1) the Act shall apply to any wills of and proceedings concerning  
6 decedents dying thereafter except that a will executed prior to the  
7 effective date of this Act shall be treated as if executed in compliance  
8 with the Act (Section 2-502) if executed in compliance with the law  
9 applicable at the time of its execution or if the application of the section  
10 of this Code on choice of law (Section 2-505) would make the will effective;

11 (2) the procedure prescribed by this Act shall apply to any pro-  
12 ceedings thereafter commenced regardless of the time of the death of  
13 decedent and also to any further procedure in proceedings then pending  
14 except to the extent that in the opinion of the court the former procedure  
15 should be made applicable in a particular case in the interest of justice  
16 or because of infeasibility of application of the procedure of this Code;

17 (3) every personal representative including a person administering  
18 an estate of a minor or incompetent holding an appointment on that date

19 shall continue to hold the appointment but shall have only the powers  
20 conferred by this Code and shall be subject to the duties imposed with  
21 respect to any act occurring or done thereafter;

22 (4) an act done before the effective date in any proceeding and  
23 any accrued right shall not be impaired by this Code. When a right is  
24 acquired, extinguished or barred upon the expiration of a prescribed  
25 period of time which has commenced to run by the provisions of any  
26 statute before the effective date, the provisions shall remain in force  
27 with respect to that right;

28 (5) any rule of construction provided in this Code shall apply to  
29 instruments executed before the effective date unless there is a clear  
30 indication of a contrary intent.

31 (c) Severability. If any provision of this Code or the application thereof  
32 to any person or circumstances is held invalid, the invalidity shall not affect  
33 other provisions or applications of the Code which can be given effect without  
34 the invalid provision or application, and to this end the provisions of this Act  
35 are declared to be severable.

36 (d) No implied repeal. This Code being a general act intended as a  
37 unified coverage of its subject matter, no part of it shall be deemed to be  
38 impliedly repealed by subsequent legislation if it can reasonably be avoided.

#### Comment

Subsection (d) is similar to a provision in the Uniform Commercial Code.

Subparagraphs (a) and (b), unlike the other sections in this Article, have not been approved by all Reporters. As drafted, the provisions reflect rejection of one possible variation that has been discussed. It deals with the situation of a testator who is incompetent on the date the Act becomes effective. Arguably, his will should be excepted from (b) (1) because of his inability to change it to

avoid unwanted application of the Act. But, the various provisions of Part 6 of Article II which may give the will a different meaning than when executed deal with instances where the draftsman did not foresee a problem. Presumably, the incompetent testator would want the new law to apply to his instrument because it would reach a result deemed desirable in light of probable drafting oversight.

Section 2-507 raises a slightly different problem. It makes divorce revoke an extant testamentary provision for the ex-spouse. It is conceivable that a testator who is incompetent on the effective date of the Act would prefer that a provision in his previously executed will in favor of his former spouse remain in effect. Even if this possibility is deemed serious enough to warrant some adjustment in the legislation, it would seem best to make the adjustment in the specific provision which gives rise to the problem, for excepting the will of an incompetent testator from this provision increases the risk of total invalidity.

1           SECTION 1-103. [Definitions.] When used in this Code, unless other-

2 wise apparent from the context:

3           (a) "Child" includes an adopted child and any child entitled under Section  
4 2-111 to take by intestate succession from the parent whose relationship is in  
5 question. It does not include any other illegitimate child, a stepchild, a foster  
6 child, a grandchild, or any more remote descendant.

7           (b) "Claims", in respect to decedents' estates, include liabilities of  
8 the decedent which survive, whether arising in contract, in tort or otherwise,  
9 and liabilities of the estate which arise at or after the death of the decedent,  
10 including funeral expenses, expenses of administration and all estate and in-  
11 heritance taxes. In respect to protective proceedings, the term has the meaning  
12 ascribed to it in Article V of this Code.

13           (c) "Devise", when used as a noun, includes "legacy" and means a  
14 testamentary disposition of real or personal property or both and when used as  
15 a verb, means to dispose of real or personal property or both by will.

16           (d) "Devisee" means any person designated in a will to receive a devise.

17 (e) "Distributee" means any person who has received property of a  
18 decedent from his personal representative other than as a creditor or purchaser.

19 (f) "Estate" denotes the real and personal property of the decedent,  
20 ward or protected person, as from time to time changed in form by sale,  
21 reinvestment or otherwise, and augmented by any accretions and additions  
22 thereto and substitutions therefor and diminished by any decreases and distri-  
23 butions therefrom. In Article V it has the further meaning stated in Section  
24 5-101 (j).

25 (g) "Exempt property" refers to that property of a decedent's estate  
26 which is described in Section 2-403.

27 (h) "Fiduciary" includes personal representative and conservator-  
28 trustee.

29 (i) "Formal proceedings" are those conducted with notice to interested  
30 persons before a judge, without limitation as to subject matter.

31 (j) "Heirs" denotes those persons, including the surviving spouse, who  
32 are entitled under the statutes of intestate succession to the property of a  
33 decedent on his death intestate.

34 (k) "Informal proceedings" are those conducted without notice to all  
35 interested persons before a [registrar] for probate of a will or appointment of  
36 a personal representative.

37 (l) "Interested person" includes heirs, devisees, children, spouses,  
38 creditors and any others having a property right in or claim against the estate  
39 of a decedent, ward or protected person which may be affected by the proceeding.  
40 It also includes fiduciaries representing interested persons. The meaning may  
41 vary from time to time and, as to any particular proceeding or part thereof, its

42 meaning must be determined according to the particular purpose and matter  
43 involved. In respect to protective proceedings, the term includes the agencies  
44 mentioned in Section 5-506.

45 (m) "Issue" of a person means all of his lineal descendants except  
46 those who are lineal descendants of a living lineal descendant. Adopted children  
47 of the person and of his lineal descendants and lineal descendants of these  
48 adopted children are lineal descendants of the person. Children of the person  
49 who are entitled under Section 2-111 to take by intestate succession from him  
50 and lineal descendants of these children are lineal descendants of the person.  
51 Children of a lineal descendant of the person who are entitled under Section 2-111  
52 to take by intestate succession from that lineal descendant and lineal descendants  
53 of these children are lineal descendants of the person. When a person's lineal  
54 descendant is adopted he ceases to be a lineal descendant unless, after the  
55 adoption, he has an adoptive parent, or a natural parent whose parental relation-  
56 ship was not terminated by the adoption, who is the person or a lineal descendant  
57 of the person.

58 (n) "Lease" includes an oil and gas lease or other mineral lease.

59 (o) "Letters" includes letters testamentary, letters of administration  
60 and letters of conservator-trusteeship.

61 (p) "Mortgages" include any conveyance, agreement or arrangement in  
62 which property is used as security.

63 (q) "Net estate", in respect to decedents' estates, refers to the property  
64 of a decedent exclusive of exempt property, family allowance and enforceable  
65 claims against the estate.

66 (r) "Person" includes natural persons and corporations.

67 (s) "Personal property" includes interests in goods, money, choses  
68 in action, evidences of debt and chattels real.

69 (t) "Personal representative" includes executor, administrator, and  
70 special administrator. "General personal representative" includes executor  
71 and administrator but not special administrator.

72 (u) "Property" includes both real and personal property.

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

81 (w) "Settlement" includes, as to a decedent's estate, the full process of  
82 administration, distribution and closing.

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

85 (y) "Testacy proceeding" means a formal proceeding to establish a will  
86 or determine intestacy.

87 (z) "Will" includes codicil; it also includes any testamentary instrument  
88 which merely appoints an executor or revokes or revives another will.

89 (aa) "Real property" includes estates and interests in land, corporeal  
90 or incorporeal, legal or equitable, other than chattels real.

[FOR ADOPTION IN COMMUNITY PROPERTY STATES]

1 [bb] "Separate property" (to be defined locally in accordance with  
2 existing concept in adopting state)]

3 [cc] "Community property" (to be defined locally in accordance with  
4 existing concept in adopting state)]

Comment

Additional sections with special definitions for Articles IV, V and VI are 4-101, 5-101 and 6-101. Except as controlled by special definitions applicable to these particular Articles, the definitions in 1-103 apply to the entire Code.

The definitions of "child" and related terms, as they may be affected by the impact of adoption on various property transmissions effective at death to or from an adopted child and his children or issue, and to or from the natural and adopting families of an adopted child, are being given further study by the Reporters. Under a recent draft of Revised Uniform Adoption Act, the critical time for termination of old and substitution of new property and inheritance rights and patterns for adopted children is entry of an interlocutory decree of adoption. This is the same as (c) above. Two other questions may be raised. The first is whether inheritance rights to and from a parent whose parental rights have been permanently terminated otherwise than incident to an adoption, or prior to entry of an interlocutory decree of adoption, should not be cut off at the time of deprivation without regard for whether new familial ties have been created by an interlocutory decree of adoption. The second relates to construction of various class gifts. The provisions of the Revised Uniform Adoption Act differ on the construction point from Section 2-609.

1 SECTION 1-104. [Use of Terms.] Words of the masculine gender in-  
2 clude the feminine and neuter. Words in the singular number include the  
3 plural and words in the plural number include the singular.

1 SECTION 1-105. [Property Moved from a Community Property State  
2 to a Common Law State.] Married persons domiciled in this state who own in  
3 this state community property acquired while domiciled in a community property  
4 state or property acquired with community funds shall be considered as co-owners  
5 having present, equal, and existing interests therein in the absence of contrary  
6 agreements.

Comment

Property, or its proceeds, acquired by married persons while domiciled in a community property state and then moved into a common law property state does not thereby lose its character as community property. The rights of each spouse in his share of the community property or in its substituted form are recognized by this provision. The parties may by agreement change their interests in the property. However, a change in the manner in which title to the property is held does not, without an agreement, defeat the interest of the other spouse. The law governing the acquisition of property will apply to determine whether the property is community.

The suggestions in this and the following sections will be reconsidered when recommendations by a committee of the ABA Section of Real Property, Probate and Trust Law which has been appointed recently to study "migrant property" problems become available.

1           SECTION 1-106. [Quasi-Community Property.] Quasi-community  
2 property of a husband or wife means all personal property wherever situated  
3 and all real property situated in this state heretofore or hereafter required  
4 by either of them while domiciled elsewhere which would have been their  
5 community property had the spouse acquiring it been domiciled in this state at  
6 the time of its acquisition or acquired in exchange for real or personal property  
7 wherever situated, acquired other than by gift, devise, bequest or descent by  
8 either of them during their marriage while domiciled elsewhere.

ARTICLE I

GENERAL PROVISIONS

Part 2

The [Probate] Court

1           SECTION 1-201. [The [Probate] Court.] The [Probate] court is a  
2 court of record with the same powers as to matters committed to it by this  
3 Code and other statutes of this state as a court of record with general juris-  
4 diction in law and equity. These matters include probate of wills; deter-  
5 mination of heirship; administration, settlement and distribution of estates  
6 of decedents; determination of title to and rights in property claimed by or  
7 against estates of decedents, minors and disabled persons; granting of letters  
8 testamentary, of administration and of conservator-trusteeship; construction  
9 of wills, whether incident to the administration or distribution of an estate or  
10 as a separate proceeding; and protection of property of minors and disabled  
11 persons.

12           It has the same legal and equitable powers to effectuate its jurisdiction,  
13 punish contempts, and carry out its determination, orders, judgments and  
14 decrees as a court of record with general jurisdiction in law and equity and the  
15 same validity, finality, and presumption of regularity shall be accorded to its  
16 determination, orders, judgments and decrees, including determinations of its  
17 own jurisdiction, as to those of a court of record with general jurisdiction in  
18 law and equity. No issue determined in a [probate] court shall be tried again  
19 on appeal or otherwise re-examined in a manner other than those appropriate  
20 to issues determined by a court of record with general jurisdiction in law and  
21 equity.

## Comment

The court to which the judicial matters described in this Code are assigned should have all of the power and stature of a trial court of general jurisdiction. This is in accordance with the recommendations of Simes and Basye in "The Organization of the Probate Court in America," 42 Mich. L. Rev. 965 and 43 Mich. L. Rev. 113, reprinted in Model Probate Code, (Michigan Legal Publications, Ann Arbor, Michigan, 1946).

Various non-judicial functions to be performed by a public officer are also described in this Code. These are concerned with the informal proceedings described in Part 2 of Article III and with the maintenance of certain files and records that pertain to estates. Non-judicial functions are assigned by this Code to a probate registrar, who is described by Section 1-204. The Code proceeds from the assumption that the registrar will be an officer within the organization of the court to which the jurisdiction described in this section is assigned. Hence the section does not divide the jurisdiction to probate wills or to grant various letters between the officers who will respond to petitions in formal proceedings, and those to whom applications in informal proceedings will be directed. Elsewhere, however, the Code divides the functions to be performed by the registrar from those to be performed by the judge. See sections 3-205, et seq.

In states where constitutional restrictions would prevent delegation of full judicial power to existing probate courts, the jurisdiction to handle informal applications, and the duties described in the Code for the registrar, could be assigned to existing probate courts. Jurisdiction to handle the judicial matters described by the Code would then be assigned to a division of the court of general jurisdiction, and the various references in the Code to the probate judge would be changed to refer to the appropriate court.

In other states where probate courts have legislatively limited jurisdiction but are courts of record manned by lawyer-judges, it may be preferable to remove all restrictions on the probate court's power so it can handle the matters assigned to it by this Code. The office of registrar presumably would be created within the organization of a court of this sort.

No grant of jurisdiction to issue letters of guardianship is included in section 1-201 in the Third Working Draft. This reflects the decision of the Reporters to omit provisions relating to judicial appointments of guardians of the person of minors and incompetents. The decision reflects the view that guardianship jurisdiction relating to minors should be dealt with in a comprehensive Juvenile Court Code, and that guardianship of other incompetents should be part of comprehensive legislation dealing with mentally defective persons. "Guardianship of the estate" of persons having property which they are unable to manage is covered by this Code. However, the term "conservator-trustee" is used rather than any term using the word "guardian". Also, a "testamentary guardian" is described by Part 2 of Article V of this Code. The "testamentary guardian" described in Part 2 derives his authority

from the provisions of a will and from the Code rather than from judicial appointment. Hence no mention of this status is appropriate in reference to a description of the court's jurisdiction.

1           SECTION 1-202. [Qualifications of Judge.] A [probate] judge shall  
2 have the same qualifications as a judge of the [court of general jurisdiction.]

1           SECTION 1-203. [Court Rules.] The [Supreme Court] may make  
2 rules and prescribe forms consistent with this Code for the conduct of business  
3 by and procedure in [probate] courts. Each [probate] court may make rules  
4 and prescribe forms consistent with this Code and with the rules of the [Supreme  
5 Court] for the conduct of business by and procedure in the court, including  
6 provisions for distribution of judicial work among judges of a court with two  
7 or more judges.

1           SECTION 1-204. [Registrar [clerk]; Powers.] The registrar [clerk]  
2 shall have power to take acknowledgments, administer oaths and affirmations,  
3 to certify and authenticate copies of instruments, documents and records of  
4 the court, to perform the usual functions of his office, and other non-judicial  
5 duties as directed by the judge. Unless otherwise directed by the provisions  
6 of Article III, Part 2, of this Code, the registrar [clerk] shall act upon ap-  
7 plications for informal probate of wills and informal appointment of personal  
8 representatives.

1           SECTION 1-205. [Notice; Method and Time of Giving.] Except as  
2 otherwise specifically provided in this Code, whenever notice is required to be  
3 given of a hearing on any petition, the petitioner shall cause notice of the time  
4 and place of hearing thereof to be given to any person interested in the subject

5 of the hearing or to their attorney, if they have appeared by attorney or re-  
6 quested that notice be sent to their attorney, in any one or more of the following  
7 ways and within the following times:

8 (1) by mailing a copy thereof at least 14 days before the time  
9 set for the hearing by ordinary, certified or registered mail addressed  
10 to him at his post office address given in his request for notice or at  
11 his office or place of residence, if known;

12 (2) by delivering a copy thereof to him personally or to his  
13 attorney at least 5 days before the time set for the hearing;

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

19 The court for reason stated may provide for other method or time of  
20 giving notice for any hearing.

21 Proof of the giving of notice shall be made on or before the hearing and  
22 filed in the proceeding. Proof may be by an admission of service, a return  
23 receipt from the postal authorities, or an affidavit or certificate of the person  
24 giving notice or by the publisher of the newspaper publishing the notice or by  
25 one of his employees.

1 SECTION 1-206. [Notice; Waiver; Appearance.] A person, including  
2 a guardian ad litem, or conservator-trustee, may waive notice by a writing  
3 signed by him or his attorney and filed in the proceeding, or by his appearance  
4 at the hearing.

1           SECTION 1-207. [Persons in Military Service.] At the time of the  
2 initiation of any formal proceeding, an affidavit shall be filed setting forth  
3 facts showing whether any person entitled to notice is on active duty in the  
4 military service of the United States. Whenever it appears that any person  
5 on active duty is entitled to notice and is not represented by an attorney, the  
6 [judge] shall appoint an attorney to represent him and protect his interest  
7 in the proceeding and in any subsequent proceeding relating to the estate.  
8 The court shall allow reasonable compensation and necessary expenses to  
9 the attorney for the person on active duty.

1           SECTION 1-208. [Filing Objections to Petition.] Any interested  
2 person, on or before the day set for hearing may file written objections to a  
3 petition previously filed. To the extent specified by section 3-223, objections  
4 to a petition for formal probate of a will must be filed in writing.

1           SECTION 1-209. [Jury Trial.]

2           (a) Right to jury trial; waiver. In a proceeding relating to a decedent's  
3 estate where the right to trial by jury is guaranteed by the constitution of this  
4 state, [or in a formal testacy proceeding], any party may demand trial by jury  
5 by statement in his pleading.

6           (b) When not of right. When, under subsection (a) hereof, there is no  
7 right to trial by jury, or if the right is waived, the court in its discretion may  
8 call a jury to decide any issues of fact, but the verdict in that case shall be  
9 advisory only.

10          (c) Guardianship and protective proceedings. The right to trial by jury  
11 in guardianship and protective proceedings and waiver thereof are governed by  
12 Article V of this Code.

Comment

The bracketed language in (a) is suggested as optional for those states wishing to preserve a right of jury trial in will contests, even though the right is not protected by the state's constitution.

1           SECTION 1-210. [Proof of Death or Status.]

2           (a) Death certificate. A death certificate purporting to be issued by an  
3 official or agency empowered by the law of the place where the death purportedly  
4 occurred to issue such a certificate is prima facie proof of the fact, place,  
5 date, time and cause of death and the identify of the deceased. These matters  
6 may be proved by any other competent evidence.

7           (b) Official records, reports and findings. An official record or report  
8 of a military or executive department of the United States, or other government  
9 that a person is missing, detained, dead, or alive, is prima facie evidence of  
10 the status and of the dates, circumstances and places disclosed by the record  
11 or report. A certified copy of any record or report, authenticated by the  
12 custodian thereof, is admissible in evidence.

13           (c) Disappeared persons. A person who is absent for a continuous  
14 period of five years, during which he has not been heard from, and whose  
15 absence is not satisfactorily explained after diligent search or inquiry shall be  
16 presumed to be dead. His death shall be presumed to have occurred at the  
17 end of the period of five years unless there is sufficient evidence for determining  
18 that death occurred at some prior time.

Comment

Subsection (c) is inconsistent with Section 1 of Uniform Absence as Evidence of Death and Absentees' Property Act (1938).

Proceedings to secure protection of property interests of an absent person may be commenced as provided in 5-501.

1           SECTION 1-211. [Vacation and Modification of Judgments.] For good  
2 cause, at any time within the period allowed for appeal the judge may vacate  
3 or modify an order.

1           SECTION 1-212. [Records.] The [probate] court shall keep in a form  
2 and with an appropriate index prescribed by rule, a record for each decedent  
3 or protected person whose estate is the subject of an application or petition.

1           SECTION 1-213. [Practice in Judicial Proceedings.] Unless specifically  
2 provided to the contrary in this Code or unless inconsistent with its provisions,  
3 the [rules of civil procedure] govern formal proceedings under this Code.

1           SECTION 1-214. [Fraud.] Whenever fraud has been perpetrated in  
2 connection with any proceeding or in any statement filed under this Code or  
3 used to avoid or circumvent the provisions or purposes of this Code, any  
4 injured person may recover damages or obtain any other appropriate relief  
5 in an action against the perpetrator of the fraud or restitution from any person  
6 benefiting from the fraud, whether innocent or not, regardless of any limitations  
7 provided in this Code, by an action commenced within two years from the  
8 discovery of the fraud.

#### Comment

This is an overriding provision that provides an exception to the procedures and limitations outlined in the Code. This provision is, of course, subject to the general principles of res judicata. Innocent purchasers for value would, of course, not come within this provision because they would not have benefited from the fraud.

ARTICLE I

GENERAL PROVISIONS

Part 3

Appeals

1           SECTION 1-301. [Appeals.] Appellate review, including the right to  
2 appellate review, interlocutory appeal, provisions as to time, manner, notice,  
3 appeal bond, stays, scope of review, record on appeal, briefs, arguments  
4 and power of the appellate court, shall be governed by the rules applicable to  
5 appeals to the [Supreme Court] in equity cases from the [court of general  
6 jurisdiction], except that in proceedings where jury trial has been had as a  
7 matter of right, the rules applicable to the scope of review in jury cases shall  
8 apply.

## ARTICLE II

### INTESTATE SUCCESSION AND WILLS

#### Part 1

##### Intestate Succession

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 personality, 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. (Extensive opinion polls would perhaps be desirable but are too expensive.)

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 (except where the persons were married less than a year and left parents or issue of parents).
- (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 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 therefore provides that gifts during lifetime are not advancements unless declared or acknowledged in writing.

While these changes may strike some persons 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 born in mind that the decedent may always choose a different rule by executing a will.

1           SECTION 2-101. [Net Intestate Estate.] Any part of the net estate of a  
2 decedent not effectively disposed of by his will shall pass to his heirs as pre-  
3 scribed in the following sections.

1           SECTION 2-102. [Share of the Spouse.] The intestate share of the  
2 surviving spouse shall be:

3                   (1) if there is no surviving issue of the decedent, the entire net  
4 intestate estate; but if there is no surviving issue of the decedent and  
5 the surviving spouse was married to the decedent for less than one  
6 year and if the decedent is survived by parents or issue of parents, then  
7 only one-half of the net intestate estate;

8                   (2) if there are surviving issue all of whom are issue of the  
9 surviving spouse also, the first [\$50,000] (reduced, in case of partial  
10 intestacy, by any amount given the spouse by will) plus one-half of the  
11 balance of the net intestate estate;

12                   (3) if there are surviving issue one or more of whom are not  
13 issue of the surviving spouse, one-half of the net 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.

ALTERNATIVE PROVISION FOR COMMUNITY PROPERTY STATES

1           [SECTION 2-102. [Share of the Spouse.] The intestate share of the  
2 surviving spouse shall be as follows:

3           As to Separate Property

4           (1) if there is no surviving issue of the decedent, the entire net  
5 intestate estate; but if there is no surviving issue of the decedent and  
6 the surviving spouse was married to the decedent for less than one year,  
7 and if the decedent is survived by parents or issue of parents, then  
8 one-half of the net estate;

9           (2) if there are surviving issue all of whom are issue of the sur-  
10 viving spouse also, the first [\$50,000] (reduced, in case of partial  
11 intestacy, by any amount given the spouse by will) plus one-half of the  
12 balance of the net intestate estate;

13           (3) if there are surviving issue one or more of whom are not  
14 issue of the surviving spouse, one-half of the net intestate estate;

15           As to Quasi-Community Property

16           (4) one-half of the net quasi-community property shall belong  
17 to the surviving spouse and the other one-half passes to the surviving  
18 spouse.

19           As to Community Property

20           (5) One-half of the net community property belongs to the sur-  
21 viving spouse and the other one-half passes to the surviving spouse.]

Comment

Paragraph (4) should be omitted in any community property state which does not recognize quasi-community property as defined in section 1-106. The term "quasi-community property" is used to make a state's local rules concerning community property apply to property, acquired in a common law jurisdiction or while the couple was domiciled in a common law jurisdiction, which would have been community property if acquired locally by domiciliaries. The term is used in connection with this section dealing with intestate succession, and in Part 2 of this Article in relation to the elective share. Also, see section 3-101 A. The combination assures full protection in a community property state for a surviving spouse of a family that moved from a common law state so recently that little true community property has been accumulated. Paragraph (5) will need to be changed in those community property states which give the interest of the deceased spouse to heirs other than the surviving spouse.

1           SECTION 2-103. [Share of Heirs Other than Surviving Spouse.] The  
2 part of the net intestate estate not passing to the surviving spouse under  
3 section 2-102, or the entire net intestate estate if there is no surviving spouse,  
4 shall pass as follows:

5                   (1) to the issue of the decedent; if they are all in the same  
6 degree of kinship to the decedent they shall take equally, but if of  
7 unequal degree, then those of more remote degree take by representation;

8                   (2) if there is no surviving issue, to his parent or parents  
9 equally;

10                  (3) if there is no surviving issue or parent, to the brothers and  
11 sisters and the issue of each deceased brother or sister by representation;  
12 if there is no surviving brother or sister, the issue of brothers and  
13 sisters take equally if they are all of the same degree of kinship to the  
14 decedent, but if of unequal degree then those of more remote degree take  
15 by representation;

16                  (4) if there is no surviving issue, parent or issue of a parent,  
17 to each surviving grandparent and the issue of each deceased grandparent

18 by representation; if there is no surviving grandparent, issue of  
19 grandparents take equally if they are all of the same degree of kin-  
20 ship, but if of unequal degree then those of more remote degree  
21 take by representation.

#### 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.

Most of the provisions of this section are simple to apply. Under subsection (4) however, illustrations of the application of the statute may be helpful:

(1) Suppose an intestate decedent is survived only by his maternal grandfather and grandmother, his paternal grandmother, a paternal uncle and two cousins who are children of a deceased paternal aunt. The estate will be divided into four shares, one for the maternal grandfather, one for the maternal grandmother, one for the paternal grandmother, the fourth to go to the issue of the deceased paternal grandfather by representation (an eighth to the paternal uncle and one-sixteenth to each of the cousins).

(2) Suppose an intestate decedent is survived only by his paternal grandfather, an aunt on the paternal side, no grandparents on the maternal side but three cousins, two of whom are children of a deceased maternal uncle and one a child of another deceased maternal uncle. The estate will be divided into four shares, one for the paternal grandfather, one for the paternal aunt who takes the share of the deceased paternal grandmother by representation, and the other two shares to go equally to the three maternal cousins (one-sixth of the total estate to each). The three maternal cousins here represent both the deceased maternal grandfather and the deceased maternal grandmother; under 2-106 they take such shares equally since they are the surviving heirs in nearest degree. Had the maternal uncle who was the father of two cousins survived, he would have received a fourth (half of two fourths) and the third cousin the other fourth by representation of his parent.

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

1           SECTION 2-104. [Requirement That Heir Survive Decedent for Five  
2 Days.] Any person who fails to survive the decedent by five full days is deemed  
3 to have predeceased the decedent for purposes of homestead allowance, exempt  
4 property and intestate succession, and the decedent's heirs are determined  
5 accordingly. If the time of death of the decedent or of the person who would  
6 otherwise be an heir, or the times of death of both, cannot be determined,  
7 and it cannot be established that the person who would otherwise be an heir  
8 has survived the decedent by five full days, it is presumed that the person  
9 failed to survive for the required period.

Comment

This section is a limited version of the type of clause frequently found in wills to take care of the common accident situation, in which several members of the same family are injured and die within a few days of each other. The Uniform Simultaneous Death Act provides only a partial solution, since it applies only if there is no proof that the parties died otherwise than simultaneously. This section requires an heir to survive by five days in order to succeed to decedent's intestate property; for a comparable provision as to wills, see section 2-601. This section avoids multiple administration 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 3-209 and 3-216 prevent informal probate of a will or informal issuance of letters for a period of five days from death.

1           SECTION 2-105. [Escheat.] If there is no heir under the provisions of  
2 this Article, the net intestate estate escheats to the [state].

1           SECTION 2-106. [Representation.] When representation is called for,  
2 the estate shall be divided into as many shares as there are surviving heirs in  
3 the nearest degree of kinship and deceased persons in the same degree who  
4 left issue who survive decedent, each surviving heir in the nearest degree re-  
5 ceiving one share and the share of each deceased person in the same degree  
6 being divided among his issue in the same manner.

1 SECTION 2-107. [Kindred of Half Blood.] Relatives of the half blood  
2 shall inherit the same share which they would have inherited if they had been of  
3 the whole blood.

1 SECTION 2-108. [Afterborn Heirs.] Relatives of the decedent con-  
2 ceived before his death but born thereafter shall inherit as if they had been  
3 born in the lifetime of the decedent.

1 SECTION 2-109. [Adopted Children.]

2 (a) General Rule. For all purposes of intestate succession, an adopted  
3 child shall be treated as a natural child of his adopting parents; and he shall  
4 cease to be treated as a child of his natural parents except that if a natural  
5 parent marries or remarries and the child is adopted by the stepfather or  
6 stepmother, the child shall continue to be treated as the child of the natural  
7 parent who is the spouse of the adopting parent.

8 (b) More Than One Adoption. For all purposes of intestate succession,  
9 a child who has been adopted more than once shall be treated as a child of the  
10 parents who have most recently adopted him and shall cease to be treated as a  
11 child of his previous parents.

12 (c) When Adoption is Effected. A child is adopted for these purposes  
13 when a final decree of adoption or an interlocutory decree of adoption which  
14 has become final has been issued by a court of this state or of any other state  
15 or government and while an interlocutory decree of adoption is in force.

Comment

See comment, Section 1-103, supra.

1           SECTION 2-110. [Scope of "All Purposes of Intestate Succession."]

2     The phrase "all purposes of intestate succession" as used in this Article means  
3     succession by, through or from a person, both lineal and collateral.

Comment

      This section is intended to assure that sections 2-109 and 2-111, both of which use the phrase "all purposes of intestate succession," are given the fullest effect. Some courts have in the past interpreted statutes conferring inheritance rights on adopted children to exclude inheritance from collaterals, for examale; this section would prevent such a strict construction. Conversely collaterals may inherit from the adopted person.

1           SECTION 2-111. [Legitimacy; Effect of Illegitimacy on Intestate

2     Succession.]

3           (a) If the parents of a child shall have lived together as man and wife  
4     and have participated in a marriage ceremony in apparent compliance with law  
5     before or after the birth of the child, though the attempted marriage be void,  
6     the child is deemed to be the legitimate child of both parents for all purposes of  
7     intestate succession. A child born or conceived during a marriage is presumed  
8     to be the legitimate child of both spouses for the same purposes.

9           (b) Any child conceived following artificial insemination of a married  
10    woman with the consent of her husband shall be treated as their child for all  
11    purposes of intestate succession; consent of the husband is presumed unless  
12    the contrary is shown by clear and convincing evidence.

13          (c) An illegitimate child or his issue is entitled to take in the same  
14    manner as a legitimate child by intestate succession from and through (1) his  
15    mother and (2) his father if the father has either been adjudicated to be the  
16    father in a proceeding brought for that purpose or judicially ordered to support the  
17    child, or has admitted in open court that he is the father, or has acknowledged

18 himself to be the father in writing signed by him, or has openly and  
19 notoriously recognized the child to be his.

20 (d) Property of an illegitimate person passes in accordance with  
21 the usual rules of intestate succession except that the father or his  
22 kindred can inherit only if the father has been adjudicated to be the  
23 father in a proceeding brought for that purpose or judicially ordered  
24 to support the child, or there has been mutual recognition of the paternity.

#### Comment

This section is designed to reflect the modern policy toward minimizing illegitimacy and its impact on inheritance rights, but with safeguards against abuse. Status of an illegitimate child who is legally adopted is governed by section 2-109.

1 SECTION 2-112. [Persons Related to Decedent Through Two Lines.]

2 A person who is related to the decedent through two lines of relation-  
3 ship is entitled to only a single share based on the relationship which  
4 would entitle him to the larger share.

1 SECTION 2-113. [Advancements.] If a person dies intestate as to  
2 all his estate, property which he gave in his lifetime to an heir shall  
3 be treated as an advancement against the latter's share of the estate  
4 if declared in writing by the decedent or acknowledged in writing by the  
5 heir to be an advancement. For this purpose the property advanced shall  
6 be valued as of the time the heir came into possession or enjoyment of the  
7 property or as of the time of death of the decedent, whichever first occurs.  
8 If the recipient of the property fails to survive the decedent, the property  
9 shall not be taken into account in computing the share of the recipient's  
10 issue.

## Comment

This section alters the common law relating to advancements by requiring written evidence of the intent that an inter vivos gift by 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.

Release. A section following this section in the 1967 Summer Draft (Second Working Draft) dealt with the subject of release. After further discussion the Reporters decided that no reference in the Code to releases was necessary. A release in favor of a third person which is executed for consideration should be effective as a contract for the benefit of a third person. A written release to the decedent for consideration can be effectuated, at least to some extent, as an advancement. In other situations it seems preferable to compel the decedent to state his intention concerning the effect to be given to a release in a duly executed will. Renunciation by an heir is dealt with in section 2-801.

1           SECTION 2-114. [Debts to Decedent.] A debt owed to the decedent  
2 shall not be charged against the intestate share of any person except the  
3 debtor. If the debtor fails to survive the decedent, the debt shall not be  
4 taken into account in computing the share of the debtor's issue.

1           SECTION 2-115. [Alienage.] No person is disqualified to take as  
2 an heir because he or a person through whom he claims is or has been  
3 an alien.

1           SECTION 2-116. [Dower and Curtesy Abolished.] The estates  
2 of dower and curtesy are abolished.

## ARTICLE II

### Part 2

#### Elective Share of Surviving Spouse

1           SECTION 2-201. [Right to Elective Share.]

2           (a) When a married person domiciled in this state dies, the surviving  
3 spouse has a right of election to take an elective share of one-third of the aug-  
4 mented net estate under the limitations and conditions hereinafter stated.

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

#### Comment

Under the common law a widow was entitled to dower, which was a life estate in lands of which her husband was seized of an estate of inheritance at any time during the marriage. Dower encumbers titles and provides inadequate protection for widows in a society which classifies most wealth as personal property. Hence the states have tended to substitute a forced share in the whole estate for dower and the widower's comparable common law right of curtesy. Few existing forced share statutes make adequate provisions for transfers by means other than succession to the surviving spouse and others. This and the following sections are designed to do so. The theory of these sections is discussed in Fratcher, "Toward Uniform Succession Legislation," 91 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.

1           SECTION 2-202. [Augmented Net Estate.] The augmented net estate  
2 shall be calculated by adding to the value of the net estate the sum of the  
3 following amounts:

4           (a) Transfers incident to death. The value of property transferred by  
5 the decedent, to the surviving spouse or anyone else, to the extent that the  
6 decedent did not receive adequate and full consideration in money or money's

7 worth for the transfer, by the following means:

8 (1) deed deposited in escrow for delivery at or after the death  
9 of the decedent;

10 (2) contract or other device under which the transfer becomes  
11 effective at or after the death of the decedent, excluding life and accident  
12 insurance, annuities and pensions.

13 (b) Transfers with retained control or survivorship. The value, as of  
14 the decedent's death, of property transferred, settled, arranged, purchased or  
15 deposited, directly or indirectly, by the decedent, during or in contemplation of  
16 his marriage to the surviving spouse, so that the decedent retained a right of  
17 survivorship, power of revocation, power of consumption, special power of  
18 appointment exercisable in favor of the surviving spouse, or general power of  
19 appointment exercisable by deed, by will, or by either, to the extent that the  
20 decedent did not receive adequate and full consideration in money or money's  
21 worth for the transfer, settlement, arrangement, purchase or deposit.

22 (c) Other gratuitous transfers. The value, as of the decedent's death or  
23 the time when the transferee came into possession or enjoyment, whichever  
24 first occurs, of property transferred by the decedent, to the extent that the  
25 decedent did not receive adequate and full consideration in money or money's  
26 worth for any transfer and was not by the transfer performing a duty of support  
27 imposed by law,

28 (1) to the surviving spouse at any time directly or by exercise of a  
29 power of appointment of which the decedent was the donee, to the extent  
30 that the aggregate of transfers exceeded one thousand dollars in any  
31 calendar year; or

32 (2) to any other person, without the written consent or joinder of  
33 the surviving spouse, during or in contemplation of the decedent's marriage  
34 to the surviving spouse and within two years before the death of the decedent,  
35 to the extent that any single transfer exceeded one thousand dollars and  
36 that the total exceeded three thousand dollars in either of those years.

37 (d) Life insurance. That part of the proceeds of insurance on the life of  
38 the decedent including accidental death benefits, which is attributable to premiums  
39 paid by him and which is payable to the surviving spouse. Premiums paid by the  
40 decedent's creditors, his employer, his partner, or a partnership of which he  
41 was a member shall be deemed to have been paid by the decedent.

42 (e) Annuities. Any lump sum immediately payable and the commuted  
43 value, as of the decedent's death, of the right to future payments, of that part of  
44 the proceeds of annuity contracts under which the decedent was the primary  
45 annuitant which is attributable to premiums paid by him, payable to the surviving  
46 spouse. Premiums paid by the decedent's employer, his partner, or a partner-  
47 ship of which he was a member shall be deemed to have been paid by the decedent.

48 (f) Pensions. The commuted value, as of the decedent's death, of the  
49 right to receive any amounts payable thereafter to the surviving spouse, under  
50 any public or private pension, disability compensation, death benefit, or  
51 retirement plan, excluding the Federal Social Security System, by reason of  
52 service performed or disabilities incurred by the decedent.

53 (g) Community property. The value of the share of the surviving spouse  
54 resulting from community property rights in any property in this or any other  
55 state owned by the decedent and his surviving spouse at the time of the decedent's  
56 death.

## Comment

The several subsections create essentially three categories of donative transactions. The first, described in (a) are transactions which are so much like a will that the surviving spouse may treat them as wills for elective share purposes even though they were established before the marriage was contemplated. A second group are transfers which may take the place of a will but also may serve present needs. Described in (b) and (c) (2), these may be included in the augmented net estate only if they were made during or in contemplation of the marriage to the surviving spouse. Any question relating to a transaction in this category can, of course, be eliminated by joining the spouse or intended spouse as provided in 2-204. Finally, several transactions are included only if they are in favor of the surviving spouse. Transfers by will or intestacy to the spouse, which fall within the third category, may be accepted or renounced by the surviving spouse as provided in section 2-206. All other transactions in this category are unaffected by the spouse's suit for an elective share. Except for renounced devises or intestate transfers, all transactions in the third category serve only to reduce the impact of the spouse's right to an elective share on transactions in favor of third persons.

It is important to note that the will-like arrangements in favor of third persons described in subparagraphs (a), (b) and (c) (2) must have been established directly or indirectly by the decedent. Thus no account is taken of property subject to a general power of appointment held by a decedent at the time of his death unless the power is one the decedent reserved in a transaction he originated, or unless the power is exercised in favor of the spouse.

One consequence of the provisions charging a surviving spouse with the value of assets attributable to the decedent will be to eliminate election as a practical prospect in all but unusual situations. The several sections apply to unusual cases and prevent a married person from leaving his spouse completely out of the circle of those to whom his estate passes after his death. Perhaps attempts to deprive survivors of all values formerly controlled by the deceased spouse are so rare that no preventative legislation is warranted. Perhaps, on the other hand, the sections will tend to discourage married persons from attempting to shunt all assets away from their spouse. Most experience to date has been with a system affording some protection. Hence, it's very difficult to predict what would happen if all protection were eliminated.

Subparagraph (g) deals with the possibility that a couple domiciled in a common law state when one dies may own some community property. The community property involved may be land that they acquired with community funds in a community property state. If section 1-105 is changed so that community property which is moved to a common law state retains its community property characteristics, subparagraph (g) would be of greater importance in assuring that the surviving spouse is properly charged with all received from the decedent.

[FOR ADOPTION IN COMMUNITY PROPERTY STATES.]

1           [SECTION 2-201. Right to Elective Share.] When a married person  
2 domiciled in this state dies, his surviving spouse has the right to take an  
3 elective share of one-half of his net quasi-community property, as hereinafter  
4 described under the limitations and conditions hereinafter stated.

Comment

No right to an elective share ordinarily exists in community property states because the community property system normally attributes one-half of the net estate to the surviving spouse as property owned by the spouse. With an increasingly mobile population, many of whom move from a common law state to a community property state after many years of marriage, there is an increasing need for protection of some additional sort for surviving spouses of persons dying domiciled in community property states. This section, suggested as optional for community property states, extends the elective share concept to quasi-community property only. See section 1-106. It maintains the idea currently prevalent in community property states that property of a married person which is separate by reason of the time of, or means for, its acquisition remains outside the legally protected interests of a surviving spouse.

1           SECTION 2-202. [Quasi-Community Property Subject to Elective Share.]

2 The following quasi-community property of a decedent shall be included in deter-  
3 mining the elective share of his surviving spouse:

4           (a) Property owned at death. The value of all quasi-community property  
5 owned by the decedent at the time of his death.

6           (b) Transfers incident to death. The value of quasi-community property  
7 transferred by the decedent, to the surviving spouse or anyone else, to the extent  
8 that the decedent did not receive adequate and full consideration in money or  
9 money's worth for the transfer, by the following means:

10                   (1) deed deposited in escrow for delivery at or after the death  
11 of the decedent;

12                   (2) contract or other device under which the transfer becomes  
13                   effective at or after the death of the decedent, excluding life and accident  
14                   insurance, annuities and pensions.

15                   (c) Transfers with retained control or survivorship. The value, as of  
16                   the decedent's death, of quasi-community property transferred, settled, arranged,  
17                   purchased or deposited, directly or indirectly, by the decedent, during his  
18                   marriage to the surviving spouse, so that the decedent retained a right of survivor-  
19                   ship, power of revocation, power of consumption, special power of appointment  
20                   exercisable in favor of the surviving spouse, or general power of appointment  
21                   exercisable by deed, by will, or by either, to the extent that the decedent did not  
22                   receive adequate and full consideration in money or money's worth for the transfer,  
23                   settlement, arrangement, purchase or deposit.

24                   (d) Other gratuitous transfers. The value, as of the decedent's death or  
25                   the time when the transferee came into possession or enjoyment, whichever first  
26                   occurs, of quasi-community property transferred by the decedent, to the extent  
27                   that the decedent did not receive adequate and full consideration in money or  
28                   money's worth for any transfer and was not by the transfer performing a duty  
29                   to support imposed by law,

40                   (1) to the surviving spouse at any time directly or by exercise of  
41                   a power of appointment of which the decedent was the donee, to the extent  
42                   that the aggregate of transfers exceeded \$1,000 in any calendar year; or

43                   (2) to any other person, without the written consent or joinder of  
44                   the surviving spouse, during the decedent's marriage to the surviving spouse  
45                   and within two years before the death of the decedent, to the extent that  
46                   any single transfer exceeded \$1,000 and that the total exceeded \$3,000 in  
47                   either of those years.

48           (e) Life insurance. That part of the proceeds of insurance on the life of  
49 the decedent, acquired with his quasi-community property including accidental  
50 death benefits, which is attributable to premiums paid by him and which is  
51 payable to the surviving spouse. Premiums paid by the decedent's creditors,  
52 his employer, his partner, or a partnership of which he was a member shall be  
53 deemed to have been paid by the decedent.

54           (f) Annuities. Any lump sum immediately payable and the commuted value  
55 as of the decedent's death, of the right to future payments, of that part of the  
56 proceeds of annuity contracts under which the decedent was the primary annuitant  
57 which is attributable to premiums paid by him, from his quasi-community  
58 property payable to the surviving spouse. Premiums paid by the decedent's  
59 employer, his partner, or a partnership of which he was a member shall be  
60 deemed to have been paid by the decedent.

61           (g) Pensions. The commuted value, as of the decedent's death, of the  
62 right to receive any amounts payable thereafter to the surviving spouse, under  
63 any public or private pension, disability compensation, death benefit, or retire-  
64 ment plan, excluding the Federal Social Security System, by reason of service  
65 performed or disabilities incurred by the decedent during his marriage to the  
66 surviving spouse.]

1           SECTION 2-203. [Right of Election Personal to Surviving Spouse.] The  
2 right of election of the surviving spouse may be exercised only during his life-  
3 time by him. In the case of a protected person, the right of election may be  
4 exercised only by order of the court in which protective proceedings as to his  
5 property are pending, after finding that exercise is necessary to provide adequate  
6 support for the protected person during his probable life expectancy.

1           SECTION 2-204. [Waiver of Right to Elect and Other Rights.] The right  
2 of election of a surviving spouse and the rights of the surviving spouse to home-  
3 stead allowance, exempt property and family allowance, or any of them, may be  
4 waived, wholly or partially, before or after marriage, by a written contract,  
5 agreement or waiver signed by the party waiving after fair disclosure. Unless  
6 it provides to the contrary, a waiver of "all rights" in the property or estate of  
7 a present or prospective spouse or a complete property settlement entered into  
8 after or in anticipation of separation or divorce is a waiver of all rights to  
9 elective share, homestead allowance, exempt property and family allowance by  
10 each spouse in the property of the other and an irrevocable renunciation by  
11 each of all benefits which would otherwise pass to him from the other by intestate  
12 succession or by virtue of the provisions of any will executed before the waiver  
13 or property settlement.

Comment

The right to homestead allowance is conferred by section 2-401, that to exempt property by section 2-403, and that to family allowance by section 2-404. The right to renounce interest 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.

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

2           (a) The surviving spouse may elect his elective share in the augmented  
3 net estate by filing in the court and mailing or delivering to the personal repre-  
4 sentative a petition for the elective share within six months after the publication  
5 of notice to creditors for filing claims which arose before the death of the decedent.

6 The [judge] may extend the time for election as he sees fit for cause shown by  
7 the surviving spouse before the time for election has expired.

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

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

14 (d) After notice and hearing, the [judge] shall determine the amount of  
15 the elective share and shall order its payment from the assets of the augmented  
16 net estate or by contribution as appears appropriate under section 2-207. If it  
17 appears that a fund or property included in the augmented net estate has not  
18 come into the possession of the personal representative, or has been distributed  
19 by the personal representative, the [judge] shall nevertheless fix the liability of  
20 any person who has any interest in the fund or property or who has possession  
21 thereof, whether as trustee or otherwise. The proceeding may be maintained  
22 against less than all of the persons against whom relief could be sought but no  
23 person is subject to contribution in any greater amount than he would have been  
24 if relief had been secured against all persons subject to contribution.

25 (e) The order or judgment of the [probate] court may be enforced as  
26 necessary in suit for contribution or payment in other courts of this state or other  
27 jurisdictions.

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

2 (a) The surviving spouse's election of his elective share does not affect the  
3 share of the surviving spouse under the provisions of the decedent's will or

4     intestate succession unless the surviving spouse also expressly renounces the  
5     benefit of all or any of these provisions in the petition for the elective share.  
6     If any provision is so renounced, the property or other benefit which would  
7     otherwise have passed to the surviving spouse thereunder shall be treated,  
8     subject to contribution under subsection 2-207 (b), as if the surviving spouse had  
9     predeceased the testator.

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

1           SECTION 2-207. [Marshalling of Assets to Satisfy Elective Share.]

2           (a) In the proceeding to determine the elective share, property which is  
3     part of the augmented net estate which passes or has passed to the surviving  
4     spouse by testate or intestate succession, homestead allowance or other means  
5     and which has not been renounced shall first be applied to the satisfaction of the  
6     elective share without any preference or priority as between real and personal  
7     property.

8           (b) Remaining property of the augmented net estate shall be so applied  
9     that the balance of the elective share of the surviving spouse is equitably appor-  
10    tioned among the recipients of the augmented net estate in proportion to the value  
11    of their interests therein.

12           (c) Only original transferees from the decedent, including appointees and

13 their donees to the extent the donees have the property or its proceeds, are  
14 subject to the contribution to make up the elective share of the surviving spouse.  
15 A person liable to contribution may choose to give up the property transferred  
16 to him or to pay its value as of the time when it is considered in computing the  
17 augmented net estate.

#### Comment

Section 2-401 provides that homestead allowance is charged against any benefit received by a surviving spouse as a part of an elective share to the extent that the property involved was part of the decedent's estate. Thus the spouse will be preferred to creditors in respect to this part of her elective share, as well as preferred to creditors in respect to transfers prior to death constituting part of the augmented estate, unless the transfers were in fraud of creditors. Sections 2-403 and 2-404 have the effect of giving a spouse certain exempt property and allowances in addition to the amount of the elective share.

ARTICLE II

Part 3

Children Unprovided for in Wills

1 SECTION 2-301. [Pretermitted Children.]

2 (a) Children born or adopted after execution of will. If a testator  
3 fails to provide in his will for any of his children born or adopted after  
4 the execution of his will, the omitted child shall receive the share of  
5 the estate provided in this section unless:

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

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

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

14 (b) Children believed to be dead when will executed. If at the time  
15 of execution of the will the testator fails to provide in his will for a child  
16 because he believes the child to be dead, the child shall receive the share  
17 of the estate provided in this section.

18           (c) Share of omitted child. The omitted child shall receive  
19 a share in the estate equal in value to that which he would have  
20 received if the testator had died intestate, provided that, if the will  
21 makes provision for any other child or children of the testator, the  
22 share of the omitted child shall not exceed the value of the smallest  
23 provision made for any other child. If the will makes substantial  
24 provision for any other child or children of the testator, the share  
25 of the omitted child shall be taken from the property or share devised  
26 to the other child or children, unless this would reduce the amount  
27 received by some other child for whom provision was made to less  
28 than the share of the omitted child. In other cases the devises made  
29 by the will shall abate as provided in section 3-602.

## ARTICLE II

### INTESTATE SUCCESSION AND WILLS

#### Part 4

#### Exempt Property and Allowances

1           SECTION 2-401. [Homestead Allowance.] A surviving spouse  
2 of a decedent domiciled in this state is entitled to a homestead  
3 allowance of \$5,000. If there is no surviving spouse, each minor  
4 child of the decedent is entitled to a homestead allowance amounting  
5 to \$5,000 divided by the number of minor children of the decedent.  
6 Homestead allowance is exempt from and has priority over all claims  
7 against the estate. Homestead allowance is charged against any benefit  
8 or share passing to the surviving spouse or unmarried minor child  
9 by the will of the decedent, by intestate succession or by way of

10 elective share, so far as the elective share is part of the estate,  
11 but the allowance shall not be diminished if it is greater than the  
12 benefit or share.

#### Comment

The term "minor" is not defined for purposes of this Article. Therefore the term would have whatever meaning is ascribed to it be existing law in an adopting state.

An earlier draft described homestead as one-half of the estate but limited it to \$10,000. The shift to a set dollar amount 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 sections 2-403 and 2-404. The "small estate" line is controlled largely, though not entirely, by the size of the homestead allowance. This is because Part 9 of Article III dealing with small estates was drafted on the assumption that the only justification for keeping a decedent's assets from his creditors was to benefit the decedent's spouse and minor children.

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

1 SECTION 2-402. [Constitutional Homestead.] The value of any  
2 constitutional right of homestead in the family home received by a  
3 surviving spouse or child shall be charged against that spouse or  
4 child's homestead allowance to the extent that the family home is  
5 part of the decedent's estate or would have been but for the homestead  
6 provision of the constitution.

#### Comment

This 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 considerably 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.

1           SECTION 2-403. [Exempt Property.] In addition to the homestead  
2 allowance, the surviving spouse of a decedent domiciled in this state  
3 is entitled from the estate to one automobile without limitation as to  
4 value, and to value not exceeding \$2,000 in household furniture,  
5 furnishings, appliances and personal effects. If there is no surviving  
6 spouse, children of the decedent are entitled jointly, in addition to  
7 homestead allowance, to value not exceeding \$2,000 in household  
8 furniture, furnishings, appliances and personal effects. Exempt  
9 property is exempt from and has priority over all claims against the  
10 estate. Exempt property is not charged against any benefit or share  
11 passing to the surviving spouse or children by the will of the decedent,  
12 by intestate succession, or by way of elective share, except to the  
13 extent that the exempt property is specifically devised to the spouse  
14 or child who receives it.

1           SECTION 2-404. [Family Allowance.] In addition to the right  
2 to homestead allowance and exempt property the surviving spouse  
3 domiciled in this state and unmarried minor children of a decedent  
4 are entitled to a reasonable allowance in money out of the estate for  
5 their maintenance during the period of administration according to  
6 their previous standard of living, which allowance may not continue  
7 for longer than one year if the estate is insolvent. The allowance  
8 may be paid as a lump sum or in periodic installments. It is payable  
9 to the surviving spouse, if living, for the use of the surviving spouse  
10 and unmarried minor children; otherwise to the unmarried minor  
11 children, their guardians or other persons having their care and

12 custody; but in case any unmarried minor child is not living with  
13 the surviving spouse, the allowance may be made partially to the  
14 child or his guardian or other person having his care and custody,  
15 as their needs may appear. The family allowance is exempt from  
16 and has priority over all claims but not over the homestead allowance  
17 and exempt property. The family allowance is not charged against  
18 any benefit or share passing to the surviving spouse or unmarried  
19 minor children by the will of the decedent, by intestate succession,  
20 or by way of elective share. The death of any person entitled to  
21 family allowance terminates his right to payments thereof not yet  
22 made.

1 SECTION 2-405. [Source, Determination and Documentation.]

2 So far as possible, property specifically devised to the surviving  
3 spouse by the will of the decedent shall be used to satisfy the right  
4 of the surviving spouse to homestead allowance and exempt property,  
5 and property specifically devised to the unmarried minor children  
6 shall be used to satisfy their right to homestead allowance and exempt  
7 property. If the estate is otherwise sufficient, property specifically  
8 devised to others shall not be used for these purposes. Under these  
9 restrictions, the surviving spouse or the guardians of the unmarried  
10 minor children may select property of the estate as homestead allowance  
11 and exempt property. The personal representative may make these  
12 selections if the surviving spouse or the guardians of the unmarried  
13 minor children are unable or fail to do so within a reasonable time.

14 The personal representative may execute an instrument or deed of  
15 distribution to establish the ownership of property taken as homestead  
16 allowance or exempt property. He may determine the family allowance  
17 in a lump sum not exceeding \$6,000 or periodic installments not  
18 exceeding \$500 per month for one year, and may disburse funds  
19 of the estate in payment of the family allowance and any part of the  
20 homestead allowance payable in cash. The personal representative  
21 or any interested person aggrieved by any selection, determination,  
22 payment, proposed payment, or failure to act under this section may  
23 petition the [probate] court for appropriate relief; which relief may  
24 provide a family allowance larger or smaller than that which the  
25 personal representative determined or could have determined.

#### Comment

See sections 3-606, 3-607.

## ARTICLE II

### Part 5

### Wills

#### Foreword

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 rightful role as the major instrument for disposition of wealth at death, its execution must be kept simple. Minimal formalities are therefore embodied in the statute, but the statute also provides for a more formal method of execution with acknowledgment before a public officer (called a self-proved will.) The basic intent of these sections is to validate the will whenever possible. To this end, the age for making wills is lowered to eighteen, formalities for a written and attested will are kept to a minimum

(normally signature by the testator and by two witnesses in his presence,) choice of law as to validity of execution is broadened, and revocation by operation of law is limited to divorce or annulment.

1           SECTION 2-501. [Who May Make a Will.] Any person eighteen  
2 years of age or older who is of sound mind and not a disabled person  
3 as defined in section 5-401 may make a will.

Comment

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

1           SECTION 2-502. [Execution.] Except as provided in section  
2 2-505 [sections 2-502A and 2-505,] every will shall be in writing signed  
3 by the testator or in the testator's name by some other person in the  
4 testator's presence and by his direction, and shall be signed by two  
5 witnesses in the presence of the testator.

Comment

The formalities for execution of a will have been reduced to a minimum. The testator must sign the will (or have another person sign for him in his presence and at his direction,) but he need not sign in the presence of the witnesses or acknowledge that the signature is his. Nor need he "publish" or declare the will to be his to the witnesses. The will must be signed by two witnesses in the presence of the testator, but they need not sign in the presence of each other. There is no requirement that the testator request the witnesses to sign. The witnesses are not described in the statute as "attesting," nor are they required to "subscribe." It is believed that obtaining the signature of two persons to the document in the presence of the testator is sufficient formality to make the testator aware of the gravity of the execution process and to minimize chances of fraud.

1           [ SECTION 2-502 A. [Holographic Will.] A will which does not  
2 comply with section 2-502 is valid as a holographic will, whether or  
3 not witnessed, if the signature and the material provisions are in the

4 the handwriting of the testator. ]

Comment

Provision for holographic wills is optional for states wishing to permit wills not witnessed as provided in section 2-502. The proposed section would require only "material" provisions and the signature to be in the testator's handwriting, not the entire will as some statutes presently require. Thus a stamped date would not invalidate the holographic will.

1 SECTION 2-503. [Self-proved Will.] A will may at the time of  
2 its execution or at any subsequent date be made self-proved, by the  
3 acknowledgment thereof by the testator and the affidavits of the  
4 attesting witnesses, each made before an officer authorized to  
5 administer oaths under the laws of this State, and evidenced by the  
6 officer's certificate, under official seal, attached or annexed to the  
7 will in form and content substantially as follows:

8 THE STATE OF \_\_\_\_\_

9 COUNTY OF \_\_\_\_\_

10 Before me, the undersigned authority, on this day personally appeared  
11 \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_,

12 known to me to be the testator and the witnesses, respectively, whose  
13 names are signed to the attached or foregoing instrument and, all of  
14 these persons being by me first duly sworn, \_\_\_\_\_, the  
15 testator, declared to me and to the witnesses in my presence that the  
16 instrument is his last will and that he had willingly signed and executed  
17 it as his free and voluntary act for the purposes therein expressed;  
18 and each of the witnesses stated to me, in the presence and hearing

19 of the testator, that he signed the will as witness in the presence  
20 of the testator and that the testator was at that time eighteen years  
21 of age or over and was of sound mind and under no constraint or  
22 undue influence.

23 \_\_\_\_\_  
Testator

24 \_\_\_\_\_  
Witness

25 \_\_\_\_\_  
Witness

26 Subscribed and acknowledged before me by \_\_\_\_\_, the testator,  
27 subscribed and sworn before me by \_\_\_\_\_, and \_\_\_\_\_  
28 witnesses, this \_\_\_\_\_ day of \_\_\_\_\_, A. D., \_\_\_\_\_.

29 (SEAL) (SIGNED) \_\_\_\_\_

30 \_\_\_\_\_  
(OFFICIAL CAPACITY OF OFFICER)

Comment

A self-proved will shall be admitted to probate as provided in sections 3-211, 3-225, 3-226 without the testimony of any subscribing witness, but otherwise it shall be treated no differently than a will not self-proved. In particular and without limiting the generality of the foregoing, a self-proved will may be contested, 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 3-210 dealing with informal probate dispenses with the necessity of testimony of witnesses even though the instrument is not self-proving under this section.

1           SECTION 2-504. [Who May Witness.]

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

4           (b) No will or any provision thereof is invalid because the will  
5 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 actual 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 3-225.

1           SECTION 2-505. [Choice of Law as to Execution.] A written will  
2 executed in compliance with the law at the time of execution of the place  
3 where the will is executed, or of the place where at the time of execution  
4 the testator is domiciled or has his habitual residence, or of the state  
5 of which he is a national at the time of execution, shall have the same  
6 force and effect in this state as if executed in compliance with section  
7 2-502.

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 or nationality (whether it is executed in this state or in another state or country.) Thus if testator is domiciled in state 1 and executes a holographic will in state 2 while on vacation, the will is validly executed if state 1 permits holographic wills but state 2 does not. Or if a national of Mexico executes a will in this state which does not meet the requirements of section 2-502 but does meet the requirements of Mexican law, the will would be recognized as validly executed under this section. The purpose of the section is to provide a wide opportunity to validate expectations of testators. When the Uniform Probate Code is widely adopted, the impact of this section will become minimal.

1           SECTION 2-506. [Revocation by Writing or by Act on Document.]

2           A will or any part thereof is revoked

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

5                   (2) by being burnt, torn, canceled, obliterated or destroyed,  
6                   with the intent and for the purpose of revoking the same, by the  
7                   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, cancelling, 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 Reporters

considered a section codifying the doctrine, but decided that the need for uniformity was not great in this area and that there was an advantage in leaving the courts free to work out satisfactory solutions to individual cases based on the testator's intent.

1       SECTION 2-507. [Revocation by Divorce; No Revocation by Other  
2       Changes of Circumstances.]   If after executing a will the testator is  
3       divorced or his marriage annulled, the divorce or annulment revokes  
4       any disposition or appointment of property made by the will to the former  
5       spouse and any nomination of the former spouse as executor, trustee or  
6       guardian, unless the will expressly provides otherwise. If these provisions  
7       are not revoked by any means except the operation of this section, they are  
8       revived by testator's remarriage to the former spouse. For purposes of  
9       this section, divorce or annulment includes any valid divorce or annul-  
10      ment and a divorce or annulment judgment or decree not recognized as  
11      valid by the laws of this state for other purposes, if obtained by the  
12      surviving spouse, or if obtained by the decedent and acknowledged as  
13      valid by the surviving spouse by entering into a marriage ceremony with  
14      a third person. No other change of circumstances revoke a will.

#### Comment

The section deals with what is sometime 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.

1           SECTION 2-508. [Revival by Revocation of Revoking Instrument.]  
2           If a will or part thereof has been revoked by a subsequent will, the  
3           later revocation of this subsequent will by act under section 2-506(2)  
4           revives the former will or part thereof if there is clear and convincing  
5           evidence that the testator intended to revive the will or part, or if  
6           the revoking instrument is a codicil which revoked only a part of  
7           the will by inconsistency and not expressly and the evidence is  
8           insufficient to prove that the testator intended no revival. No will  
9           or part can be revived unless it is in the testator's possession,  
10          custody or control at the time of his death; proof of testator's  
11          statements at or after the act of revocation is admissible to  
12          establish intent.

#### Comment

A revoked will can be revived by reexecution or by execution of a codicil incorporating the revoked will by reference, in accordance with the formalities for execution of any will; these are really instances of execution of a new will. The present section deals only with revival when an earlier will is revoked expressly or by inconsistency by a later will and subsequently the revoking instrument is destroyed by act of the testator with the intent that the earlier will be reinstated. The policy issue is whether this intent must be incorporated in a document executed with the formalities required for any will, or whether the testator's intent orally expressed should be given effect. The above section gives effect to that intent when it can be proved with clear and convincing evidence. Use of extrinsic evidence to establish intent is justified here because (1) such evidence is admissible in any case involving revocation by act in order to prove that the act itself was intended as a revocation; (2) in many states the same evidence could be used to establish dependent relative revocation and thus allow probate of the second will as unrevoked; and (3) there is general understanding among non-lawyers that the earlier will, still intact, is good if the revoking instrument is destroyed.

A special provision for revival by remarriage after provisions of a will for a spouse are revoked by divorce or annulment is found in section 2-506.

The probate of a revived will should normally be handled by a formal proceeding. On informal probate, see the requirements of sections 3-208 (e) (3), 3-211, 2-312 and 2-314.

There was strong disagreement among the Reporters on this section and the policy expressed. One group would have preferred the following section, on the grounds that the Code facilitates easy execution of a new will and that the testator should either reexecute his old will or execute a new will, complying with the formalities and assuring that his real intent is carried out. Underlying this position is concern that use of extrinsic evidence of intent permits fraud in some cases. The alternative section would read:

"Revival. No will or part thereof which is revoked in any manner, or which is invalid, can be revived other than by reexecution or by execution of a will incorporating by reference the revoked or invalid will or part. "

1           SECTION 2-509. [Incorporation by Reference.] Any writing in  
2           existence when a will is executed may be incorporated by reference  
3           if the language of the will manifests this intent and describes the  
4           writing sufficiently to permit its identification.

1           SECTION 2-510. [Testamentary Additions to Trusts.] (This  
2           is section 1 of the Uniform Testamentary Additions to Trusts Act  
3           already promulgated.)

1           SECTION 2-511. [Events of Independent Significance.] A will  
2           may dispose of property by reference to acts and events which  
3           have significance apart from their effect upon the dispositions  
4           made by the will, whether they occur before or after the execution  
5           of the will or before or after the testator's death. The execution  
6           or revocation of a will of another person is such an event.

## APPENDIX

### Part 5

#### Execution of Wills

The following section may be proposed at a later date if the United States becomes a party to the International Convention of Rome (1966). An international will is one executed under the terms of this section implementing the Convention. The section follows the Draft Uniform Law on the Form of Wills proposed by Unidroit, The International Institute for the Unification of Private Law, Rome.

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1           SECTION 2-502 B. [International Wills.]

2           (a) (1) A will shall be valid as regards form, irrespective of the  
3           place where it is made and irrespective of the nationality, domicile  
4           or residence of the testator, if it is made in the form of an international  
5           will complying with the provisions set out hereafter.

6           (2) Failure to observe any such provision shall not by itself  
7           affect the validity of the document as a will of another kind.

8           (b) (1) The will shall be made in writing.

9           (2) It may be written in any language, by hand or by any other  
10          means.

11          (3) It need not be written by the testator himself.

12          (c) (1) The testator shall declare in the presence of two witnesses  
13          and of a person qualified to receive the will that the document is his will.

14          (2) The testator need not inform the witnesses, or the person

15 qualified to receive the will, of the content of the will.

16 (d) (1) The will shall be signed by the testator in the presence  
17 of the witnesses and of the person qualified to receive it.

18 (2) The signature of the testator shall be placed at the end of  
19 the will.

20 (e) The witnesses and the person qualified to receive the will shall  
21 there and then sign the will in the presence of the testator.

22 (f) (1) The date of reception shall be indicated on the document.

23 (2) The absence of a date or the indication of an erroneous date  
24 shall not affect the validity of the will.

25 (g) (1) If the will consists of several sheets, each sheet shall be  
26 signed or initialled by the testator, unless the sheets follow each other  
27 and form a whole.

28 (2) Every correction in the body of the will shall be signed or  
29 initialled by the testator.

30 (3) Additions subsequent to the signatures shall be signed by the  
31 testator, the witnesses and the person qualified to receive the will.

32 (h) The signature or initials of the testator required by this law  
33 may be replaced by the fingerprint of the testator.

24 (i) (1) If the testator is unable to read, the will shall be read to him  
25 in the presence of the witnesses and of the person qualified to receive  
26 the will.

27 (2) If the testator does not know the language in which the will  
28 is drawn up, the will shall be read to him, translated into a language  
29 which he knows, in the presence of the witnesses and of the person  
30 qualified to receive the will.

31 (3) Such circumstances shall be mentioned in the document.

32 (j) The person who received the will shall satisfy himself of the  
33 identity of the testator and of the witnesses.

34 (k) (1) The capacity of the witnesses shall be governed by the  
35 internal law of the place where the will is received.

26 (2) The fact that a will contains a disposition in favour of a  
27 witness or of the person who received the will or in favour of a parent,  
28 relation, including relation by marriage, or spouse of any of them, shall  
29 not affect his capacity to act as a witness or to receive the will.

30 (l) The will shall be left in the custody of the qualified person who  
31 has received it.

32 (m) The will shall cease to be valid, as an international will, if it  
33 be withdrawn by the testator.

34 [(n) A person qualified to receive an international will is an attorney  
35 at law currently licensed to practice in this state.]

## ARTICLE II

### Part 6

#### Rules of Construction

#### Foreword

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 inclusion of adopted children in class gifts.

One of the sections, 2-609, provides a rule of construction applicable to documents other than wills. It is simpler to include those documents here rather than create a separate isolated section elsewhere. The problem occurs just as frequently in interpretation of inter vivos trusts as of wills.

1           SECTION 2-601. [Requirement That Devisee Survive Testator by  
2           Five Days.] A devisee who fails to survive the testator by five full  
3           days is deemed to have predeceased the testator, unless the will of  
4           decedent creates a presumption that the devisee is deemed to survive  
5           the testator or requires that the devisee survive the testator for any  
6           stated period in order to take under the will.

Comment

This parallels section 2-104 requiring an heir to survive by five days in order to inherit.

1           SECTION 2-602. [Presumption That Will Passes All Property;  
2           After-Acquired Property.] A will is presumed to pass all property  
3           which the testator owns at his death, including property acquired  
4           after the execution of the will.

1           SECTION 2-603. [Anti-lapse; Deceased Devisee; Class Gifts.]  
2           Unless a contrary intent is indicated by the will, if any relative who  
3           is designated as a devisee or would have been a devisee under a class  
4           gift had he survived the testator, fails to survive the testator, whether

5 the devisee dies before or after the execution of the will, or is deemed  
6 to have predeceased the testator by reason of section 2-601, the issue  
7 of the deceased devisee who survive the testator by five full days shall  
8 take in place of the deceased devisee by representation. A relative is  
9 any lineal descendant of any grandparent of the testator.

Comment

This section prevents lapse by death of a devisee before the testator if the devisee is a relative and leaves issue who survive 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 1-103(n). Note that the section is broader than some existing anti-lapse statutes which apply only to gifts 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.

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.

The application of the section to "void" gifts, though contrary to some decisions, seems justified by the assumption that the testator must have meant something by the provision in his will. If the devisee who predeceased the making of the will is designated as a member of a class, it still seems likely that the testator would want his issue 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.

1 Section 2-604. [Failure of Testamentary Provision.]

2 (a) Non-residuary Devise. Except as provided in section 2-603, if  
3 a devise not included in the residuary clause fails for any reason, it shall  
4 become a part of the residue unless a contrary intent is indicated by the  
5 will.

6 (b) Residuary Devise to Several Persons. Except as provided in

7 section 2-603, if the residue is devised to two or more persons and  
8 the share of one of the residuary devisees fails for any reason, his  
9 share shall pass to the other residuary devisee, or to other residuary  
10 devisees in proportion to their interests in the residue, unless a  
11 contrary intent is indicated by the will.

Comment

If a devise fails by reason of lapse and the conditions of section 2-603 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 2-603 or the present section, depending on the circumstances.

1 SECTION 2-605. [Change in Securities; Accessions; Nonademption.]

2 If securities are specifically devised and subsequent to execution of the  
3 will other securities of the same or another entity are distributed to the  
4 testator by reason of his ownership of the specifically devised securities,  
5 as a result of a partial liquidation, stock dividend, stock split, merger,  
6 consolidation, reorganization, recapitalization, redemption, exchange  
7 or other transaction, and if these other securities are part of the  
8 testator's estate at his death, the specific gift shall include the additional  
9 or substituted securities unless a contrary intent is indicated by the will.

1 SECTION 2-606. [Nonademption of Specific Devises in Certain Cases;  
2 Sale by Conservator-Trustee; Unpaid Proceeds of Sale, Condemnation  
3 or Insurance.]

4 (a) If specifically devised property is sold by a conservator-trustee,  
5 or if a condemnation award or insurance proceeds are paid to a conservator-  
6 trustee as a result of condemnation or casualty, the specific devisee has  
7 the right to a general pecuniary devise equal to the proceeds of sale,

8 the condemnation award or the insurance proceeds. This subsection  
9 does not apply if subsequent to the sale, condemnation or casualty,  
10 it is determined by the court that the disability of the testator has ceased  
11 and the testator survives such determination by one year.

12 (b) Unless a contrary intent is indicated by the will, if specifically  
13 devised property is not part of the estate at death, the specific devisee  
14 shall have the same right to:

15 (1) any balance of the purchase price (together with any  
16 security interest) owing to the testator at death by reason of  
17 sale of the property;

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

20 (3) any proceeds unpaid at death on casualty insurance on  
21 the property;

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

1 SECTION 2-607. [Exoneration.] Unless a contrary intent is indicated  
2 by the will, a specific devise shall pass subject to any security interest  
3 which existed at the time of execution of the will or which is a renewal,  
4 extension or refinancing of a security interest existing at the time of  
5 execution of the will; but if any security interest is initially created after

6 the execution of the will, the devisee is entitled to exoneration.

Comment

See section 3-516 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 restricted by this section to a mortgage or other incumbrance placed on the property after the will is executed, but in the latter situation exoneration applies to personal as well as real property. Thus, if testator specifically devised stock to a named devisee and pledged the stock to a bank on a short-term obligation prior to his death, the specific devisee of the stock could force the personal representative to pay off the loan in order that the stock would not be sold, assuming other assets sufficient to pay the debt under normal rules of abatement as provided in section 3-602.

1 SECTION 2-608. [Exercise of Power of Appointment.] A will,  
2 whether or not it contains a residuary clause, does not exercise a  
3 power of appointment held by the testator unless an intent to exercise  
4 the power is indicated by the will.

Comment

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

Under this section, the intent to exercise the power does not have to be expressed. The intent must be "indicated by the will." Such 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 under this section.

1           SECTION 2-609. [Construction of Gifts in Wills, Deeds and Trusts  
2           to Accord with Law of Intestate Succession.] Unless a contrary intent  
3           is indicated by the instrument, a gift by will, deed or other instrument  
4           to an individual or member of a class described generically in relation  
5           to a particular person as child, children, lawful issue, grandchildren,  
6           descendants, heirs, heirs of the body, next of kin, distributees, relatives,  
7           nieces, nephews or the like shall include any person who would be treated  
8           as so related for purposes of intestate succession, but not an adopted  
9           person unless he was adopted while a minor or after having been a  
10          member of the household of the adopting parent while a minor.

#### Comment

The purpose of this section is to facilitate a modern construction of gifts, usually class gifts, in various kinds of instruments. This section would require parallel construction with the rules of this Code as to intestate succession, particularly section 2-103 (heirs), 2-108 (afterborn heirs), section 2-109 (adopted persons), and section 2-111 (determination of legitimacy and effect of illegitimacy.)

1           Section 2-610. [Advancement in Testate Estate; Ademption by  
2           Satisfaction.] Property which a testator gave in his lifetime to a  
3           devisee shall be treated as an advancement against the devise, or  
4           ademption in whole or in part, if the will provides for deduction of the  
5           lifetime gift, or if the testator declares in writing that the gift is to be  
6           deducted from the devise or is in satisfaction of the devise, or if the  
7           devisee acknowledges in writing that the gift is an advancement or  
8           satisfaction. For purpose of advancement or partial satisfaction,

9 property given during lifetime shall be valued as of the time the  
10 devisee came into possession or enjoyment of the property or as  
11 of the time of death of the testator, whichever first occurs.

#### Comment

This section parallels section 2-113 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 2-113 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.

## ARTICLE II

### Part 7

#### Contractual Arrangements Relating to Death

1 SECTION 2-701. [Contracts Concerning Succession.] A contract  
2 to make a will or devise, or not to revoke a will or devise, or to die  
3 intestate, can be established only by:

- 4 (1) provisions of a will sufficiently stating the contract;
- 5 (2) an express reference in a will to a contract and extrinsic  
6 evidence proving the terms of the contract; or
- 7 (3) a writing signed by the testator evidencing the contract.

8 The execution of a joint will or mutual wills gives rise to no  
9 presumption of a contract.

1           SECTION 2-702. [Non-Testamentary Instruments Relating to  
2     Death.] A provision in an insurance policy, contract, bond, mortgage,  
3     promissory note, deposit agreement, pension plan, trust agreement,  
4     conveyance or any other written instrument effective as a gift, conveyance,  
5     trust or contract reflecting the purpose and intention of the party or  
6     parties that money or other benefits theretofore due to, controlled by,  
7     or owned by one who has since died shall be paid, or that land or  
8     property shall pass to some person designated or to be designated to  
9     another party to the transaction in writing by the decedent, at or after  
10    the death of the decedent, or that money due under a contract shall cease  
11    to be due in the event of the death of the promisee or promisor before  
12    payment or demand, does not make the instrument a will and no provision  
13    in this Code shall invalidate it.

## ARTICLE II

### Part 8

#### General Provisions

#### Foreword

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 spells out the legal consequence of murder on the right of the murderer to take as heir, devisee, joint tenant or life insurance beneficiary.

1           SECTION 2-801. [Renunciation.] A person may renounce testate  
2 or intestate succession or both, wholly or partially, if he has not  
3 accepted possession as heir or devisee, within six months after death  
4 unless the taker of the property is not then ascertained, in which  
5 case he may renounce within six months after ascertainment. Property  
6 renounced by an heir or devisee passes as if he had failed to survive  
7 the decedent. Creditors of the renouncing heir or devisee have no  
8 interest in the property renounced, whether their claims are based on  
9 contract, tort, tax obligations or otherwise.

#### Comment

This section is designed to facilitate renunciation in order to aid post-mortem 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 2-603; otherwise disposition will be governed by section 2-604 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.

1           SECTION 2-802. [Effect of Divorce, Valid or Invalid; Effect  
2           of Valid Decree of Separation.]

3           (a) A person who is validly divorced from the decedent or whose  
4           marriage to the decedent has been validly annulled is not a surviving  
5           spouse unless, by virtue of a subsequent marriage, he is married  
6           to the decedent at the time of death.

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

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

14          (2) a person who, by participating in a marriage ceremony  
15          with a third person, acknowledges as valid a decree or judgment  
16          of divorce or annulment obtained by the decedent.

17          (c) If a final decree or judgment of separation recognized as valid  
18          under the law of this state, has been rendered against the surviving  
19          spouse and is still in effect at the time of death, the surviving spouse  
20          has no right to an elective share under Part 2 or to homestead, exempt  
21          property and allowances under Part 4 of this Article.

Comment

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, there has often been no permanent property settlement; subsection (c) applies if the decree is rendered against the surviving spouse but does not operate against the surviving spouse if he or she is the person who obtained the decree. Even in a proper case the separation operates only as a bar to elect against the decedent's will or to homestead, exempt property and allowances; it does not bar the surviving spouse to a share in intestate property under section 2-102.

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

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

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

17           (c) A named beneficiary of a bond, life insurance policy, or other  
18 contractual arrangement who feloniously and intentionally kills the

19 principal obligee or the person upon whose life the policy is issued  
20 is not entitled to any benefit under the bond, policy or other contractual  
21 arrangement, which shall become payable as though the killer had  
22 predeceased the decedent.

23 (d) A final judgment of conviction of felonious and intentional killing  
24 is conclusive for purposes of this section. In the absence of a conviction  
25 of felonious and intentional killing, the [probate] court may determine  
26 whether the killing was felonious and intentional for purposes of this  
27 section, on the basis of clear and convincing evidence.

28 (e) The provisions of this section shall not affect the rights of any  
29 person who, before rights under this section have been adjudicated,  
30 purchases for value and without notice from the killer property which  
31 the killer would have acquired except for this section; but the killer  
32 shall be liable for the amount of the proceeds. Any insurance company,  
33 bank or other obligor making payment according to the terms of its  
34 policy or obligation is not liable by reason of this section unless prior  
35 to payment it has received at its home office or principal address  
36 written notice of a claim under this section.

#### Comment

This section should not preclude the court from imposing a constructive trust to prevent a killer from profiting in other less common situations not covered by the provisions of the section. Thus, if a joint annuity is issued on the lives of A and B, and A murders B, B's estate may obtain a constructive trust of the proceeds during A's life. Or if a trust is set up to pay income to A for life, on A's death to divide the principal among A's surviving issue, and A's son B murders A, the court may divide the principal on an equitable basis to preclude B from sharing, as though B had predeceased A.

ARTICLE II

Part 9

Custody, Deposit and Verification of Wills

1 SECTION 2-901. [Deposit of Will with Court in Testator's Lifetime.]

2 (a) Deposit of will. A will may be deposited by the person making it,  
3 or by his agent with any [probate] court for safekeeping. The [registrar]  
4 shall give a certificate of deposit for it, upon the payment of the required fee.

5 (b) How enclosed. The will shall be enclosed in a sealed wrapper,  
6 which shall have endorsed thereon "Will of, " followed by the name of  
7 the testator, his address and his social security number, if any. The  
8 [registrar] shall endorse thereon the day when and the person from whom  
9 it was received. The wrapper also shall be endorsed with the name of  
10 the person to whom the will is to be delivered after the death of the  
11 testator. It is not to be opened or delivered except as provided in  
12 this Article.

13 (c) To whom delivered. During the lifetime of the testator, a  
14 deposited will shall be delivered only to him, or to a person authorized  
15 by him in writing to receive it. Upon being informed of his death, the  
16 [registrar] shall notify any person designated to receive the will and  
17 deliver it to him if he requests it, or to the appropriate court or  
18 authorized person on the request of any interested person.

19 (d) When will to be opened. If the will is not delivered to a person  
20 named on the wrapper, it is to be opened by the [registrar] after being  
21 informed of the testator's death. The [registrar] shall give notice by  
22 mail to any executor named in the will and to other appropriate persons

23 as determined by the [court] that the will is on deposit with the court.  
24 The will shall be retained by the [court] as a deposited will until offered  
25 for probate. The [court] shall keep a true copy of any will that is  
26 transmitted elsewhere for probate.

Comment

M. P. C. section 59, changed to shift depository function to court [registrar], to accommodate international wills and to simplify method by which testator may take the will from deposit during his lifetime.

1 SECTION 2-902. [Duty of Custodian of Will; Liability.] After the  
2 death of a testator and on request of an interested person, any person  
3 having custody of a will of the testator shall deliver it to an appropriate  
4 court or to a person authorized to give effect to its terms. Any person  
5 who wilfully refuses or fails to deliver a will is liable to any person  
6 aggrieved for the damages which may be sustained by the refusal or  
7 failure. Also, any person who wilfully refuses or fails to deliver a  
8 will after being ordered by the court in a proceeding brought for the  
9 purpose of compelling delivery shall be subject to penalty for contempt  
10 of court.

Comment

M. P. C. section 63, slightly changed. A person authorized by a court to accept delivery of a will from a custodian may, in addition to a registrar or clerk, be a universal successor or other person authorized under the law of another nation to carry out the terms of a will.

1 [SECTION 2-903. [Verification of Will; Declaration of Due Execution  
2 of a Will in Testator's Lifetime.]

3 (a) Venue. A testator may during his lifetime petition a [probate]

4 court in the county of his domicile for an order declaring that his will  
5 has been duly executed and is his valid will subject only to subsequent  
6 revocation.

7 (b) Petition. The petition shall contain (1) a copy of the will which  
8 the plaintiff wishes to verify, (2) an allegation that the will is in writing  
9 and was signed by the petitioner or in the petitioner's name by some other  
10 person in the petitioner's presence and by his direction and was signed  
11 by two witnesses in the presence of the testator, and (3) an allegation  
12 that the instrument was properly executed with testamentary intent. The  
13 original will shall be filed with the petition.

14 (c) Defendants. The defendants to the proceedings shall be named  
15 from among the heirs presumptive of the plaintiff and the devisees under  
16 earlier wills of the plaintiff. If these are not numerous, all whose interests  
17 are adverse shall be named as defendants. If they are so numerous that  
18 joinder of all is impracticable, several may be sued as representative  
19 parties on behalf of all. Before the court allows the action to proceed,  
20 if all of the heirs presumptive and devisees under earlier wills are not  
21 joined, it shall find that the defendants will adequately protect the interest  
22 of all others adverse to the plaintiff.

23 (d) Service. The defendants shall be served as provided in 1-208.  
24 The court may order additional persons made defendants and served to  
25 assure the adequate representation of the interest of those adverse to  
26 the plaintiff. Interested persons shall be freely allowed to intervene.]

#### Comment

See comments to section 2-906.

1 SECTION 2-904. [Hearing; Witnesses.]

2 (a) Hearing; Inquiry by Court. After notice, the court shall hear  
3 the testator, the attesting witnesses if available and other witnesses  
4 or relevant evidence as the testator or parties defendant may present.  
5 The court may make any independent inquiry it deems appropriate.

6 (b) Witnesses; Competence. Any person who is a competent witness  
7 may testify concerning any issue despite possible disqualification after  
8 the death of the testator and shall not be precluded by reason of interest.

9 (c) Court Witnesses. The court may call as independent witnesses,  
10 physicians, psychologists, psychiatrists, and other persons of its own  
11 choosing to examine the testator or to testify in the proceedings.

1 SECTION 2-905. [Order; Judgment.]

2 (a) If the court is satisfied that the allegations of the petition have  
3 been sustained, it shall by order declare that the testator's will has been  
4 duly executed and is his valid will subject only to subsequent revocation  
5 and shall order the will retained in custody of the court.

6 (b) The judgment, if for the plaintiff, shall bind the defendants and  
7 all persons whose interests they represent. The judgment, if for the  
8 defendants, shall be a conclusive determination that the will which  
9 was the subject of the adjudication was not a valid will.

1           SECTION 2-906. [Withdrawal of Will, Revocation.] A will declared  
2 to be valid under this procedure may be withdrawn during the testator's  
3 lifetime upon his verified application filed with the court and when so  
4 withdrawn shall be deemed revoked. A will declared to be valid here-  
5 under may also be revoked or modified by a subsequent written will or  
6 codicil.

Comment

A copy of the will is included in the petition for convenience under common practice in providing copies of the petition to the parties to the proceedings. If this section is enacted, section 2-506 should be amended by adding: "(c) Withdrawing a verified will by petition under section 2-903."

Sections 2-903 - 2-906 provide for a declaratory determination of the due execution of a will during the testator's lifetime. This is not a probate of the will because it is subject to revocation or subsequent modification by testamentary instruments or similar proceedings on subsequent instruments. The area of contest is cut down, however, by this proceeding which goes beyond preservation of testimony to a judicial determination of the effect of a prior act and existing instrument. It is essentially a proceeding in the nature of a class action similar to a declaratory judgment proceeding designed to accommodate those testators who desire a formal determination of the valid execution of their wills while the best evidence is available. Although perhaps this is a procedure which will not be often used, it is one often recommended and of considerable attraction to the public. Its availability offers some insurance against unwarranted will contests. Material discussing the matter may be found in:

First Tentative Draft of Uniform Act to Establish Wills Before Death of Testator, 1932 Handbook National Conference Comm. Unif. State Laws, p. 463, 465; Am. L. Prop. section 14.2 (Atkinson); Cavers, Ante Mortem Probate, 1 U. of Chi. L. Rev. 440 (1934); Mechem, Why Not a Modern Wills Act?, 33 Iowa L. Rev. 501, 521 (1948); Kutscher, Living Probate, 21 Am. B.J. 427 (1935); Kutscher, Living Probate, Further Consideration, 70 U.S.L. Rev. 133 (1936); Lloyd V. Wayne Cir. Ct., 56 Mich. 236 (1895).

ARTICLE III

PROBATE OF WILLS AND ADMINISTRATION

Part 1

General Provisions

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

2 The power of a person to leave property by will, and the rights of  
3 creditors, devisees, and heirs to his property are subject to the  
4 restrictions and limitations expressed or implicit in this Code  
5 to facilitate the prompt settlement of estates. Upon the death of a  
6 person, his real and personal property devolves to the persons to  
7 whom it is devised by his last will or, in the absence of testamentary  
8 disposition, to his heirs, subject to provisions for homestead allowance,  
9 exempt property and family allowance, to rights of creditors, elective  
10 share of the surviving spouse, and to administration. The provisions  
11 of this Code shall apply without any preference or priority as between  
12 real and personal property.

ALTERNATIVE SECTION FOR COMMUNITY PROPERTY STATES

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

2 The power of a person to leave property by will, and the rights of  
3 creditors, devisees, and heirs to his property are subject to the  
4 restrictions and limitations expressed or implicit in this Code to  
5 facilitate the prompt settlement of estates. Upon the death of a  
6 person, his separate property devolves to the persons to whom it is  
7 devised by his last will, or in the absence of testamentary disposition,  
8 to his heirs; and upon the death of a husband or wife, the decedent's

9 quasi-community property and his share of their community property  
10 devolve to the persons to whom it is devised by his last will, or in  
11 the absence of testamentary disposition, to his heirs, but all of their  
12 community property which is under the management and control of the  
13 decedent is subject to his debts and administration, and that portion  
14 of their community property which is not under the management and  
15 control of the decedent but which is necessary to carry out the provisions  
16 of his will is subject to administration; but the devolution of all the above  
17 described property is subject to provisions for homestead allowance,  
18 exempt property and family allowances, to rights of creditors, elective  
19 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 community property states may not adopt the quasi-community property concept. Finally, some changes of language also may be necessary to reflect differing views concerning what estate is subject to "separate" and "community" debts.

1 SECTION 3-102. [Proceedings Affecting Devolution and Administration  
2 Proper Court.] Persons interested in decedents' estates may apply to the  
3 [probate registrar] for determination in the informal proceedings provided  
4 in this Article, and may petition the [probate judge] for judicial orders in  
5 the formal proceedings provided herein and for orders or instructions  
6 as otherwise desirable incident to estate administration. The [probate]  
7 court is the only court which can make determinations in informal pro-  
8 ceedings concerning estates and shall have exclusive jurisdiction of formal  
9 proceedings to determine how decedents' estates subject to the laws of this

10 state are to be administered, expended and distributed. The [probate]  
11 court has concurrent jurisdiction of any other action or proceeding to  
12 which the estate, through the personal representative, may be a party,  
13 including actions to determine title to property alleged to belong to the  
14 estate, and of any action or proceeding in which property distributed  
15 by a personal representative or its value is sought to be subjected to  
16 rights of creditors or successors of the decedent.

1 SECTION 3-103. [Proceedings Within the Exclusive Jurisdiction of  
2 [Probate] Court; Service.] In proceedings for judicial orders on matters  
3 within the exclusive jurisdiction of the [probate] court, persons interested  
4 in the estate may be subjected to the orders of the court in respect to  
5 property in or subject to the laws of this state by notice in conformity  
6 with section 1-205. The giving of notice to all persons interested in any  
7 proceeding shall not be necessary to a valid order as to those who are  
8 properly given, or who waive, notice.

1 SECTION 3-104. [Proceedings Independent; Exception.] Unless  
2 supervised administration is ordered as provided in section 3-105, each  
3 judicial proceeding relating to an estate is independent of any other or  
4 further proceeding. Parties to one proceeding are not thereby subject  
5 to the court's order in any other proceeding. Resort to one or more  
6 proceedings does not involve any other or further obligation on the part  
7 of the personal representative to seek other orders from the court.

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 3-105 through 3-108 describe supervised administration, a judicial proceeding which is continuous throughout administration. This proceeding corresponds with the theory of administration of decedent's estates which prevails generally in the United 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) and informal proceedings (request for the limited response that nonjudicial personnel of the probate court are authorized to make in response to verified application) 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 is framed by the petition. The securing of necessary jurisdiction over interested persons in a formal proceeding is facilitated by sections 3-103 and 3-303.

1           SECTION 3-105. [Supervised Administration; Petition.] A petition  
2 for supervised administration may be filed by any interested person or  
3 by a personal representative at any time or joined with a petition for  
4 the appointment of a personal representative. After notice to other  
5 interested persons, the [judge] may order that administration of a  
6 decedent's estate proceed under the continuing supervision of the court.

Comment

An order for supervised administration may be appropriate; (a) when the estate is, or may be insolvent; or (b) when numerous contested claims against the estate result in, or appear likely to cause, a multiplicity of independent proceedings against a personal representative; or (c) where the kind, location or condition of the decedent's assets is such as to make the collection and preservation of the values in the estate an unusually complex process involving a high degree of probability that the personal representative, or other interested parties, will need several orders or instructions from the court in the process of administration; or (d) where serious doubts, not resolvable by proceedings to probate a will, exist as to who may

be the successors to the decedent, and such circumstances, or other complications, make it desirable to provide a continuous proceeding for the resolution of various problems that should be resolved prior to final distribution and settlement of the estate.

In an earlier draft the words "upon a finding of necessity" followed "judge" in the second sentence. These words were dropped because it was concluded that the granting of an order for supervised administration should be obtainable on petition without regard to "necessity," or any other predetermined standard. But, a suggestion to substitute "shall order" for "may order" in the same sentence was rejected. The permissive expression gives a judge some flexibility which might be used, for example, to permit interested parties to arrange for payment to a creditor whose demand for supervised administration brings the question before the judge.

1           SECTION 3-106. [Supervised Administration; Effect on Other  
2 Proceedings in [Probate] Court.]

3           (a) The filing of a petition for supervised administration of a  
4 decedent's estate shall stay action on any informal application then  
5 pending.

6           (b) If a will has been previously probated in informal proceedings,  
7 the filing of a petition for supervised administration shall have no effect  
8 on the previous informal probate unless the petition also requests a  
9 formal determination of testacy, in which case, the effect shall be  
10 governed by section 3-221.

11           (c) If a personal representative has been appointed previously,  
12 after he has received notice of the filing of a petition for supervised  
13 administration under section 3-106 he shall refrain from exercising  
14 his power to pay creditors and to distribute any estate. The filing  
15 of the petition shall not affect his other powers and duties unless the  
16 [judge] restrains the exercise thereof pending full hearing on the petition.

Comment

The duties and powers of personal representatives are described in Part 4 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 3-413. However, formal proceedings against a personal representative may involve requests for restraining orders which, if granted, would subject the personal representative to the penalties for contempt of court if he disregarded the mandate. See section 3-308. 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.

1           SECTION 3-107. [Supervised Administration; Nature of Proceeding.]

2           Supervised administration is a formal proceeding to secure settlement  
3           of a decedent's estate by continuous judicial control of the personal  
4           representative. A supervised personal representative is responsible  
5           to the court, as well as to the interested parties, and is subject to  
6           directions concerning the estate made by the [judge] on motion of any  
7           interested party, or on his own motion, and after notice as directed  
8           by the judge or as provided by rule.

Comment

One significant difference between supervised and nonsupervised administration is that in the former, the judge can initiate hearings or procedures as necessary to secure proper administration. Another is that the personal representative is obligated to complete administration in a manner that would eliminate, to the extent possible, any question as to liability of distributees. See section 3-701. Whether one notice to all interested persons at the beginning of supervised administration may serve to bind all persons to all orders that may be made in the course of the proceeding may be doubted. Surely, a single notice would not protect a personal representative or others against the later complaint of one affected by an order who was not given fair notice of the fact that the court was requested to make the order. See Mullane v. Central Hanover Bank, 339 S. Ct. 306 (1959).

1           SECTION 3-108. [Supervised Administration: Powers of Personal  
2    Representative.] Unless restricted by the [judge], a supervised  
3    personal representative has all the powers of personal representatives  
4    under this Code, but he shall refrain from exercising any power to pay  
5    creditors, or to distribute the estate without prior order of the [judge.]  
6    Any restriction on the power of a personal representative which may be  
7    ordered by the [judge] may be endorsed on his letters of appointment  
8    and, unless so endorsed, shall be ineffective as to persons dealing  
9    in good faith with the personal representative.

Comment

    This section provides authority to issue special 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 3-415.

ARTICLE III

Part 2

Probate of Wills and Appointment Proceedings

1           SECTION 3-201. [Wills; Informal or Formal Probate; Necessity.]  
2    Except as provided in section 3-901 of this Code, to be effective to  
3    prove the transfer of any property, or to nominate an executor, a will

4 must be probated informally by the [registrar], or probated formally  
5 by the [judge] in proceedings initiated for that purpose.

Comment

This section follows section 85 of the Model Probate Code, but is changed to introduce informal probate by the [registrar] as an alternative to judicial probate. Reference to the [registrar] in these sections is intended to refer to whatever administrative officer may be designated to handle non-judicial matters concerning estates. In smaller counties which are required to have a probate judge, the judge may serve in both administrative and judicial capacities. The exception under section 3-901 deals with transfers by affidavit in estates worth less than \$5,000.

1           SECTION 3-202. [Informal or Formal Appointment Proceedings;  
2           Requirement.] To acquire the powers and assume the duties and  
3 liabilities of a personal representative of a decedent, a person must  
4 be appointed in informal or formal proceedings, qualify and be issued  
5 letters.

Comment

This section makes it clear that appointment by a public official is required before one can acquire the status of personal representative. "Qualification" is dealt with in section 3-301. "Letters" are the subject of section 3-302. Section 3-401 is also related, since it deals with the time of accrual of duties and powers of personal representatives.

1           SECTION 3-203. [Combined Applications or Petitions.] An  
2 application for informal probate may, but need not, be combined with  
3 an application for informal appointment of a personal representative.  
4 A petition for a formal testacy order may be combined with requests  
5 for judicial orders concerning a personal representative.

Comment

This and other sections express the concept that the probate of a will and the administration of the decedent's estate under the will

are separable and may be dealt with independently. It may be desirable to establish the validity of a decedent's will but unnecessary to administer his estate. If this is so, no appointment of a personal representative should be sought. Under the Model Probate Code, the appointment of an executor or administrator with will annexed occurred as a part of a single court proceeding which included the probate of any will. Section 62 and related sections, M. P. C. The approach of this Code is to permit interested persons to use official procedures to the extent their interests dictate, subject, of course, to the rights and powers of others to initiate official or judicial proceedings that they deem necessary or desirable.

1           SECTION 3-204. [Appointment or Testacy Proceedings, Informal  
2 or Formal; Venue.]

3           (a) Proper [county]. Venue for informal or formal testacy or  
4 appointment proceedings is:

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

7                   (2) if the decedent was not domiciled in this state, in any  
8 [county] where property of the decedent was located at the time  
9 of his death. The situs of tangible personal estate is its location  
10 and the situs of intangible personal estate is the location of the  
11 instrument evidencing a debt, obligation, stock or chose in  
12 action, or the residence of the debtor if there is no instrument  
13 evidencing the debt, chose in action, or obligation in this state.

14           An interest in property held in trust is located where the trustee  
15 may be sued.

16           (b) Application of petition in more than one [county]. Testacy or  
17 appointment proceedings concerning a particular decedent shall not be  
18 maintained in more than one [county]. If a proceeding is commenced  
19 in more than one [county] of this state, it shall be stayed except in the

20 [county] where first filed until final determination there of venue.  
21 If the decedent was not domiciled in the state, the [county] as  
22 described by (a) (2) of this section where a proceeding was first  
23 commenced is the proper [county]. If the proper venue is finally  
24 determined to be in another [county], the entire file shall be transferred  
25 to the proper [county].

26 (c) Transfer of file relating to personal representative. If it  
27 appears to the [judge] at any time that it would be for the best interest  
28 of the persons interested in the estate, the [judge], upon petition and  
29 after notice to interested persons, in its discretion, may order any  
30 pending proceedings, or any file relating to a previously appointed  
31 personal representative, transferred to the [probate] court of another  
32 [county]. After transfer, the court to which any proceeding is  
33 transferred shall have the same jurisdiction as the court transferring  
34 it had, and shall bear the same relationship to any transferred file  
35 and to persons interested therein as that borne by the transferring  
36 court, for all other purposes.

37 (d) Venue in formal testacy or appointment proceedings involving  
38 conflicting claims of domicile. If conflicting claims as to the domicile  
39 of a decedent are made in formal testacy or appointment proceedings  
40 commenced in this state and in one or more other states whose judgments  
41 are entitled to full faith and credit, the courts of this state shall stay,  
42 dismiss, or permit suitable amendments in, the proceeding here unless  
43 it is determined that the local proceeding was commenced before the  
44 proceeding elsewhere. The determination of domicile in the proceeding  
45 first commenced shall be accepted as determinative in the proceeding  
46 in this state.

Comment

M. P. C. section 61 is related. A change is the provision in (d) requiring the courts of this state to respect the priority of proceedings commenced elsewhere for probate or appointment when such proceedings involve a claim of domicile which is in conflict with a claim of domicile made in connection with the local proceeding. This provision presupposes that a formal testacy proceeding will be an application to a court for a binding order concerning the testacy of the decedent and that a formal appointment proceeding involves a request for a judicial order that the decedent died intestate and determining heirs. In either case, the assumption also is that the order will be entered after due notice and opportunity for contest.

The transfer procedure authorized by (c) requires judicial attention. Hence, a petition to transfer a file in a pending proceeding must be included with a request for other formal adjudication, or be made the subject of a separate petition which could be heard after appropriate notice.

1           SECTION 3-205. [Informal or Formal Testacy or Appointment  
2           Proceedings; Application or Petition; Who May Apply or Petition.] Any  
3           interested person may apply to the [registrar] for informal probate of  
4           the decedent's will, or for informal appointment of a personal repre-  
5           sentative, or for both if the requests involved are consistent, or may  
6           petition the [judge] for a judicial order in a formal testacy or appointment  
7           proceeding.

1           SECTION 3-206. [Persons Entitled to Letters.]  
2           (a) Order of persons entitled in informal appointment proceedings.  
3           In informal proceedings, letters testamentary or letters of general  
4           administration may be granted to the persons hereinafter mentioned  
5           who are not disqualified and who have not renounced their right to be  
6           appointed in the following order:

7 (1) to the executor designated in any probated will.

8 (2) to the heirs or devisees of the decedent.

9 (3) to the surviving spouse of the decedent.

10 (4) to the child or children of the decedent who reside  
11 in the state in which the decedent was domiciled at the time  
12 of his decease.

13 (5) 45 days after the death of the decedent, any creditor.

14 A person or persons entitled to letters, other than an executor,  
15 may nominate a qualified person to act in his stead. Any person may  
16 renounce by appropriate writing his right to the appointment or to  
17 nominate.

18 (b) Order of persons entitled in formal proceedings. Unless  
19 probable insolvency of the estate is shown, letters testamentary or  
20 letters of general administration shall be granted in formal proceedings  
21 to persons as determined by the priorities stated in (a) above, except  
22 if there is objection from any party having a substantial interest in the  
23 estate to the appointment of one or more of the persons so indicated,  
24 the [judge] may appoint any person who is acceptable to those representing  
25 a majority in interest of the heirs or devisees, or, in default of accord,  
26 any suitable person. If it appears that the estate is probably insolvent,  
27 or that it has little value in excess of that needed to meet probable  
28 expenses, cost and claims, the [judge] may appoint any person not  
29 disqualified who is acceptable to a majority in interest of the creditors,  
30 or, in default of accord, any suitable person.

31 (c) Who are disqualified. No person is qualified to serve as a

32 domiciliary personal representative who is  
33 (1) under twenty-one years of age;  
34 (2) of unsound mind;  
35 (3) a non-resident of this state who has not appointed a  
36 resident agent to accept service of process in all actions in  
37 any court in respect to matters concerning the estate and caused  
38 such appointment to be filed with the [probate] court;  
39 (4) a person whom the [judge] finds unsuitable in formal  
40 proceedings.

#### Comment

The statement of priorities applicable to informal proceedings is applicable to formal proceedings but is qualified by the ability of a person with a substantial interest to protest the selection of the person with priority, as described in (b). 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.

Priority to administer is given to heirs over the spouse of the decedent. The spouse will be the sole heir except in cases where there are issue by another spouse, where the marriage occurred less than one year prior to death and there are no issue, or where the estate exceeds \$50,000 (see section 2-102), and one who must vote with the others to express the position of the heirs in other cases. The effect of the provisions is to coerce agreement among interested persons concerning whether the spouse should handle the estate when there are other heirs.

1 SECTION 3-207. [Informal or Formal Testacy or Appointment  
2 Proceedings; Demand for Notice.] Any interested person who desires  
3 to be notified before any order is made in an informal or formal testacy  
4 or appointment proceeding relating to the decedent, may file a request  
5 for notice with the [court] at any time after the death of the testator.

6 A request is not effective unless it contains a statement showing  
7 the interest of the person making it and his address, or that of his  
8 attorney, and is effective only as to matters occurring after filing.

Comment

This provision is derived from section 67 of Model Probate Code. When read with the fact that no will may be probated, or no personal representative appointed, until the decedent has been dead at least five days, it provides a means by which relatives or creditors of a decedent may protect themselves against risks they may apprehend concerning informal proceedings. See sections 3-209 and 3-216.

1 SECTION 3-208 [Informal Probate or Appointment Proceedings;  
2 Application; Contents.] Applications for informal probate or informal  
3 appointment shall be directed to the [registrar], and shall be verified  
4 by the applicant as being true, accurate and complete to the best of  
5 his knowledge and belief in respect to the following information:

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

9 (1) a statement of the interest of the applicant;

10 (2) the name, age, domicile and date of death of the decedent,  
11 and the names, addresses, and the ages of any who are minors,  
12 of the spouse, children, heirs and devisees so far as known or  
13 ascertainable with reasonable diligence by the applicant;

14 (3) if the decedent was not domiciled in the state at the time  
15 of his death, a statement that there is property of the decedent  
16 within the [county];

17 (4) a statement identifying any personal representative of  
18 the decedent appointed in this state or elsewhere whose appointment

19 has not been terminated;

20 (5) a statement indicating whether the applicant is  
21 aware of any demand for notice of any probate or appointment  
22 proceeding concerning the decedent that may have been filed  
23 in this state or elsewhere.

24 (b) An application for informal appointment of an administrator  
25 in intestacy shall state in addition to the statements required by (a):

26 (1) that after the exercise of reasonable diligence,  
27 the applicant is unaware of any unrevoked testamentary  
28 instrument relating to property that is or may be subject to  
29 the law of this state, or, a statement why any such instrument  
30 of which he may be aware is not being probated;

31 (2) the priority of the person whose appointment is sought.

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

34 (1) that the original of the decedent's last will is in the  
35 possession of the court, or accompanies the application, or  
36 that a certified copy of a will probated in another jurisdiction  
37 accompanies the application;

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

40 (3) that after the exercise of reasonable diligence, the  
41 applicant is unaware of any other unrevoked, conflicting testamentary  
42 instrument of the decedent, or that any instrument of which he is  
43 aware does not revoke the will for reasons that are stated.

44 (d) An application for informal appointment of an executor,  
45 or of a personal representative to administer an estate under a  
46 will shall describe the will by date of execution and state the time  
47 and place of probate or the pending application or petition for probate.  
48 The application for appointment shall adopt the statements in the  
49 application or petition for probate and state the name and address  
50 of the person whose appointment is sought.

#### 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.

1 SECTION 3-209. [Informal Probate; Duty of [Registrar]; Effect  
2 of Informal Probate.] Upon receipt of an application requesting  
3 informal probate of a will, the [registrar], upon making the findings  
4 required by section 3-210, after determining that the application is  
5 not one requiring approval of the judge under section 3-211, or, having  
6 secured the written approval of the judge to informal probate of the will  
7 if required, and after being satisfied that any notice required by section  
8 3-212 has been given, shall, if at least five days have elapsed since  
9 the decedent's death, issue a written statement of informal probate.  
10 Informal probate is conclusive as to all persons until superseded by an  
11 order in a formal testacy proceeding, or vacation in accordance with  
12 section 3-214. No defect in the application or procedure relating

13 thereto which leads to informal probate of a will shall render the  
14 probate void.

#### Comment

M.P.C. 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 administrative officers of the court, although a succeeding section describes cases in which approval of the judge is required. "Informal probate" is subjected to safeguards that seem appropriate to a transaction which has the effect of making a will operative and which may be the only official reaction concerning the validity of the will. "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.

1           SECTION 3-210. [Informal Probate; Proof and Findings Required.]  
2           (a) The [registrar] shall determine that an application for original,  
3 informal probate of a will is complete, that the applicant is an interested  
4 person who has made oath or affirmation that the statements contained  
5 in the application are true to the best of his knowledge and belief and,  
6 on the basis thereof, that the venue is proper. If the application indicates  
7 that a personal representative has been appointed in another [county]  
8 of this state, it shall be denied. The [registrar] also shall find that  
9 an original, duly executed and unrevoked will, or a certified copy of  
10 a will probated in another jurisdiction, is in its possession, that the  
11 testator is deceased and that the time limit for probate of his will has  
12 not expired. As proof of due execution, if the will appears to have been  
13 duly executed or contains a recital by attesting witnesses of facts  
14 constituting due execution, it may presume due execution from the  
15 appearance and recital, or the [registrar] may accept the sworn statement

16 or affidavit of any person with personal knowledge of the circumstances  
17 of execution, whether or not the person was an attesting witness. As  
18 proof of death, the [registrar] may accept a duly executed death  
19 certificate, or other suitable proof.

20 (b) Informal probate of a will which has been previously probated  
21 elsewhere may be granted at any time upon written application by  
22 any interested person, together with deposit of a certified copy of  
23 the will and of the statement probating it under the seal of the office  
24 or court where it was first probated.

#### 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 has occurred previously in another state, informal probate is available only where an original will exists and is available to be filed with the court. Lost or destroyed wills must be established in formal proceedings. See section 3-221.

#### 1 SECTION 3-211. [Informal Probate; Approval of Judge Required.]

2 (a) The [registrar] shall not probate any will which has been torn,  
3 mutilated, burned in part, or marked in any way as to leave doubt as  
4 to whether the marking occurred before or after execution, without  
5 first submitting the same to the judge and receiving the judge's written  
6 approval of its informal probate. Applications for informal probate which  
7 relate to one or more of a known series of testamentary instruments  
8 executed by a particular testator, the latest of which does not expressly

9           revoke the earlier, shall not be acted upon until the instruments  
10           have been submitted to the judge and he has given his written approval  
11           of the request involved.

12           (b) After a will has been probated informally, an application for  
13           informal probate of another testamentary instrument of the same  
14           testator shall be denied unless, after reference of the matter to  
15           the judge, the judge indicates in writing that the instrument neither  
16           totally revokes nor is totally revoked by, the previously probated will.  
17           This subsection is inapplicable where the informal probate of the first  
18           presented instrument has been vacated pursuant to section 3-215 of  
19           this Code.

#### Comment

          The [registrar] handles the informal proceeding, but is required to refer certain matters to the "judge." The "judge" should be a judicial officer who is associated with the public office which includes the [registrar]. Section 3-219 describes the advisory function of the judge as it is involved at various points in informal proceedings. Use of the judge in advisory capacity does not make the matter a judicial proceeding, nor alter the weight or effectiveness of any informal order.

1           SECTION 3-212. [Informal Probate; Notice Requirements.]

2           If a demand for notice as described in section 3-207 of this Code has  
3           been filed with the court, or if the application shows that a demand  
4           for notice has been filed in an appropriate office elsewhere, the  
5           [registrar] shall delay informal probate until at least five days notice  
6           that the will would be offered for informal probate has been given to  
7           the person demanding it. This notice may be waived in writing or  
8           shall be unnecessary if the person demanding it has since died. Unless  
9           waived in writing, notice also must be given to any person representative

10 of the decedent whose appointment has not been terminated.

1 SECTION 3-213. [Informal Probate; Court [Registrar] Not  
2 Satisfied by Proof.] If the [registrar] is not satisfied for reasons  
3 other than the applicant's failure to meet the requirements of section  
4 3-209 that a will is entitled to be probated in informal proceedings it  
5 may, with the written approval of the judge, refuse the application.

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. But, as a check on the exercise of such discretion, the [registrar] may not deny probate where stated requirements have been met, unless the written approval of the judge is obtained. 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.

1 SECTION 3-214. [Informal Probate; Vacation.] Upon the written  
2 application of a duly appointed personal representative of the decedent, or,  
3 if none, of the person who previously sought and obtained informal probate  
4 of a will, filed before the probate has become conclusive under section 3-234,  
5 the [registrar] shall vacate the previous probate upon a showing that the will  
6 was totally revoked by a later executed instrument. In other cases, relief  
7 for erroneous informal probate may be had only in a formal proceeding.

Comment

This is new. It is designed to permit persons seeking to settle an estate with minimum contact with a court to secure elimination of an informal probate when a later will which they concede to be valid is discovered. Once the prior probate is vacated, the later will may be probated informally. See section 3-210.

1           SECTION 3-215. [Informal Appointment Proceedings; Duty of  
2           [Registrar]; Effect of Appointment.] Upon receipt of an application for  
3           original, informal appointment of a personal representative, and after  
4           determining that the requirements of section 3-216 have been met, the  
5           [registrar] shall appoint the person seeking appointment subject to  
6           qualification and acceptance. The status of personal representative,  
7           and the powers and duties pertaining thereto, conferred as a result  
8           of informal appointment though subject to termination as provided in  
9           section 3-310 shall not be subject to retroactive vacation.

1           SECTION 3-216. [Informal Appointment Proceedings; Proof and  
2           Findings Required.] In informal proceedings, the [registrar] shall  
3           determine that an application for appointment is complete, that any will  
4           to which the requested appointment relates has been formally or informally  
5           probated, that any notice required by section 3-217 and any approval  
6           required by section 3-218 has been given and obtained, and, unless  
7           indicated by the probate of a will, that the decedent has been dead five  
8           days. The [registrar] may accept a duly executed death certificate, or  
9           any other suitable evidence, as proof of death. The [registrar] also shall  
10          determine from the statements in the application whether the petitioner is  
11          entitled to request an appointment, and whether the person whose appointment  
12          is sought is entitled to receive the appointment. In any case where the  
13          [registrar] is not satisfied for any reason other than failure to meet the  
14          requirements of this and related sections that the requested appointment  
15          should be made, it may, with the approval of the judge, decline the  
16          application.

Comment

Authority to decline an application for appointment is conferred on the [registrar] acting with the judge's approval. Unlike section 3-213, the judge's approval of a proposed declination of appointment does not need to be in writing. 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.

1           SECTION 3-217. [Informal Appointment Proceedings; Notice  
2 Requirements.]   The moving party must mail notice of his intention to  
3 seek an appointment informally at least seven days prior to the making of  
4 application: (i) to any person demanding it as provided in section 3-207;  
5 and (ii) to any person having a prior right to appointment not waived in  
6 writing and filed with the court unless, after due diligence, the applicant  
7 is unable to locate the person having priority in which case he shall give  
8 a sworn statement to that effect to the court.

1           SECTION 3-218. [Informal Appointment Proceedings; Approval  
2 of Judge Required.]

3           (a) If an application for informal appointment indicates the existence  
4 of a possible testamentary instrument which is unrevoked, may relate to  
5 property subject to the laws of this state, and is not filed for probate in  
6 this court, the [registrar] shall refer the matter to the judge who shall  
7 approve the requested appointment before it can be made. Approval is  
8 proper if the judge believes the instrument is probably ineffective as a  
9 testamentary instrument.

10           (b) If the appointment of a domiciliary administrator in intestacy  
11 is sought notwithstanding an unrevoked will which may or may not have

12 been probated, the [registrar] shall refer the matter to the judge who  
13 shall approve the requested appointment before it can be made. Approval  
14 is proper if all heirs and devisees of the decedent are competent and join  
15 in a written request that the estate be administered as intestate and the  
16 judge believes that no injustice will result from granting the request.

#### Comment

This and other sections which require reference in informal matters to the judge are designed to minimize the number of matters involving important discretion that are assigned to the [registrar.]

1 SECTION 3-219. [Informal Probate or Appointment Proceedings;  
2 Nature of Judge's Advice.] In instances in which the judge's approval  
3 is required in connection with a request for informal probate or appointment,  
4 the judge acts only in advisory capacity to the nonjudicial officer of the court.  
5 His approval or refusal to approve in any instance is of no evidentiary or  
6 other value in any formal proceeding.

1 SECTION 3-220. [Formal Testacy Proceedings; Nature; When  
2 Commenced.] A formal testacy proceeding is litigation to determine  
3 whether a decedent left a valid will. A formal testacy proceeding may  
4 be commenced by:

- 5 (1) an interested person filing a petition as described in  
6 section 3-221 (a) in which he requests that the [judge] proceed,  
7 after notice and hearing to enter an order probating a will; or
- 8 (2) an heir of the decedent filing a petition to set aside an  
9 informal probate of a will or to prevent informal probate of a  
10 will which is the subject of a pending application.

11                   (3) an heir filing a petition in accordance with section  
12                   3-221 (b) for an order that the decedent died intestate.

13                   A petition under (1) may petition for formal probate of a will  
14                   without regard to whether the same or a conflicting will has been  
15                   informally probated. A formal testacy proceeding may, but need not,  
16                   involve a request for appointment of a personal representative.

17                   Commencement of a formal testacy proceeding shall stay any  
18                   pending application for informal probate of any will of the decedent  
19                   dealing with the same assets, or any pending application for informal  
20                   appointment of a personal representative of the decedent.

21                   Unless a petition in a formal testacy proceeding also requests  
22                   confirmation of the previous informal appointment, a previously appointed  
23                   personal representative, after notice of the commencement of a formal  
24                   probate proceeding, shall refrain from any further distribution of the  
25                   estate during the pendency of the formal proceeding. A petitioner who  
26                   seeks the appointment of a different personal representative in a formal  
27                   proceeding also may request an order restraining the present personal  
28                   representative from exercising any of the powers of his office and  
29                   requesting the appointment of a special administrator. In the absence of  
30                   such a request, or if the request is denied, the commencement of a formal  
31                   proceeding shall have no effect on the powers and duties of a previously  
32                   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.

The formal proceedings described by this section may: (i) be an original proceeding to secure "solemn form" probate of a will; (ii) be a proceeding to secure "solemn form" probate to corroborate a previous informal probate; (iii) be brought to block a pending application for informal probate, or to prevent an informal application from occurring thereafter; (iv) be brought to contradict a previous order of informal probate; (v) be brought to secure a declaratory judgment of intestacy and determining 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 3-226. The petitioner in the formal proceedings may be content to let matters stop there, or he can frame his petition, or amend, to bring his action under (3) 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 3-403 directing him to abide by the will.

1           SECTION 3-221. [Formal Testacy or Appointment Proceedings;  
2   Petition; Contents.] Petitions for formal probate of a will, or for formal  
3   appointment of a personal representative, shall be verified, directed to  
4   the [judge], request a judicial order after notice and hearing and contain  
5   further statements as indicated herein:  
6           (a) A petition for formal probate of a will shall  
7               (1) request an order as to the testacy of the decedent in  
8           relation to a particular instrument which may or may not have  
9           been informally probated,

10                   (2) contain the statements required for informal applications  
11                   as stated in the five subparagraphs under section 3-208 (a), and  
12                   the statements required by subparagraphs (2) and (3) of section  
13                   3-208 (c) and

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

16                   If the original will is neither in the possession of the court  
17                   or accompanying the petition and no certified copy of a will probated  
18                   in another jurisdiction accompanies the petition, the petition also shall  
19                   state the contents of the will, and indicate that it is lost, destroyed or  
20                   otherwise unavailable.

21                   (b) A petition for formal appointment of an administrator in  
22                   intestacy shall request a judicial finding and order that the decedent  
23                   left no will and determining the heirs, contain the statements required  
24                   by (a) and (b) of section 3-208, and indicate whether supervised administra-  
25                   tion is sought. A petition may request an order determining intestacy  
26                   and heirs without requesting the appointment of an administrator, in  
27                   which case, the statements required by subparagraph (2) of section 3-208  
28                   (b) above may be omitted.

29                   (c) A petition for formal appointment of a personal representative  
30                   to administer an estate under a will shall contain the statements required  
31                   for informal applications by section 3-208 (d) above and indicate whether  
32                   supervised administration is sought. Also it shall describe any question  
33                   of priority concerning appointment of a personal representative that is  
34                   involved.

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 that 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 supervised administration is sought, there will be little occasion for a formal order concerning appointment of a personal representative except where disagreement exists over who should serve. A formal order concerning appointment settles disputes of priority.

1           SECTION 3-222. [Formal Testacy Proceeding; Notice of Hearing  
2 on Petition.]

3           (a) When and to whom notice is given. Upon commencement of  
4 a formal testacy proceeding, the [judge] shall fix a time and place for  
5 hearing. Notice shall be given by the petitioner to the persons herein  
6 enumerated and to any additional person who have filed a demand for  
7 notice under section 3-207 of this Code.

8           Notice shall be given to the following persons: the surviving  
9 spouse, children, and heirs of the decedent, the devisees and executors  
10 named in any will that is being, or has been, probated, or offered for  
11 informal or formal probate in the [county,] or that is known by the  
12 petitioner to have been probated, or offered for informal or formal  
13 probate elsewhere, and any personal representative of the decedent  
14 whose appointment has not been terminated.

15           In addition, the petitioner shall give notice by publication to all  
16 unknown persons who may have any interest in the matters being litigated.

17           (b) Notice to and search for alleged decedent. If it appears by  
18 the petition or otherwise that the fact of the death of the alleged decedent

19 may be in doubt, or on the written demand of any interested person,  
20 a copy of the notice of the hearing on said petition shall be sent by  
21 registered mail to the last known address of the alleged decedent.  
22 The court shall direct the petitioner to report the results of, or  
23 make, a reasonably diligent search for the alleged decedent in any  
24 manner that may seem advisable, including any or all of the following  
25 methods:

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

29 (2) by notifying officers of justice and public welfare  
30 agencies in appropriate locations of the disappearance of  
31 of the alleged decedent;

32 (3) by engaging the services of an investigation agency.

33 The costs of any search so directed shall be paid by the  
34 petitioner if there is no administration or by the estate of  
35 the decedent in case there is administration.

#### Comment

The provisions concerning search for the alleged decedent are derived from Model Probate Code, section 71, M. P. C.

Testacy proceedings involve adjudications that no will exists. Unknown wills as well as any which are brought to the attention of the court are affected. Persons with potential interest under unknown wills have the notice afforded by death and by publication. Arguably, the notice requirements should 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. But, a requirement of this sort might result in a very burdensome, possibly fruitless and probably disruptive obligation to notify persons named in obviously obsolete instruments. Moreover, it seemed unwise to require the petitioner to guess whether some instrument of which he is aware is or is not one that should be taken seriously. Another idea was that of requiring the

petitioner to affirm that he was not secreting and had not destroyed any potentially testamentary document of the decedent, other than any that might be mentioned in his pleading. This was rejected also. Among other considerations, section 1-214 provides a very significant deterrent against actual fraud of the sort suggested. Furthermore, it has never been wise for testators to leave conflicting testamentary instruments lying about at death. The fact that some testators act unwisely, and that the "wrong" will may be probated while the "right" will is excluded as a consequence, seems to be an inadequate reason for establishing a procedure which would tend to cause great inconvenience in all formal testacy proceedings, simply to narrow the chance of unwanted results, in a very small number of cases involving thoughtless testators.

However, 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.

1           SECTION 3-223. [Formal Testacy Proceedings; Written Objections  
2 to Probate.] Any party to a formal proceeding who opposes the probate  
3 of a will for any reason except that it is expressly revoked by a later  
4 will which is the subject of a petition for formal probate, shall state  
5 his objections to the will in his pleadings. Amendments shall be freely  
6 allowed in the interests of justice.

Comment

M. P. C. 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.

1           SECTION 3-224. [Formal Testacy Proceedings; Uncontested;  
2 Hearings and Proof.] If a petition in a testacy proceeding is unopposed,  
3 the [judge] may order probate or intestacy on the strength of the pleadings  
4 if satisfied that the conditions of section 3-228 have been met, or conduct  
5 a hearing in open court and require proof of the matters necessary to

6. support the order sought. A hearing shall be conducted if the petitioner  
7 requests it.

Comment

For various reasons, attorneys handling estates may want interested persons to be gathered for a hearing before the [judge] on the formal allowance of the will. The [judge] is not required to conduct a hearing unless one is requested, 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 any evidence on a formal probate. 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.

1 SECTION 3-225. [Formal Testacy Proceedings; Testimony of  
2 Subscribing Witnesses.]

3 (a) Where evidence concerning execution of the will is necessary  
4 in uncontested proceedings for probate, the affidavit or testimony of one  
5 of the subscribing witnesses to the instrument propounded shall be  
6 sufficient. In contested cases, the testimony of at least one of the  
7 subscribing witnesses, if within the state, competent and able to testify  
8 shall be received. Due execution of the will may be proved by other  
9 evidence.

10 (b) Due execution of a self-proved will shall be conclusively  
11 presumed without the testimony of any attesting witness upon filing the  
12 will and the acknowledgment and affidavits annexed or attached thereto,  
13 unless there is proof of fraud or forgery affecting the acknowledgment  
14 or affidavit.

Comment

M. P. C. section 76, combined with section 77, substantially unchanged. The self-proved will is described in Article II. See

section 2-503. The "conclusive presumption" described here would foreclose questions like whether the witnesses signed in the presence of the testator and whether the testator knew that the instrument he signed purported to be his will. It would not preclude proof of undue influence, lack of testamentary capacity, revocation or any relevant proof that he was unaware of the contents of the document. The balance of the section is derived from M. P. C. sections 76 and 77.

1           SECTION 3-226. [Formal Testacy Proceedings; Burdens in  
2           Contested Cases.] In contested cases, petitioners who seek to establish  
3           intestacy have the initial burden of going forward with prima facie proof  
4           of death, venue, and heirship. Proponents of a will have the initial burden  
5           of going forward with prima facie proof of testamentary intent and due  
6           execution in all cases, and, if they are also petitioners, with prima  
7           facie proof of death and venue. Contestants of a will have the initial  
8           burden of going forward with prima facie proof of lack of testamentary  
9           capacity, undue influence, fraud, duress, mistake or revocation. Parties  
10          have the ultimate burden of persuasion as to matters on which they have  
11          the initial burden of going forward. If a will is opposed by the petition  
12          for probate of a later will revoking the former, it shall first be determined  
13          whether the later will is entitled to probate, and if a will is opposed by a  
14          petition for a declaration of intestacy, it shall first be determined whether  
15          the will is entitled to probate.

Comment

This is new. It is designed to clarify by stating what is believed to be a fairly general approach to questions concerning burdens of going forward with evidence in will contest cases.

1           SECTION 3-227. [Formal Testacy Proceedings; Effect of Final  
2           Order in Another Jurisdiction.] A final order or decree concerning  
3           succession of a decedent's estate of a court whose judgments are

4 entitled to full faith and credit, in a proceeding that is designed to give  
5 notice and opportunity for contest to all interested persons reasonably  
6 entitled to notice, shall be conclusive in this state and shall be accepted  
7 as the basis for implementing orders by a court of this state if the foreign  
8 court found that the decedent was domiciled at his death in the other  
9 jurisdiction. A petition for local implementation of the foreign order  
10 or decree shall be accompanied by an authenticated copy of any will and  
11 the findings and order concerning it made by the foreign court, its order  
12 concerning intestacy and heirship, or other orders concerning the estate.  
13 The findings of the foreign court, including its findings of domicile, shall  
14 be conclusive in this state notwithstanding the possibility that the laws of  
15 this state otherwise applicable to determine the validity of the will or to  
16 determine heirs would produce a different result.

#### 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 personally are 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 3-204 (d) applies. Section 3-227 is intended to apply where a formal proceeding elsewhere has been previously concluded, or where there is no conflict between local and foreign proceedings in respect to domicile. Hence, if a local formal proceeding not involving a claim of local domicile is concluded before formal proceedings and domicile are concluded, local law will control, for this section is not intended to cut across the principle of res judicata.

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 3-204 (d) or this section. By use of informal proceedings, it is possible to begin and conclude administration without a formal order of the sort that may be important under sections 3-204 (d) or 3-227.

1           SECTION 3-228. [Formal Testacy Proceedings; Order.] After  
2 the time required for any notice has expired, upon proof of notice, and  
3 after any hearing that may be necessary, if the [judge] finds that the  
4 testator is dead and venue proper, it shall determine the decedent's  
5 domicile at death, his heirs and his state of testacy. Any will found  
6 to be valid and unrevoked shall be formally probated. The petition  
7 should be dismissed or appropriate amendment allowed if the court is  
8 not satisfied that the alleged decedent is dead.

Comment

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

1           SECTION 3-229. [Formal Testacy Proceedings; Probate of More  
2 Than One Instrument.] If two or more instruments are offered for probate  
3 before a final order in a formal testacy proceeding is entered, more than  
4 one instrument may be probated where neither expressly revokes the other  
5 nor contains provisions which work a total revocation by implication. If  
6 more than one instrument is probated, the order shall indicate what pro-  
7 visions control in respect to the nomination of an executor, if any. The order  
8 may, but need not, indicate how any provisions of a particular instrument  
9 are affected by the other instrument. After a final order in a testacy  
10 proceeding has been entered, no petition for probate of any other instrument  
11 of the decedent may be entertained, except incident to a petition to vacate  
12 or modify a previous probate order and subject to the time limits of the  
13 proceedings.

Comment

Except as otherwise provided in section 3-231, 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.

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.

1           SECTION 3-230. [Formal Testacy Proceedings; Partial Intestacy.]

2           If it becomes evident in the course of a formal testacy proceeding that,  
3           though one or more instruments are entitled to be probated, the decedent's  
4           estate is or may be partially intestate, the [judge] shall enter an order to  
5           that effect and determining the heirs of the decedent.

1           SECTION 3-231. [Formal Testacy Proceeding; Effect of Order.]

2           Subject to any right of appeal, and subject to vacation as provided in  
3           section 3-232, a formal testacy order under section 3-228, including an  
4           order that the decedent left no valid will and determining heirs, is final  
5           as to all persons, as to all estate of the testator subject to local law, and  
6           as to all issues that the court considered or might have considered incident  
7           to its rendition relevant to the question of whether the decedent left a  
8           valid will, except that:

9                   (1) Later discovered will; discovery of unknown heir.

10                   (A) the [judge] shall entertain a petition for modification  
11                   or vacation of its order and probate of another will of the  
12                   decedent if it is shown that the proponents of the later-offered  
13                   will, in spite of the exercise of reasonable diligence in efforts

14 to locate any will, were unaware of its existence at the time of  
15 the earlier proceeding, or were unaware of the earlier proceeding  
16 and had no notice thereof, except by publication.

17 (B) If intestacy of all or part of the estate has been ordered,  
18 the determination of heirs of the decedent may be reconsidered when  
19 it is shown that one or more persons were omitted from the determina-  
20 tion if it is also shown that the persons were unaware of their relationship  
21 to the decedent, or were unaware of his death and had no notice of any  
22 proceeding concerning his estate, except by publication.

23 (C) A petition for vacation under either (A) or (B) above must be  
24 filed prior to the earlier of the following time limits:

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

29 (ii) Whether or not a personal representative has been appointed  
30 for the estate of the decedent, the time when it is no longer possible  
31 to initiate an original proceeding to probate a will of the decedent.

32 (iii) Twelve months from the entry of the order to be vacated.

33 (D) The order originally rendered in the testacy proceeding may  
34 be modified or vacated, as is appropriate under the circumstances, by  
35 the order of probate of the later-offered will, or the order redetermining  
36 heirs.

37 (2) Alleged decedent alive. The finding of the fact of death shall  
38 be binding as to the alleged decedent only if notice of the

39 hearing on the petition in the formal testacy proceeding was sent  
40 by registered mail addressed to the alleged decedent at his last  
41 known address and the [judge] finds that the search provided in  
42 section 3-222 (b) was made.

43 If the alleged decedent is not dead and if notice was sent and search  
44 was made, his sole rights shall be at any time to recover estate from the  
45 personal representative if it be in his hands, or to recover the estate or  
46 its proceeds from the distributees, if either be in their hands.

#### 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 for the provisions of (2) above. The provisions permitting vacation of an order determining heirs on certain conditions were established through the effort to make complete parallels of the possibilities for adjudications of intestacy and adjudications of testate status. See section 3-220. 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 of its proceeds." If neither can be identified through the normal process of tracing assets, their liability is at an end. 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 3-609 and 3-704.

1 SECTION 3-232. [Formal Testacy Proceeding; Vacation of Order  
2 for Other Cause.] An order in a formal testacy proceeding may be modified  
3 or vacated within the time permitted for appeal therefrom for good cause  
4 shown as provided in section 1-215.

Comment

The reference is to the general section in Article I that authorizes vacation of probate court orders within the time permitted for appeal.

1           SECTION 3-233. [Informal and Formal Probate and Testacy  
2           Proceedings; Ultimate Time Limit.] No informal or formal probate or  
3           testacy proceeding may be commenced after the third anniversary of the  
4           decedent's death, except; (i) if a previous informal or formal proceeding  
5           was initiated and dismissed because the [registrar] or [judge] was not  
6           satisfied that the alleged decedent was dead, informal or formal proceedings  
7           may be initiated at any time thereafter if it is found that death occurred  
8           prior to the initiation of the previous proceeding and that the proponent  
9           has not delayed unduly in initiating the subsequent proceeding; (ii) an  
10          informal or formal proceeding may be commenced by any person interested  
11          in the estate of an absentee, disappeared or missing person for whom a  
12          conservator-trustee has been appointed, at any time within three years  
13          after the conservator-trustee learns of the death of the protected person  
14          or otherwise becomes able to establish death; and (iii) a formal testacy  
15          proceeding to contest an informally probated will may be commenced  
16          within twelve months from the date of the informal probate. An original  
17          proceeding to determine the heirs of an intestate may be brought at any  
18          time during which any will might be probated has elapsed.

Comment

This section establishes a basic limitation period of three years within which it may be determined that a decedent left a will. But, an exception assures that heirs will have at least one year after an informal probate to initiate a contest. If the informal probate occurred less than two years after death, the heirs will have longer than one year. If no will is probated within three years from death, the section has the effect of

making the assumption of intestacy final. If a will has been informally probated within the period, the section has the effect of making the informal probate conclusive after three years or within twelve months from informal probate, if later. Heirs of devisees can protect themselves against change of assumption within the three years that the decedent died either testate or intestate by bringing a formal proceeding which shortens the period to that described in sections 3-231 and 2-232. A personal representative who has been appointed under an assumption concerning testacy that may be turned around in the three-year period if there has been no formal proceeding, is protected by section 3-404, which 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 without any formal determination serving to accelerate the time for certainty, remain potentially liable to persons determined to be entitled by formal proceedings instituted within the basic period under sections 3-609 and 3-706.

Purchasers from personal representatives and distributees may be protected without regard to whether the three-year period has run. See sections 3-415 and 3-610.

All creditors' claims are barred after three years from death. See section 3-504 (a) (2). A consequence of this and the section being discussed is that administration probably will not be necessary if none is instituted within three years after death. Nonetheless, later administration is not barred, for it may provide a convenient way of collecting and distributing assets even though no question concerning testacy or claims is possible.

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. But, earlier protection cannot be fully achieved without a judicial proceeding which is, of course, subject to the notice requirements implicit in the due process concept.

1           SECTION 3-234. [Formal Appointment Proceedings; Findings; Order.]

2           (a) Commencement of a formal appointment proceeding that does not

3 involve an issue as to the testacy of the decedent shall stay any pending

4 application for informal appointment of a personal representative of the  
5 decedent. A previously appointed personal representative, after notice  
6 of the commencement of a formal appointment proceeding, shall refrain  
7 from exercise of any power of administration or distribution of the estate,  
8 except as necessary to preserve assets, unless and until the judge shall  
9 order otherwise. A formal appointment proceeding that is combined with  
10 a formal testacy proceeding shall have the effect on previous and pending  
11 informal proceedings concerning the decedent's estate described in section  
12 3-220

13 (b) If appointment of a personal representative is sought in formal  
14 proceedings, the [judge], after notice to interested persons and hearing,  
15 shall determine that the matters required to be contained in the petition  
16 by the preceding sections of this Part have been established, and make an  
17 order finding the domicile of the decedent, and determining who upon  
18 qualification, is entitled to be appointed personal representative of his  
19 estate. If supervised administration is also ordered, the order shall  
20 indicate any limitations on the power of the personal representative which  
21 are to be mentioned in the letters and make such other provision as may  
22 be desirable to assure suitable supervision of the administration.

#### Comment

A petition for formal appointment of a personal representative may be combined with a petition in a formal testacy proceeding. However, it is not necessary to formally petition for the appointment of a personal representative in such a case because a personal representative may be appointed on informal application either before or after formal proceedings which establish whether the decedent died testate or intestate. See sections 3-205, 3-208 (b) and (d) and 3-215. Furthermore, procedures for securing the appointment of a new personal

representative after a previous assumption as to testacy has been changed is provided by section 3-313. These may be informal, or related to pending formal proceedings concerning testacy. Hence, the times when it will be necessary to obtain a formal order relating to appointment are when there is a dispute concerning who has priority to serve that cannot be resolved incident to a determination of testacy, or when supervised administration is sought under sections 3-105 et seq. Requests for formal appointments in other cases are not prohibited, however. It is important to distinguish "formal appointment" proceedings from "supervised administration." The former applies generally to any proceeding after notice involving a request for an appointment. The latter originates in a "formal proceeding," but is descriptive of the relationship of the appointee to the appointing court. In other words, a personal representative appointed in a formal proceeding may or may not be supervised.

Another point should be noted. The [judge] does not issue letters even though a formal proceeding seeking appointment is involved and results in an order authorizing appointment. Rather, section 3-301 et seq. control the subjects of qualification and issuance of letters.

1           SECTION 3-235. [Certificate of Probate or Intestacy.] The court  
2 shall issue certificates evidencing findings or orders entered in any  
3 proceeding together with authenticated copies of any wills so established,  
4 to any interested person upon request and payment of the fees required  
5 therefor. Certificates relating to probated wills shall indicate whether  
6 the decedent was domiciled in this state and whether the proceedings were  
7 formal or informal.

### ARTICLE III

#### Part 3

#### Personal Representative; Appointment, Control and Termination

1           Section 3-301. [Qualification.] Prior to the issuance of letters, a  
2 personal representative shall qualify by filing any required bond and a  
3 statement of acceptance of the duties of the office.

### Comment

This and related sections of this Part describe details and conditions of appointment that may be applicable to all personal representatives without regard to whether the appointment proceeding involved is formal or informal, or whether the personal representative is supervised.

1           SECTION 3-302. [Issuance and Contents of Letters.] After a personal  
2 representative has qualified, the [registrar] shall issue letters testamentary,  
3 letters of administration with will annexed, letters of administration, letters  
4 of special administration, or letters of ancillary administration as appropriate  
5 under the circumstances. If the letters confer authority to administer the  
6 estate under a will of the decedent, the dates of execution and probate of  
7 the will shall be stated in the letters. The [registrar] shall issue certified  
8 copies of letters upon request of the personal representative and payment  
9 of the fee required therefor.

### Comment

This section should be read with section 3-108 which directs endorsement on letters of any restrictions of power of a supervised administrator.

1           SECTION 3-303. [Acceptance of Appointment; Consent to Jurisdiction.]  
2 By accepting appointment, a personal representative submits personally to  
3 the jurisdiction of the [probate] court in any proceeding relating to the estate  
4 that may be instituted by any interested person. Notice of any proceeding shall  
5 be delivered to the personal representative, or mailed to him by ordinary  
6 mail at his address, as listed in the application or petition for appointment  
7 or as thereafter reported to the court.

### Comment

Except for personal representatives appointed pursuant to section 3-105, appointees are not deemed to be "officers" of the appointing court (see section 3-403) or to be parties in one continuous judicial proceeding that extends until final settlement. See section 3-104. Yet, it is desirable to continue the present pattern which prevents a personal representative who might make himself unavailable to service within the state from affecting the power of the appointing court to enter valid orders affecting him. See Michigan Trust Co. v. Ferry, 228 U.S. 346, 57 L. Ed. 867, 33 Sup. Ct. 550 (1912). The concept employed to accomplish this is that of requiring each appointee to consent in advance to the personal jurisdiction of the probate 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.

1           SECTION 3-304. [Bond Not Required Without Court Order, Exceptions.]

2           No bond is required of a personal representative appointed in informal  
3           proceedings, except (i) upon the appointment of a special administrator;  
4           (ii) when an executor or other personal representative is appointed to  
5           administer an estate under a will containing an express requirement of bond  
6           or (iii) when bond is required under section 3-306. When a personal repre-  
7           sentative is appointed in any formal proceeding, bond may be required by  
8           the order, but no bond is required in formal proceedings if the will relieves  
9           the executor of bond, unless bond has been requested by an interested party  
10          and the [judge] is satisfied that it is desirable. No bond is required of any  
11          personal representative who, pursuant to statute, has deposited cash or  
12          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, they are coerced to do so by the remedies available to interested persons. Interested persons are protected by their ability to demand prior notice of informal proceedings (section 3-207), contest a requested appointment by use of a formal testacy proceeding (section 3-220) or by use of a formal proceeding seeking the appointment of another person (section 3-234). Section 3-102 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 3-306 and 3-308. Finally, interested persons have assurance under this Code that their rights in respect to the values of a decedent's estate cannot be terminated without a judicial order after notice or before the passage of three years from the decedent's death.

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

1           SECTION 3-305. [Amount and Terms of Required Bond or Security.]

2           When bond is required and the provisions of the will or order do not specify  
3           the amount, unless stated in his application or petition, the applicant shall  
4           file a statement under oath with the [registrar] indicating his best estimate  
5           of the value of the personal estate of the decedent and of the income expected  
6           from the personal and real estate during the next year. The person being  
7           appointed shall execute and file a bond with the [registrar], or give other  
8           suitable security, in an amount equal to or greater than the estimate. A  
9           bond is to the state and is for the benefit of the persons interested in the  
10          estate and shall be conditioned upon the faithful discharge of all duties of  
11          the trust according to law. The [registrar] shall determine that the bond  
12          is executed by an authorized corporate surety, or one or more responsible

13 individual sureties, or that its performance is secured by pledge of  
14 personal property, mortgage on real property or other adequate security.  
15 The [registrar] may permit the amount of the bond to be reduced by the  
16 value of assets of the estate deposited with a domestic banking or trust  
17 company in a manner that prevents their unauthorized disposition. On  
18 petition of the personal representative or another interested person the  
19 [judge] may permit reduction of the amount of the bond, release sureties,  
20 or permit the substitution of another bond with the same or different  
21 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.

#### 1 SECTION 3-306. [Demand for Bond by Interested Person.]

2 (a) Any person apparently entitled to a share of the residue, or to a  
3 devise of personal property estimated to be worth in excess of \$500, or  
4 any creditor having a claim in excess of \$500, may make a written demand  
5 that a personal representative give bond. The demand must be filed with  
6 the [registrar] and a copy mailed to the personal representative, if appointment  
7 and qualification have occurred. Thereupon, bond shall be required. From  
8 the time of receipt of notice and until the filing of the bond, the personal  
9 representative shall refrain from exercising any powers of his office  
10 except as necessary to preserve the estate. Failure of the personal representa-  
11 tive to give suitable bond within thirty (30) days from receipt of notice is cause  
12 for his removal and appointment of a successor personal representative.

13 (b) A bond required by demand of a creditor shall be in the amount  
14 estimated to be necessary to protect the interests of creditors.

15 (c) The amount of a bond required by demand of an heir or devisee  
16 shall be determined by section 3-305 or, in formal proceedings, be the  
17 amount fixed by order.

#### 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.

1 SECTION 3-307. [Terms and Requirements of Bonds.] The following  
2 requirements and provisions apply to any bond required by the foregoing sections:

3 (a) Unless otherwise provided by the terms of the approved bond,  
4 sureties are jointly and severally liable with the personal representative and  
5 with each other.

6 (b) Enforcing liability of surety.

7 (1) Execution of bond is consent to suit. By executing an approved  
8 bond of a personal representative, the surety consents to the jurisdiction  
9 of the probate court which issued letters to the primary obligor in any  
10 proceeding pertaining to the fiduciary duties of the personal representative  
11 and naming the surety as a party defendant, provided that notice of the  
12 proceeding is delivered to the surety or mailed to him by ordinary mail  
13 at his address as listed with the court where the bond is filed.

14                   (2) Probate court proceeding on bond. On petition of a successor  
15 personal representative, any other personal representative of the same  
16 decedent, or any interested person, a proceeding in the [probate] court  
17 may be initiated against a surety for breach of the obligation of the bond  
18 of the personal representative.

19                   (3) Bond not void upon first recovery. The bond of the personal  
20 representative is not void after the first recovery but may be proceeded  
21 upon from time to time until the whole penalty is exhausted.

22                   (c) Limitation of action on bond. No actions or proceedings may be com-  
23 menced against the surety on any matter as to which an action or proceeding  
24 against the primary obligor is barred by adjudication or limitation.

#### Comment

Paragraph (a) is based, in part, on section 109 of the Model Probate Code.  
Paragraph (b) is derived from section 118 of the Model Probate Code.

#### 1                   SECTION 3-308. [Order Restraining Personal Representative.]

2                   (a) On written petition of any person who appears to have an interest  
3 in the estate, the [judge] may order a personal representative to refrain  
4 from performing specified acts of administration, disbursement or distri-  
5 bution, or from exercising any powers or discharging any duties of his office  
6 if it appears to the [judge] that, unless restrained, the personal representative  
7 may take some action which would jeopardize unreasonably the interest of the  
8 applicant or of some other interested person. Persons with whom the  
9 personal representative may transact business may be made parties. The  
10 restraining order shall be effective until the propriety of the proposed action  
11 of the personal representative has been determined or the proceeding dismissed.

12 (b) The [judge] shall cause notice of the restraining order to be  
13 mailed to the personal representative. The notice shall state a time  
14 not sooner than seven days nor later than twenty-one days from the date  
15 and place where the question raised by the application will be considered  
16 in preliminary hearing. At the preliminary hearing the [judge] may dissolve  
17 the restraining order, or dissolve it upon the filing of bond or other security  
18 or assurance that provides reasonable protection for the person requesting  
19 the restraining order, or continue it, with or without modification, pending  
20 a full hearing after notice to all interested parties.

21 (c) A personal representative who disregards a restraining order after  
22 receiving notice thereof may be punished for contempt of court and shall be  
23 liable for any losses occurring as a result thereof.

#### Comment

Cf. section 3-221 which makes provision 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 3-303, is practically in the position of one who, on motion, may be cited to appear before a judge.

1 SECTION 3-309. [Termination of Appointments; General.] Termination  
2 of appointment of a personal representative occurs as indicated in sections  
3 3-310 - 3-313. Termination ends the right and power pertaining to the  
4 office of personal representative as conferred by this Code or any will,  
5 except that a personal representative, at any time prior to distribution or

6 until restrained or enjoined by court order, may perform acts necessary  
7 to protect the estate and may deliver the assets to a successor representative.  
8 Termination does not discharge a personal representative from liability  
9 for transactions or omissions occurring before termination, or relieve  
10 him of the duty to preserve assets subject to his control, to account  
11 therefor and to deliver the assets. Termination shall not affect the jurisdic-  
12 tion of the [probate] court over the personal representative in proceedings  
13 which may be commenced against him, but shall only terminate his status  
14 as personal representative for purposes of any actions which may be  
15 subsequently commenced against him in any other court.

#### 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 the status of the personal representative in actions which may have been commenced against him prior to termination. In such cases, a substitution of successor or special representative should occur if the plaintiff desires to maintain his action against the estate.

It is important to note that "termination" is not "discharge." However, an order of the [judge] entered under 3-701 or 3-702 both terminated the appointment of, and discharges, a personal representative.

#### 1 SECTION 3-310. [Termination of Appointment: Death or Disability.]

2 The death of a personal representative or the appointment of a conservator-  
3 trustee for the estate of a personal representative, terminates his appointment.

4 The representative of the estate of the deceased or disabled personal repre-  
5 sentative shall have the duty to protect assets belonging to the estate being  
6 administered by his decedent or ward and possessed by such decedent or ward

7 at the time his appointment terminated, and has the power to perform  
8 acts necessary for protection. The representative shall account for and  
9 deliver the estate assets to a successor personal representative. The  
10 representative may apply for the appointment of a special or successor  
11 personal representative to carry on the administration of the estate  
12 which was being administered by his decedent or disabled person.

1 SECTION 3-311 [Termination of Appointment; Voluntary.]

2 (a) An appointment of a personal representative terminates as provided  
3 in section 3-703 (c), one year after the filing of a closing statement.

4 (b) An order closing an estate as provided in section 3-701 or 3-702  
5 terminates an appointment of a personal representative.

6 (c) A personal representative may resign his position by filing a  
7 written statement of resignation with the [registrar] after he has given  
8 at least fifteen (15) days written notice to the persons known to be interested  
9 in the estate of his intention to resign. If no one applies or petitions for the  
10 appointment of a successor representative within this time, the filed state-  
11 ment of resignation shall be ineffective unless the appointment of a special  
12 administrator for the estate is secured and the resigning personal representa-  
13 tive delivers the assets of the estate to the special administrator.

Comment

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

An earlier draft provided for automatic termination twelve months following appointment and provided an informal procedure for extending an appointment beyond such time. This scheme, which was designed to encourage prompt settlement of estates, was rejected after considerable discussion. The prevailing view of the Reporters was that automatic

termination would occasion more paper work for personal representatives who, for reasons beyond their control in many cases, could not complete administration in twelve months.

1           SECTION 3-312. [Termination of Appointment; Cause for Removal;  
2           Procedure.]

3           (a) Whenever it appears that the best interests of the estate would  
4           be served, the [judge] may remove a personal representative in a pro-  
5           ceeding as described in (b) of this section. Subject to the best interests  
6           of the estate, cause for termination of appointment exists if it is shown  
7           that a personal representative, or the person seeking his appointment,  
8           misrepresented material facts in the proceedings leading to his appointment,  
9           or that the personal representative has disregarded an order of the [judge],  
10          has ceased to be a resident of the state without designating an agent to  
11          accept service as provided in section 3-206 (b), has become incapable of  
12          discharging his trust effectively, or has mismanaged the estate or failed to  
13          perform any duty pertaining to the office.

14          (b) A person interested in the estate may petition for removal of a  
15          personal representative for cause at any time. Upon filing of the petition,  
16          the [judge] shall fix a time and place for hearing. Notice shall be given by  
17          the petitioner to the personal representative, and to other persons as the  
18          [judge] may order. If not otherwise restrained, as provided in section 3-308,  
19          after receipt of notice of removal proceedings, the personal representative  
20          shall not act except to preserve the estate. If removal is ordered, the [judge]  
21          also shall direct by order the disposition of the assets remaining in the name  
22          of, or under the control of, the personal representative being removed.

### Comment

Thought was given to qualifying (b) 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 sound judgment of interested persons and the judge.

1           SECTION 3-313. [Termination of Appointment; Change of Testacy  
2           Status.] Except as otherwise ordered in formal proceedings, the probate  
3           of a will subsequent to the appointment of a personal representative in  
4           intestacy or under a prior will, or the vacation of an informal probate of  
5           a will subsequent to the appointment of a personal representative thereunder,  
6           shall not terminate the appointment of the personal representative although  
7           his powers may be reduced as provided in section 3-220. Termination  
8           shall occur upon appointment in informal or formal appointment proceedings  
9           of a person entitled to the subsequent appointment. If no request for new  
10          appointment is made within thirty (30) days from expiration of time for  
11          appeal from the order in formal testacy proceedings, or from the informal  
12          probate, changing the right to appointment, the previously appointed  
13          personal representative may upon request be appointed personal representative  
14          under the recently probated will, or as in intestacy, as the case may be.

### Comment

This section and section 3-221 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 testacy?; what will is the last will? Hence, a previously appointed personal representative continues to serve in spite of formal or informal proceedings that may give another a prior right to serve as personal representative. But, if the testacy status is changed in formal proceedings, the petitioner also may request appointment of the person who would be entitled to serve if his assumption concerning the decedent's will

prevails. Provision is made for a situation where all interested persons are content to allow a previously appointed personal representative to continue to serve even though another has a prior right because of a change relating to the decedent's will. It is not necessary for the continuing representative to seek reappointment under the new assumption for section 3-403 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.

1           SECTION 3-314. [Special Administrator; Appointment Proper; Procedure.]

2           A special administrator may be appointed:

3                   (1) informally by the [registrar] on the application of any interested  
4                   person when necessary to protect the estate of a decedent prior to the  
5                   appointment of a general personal representative,

6                   (2) in a formal proceeding by order of the [judge] on the application  
7                   of any interested person upon a finding, after notice to the personal  
8                   representative and hearing, that appointment is necessary to preserve  
9                   the estate, or to secure its proper administration, The appointment  
10                  shall be for a specified time, to perform duties respecting specific  
11                  property, or to perform particular acts, and on other terms as the court  
12                  may direct. When it appears to the [judge] that an emergency exists,  
13                  appointment may be ordered prior to notice and hearing.

Comment

The appointment of a special administrator other than one appointed pending original appointment of a general personal representative must be handled by the [judge]. If a need arises because of temporary absence or anticipated incapacity for delegation of the authority of a personal representative, the problem can be handled without judicial intervention by use of the delegation powers granted to personal representative by section 3-416.

1           SECTION 3 -315. [Special Administrator; Who May Be Appointed.]

2           (a) When a special administrator is to be appointed pending the probate  
3           of a will which is the subject of a pending application or petition for probate,

4 the person named executor in the will shall be appointed if available  
5 and qualified.

6 (b) In other cases, any proper person may be appointed special  
7 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.

1 SECTION 3-316. [Special Administrator; Appointed Informally;  
2 Powers and Duties.] A special administrator appointed by the [registrar]  
3 in informal proceedings pursuant to section 3-314 (1) shall have the power  
4 and authority of any personal representative as necessary to collect,  
5 manage and preserve the assets of the estate and to account therefor to the  
6 general personal representative upon his qualification.

1 SECTION 3-317. [Special Administrator; Formal Proceedings; Power  
2 and Duties.] A special administrator appointed by order of the [judge] in  
3 any formal proceeding shall have the power and authority of a general personal  
4 representative except as limited in the appointment.

1           SECTION 3-318. [Termination of Appointment; Special Administrator.]

2           The appointment of a special administrator terminates in accordance with  
3           the provisions of the order of appointment, or on the appointment of his  
4           successor. In other cases, the appointment of a special administrator  
5           is subject to termination as provided in sections 3-310 through 3-312.

ARTICLE III

Part 4

Duties and Powers of Personal Representatives

1           SECTION 3-401. [Time of Accrual of Duties and Powers.] The

2           duties and powers of a personal representative commence upon the  
3           issuance of his letters. The powers of a personal representative relate  
4           back in time to give his acts occurring prior to appointment the same  
5           effect as those occurring thereafter where beneficial to the estate. A  
6           personal representative may ratify and accept acts on behalf of the estate  
7           done by others where such acts would have been proper for a personal  
8           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 arises upon the issuance of his letters which, under section 3-301, cannot occur until the appointee has qualified. 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 3-416 (16) relates to delegation of authority after appointment.

1           SECTION 3-402. [Priority Among Different Letters.] A person to  
2 whom general letters are first issued has exclusive authority under the  
3 letters until his appointment is terminated or modified. If, through error,  
4 general letters are afterwards issued to another, the first appointed  
5 representative may recover any property of the estate in the hands of  
6 the representative subsequently appointed, but the acts of the latter done  
7 in good faith before notice of the first letters, are not void for want of  
8 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 concerning erroneous dual appointment is derived from recent New York legislation. See section 704, Surrogate's Court Procedure Act.

1           SECTION 3-403. [General Duties; Relation and Liability to Persons  
2 Interested in Estate; Standing to Sue.]

3           (a) A personal representative is a fiduciary who, in addition to the  
4 specific duties expressed in this Code, is under a general duty to settle  
5 and distribute the estate of the decedent in accordance with the terms  
6 of the will and this Code, and as expeditiously and with as little sacrifice  
7 of value as is reasonable under all of the circumstances. He shall use  
8 the authority conferred upon him by this Code, the terms of the will, if any,  
9 any order in proceedings to which he is party, and the rules generally  
10 applicable to fiduciaries, for the best interests of creditors of the decedent  
11 and successors to the estate.

12           (b) A personal representative shall not be surcharged for acts of  
13 administration or distribution if the conduct in question was authorized  
14 at the time. Subject to other obligations of administration, an informally  
15 probated will is authority to distribute according to its terms and informally  
16 issued letters are authority to distribute undivided estate to the heirs of  
17 the decedent if, at the time of distribution, the personal representative  
18 has not received notice of a pending petition in a formal testacy proceeding,  
19 formal appointment proceeding or supervised administration proceeding.  
20 Nothing in this section shall affect the duty of the personal representative  
21 to administer and distribute the estate in accordance with the rights of  
22 claimants, the surviving spouse, any unmarried minor children and any  
23 pretermitted child of the decedent as described elsewhere in this Code.

24           (c) A personal representative of a decedent who was domiciled in this  
25 state at his death has the same standing to sue and be sued in the courts of this  
26 state and the courts of any other jurisdiction as his decedent had immediately  
27 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 3-107.

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 [probate] 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 section 3-404. 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, an informally probated will, or an informal order appointing him to administer on the assumption that the estate is intestate even though formal proceedings occurring later may change the assumption as to whether the decedent died testate or intestate. See section 3-209 concerning the status of an informally probated will, and section 3-201 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 in formal proceeding. See sections 3-609 and 3-706. Thus, a distribution may be "authorized at the time" within the meaning of this section, but be "improper" under the latter sections.

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.

1           SECTION 3-404. [Personal Representative to Proceed Without Court  
2           Order; Exception.]   Except where supervised administration has been  
3           ordered, a personal representative shall proceed expeditiously with the  
4           settlement and distribution of a decedent's estate without adjudication,  
5           order, or direction of the [judge], but he may invoke the jurisdiction of  
6           the [probate] court, in proceedings authorized by this Code, to resolve  
7           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 3-102 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 concerning disputed claims and proceedings to close estates.

1           SECTION 3-405. [Duty of Personal Representatives: Information to  
2           Heirs and Devisees.]   Not later than thirty (30) days after his appointment  
3           every personal representative, except any special administrator or a  
4           person appointed pursuant to a formal appointment proceeding, shall give  
5           information of his appointment to the heirs of the decedent, if his appointment  
6           was made on the assumption that the decedent left no will, to the devisees  
7           if his appointment related to a will, or to heirs and devisees if it appears  
8           that the estate is partially testate. The information shall be delivered or  
9           sent by ordinary mail to each of the foregoing persons known to the personal  
10          representative and for whom he has an address. The information shall  
11          include the name and address of the personal representative, indicate that  
12          it is being sent to persons who appear to have some interest in the estate  
13          being administered, and describe the court where papers relating to the  
14          estate are on file. The personal representative's failure to give this  
15          information shall be a breach of his duty to the persons concerned but  
16          shall not affect the validity of his appointment, powers or other duties.  
17          A personal representative may inform other persons of his appointment  
18          by delivery or ordinary 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. The communication involved is not to be confused with the notice requirements implicit in the due process requirement. The rights of persons other than those who are to get the information here described cannot be cut off except by the running of the three year statute of limitations provided in section 3-233, or by a formal judicial proceeding which will include full notice to all interested persons. The rights of such persons can 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 respect to the status of 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 3-221 or, in connection with a formal closing, as provided by section 3-701.

1           SECTION 3-406. [Duty of Personal Representative; Inventory and  
2           Appraisalment.]    Within three months after his appointment, a personal  
3           representative, who is not a special administrator or a successor to  
4           another representative who has previously discharged this duty, shall  
5           prepare an inventory of property owned by the decedent at the time of  
6           his death, listing it with reasonable detail, and indicating, as to each  
7           item, its fair market value as of the date of the decedent's death, and  
8           the type and amount of any encumbrance that may exist with reference  
9           to any item.

10           The personal representative shall send a copy of the inventory to  
11           all persons interested in the estate except creditors, or he may file  
12           the original of the inventory with the court and furnish a copy to any  
13           interested person who requests it.

#### 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 3-312. Or, an interested person seeking to surcharge a personal representative for losses incurred as a result of his administration might be able to take advantage of any breach of duty concerning inventory. The section provides two ways in which a personal representative may handle an inventory. If the personal representative elects to send copies to all interested persons, information concerning the assets of the estate will not become a part of the records of the probate court. It would still be necessary for the personal representative to give needed information to creditors who request it, because the personal representative owes the duties of a trustee to creditors as well as to the successors of the decedent. The alternative procedure is to file the inventory with the court and give copies to interested persons requesting the same. This procedure would be indicated in estates where a large number of persons are "interested" and 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.

1           SECTION 3-407. [Employment of Appraisers.] The personal  
2 representative may employ a qualified and disinterested appraiser  
3 to assist him in ascertaining the fair market value as of the date of  
4 the decedent's death of any asset the value of which may be subject to  
5 reasonable doubt. Different persons may be employed to appraise  
6 different kinds of assets included in the estate. The names and addresses  
7 of any appraiser shall be indicated on the inventory with the item or  
8 items he appraised.

1           SECTION 3-408. [Duty of Personal Representative; Supplementary  
2 Inventory.] Whenever any property not included in the original inventory  
3 comes to the knowledge of a personal representative, or whenever the  
4 personal representative learns that the value indicated in the original  
5 inventory for any item is erroneous and misleading, he shall make a  
6 supplementary inventory or appraisal showing the market value as  
7 of the date of the decedent's death of the new item or the revised market  
8 value, and the appraisers or other data relied upon, if any, and file it  
9 with the court if the original inventory was filed, or furnish copies thereof  
10 or information thereof to persons interested in the new information.

1           SECTION 3-409. [Duty of Personal Representative; Possession of  
2 Estate.] Every personal representative has a right to, and shall take  
3 possession or control of the decedent's estate, except that property in  
4 the possession of the person presumptively entitled thereto as heir or  
5 devisee shall be possessed by the personal representative only when  
6 reasonably necessary for purposes of administration. The request by  
7 a personal representative for delivery of any property possessed by the

8 heir or devisee shall be conclusive evidence, in any action against the  
9 heir or devisee for possession thereof, that the possession of the property  
10 by the personal representative is reasonably necessary for purposes of  
11 administration. The personal representative shall pay taxes on all property  
12 in his possession. He shall keep buildings and fixtures in his possession  
13 in tenantable repair. He may maintain an action to recover possession of  
14 any property or to determine the title thereto.

Comment

Section 3-101 provides for the devolution of title on death. Section 3-412 defines the status of the personal representative with reference to "title" and "power" in a way that should make it unnecessary to discuss the "title" to decedent's assets which his personal representative acquires. This section deals with the personal representative's duty and right to possess assets. It proceeds from the assumption that it is desirable whenever possible to avoid disruption of possession of the decedent's assets by his devisees or heirs. But, if the personal representative decides that possession of an asset is necessary or desirable for purposes of administration, his judgment is made conclusive in any action for possession that he may have 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 a 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.

1 SECTION 3-410. [Power to Avoid Transfers.] The property liable  
2 for the payment of debts of a decedent shall include all property transferred  
3 by him by any means which is in law void or voidable as against his creditors,  
4 and the right to recover such property, so far as necessary for the payment  
5 of the debts of the decedent, shall be exclusively in the personal representative.

Comment

M.P.C. section 125, with additions.

1           SECTION 3-411. [Property Embezzled or Converted.] If any person  
2           embezzles or converts to his own use any of the personal property of a  
3           decedent before the appointment of a personal representative, the person  
4           shall be liable to return the property or its value to the estate. No person  
5           shall be charged as executor by his own wrong [de son tort.]

Comment

This section is similar to section 129 of the Model Probate Code.

1           SECTION 3-412. [Powers of Personal Representatives; In General.]  
2           Until termination of his appointment a personal representative has the same  
3           power over the title to property of the estate as an absolute owner would  
4           have, in trust however, for the benefit of the creditors and others interested  
5           in the estate. This power may be exercised without notice, hearing, or order  
6           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. 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 the 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 use the protective devices implicit in the several sections of Parts 1 and 3 of this Article to ease their concern. See especially sections 3-105, 3-306, 3-308, and 3-312.

1           SECTION 3-413. [Improper Exercise of Power; Breach of Fiduciary  
2           Duty. If the exercise of power concerning the estate is improper, the  
3           personal representative shall be liable for breach of his fiduciary duty

4 to interested persons for resulting damage or loss to the same extent  
5 as a trustee of an express trust. The exercise of power in violation  
6 of court order, or contrary to the provisions of the will may be breaches  
7 of duty. The rights of purchasers and others dealing with a personal  
8 representative shall be determined as provided in sections 3-414 and  
9 3-415 and may be unaffected by the fact that the personal representative  
10 breached his fiduciary duty in the transaction.

#### Comment

An interested person has two principal remedies to forstall a personal representative from committing a breach of fiduciary duty.

(1) Under section 3-308, 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 3-312, 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 3-102 and 3-104 authorize the joinder of third persons who may be involved in contemplated transactions with a personal representative in proceedings to restrain a personal representative under section 3-308.

1           SECTION 3-414. [Sale or Encumbrance to Personal Representative  
2 Voidable; Exceptions.] Any sale or encumbrance to the personal repre-  
3 sentative, his spouse, agent or attorney, or any corporation or trust in  
4 which he has more than a one-third beneficial interest, is voidable unless,  
5           (1) the transaction was consented to by all interested persons  
6           affected thereby, or approved by the [judge;]

7 (2) the will expressly authorized the transaction by the personal  
8 representative with himself.

9 The title of a purchaser for value without notice of the circumstances  
10 of the transaction with the personal representative is not affected unless  
11 the purchaser should have known of the defect in the title of his seller.

#### 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 that may relate to a sale of assets will not cloud the title created by the sale, unless the purchaser has actual knowledge of the breach. See section 3-415.

1 SECTION 3-415. [Persons Dealing with Personal Representatives,  
2 Protection.] A person dealing with or assisting a personal representative  
3 without actual knowledge that the personal representative is improperly  
4 exercising his power is protected as if the personal representative  
5 properly exercised the power. The person is not bound to inquire whether  
6 the personal representative is properly exercising his power, and is not  
7 bound to inquire concerning the provisions of any will or any order of court that  
8 may affect the propriety of the acts of the personal representative. Except  
9 for restrictions on powers of supervised personal representatives which  
10 are endorsed on letters as provided in section 3-108 no provision in any  
11 will or order of court purporting to limit the power of a personal representa-  
12 tive shall be effective except as to persons with actual knowledge thereof.  
13 A person is not bound to see to the proper application of estate assets paid  
14 or delivered to a personal representative. The protection here expressed  
15 extends to instances where some procedural irregularity or jurisdictional

16 defect including the case where the alleged decedent is found to be alive  
17 occurred in proceedings leading to the issuance of letters. The protection  
18 here expressed is in addition to rather than by substitution for that provided  
19 by comparable provisions of the laws relating to commercial transactions  
20 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 3-403. 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 section 3-105 3-108. 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 6324, Internal Revenue Code.

1 SECTION 3-416. [Transactions Authorized for Personal Representatives;  
2 Exceptions.] Except as restricted or otherwise provided by the will or by  
3 an order in a formal proceeding and subject to the priorities stated in  
4 section 3-602, a personal representative, acting reasonably for the benefit  
5 of the interested persons, may properly:

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

10 (2) receive assets from fiduciaries, or other sources;

11 (3) complete compromise or refuse performance of the  
12 decedent's contracts that continue as obligations of the estate,  
13 as he may determine under the circumstances. In performing  
14 enforceable contracts by the decedent to convey or lease land,  
15 the personal representative, among other possible courses of  
16 action, may:

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

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

25 (4) satisfy written charitable pledges of the decedent irrespective  
26 of whether such pledges constituted binding obligations of the decedent  
27 or were properly presented as claims when, in the judgment of the  
28 personal representative, the decedent would have wanted the pledges  
29 completed under the circumstances;

30 (5) when funds are not needed to meet debts and expenses currently  
31 payable and are not immediately distributable, deposit liquid assets  
32 of the estate, including moneys received from the sale of other assets,  
33 in federally insured interest-bearing accounts or other short-term  
34 loan arrangements that may be reasonable for use by trustees generally;

35 (6) abandon property when, in the opinion of the personal  
36 representative, it is valueless, or is so encumbered, or is in  
37 condition that it is of no benefit to the estate;

38 (7) vote stocks or other securities in person or by general  
39 or limited proxy;

40 (8) pay calls, assessments, and other sums chargeable or  
41 accruing against or on account of securities, unless barred by the  
42 provisions relating to claims;

43 (9) hold a security in the name of a nominee or in other form  
44 without disclosure of the interest of the estate but the personal  
45 representative shall be liable for any act of the nominee in connection  
46 with the security so held;

47 (10) insure the assets of the estate against damage, loss and  
48 liability and himself against liability in respect to third persons;

49 (11) borrow money with or without security to be repaid from  
50 the estate assets or otherwise; and advance money for the protection  
51 of the estate;

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

59           (13) pay taxes, assessments, compensation of the personal  
60           representative, and other expenses incident to the administration  
61           of the estate;

62           (14) sell or exercise stock subscription or conversion rights;  
63           consent, directly or through a committee or other agent, to the  
64           reorganization, consolidation, merger, dissolution, or liquidation  
65           of a corporation or other business enterprise;

66           (15) allocate items of income or expense to either estate income  
67           or principal, as permitted or provided by law;

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

75           (17) prosecute or defend actions, claims, or proceedings in  
76           any jurisdiction for the protection of the estate and of the personal  
77           representative in the performance of his duties;

78           (18) sell, mortgage, or lease any real or personal property  
79           of estate;

80           (19) continue any unincorporated business or venture in which  
81           the decedent was engaged at the time of his death (i) in the same  
82           business form for a period of not more than four months from the  
83           date of appointment of a general personal representative where

84 continuation is a reasonable means of preserving the value of the  
85 business including good will, (ii) in the same business form for any  
86 additional period of time that may be approved by order of the [judge]  
87 in a formal proceeding to which the persons interested in the estate  
88 are parties, or (iii) throughout the period of administration if the  
89 business is incorporated by the personal representative and if none  
90 of the probable distributees of the business who are competent adults  
91 object to its incorporation and retention in the estate;

92 (20) incorporate any business or venture in which the decedent  
93 was engaged at the time of his death;

94 (21) provide for exoneration of the personal representative  
95 from personal liability in any contract entered into on behalf of the  
96 estate;

97 (22) satisfy and settle claims and distribute the estate as  
98 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 (22) and (13) support the other provisions of the Code, particularly section 3-404, which contemplates that personal representatives will proceed with all of the business of administration without court orders.

In part, sub-paragraph (4) involves a substantive question of whether 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.

1           SECTION 3-417. [Powers and Duties of Successor Personal  
2           Representative.] A successor personal representative has the same  
3           power and duty as the original personal representative to complete  
4           the administration and distribution of the estate, as expeditiously  
5           as possible, but he has a duty not to exercise any power which was  
6           expressly made personal to the executor named in the will.

1           SECTION 3-418. [Co-representatives; When Joint Action Required.]  
2           When two or more persons are appointed co-representatives, the con-  
3           currence of all is required on all acts connected with the administration  
4           and distribution of the estate, except: (i) any co-representative may  
5           receive and receipt for property due the estate, (ii) when the concurrence  
6           of all cannot readily be obtained in the time reasonably available for  
7           emergency action, (iii) where any others have delegated their power  
8           to act, or (iv) where the will provides otherwise. Persons dealing with  
9           a co-representative who are actually unaware that another has been  
10          appointed to serve with him shall be as fully protected as if the person  
11          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-representative who abdicates his responsibility to co-administer the estate by a blanket delegation breaches his duty to interested persons

as described by section 3-403. Section 3-416 (16) authorizes delegation, but only that which is reasonable and for the benefit of interested persons.

1           SECTION 3-419. [Powers of Surviving Personal Representative.]

2           Every power exercisable by copersonal representatives may be exercised  
3           by the survivors or survivor of them when the appointment of one is  
4           terminated, unless the terms of the will provide otherwise. Where one  
5           of two or more nominated as coexecutors is not appointed, those appointed  
6           may exercise all the powers incident to the office unless the will otherwise  
7           provides.

Comment

Source, M. P. C. section 102.

1           SECTION 3-420. [Compensation of Personal Representative.]

2           A personal representative is entitled to reasonable compensation for  
3           his services. If a will provides for compensation of the personal  
4           representative, he may renounce the provision before qualifying and  
5           be entitled to reasonable compensation. A personal representative  
6           may also renounce his right to all compensation.

1           SECTION 3-421. [Expenses in Estate Litigation.] When any personal  
2           representative or person nominated as personal representative defends  
3           or prosecutes any proceeding in good faith and with just cause, whether  
4           successful or not, he shall be entitled to receive from the estate his  
5           necessary expenses and disbursements including reasonable attorney's  
6           fees in the proceedings.

Comment

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

ARTICLE III

PROBATE OF WILLS AND ADMINISTRATION OF DECEDENTS' ESTATES

Part 5

Creditors' Claims

1           SECTION 3-501. [Claims Not Paid in Normal Course of Administration.]

2           No action to enforce a claim against a decedent's estate may be revived or  
3           commenced before the appointment of a personal representative. After  
4           appointment of a personal representative and until the estate is closed, all  
5           proceedings and actions to enforce claims against a decedent's estate shall  
6           follow the procedures prescribed by section 3-505. After the estate is closed,  
7           a creditor whose claim has not been barred may recover directly from the  
8           distributees as provided in section 3-705, or from a former personal  
9           representative individually as provided in section 3-706.

Comment

This and succeeding sections are designed to force creditors of decedents to assert their claims against duly appointed personal representatives. Creditors of a decedent are interested persons who may seek the appointment of a personal representative (section 3-205). If no appointment is granted to another within 45 days after the decedent's death, a creditor may be eligible to be appointed if other persons with priority decline to serve or are ineligible (section 3-206). But, if a personal representative has been appointed and has closed the estate under circumstances that leave a creditor's claim unbarred, creditors are permitted to enforce their claims against distributees. The methods for closing estates are outlined in sections 3-701 through 3-703. Termination of appointment under sections 3-309, et seq. may occur though the estate is not closed and so may be irrelevant to the question of whether creditors may pursue distributees.

1           SECTION 3-502. [Notice to Creditors.] Unless notice has already  
2           been given under this section, a personal representative shall upon his  
3           appointment publish a notice in a newspaper of general circulation in the  
4           county once a week for three successive weeks, announcing his appointment  
5           and address, and notifying creditors of the estate to present their claims  
6           within four months from the date of the first publication of the notice or  
7           be forever barred. In addition, the personal representative may mail or  
8           deliver a copy of this notice to any creditor.

Comment

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 3-704, 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 3-703 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.

1           SECTION 3-503. [Statutes of Limitations.] No claim which was barred  
2           by any statute of limitations at the time of the decedent's death shall be allowed  
3           or paid. The running of any statute of limitations is suspended during the  
4           four months following the decedent's death. For purposes of any statute of  
5           limitation, the proper presentation of a claim under section 3-505 is equivalent  
6           to commencement of an action 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 3-504 have not been triggered. Hence, the non-claim and limitation provisions of section 3-504 are not exclusive.

It should be noted also that under sections 3-504 and 3-505 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 3-504 and 3-505, and the three-year limitation of section 3-504 all have potential application to a claim. The first of the three to accomplish a bar applies.

1           SECTION 3-504. [Limitations on Presentation of Claims.]

2           (a) Claims arising before death; nonclaim; limitation. All claims  
3 against a decedent's estate, which arose before the death of the decedent,  
4 including claims of the state and any subdivision thereof, whether due or  
5 to become due, absolute or contingent, liquidated or unliquidated, founded  
6 on contract, tort, or other legal basis, shall be forever barred against the  
7 estate, the personal representative, and the heirs and devisees of the  
8 decedent, unless presented as follows:

9           (1) if notice to creditors has been published,  
10 within four months after the date of the first published notice to  
11 creditors;

12           (2) if notice to creditors has not been published, within three  
13 years after the decedent's death.

14           (b) Claims arising at or after death. All claims against a decedent's  
15 estate which arise at or after the death of the decedent, other than estate  
16 and inheritance taxes, but including other claims of the state and any  
17 subdivision thereof, whether due or to become due, absolute or contingent,  
18 liquidated or unliquidated, founded on contract, tort, or other legal basis,  
19 shall be forever barred against the estate, the personal representative, and  
20 the heirs and devisees of the decedent, unless presented as follows:

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

24 (2) any other claim, within four months after it arises.

25 (c) Liens and liability insurance not affected. Nothing in this section  
26 shall affect or prevent any action or proceeding to enforce any mortgage,  
27 pledge or other lien upon property of the estate, or any action to establish  
28 liability of the decedent or the personal representative for the sole purpose  
29 of enforcing the liability of any insurer of the decedent or of the personal  
30 representative.

#### 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. After discussion, sub-paragraph (b) was 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 3-509 a personal representative is not liable on transactions entered into on behalf of the estate unless he agrees to be personally liable or unless he breaches a duty by making the contract. Creditors of the estate and not of the personal representative thus face a special limitation that runs four months after performance is due from the personal representative. Tort claims normally will involve casualty insurance of the decedent or of the personal representative, and so will fall within the exception of sub-paragraph (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 sub-paragraph (2) of (a) dovetails with the three-year limitation provided in section 3-233 to eliminate most questions of succession that are controlled by state law after three 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.

1           SECTION 3-505. [Manner of Presentation of Claims.] Claims against  
2 a decedent's estate may be presented in the following manners:

3           (1) To the personal representative. The claimant may deliver  
4 or mail to the personal representative a written statement of the  
5 claim indicating its basis, the name and address of the claimant  
6 and the amount claimed. If the claim is not yet due, the date when  
7 it will become due shall be stated. If the claim is contingent, the  
8 nature of the contingency shall be stated. If the claim is secured,  
9 the security shall be described and the intention of the claimant to  
10 (i) surrender the security, (ii) exhaust the security, or (iii) accept  
11 payment of the claim reduced by the value of the security, should be  
12 stated. Omission of matters mentioned in the three preceding  
13 sentences does not invalidate the presentation but the failure of the  
14 claimant to comply with the personal representative's reasonable  
15 requests for additional information is a basis for disallowance of  
16 a claim.

17           (2) Filing in [probate] court. The claimant may file a  
18 written statement of the claim, in the form prescribed by rule, with  
19 the clerk of the [probate] court and deliver or mail a copy of the state-  
20 ment to the personal representative.

21           (3) Action against personal representative. The claimant  
22 may revive against the personal representative any action or suit  
23 pending against the decedent at the time of his death based on a cause  
24 of action which survives death or commence an action against the  
25 personal representative in any court where the personal representative

17 notice of allowance. Failure of the personal representative to mail  
18 notice to a claimant of action on his claim for thirty (30) days after  
19 the time for original presentation of the claim has expired shall have the  
20 effect of a notice of disallowance.

21 (b) By the [probate] court. Upon the petition of the personal  
22 representative or of a claimant in a special proceeding for the purpose,  
23 the probate court may allow in whole or in part any claim or claims  
24 presented to the personal representative or filed with the clerk of the  
25 [probate] court in due time and not barred by subsection (a) of this  
26 section. Notice in this proceeding shall be given to the claimant, the  
27 personal representative and those other persons interested in the estate  
28 as the court may direct by order entered at the time the proceeding is  
29 commenced.

30 (c) In an action against the personal representative. A judgment  
31 in an action against a personal representative to enforce a claim against  
32 a decedent's estate is an allowance of the claim to the extent that it directs  
33 payment from the estate.

34 (d) Interest on allowed claims. Unless otherwise provided in any  
35 judgment in a court other than the [probate] court entered in an action  
36 against the personal representative, allowed claims bear interest at the  
37 legal rate for the period commencing thirty (30) days after the time for  
38 original presentation of the claim has expired unless based on a contract  
39 making a provision for interest, in which case they shall bear interest  
40 in accordance with that provision.

26 may be subjected to jurisdiction, to obtain payment of his claim  
27 against the estate, but the revival or commencement of action  
28 must occur within the time limited for presenting the claim. If  
29 a claim against the estate is presented under subsection (1) or (2),  
30 no action or suit thereon may be revived or commenced more than  
31 thirty (30) days after the personal representative has mailed a notice  
32 of disallowance or more than sixty (60) days after the time for original  
33 presentation of the claim has expired. This does not bar an action against  
34 the personal representative individually for breach of his fiduciary duty  
35 to the claimant.

#### 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 3-406.

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 3-503.

1           SECTION 3-506. [Classification of Claims.] If the applicable assets  
2 of the estate are insufficient to pay all claims in full, the personal representa-  
3 tive shall make payment in the following order:  
4           (1) costs and expenses of administration;  
5           (2) reasonable funeral expenses;  
6           (3) debts and taxes with preference under federal law;  
7           (4) reasonable and necessary medical and hospital expenses  
8 of the last illness of the decedent, including compensation of persons  
9 attending him;

10 (5) debts and taxes with preference under the laws of this state;  
11 but no personal representative shall be required to pay taxes on  
12 property of the decedent unless they are due and payable before any  
13 possession which has been taken by the personal representative  
14 pursuant to this Code has been delivered by him to another;

15 (6) all other claims.

16 No preference shall be given in the payment of any claim over any  
17 other claim of the same class, nor shall a claim due and payable be  
18 entitled to a preference over claims not due.

1 SECTION 3-507. [Allowance of Claims.]

2 (a) By the personal representative. As to claims presented in the  
3 manner described in section 3-504 (a) and (b) within the time limit  
4 prescribed above, the personal representative may mail a notice to any  
5 claimant stating (i) that the claim has been allowed in a stated amount;  
6 (ii) that the claim has been disallowed: or (iii) that the personal repre-  
7 sentative will petition the [probate] court to determine whether the claim  
8 should be allowed. If, after notifying a claimant of allowance of a claim,  
9 the personal representative rescinds the allowance, he shall notify the  
10 claimant of the rescission and of the new response. Every claim which  
11 is disallowed in whole or in part by the personal representative is forever  
12 barred so far as not allowed unless the claimant files a petition for allowance  
13 in the [probate] court or commences an action against the personal representa-  
14 tive not later than thirty (30) days after the mailing of the notice of disallowance  
15 or partial allowance and the notice shall warn the claimant to this effect. For  
16 purposes of the preceding sentence, a notice under (iii) above shall be treated as

1           SECTION 3-508. [Payment of Claims.]

2           (a) Upon the expiration of four months from the date of the first  
3 published notice to creditors, the personal representative shall, after  
4 making provision for homestead, family and support allowances, for  
5 claims already presented which have not yet been allowed or whose  
6 allowance has been appealed, and for claims wh ich may yet be presented,  
7 including costs and expenses of administration, proceed to pay the claims  
8 allowed against the estate in the order of priority hereinbefore prescribed.  
9 A claimant whose claim has been allowed but not paid as provided herein  
10 may, by petition to the [probate] court in a special proceeding for the  
11 purpose, secure an order directing the personal representative to pay  
12 the claim to the extent that funds of the estate are available for such  
13 payment.

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

18                 (1) the payment was made before the expiration of the time  
19                 limit stated in (a) of this section and the personal representative  
20                 failed to require the payee to give adequate security to refund any  
21                 of the payment necessary to pay other claimants; or

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

1           SECTION 3-509. [Individual Liability of Personal Representative.]

2           (a) A personal representative is individually liable on contracts  
3 properly entered into in his fiduciary capacity in the course of administra-  
4 tion of the estate only if he expressly agrees to be.

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

9           (c) Claims based upon contracts, obligations and torts of the types  
10 described in (a) and (b) may be allowed against the estate whether or not  
11 the personal representative is individually liable therefor.

12           (d) The individual liability of the personal representative to third  
13 parties arising from the administration of the estate may be determined  
14 in the same action, suit or [probate] court proceeding in which a claim  
15 against the estate is considered.

16           (e) When there is doubt whether a claim should be allowed against the  
17 estate or against the personal representative as an individual, or both,  
18 a court in which a proceeding or action to enforce the claim is pending  
19 shall direct that notice be given to distributees or major creditors whose  
20 interests will be affected by the result and give them an opportunity to  
21 be heard.

22           (f) When the [probate] court allows a claim against the personal  
23 representative in his individual capacity, the allowance has the same  
24 effect as a judgment against him individually.

### Comment

In the absence of statute a fiduciary owner of property 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 fiduciary property 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.

1           SECTION 3-510. [Claims Not Due.]   A claim which will become  
2           due at a future time is allowable and payable at its discounted value.

### Comment

If the obligation upon which a claim not yet due was founded arose before the enactment of legislation with the effect of this section it may be necessary, for constitutional reasons, to arrange for future full payment of the claim by creating a trust, giving a mortgage, securing a bond from a distributee, or otherwise.

1           SECTION 3-511. [Secured Claims.]   Payment of a secured claim  
2           shall be upon the basis of the amount allowed if the creditor shall  
3           surrender his security; otherwise payment shall be upon the basis of  
4           one of the following:

5                   (1) if the creditor exhausts his security before receiving payment,  
6                   then upon the amount of the claim allowed less the fair value of the  
7                   security; or

8                   (2) if the creditor does not have the right to exhaust his security  
9                   or has not done so, then upon the amount of the claim allowed less

10 the value of the security determined by converting the same into  
11 money according to the terms of the agreement pursuant to which  
12 the security was delivered to the creditor, or by the creditor and  
13 personal representative by agreement, arbitration, compromise  
14 or litigation.

1 SECTION 3-512. [Contingent Claims.] If a contingent claim becomes  
2 absolute before the distribution of the estate, it shall be paid in the same  
3 manner as absolute claims of the same class. In other cases the personal  
4 representative or, on petition of the personal representative or the  
5 claimant in a special proceeding for the purpose, the [probate] court,  
6 may provide for payment in either of the following ways:

7 (1) if the claimant consents, he may be paid the present value  
8 of the claim, taking the contingency into account;

9 (2) future full payment on the happening of the contingency may  
10 be arranged by creating a trust, giving a mortgage, securing a  
11 bond from a distributee or otherwise.

1 SECTION 3-513. [Counterclaims.] In allowing a claim the personal  
2 representative may deduct any counterclaim which the estate has against  
3 the claimant. In determining a claim against an estate a court (including  
4 a [probate] court) shall reduce the amount allowed by the amount of any  
5 counterclaims and, if the counterclaims exceed the claim, render a  
6 judgment against the claimant in the amount of the excess. A counterclaim,  
7 liquidated or unliquidated, may arise from a transaction other than that  
8 upon which the claim is based. A counterclaim may give rise to relief

9 exceeding in amount or different in kind from that sought in the claim.

1 SECTION 3-514. [Execution and Levies Prohibited.] No execution  
2 shall issue upon nor shall any levy be made against any property of the  
3 estate under any judgment against a decedent or a personal representative,  
4 but the provisions of this section shall not be construed to prevent the  
5 enforcement of mortgages, pledges or liens upon real or personal property  
6 in an appropriate proceeding.

1 SECTION 3-515. [Compromise of Claims.] When a claim against the  
2 estate has been presented in any manner, the creditor and personal  
3 representative may, if it appears for the best interests of the estate,  
4 compromise the claim, whether due or not due, absolute or contingent,  
5 liquidated or unliquidated.

1 SECTION 3-516. [Encumbered Assets.] When any assets of the  
2 estate are encumbered by mortgage, pledge or other lien, the personal  
3 representative may pay the encumbrance or any part thereof, renew or  
4 extend any obligation secured by the encumbrance or may convey or  
5 transfer the assets to the creditor in satisfaction of his lien, in whole  
6 or in part, whether or not the holder of the encumbrance has filed a  
7 claim, if it appears to be for the best interest of the estate. Payment  
8 of an encumbrance shall not increase the share of the distributee entitled  
9 to the encumbered assets unless the distributee is entitled to exoneration  
10 under section 2-251.

ARTICLE III

Part 6

Special Provisions Relating to Distribution

1           SECTION 3-601. [Successors' Rights Where No Administration.] In the  
2 absence of administration, the heirs and devisees are entitled to the assets of the  
3 decedent's estate in accordance with the terms of a probated will or the laws of  
4 intestate succession. Devisees may establish title by the probated will to devised  
5 property. Persons entitled to property by homestead allowance, exemption or  
6 intestacy may establish title thereto by proof of the decedent's ownership, his  
7 death, and their relationship to the decedent. Successors take subject to all  
8 charges incident to administration, including the claims of creditors, allowances  
9 of surviving spouse and dependent children, and subject to the rights of others  
10 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 indicates how successors may establish record title in the absence of administration.

1           SECTION 3-602. [Distribution; Order in Which Assets Appropriated;  
2 Abatement.]

3           (a) General rules. Except as provided in subsection (b) and except as pro-  
4 vided in section 2-301 dealing with the shares of pretermitted heirs and in section  
5 2-207 dealing with the share of the surviving spouse who elects to take an elective  
6 share, shares of distributees abate, without any preference or priority as between  
7 real and personal property, in the following order:

8                   (1) property not disposed of by the will;

9 (2) residuary devises;

10 (3) general devises;

11 (4) specific devises.

12 A general devise charged on any specific property or fund is, for purposes of  
13 abatement, deemed property specifically devised to the extent of the value of the  
14 thing on which it is charged. Upon the failure or insufficiency of the thing on  
15 which it is charged, it is deemed a general devise to the extent of this failure  
16 or insufficiency. Abatement within each classification is in proportion to the  
17 amounts of property each of the beneficiaries would have received, had full  
18 distribution of the property been made in accordance with the terms of the will.

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

24 (c) Abatement; sales, contribution. When the subject matter of a pre-  
25 ferred devise is sold or used incident to administration, abatement shall be  
26 achieved by appropriate adjustments in, or contribution from, other interests  
27 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 lay down rules which may be regarded as approximating what testators generally may be deemed to 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.

1           [SECTION 3-602A. [Distribution; Order in Which Assets Appropriated;  
2 Abatement.] (addendum for adoption in community property states)

3           [(a) and (b) as above.]

4           (c) Mixed estates; Apportionment of debts and expenses of administration.

5 When an estate of a decedent consists partly of separate property, of community  
6 property, and of quasi-community property, or of any two kinds thereof, the  
7 debts and expenses of administration shall be apportioned and charged against  
8 the different kinds of property in proportion to the value thereof.

9           [(d) same as (c) in common law state.] ]

#### Comment

(c) is suggested for inclusion in section 3-602 in a community property state. Its inclusion causes (c) as drafted for common law states to be re-designated (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. The exact content of the insertion suggested here would vary, for example, if the adopting state did not accept the quasi-community property concept.

1           SECTION 3-603. [Right of Retainer.] The amount of the indebtedness of  
2 a distributee to the estate if due, or its present worth, if not due, shall be offset  
3 against the distributee's interest; but the distributee shall have the benefit of  
4 any defense which would be available to him in a direct proceeding for recovery  
5 of the debt.

1           SECTION 3-604. [Interest on General Pecuniary Devise.] General pe-  
2 cuniary devises bear interest at the legal rate for a period beginning one year  
3 from the first appointment of a personal representative until payment, unless a  
4 contrary intent is indicated by the will.

1           SECTION 3-605. [Penalty Clause for Contest Void.] A provision in a  
2 will purporting to penalize any interested person for contesting the will or  
3 instituting other proceedings relating to the estate is void if probable cause  
4 exists for instituting proceedings.

1           SECTION 3-606. [Distribution in Kind; Valuation; Method.] Subject to  
2 contrary terms of any will and the needs of administration, the assets of a  
3 decedent's estate shall be distributed in kind to the extent possible through  
4 application of the provisions herein.

5           (a) A specific devisee shall receive distribution of the thing devised to him.

6           (b) Any homestead or family allowance or devise payable in money may  
7 be satisfied by value in kind provided

8                   (1) the person entitled to the payment has not demanded payment  
9 in cash;

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

12                   (3) no residuary devisee has requested that the asset in question  
13 remain a part of the residue of the estate.

14           (c) For the purpose of valuation under subsection (b) securities regularly  
15 traded on recognized exchanges, when distributed in kind, shall be valued at the  
16 price for the last sale of like securities traded on the business day prior to  
17 distribution or if no sale on that day at the median between amounts bid and offered  
18 at the close of that day. Assets consisting of sums owed the decedent or the  
19 estate by solvent debtors as to which there is no known dispute or defense, shall  
20 be valued at the sum due with accrued interest, or discounted to the date of

21 distribution. For assets which do not have readily ascertainable values, a  
22 valuation as of a date not more than 30 days prior to the date of distribution, if  
23 otherwise reasonable, controls. For purposes of facilitating distribution, the  
24 personal representative may ascertain the value of the assets as of the time of  
25 the proposed distribution in any reasonable way, including, the employment of  
26 qualified appraisers, even though the assets may have been previously appraised.

27 (d) The residuary estate shall be distributed in kind when there is no  
28 objection to the proposed distribution, or when it is practicable to distribute  
29 undivided interests. In other cases, residuary property may be converted into  
30 cash for distribution.

31 After the probable charges against the estate are known, the personal  
32 representative may mail or deliver a proposal for distribution to all persons  
33 who have a right to object to the proposed distribution. The right of any distri-  
34 butee to object to the proposed distribution if not waived in writing, terminates  
35 if he fails to object in writing received by the personal representative within  
36 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.

1 SECTION 3-607. [Distribution in Kind; Evidence.] When distribution in  
2 kind is made, the personal representative shall execute an instrument or deed of  
3 distribution assigning, transferring or releasing the assets to the distributee as  
4 evidence of the distributee's title to the property.

Comment

This and sections following should be read with section 3-409 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.

1           SECTION 3-608. [Distribution in Kind; Title of Distributees.] The title  
2 of the distributee who shall receive from the personal representative an instrument  
3 or deed of distribution of assets in kind is conclusive against all persons interested  
4 in the estate, except that the personal representative may recover the assets or  
5 their value upon a finding that the distribution was improper.

Comment

The purpose of this section is to channel controversies that may arise among successors of a decedent because of improper distributions through the personal representative who made the distribution, or a successor personal representative.

1           SECTION 3-609. [Improper Distribution; Liability of Distributee.] A  
2 distributee of property improperly distributed or a claimant who was improperly  
3 paid, is liable to return the property received if he has it or its value unless the  
4 distribution or payment can no longer be questioned because of adjudication or  
5 limitation. If a distributee has disposed of any property improperly distributed  
6 to him his liability shall be the lower of the value of the property on the date of  
7 distribution or the value on the date of disposition.

Comment

The term "improperly" as used in this section must be read in light of section 3-403 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 a matter that must involve adjudications. Thus, a distribution may be "authorized

at the time" as contemplated by section 3-403, and still be "improper" under this section. Section 3-403 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.

1           SECTION 3-610. [Purchasers from Distributees Protected.] If property  
2 distributed in kind is sold to a purchaser for value by a distributee who has  
3 received an instrument or deed of distribution from the personal representative,  
4 the purchaser takes good title free of any claims of the estate and incurs no  
5 personal liability to the estate irrespective of whether the distribution was  
6 proper. To be protected under this provision, a purchaser need not inquire  
7 whether a personal representative acted properly in respect to a distribution in  
8 kind.

#### Comment

The words "instrument or deed of distribution" are explained in section 3-607. 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 3-601.

1           SECTION 3-611. [Partition for Purpose of Distribution.] When two or  
2 more heirs or devisees are entitled to distribution of undivided interests in any  
3 real or personal property of the estate, the personal representative or one or  
4 more of the heirs or devisees may petition the [judge] prior to the formal or  
5 informal closing of the estate, to make partition. After notice to the interested  
6 heirs or devisees, the [judge] shall partition the property in the same manner as  
7 provided by the law for civil actions of partition. The [judge] may direct the  
8 personal representative to sell any property which cannot be partitioned without  
9 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 3-801.) If court determination is necessary, the court with jurisdiction to administer the estate has jurisdiction to partition the property.

1           SECTION 3-612. [Disposition of Unclaimed Assets.]

2           (a) Heirs unknown. If there is no known heir of the decedent, all of his  
3 net estate not disposed of by will shall be paid to the [state treasurer] to become  
4 a part of the [state escheat fund].

5           (b) Unclaimed property or money. If any distributee or claimant cannot  
6 be found, the personal representative shall distribute the share of the absentee  
7 to his conservator-trustee, if any, otherwise to the [state treasurer] to become  
8 a part of the [state escheat fund].

9           (c) Refund of money so paid. The money received by [state treasurer]  
10 shall be paid to the person entitled on proof of his right thereto or, if the [state  
11 treasurer] refuses or fails to pay, the person may petition the [judge] which  
12 appointed the personal representative, whereupon the [judge] upon notice to the  
13 [state treasurer] may determine the person entitled thereto and order the  
14 [treasurer] to pay the same to him. No interest shall be allowed thereon and  
15 the distributee or claimant shall pay all costs and expenses incident to the pro-  
16 ceeding. If no petition is made to the [judge] within eight years after payment to  
17 the [state treasurer], the right of recovery is barred.

1           SECTION 3-613. [Distribution to Person Under Disability.] A personal  
2 representative may discharge his obligation to distribute to any person under  
3 legal disability by distributing to his conservator-trustee, or any other person  
4 authorized 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.

1           SECTION 3-614. [Apportionment of Estate Taxes.]

2           (a) Definitions. For purposes of this section:

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

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

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

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

15                   (5) "tax" means the federal estate tax and the additional inheritance  
16                   tax provided by \_\_\_\_\_ and interest and penalties imposed in addition  
17                   to the tax;

18                   (6) "fiduciary" means executor, administrator of any description,  
19                   or trustee.

20           (b) Apportionment among interested persons; valuations; testamentary  
21 apportionment. Unless the will otherwise provides, the tax shall be apportioned  
22 among all persons interested in the estate. The apportionment shall be made in

23 the proportion that the value of the interest of each person interested in the  
24 estate bears to the total value of the interests of all persons interested in the  
25 estate. The values used in determining the tax shall be used for that purpose.  
26 In the event the decedent's will directs a method of apportionment of tax dif-  
27 ferent from the method described in this act, the method described in the will  
28 shall control.

29 (c) Apportionment proceedings; jurisdiction; equitable apportionment;  
30 penalties and interest; charging fiduciary; court determination of amount of tax.

31 (1) the [probate] court where venue over the administration of the  
32 estate of a decedent lies, may on petition for the purpose determine the  
33 apportionment of the tax;

34 (2) if the [probate] court finds that it is inequitable to apportion  
35 interest and penalties in the manner provided in subsection (b), because  
36 of special circumstances, it may direct apportionment thereof in the  
37 manner it finds equitable;

38 (3) if the [probate] court finds that the assessment of penalties  
39 and interest assessed in relation to the tax is due to delay caused by the  
40 negligence of the fiduciary, the court may charge the personal representa-  
41 tive with the amount of the assessed penalties and interest;

42 (4) in any suit or judicial proceeding to recover from any person  
43 interested in the estate the amount of the tax apportioned to the person  
44 in accordance with this act, the determination of the [probate] court in  
45 respect thereto shall be prima facie correct.

46 (d) Withholding of tax; recovery from estate; bond of distributee.

47 (1) the personal representative or other person in possession of

48 the property of the decedent required to pay the tax may withhold from any  
49 property distributable to any person interested in the estate, upon its  
50 distribution to him, the amount of tax attributable to his interest. If the  
51 property in possession of the personal representative or other person re-  
52 quired to pay the tax and distributable to any person interested in the  
53 estate is insufficient to satisfy the proportionate amount of the tax deter-  
54 mined to be due from the person, the personal representative or other  
55 person required to pay the tax may recover the deficiency from the person  
56 interested in the estate. If the property is not in the possession of the  
57 personal representative or the other person required to pay the tax, the  
58 personal representative or the other person required to pay the tax may re-  
59 cover from any person interested in the estate the amount of the tax ap-  
60 portioned to the person in accordance with this act;

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

65 (e) Exemptions; allowance; relationship of donee; foreign taxes; tax  
66 credits; property includable in computation.

67 (1) in making an apportionment, allowances shall be made for any  
68 exemptions granted, any classification made of persons interested in the  
69 estate and for any deductions and credits allowed by the law imposing the  
70 tax;

71 (2) any exemption or deduction allowed by reason of the relationship  
72 of any person to the decedent or by reason of the purposes of the gift shall

73 inure to the benefit of the person bearing such relationship or receiving  
74 the gift; except that when an interest is subject to a prior present interest  
75 which is not allowable as a deduction, the tax apportionable against the  
76 present interest shall be paid from principal;

77 (3) any deduction for property previously taxed and any credit  
78 for gift taxes or death taxes of a foreign country paid by the decedent or  
79 his estate shall inure to the proportionate benefit of all persons liable to  
80 apportionment;

81 (4) any credit for inheritance, succession or estate taxes or taxes  
82 in the nature thereof in respect to property or interests includable in the  
83 estate shall inure to the benefit of the persons or interests chargeable with  
84 the payment thereof to the extent that, or in proportion as the credit  
85 reduces the tax;

86 (5) to the extent that property passing to or in trust for a surviving  
87 spouse or any charitable, public or similar gift or bequest does not con-  
88 stitute an allowable deduction for purposes of the tax solely by reason of  
89 an inheritance tax or other death tax imposed upon and deductible from  
90 the property, the property shall not be included in the computation pro-  
91 vided for in section (b) hereof, and to that extent no apportionment shall  
92 be made against the property. The sentence immediately preceding shall  
93 not apply to any case where the result will be to deprive the estate of a  
94 deduction otherwise allowable under section 2053 (d) of the Internal  
95 Revenue Code of 1954 of the United States, relating to deduction for state  
96 death taxes on transfers for public, charitable or religious uses.

97 (f) Income interests; life or temporary interests; charging corpus.

98 No interest in income and no estate for years or for life or other temporary  
99 interest in any property or fund shall be subject to apportionment as between  
100 the temporary interest and the remainder. The tax on the temporary interest  
101 and the tax, if any, on the remainder shall be chargeable against the corpus  
102 of the property or funds subject to the temporary interest and remainder.

103 (g) Proceedings for recovery of tax; commencement; liability of  
104 fiduciary; apportionment of amount recovered. Neither the personal repre-  
105 sentative nor other person required to pay the tax shall be under any duty to  
106 institute any suit or proceeding to recover from any person interested in the  
107 estate the amount of the tax apportioned to the person until the expiration of  
108 the three months next following final determination of the tax. A personal  
109 representative or other person required to pay the tax who institutes the suit  
110 or proceeding within a reasonable time after the three months' period shall  
111 not be subject to any liability or surcharge because any portion of the tax  
112 apportioned to any person interested in the state was collectable at a time  
113 following the death of the decedent but thereafter became uncollectable. If  
114 the personal representative or other person required to pay the tax cannot  
115 collect from any person interested in the estate the amount of the tax appor-  
116 tioned to the person, the amount not recoverable shall be equitably apportioned  
117 among the other persons interested in the estate, who are subject to appor-  
118 tionment.

119 (h) Foreign fiduciaries and estates; tax credits.

120 (1) a personal representative acting in another state or a  
121 person required to pay the tax domiciled in another state may insti-  
122 tute an action in the courts of this state and may recover a proportionate

123 amount of the federal estate tax, of an estate tax payable to another  
124 state or of a death duty due by a decedent's estate to another state,  
125 from a person interested in the estate who is either domiciled in this  
126 state or who owns property in this state subject to attachment or  
127 execution. For the purposes of the action the determination of appor-  
128 tionment by the court having jurisdiction of the administration of the  
129 decedent's estate in the other state shall be prima facie correct.

130 (i) Construction. This section embodies the Uniform Estate Tax Appor-  
131 tionment Act and shall be so construed as to effectuate its general purpose to  
132 make uniform the law of those states which enact it.

#### Comment

Section 3-614 copies the Uniform Estate Tax Apportionment Act without change.

ARTICLE III

Part 7

Closing Estates

1           SECTION 3-701. [Formal Proceedings Terminating Administration;  
2           Testate or Intestate; Order of General Protection.] A personal representa-  
3           tive or any interested person may petition for an order of complete settlement  
4           of the estate. The personal representative may petition after the time has  
5           passed for presenting claims which arose prior to the death of the decedent  
6           and any other interested person may petition after one year from the appoint-  
7           ment of the original personal representative. The petition may request the  
8           [judge] to determine testacy, if not previously determined, to consider the  
9           final account or compel or approve an accounting and distribution, to con-  
10          strue any will or determine heirs and adjudicate the final settlement and  
11          distribution of the estate. After notice to all interested persons and hearing,  
12          the [judge] may enter an order or orders, on appropriate conditions, deter-  
13          mining the persons entitled to distribution of the estate, and, as circumstances  
14          require, approving settlement and directing or approving distribution of the  
15          estate and discharging the personal representative from further claim or  
16          demand of any interested person.

1           SECTION 3-702. [Formal Proceedings Terminating Testate Adminis-  
2           tration; Order of Limited Protection.] A personal representative adminis-  
3           tering an estate under an informally probated will or any devisee under an  
4           informally probated will may petition for an order of limited settlement of  
5           the estate. The personal representative may petition after five months, and  
6           a devisee may petition after one year, from the appointment of the original

7 personal representative. The petition may request the [judge] to consider  
8 the final account or compel or approve an accounting and distribution, to  
9 construe any will and adjudicate final settlement and distribution of the  
10 estate. After notice to all devisees and the personal representative and  
11 hearing, the [judge] may enter an order or orders, on appropriate condi-  
12 tions, determining the persons entitled to distribution of the estate under  
13 the will, and, as circumstances require, approving settlement and direct-  
14 ing or approving distribution of the estate and discharging the personal  
15 representative from further claim or demand of any devisee who is a party  
16 to the proceeding and those he represents. If it appears that a part of the  
17 estate is intestate, the proceedings shall be dismissed or amendments made  
18 to meet the provisions of section 3-701.

Comment on Sections 3-701 and 3-702

Section 3-702 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. Section 3-701 permits a final determination of the rights between each other and against the personal representative of all persons interested in an estate.

1 SECTION 3-703. [Closing Estates; By Sworn Statement of Personal  
2 Representative.]

3 (a) Unless prohibited by order of the [probate] court and except for  
4 estates being administered by supervised personal representatives, a  
5 personal representative may close an estate by filing with the court no  
6 earlier than 6 months from the date of original appointment of a general  
7 personal representative for the estate, a verified statement stating that the  
8 personal representative has:

9 (1) published notice to creditors as provided by section  
10 3-502 and that the first publication occurred more than 5 months  
11 prior to the date of the statement.

12 (2) fully administered the estate of the decedent by making  
13 payment, settlement or other disposition of all claims which were  
14 presented, expenses of administration and estate, inheritance and  
15 other death taxes, except as specified in the statement, and that the  
16 assets of the estate have been distributed to the persons entitled.  
17 If certain claims remain undischarged, it shall state whether the  
18 personal representative has distributed the estate subject to possible  
19 liability with the agreement of the distributees, or has established a  
20 trust for the benefit of claimants and distributees, as their interests  
21 may appear, or state in detail other arrangements which have been  
22 made to accommodate outstanding liabilities.

23 (3) sent a copy thereof to all distributees of the estate and  
24 to all creditors or other claimants of whom he is aware whose claims  
25 are neither paid nor barred, and has furnished a full account in writ-  
26 ing of his administration to the distributees whose interests are  
27 affected thereby.

28 (b) After one year has elapsed from the filing of a statement closing  
29 administration, and if no actions or proceedings involving the personal repre-  
30 sentative are then pending in the probate court the appointment of the personal  
31 representative terminates.

Comment

Section 3-311 (a) makes express reference to subsection (b) of this section. Section 3-309 describes the significance of "termination."

1           SECTION 3-704. [Liability of Distributees to Claimants.] After  
2 an estate has been closed and subject to section 3-706, a claim not barred  
3 may be prosecuted in an action against one or more distributees. No dis-  
4 tributee shall be liable to claimants for amounts in excess of the value of  
5 his distribution. Any distributee who shall have notified other distributees  
6 of the demand made upon him by the claimant in sufficient time to permit  
7 them to join in any proceeding in which the claim was asserted against him  
8 shall have a right of contribution against other distributees. As between  
9 distributees, each shall bear the cost of satisfaction of unbarred claims as  
10 if the claim had been satisfied before distribution.

1           SECTION 3-705. [Limitations on Proceedings Against Personal  
2 Representative.] Unless previously barred by adjudication, the rights of  
3 successors and of creditors whose claims have not otherwise been barred  
4 shall be forever barred, except as provided in the closing statement, against  
5 the personal representative for breach of fiduciary duty unless a proceeding  
6 or action to assert the same is commenced within 6 months after the filing  
7 of the closing statement. The rights thus barred do not include rights to  
8 recover from a personal representative for fraud, misrepresentation or non-  
9 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 section 3-508. 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 within the period described here. A personal representative may, however, use section 3-701, or, where appropriate, 3-702 to secure greater protection.

1           SECTION 3-706. [Limitations on Actions and Proceedings Against  
2 Distributees.] Unless previously adjudicated in a formal testacy proceed-  
3 ing or in a proceeding settling the accounts of a personal representative or  
4 otherwise barred, the right of any person claiming as heir or devisee of the  
5 decedent or as a creditor of the decedent or of his estate, to recover from the  
6 distributees, property improperly distributed or the value thereof, shall be  
7 forever barred at the later of:

8                   (1) three years from the decedent's death;

9                   (2) one year from the time of distribution thereof.

10 This section shall not bar recovery of property or value received as the  
11 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 3-233 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 3-233 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 3-231. (3) The limitation of this section ends the possibility of appointment of a personal representative to correct an erroneous distribution as mentioned in sections 3-705 and 3-708. If there have been no adjudications under section 3-230, or possibly 3-701 or 3-702, 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.

1           SECTION 3-707. [Certificate Discharging Liens Securing Fiduciary Performance.] After his appointment has terminated, the personal  
2           representative, his sureties, or any successor of either, upon filing of a  
3           verified application that, so far as is known by the applicant, no action  
4           concerning the estate is pending in any court, is entitled to receive a certificate from the [probate] court that the personal representative has fully  
5           administered the estate in question and is finally discharged from any and  
6           all claims and demands relating thereto. The certificate shall, upon proper  
7           filing or registration, discharge any lien on any property given to secure the  
8           obligation of the personal representative in lieu of bond or any surety, but  
9           shall not foreclose possible action against the personal representative or the  
10          surety for fraud, misrepresentation or nondisclosure.  
11  
12

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 3-307.

1           SECTION 3-708. [Subsequent Administration] If, after an estate  
2           has been settled and the personal representative discharged or after one  
3           year after a closing statement has been filed, other property of the estate  
4           shall be discovered, or for other proper cause, the [judge] upon the petition  
5           of any interested person and upon notice as it may direct, may appoint the  
6           same or a successor personal representative, or make other appropriate  
7           order. If a new appointment is made and unless the [judge] shall otherwise

8 order, the provisions of this Code shall apply as appropriate; but no claim  
9 previously barred can be asserted in the reopened administration.

## ARTICLE III

### Part 8

#### Compromise of Controversies

1           SECTION 3-801. [Private Agreements Among Successors to  
2 Decedent Binding on Personal Representative.] Subject to the rights of  
3 creditors and taxing authorities, competent successors may agree among  
4 themselves to alter the interests, shares or amounts to which they are  
5 entitled under the will of the decedent, or under the laws of intestacy, in  
6 any way that they provide in a written contract executed by all who are  
7 affected by its provisions. A personal representative shall abide by the  
8 terms of the agreement subject to his obligation to administer the estate  
9 for the benefit of creditors, to pay all taxes and costs of administration,  
10 and to carry out the responsibilities of his office for the benefit of any suc-  
11 cessors of the decedent who are not parties. Personal representatives of  
12 decedents' estates are not required to see to the performance of trusts when  
13 the trustee thereof is another person who is willing to accept the trust.  
14 Accordingly, devisee-trustees are successors for the purposes of this sec-  
15 tion. Nothing herein shall relieve trustees of any duties owed to beneficiaries  
16 of trusts.

#### Comment

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 concern to the personal representative. It is contemplated that future drafts of provisions for Article VI, or for a separate article that has not yet been identified may contain optional procedures which will extend the safeguards available to personal representatives to trustees of both inter vivos and testamentary trusts.

1           SECTION 3-802. [Proceeding for Approval of Agreements Involving  
2 Inalienable Interests, or Interests of Persons Unable to Contract.] Notwith-  
3 standing the nonconcurrence or disapproval of any testamentary trustee, a  
4 compromise of any controversy as to admission to probate of any instrument  
5 offered for formal probate as the will of a decedent; the construction, validity  
6 or effect of any probated will; the rights or interests in the estate of the  
7 decedent, of any successor; or the administration of the estate; whether or  
8 not there is any trust or inalienable interest, present or future, which may  
9 be affected by the compromise, shall, if approved in a formal proceeding in  
10 the probate court for that purpose, be binding on all the parties thereto,  
11 including those unborn, unascertained or who could not be located. No com-  
12 promise shall in any way impair the rights of creditors or of taxing authori-  
13 ties who are not parties thereto. The procedure for securing court approval  
14 is as follows:

15           (1) Execution of compromise agreement by competent persons.

16           The terms of the compromise shall be set forth in an agreement in  
17 writing which shall be executed by all competent persons having bene-  
18 ficial interests whether or not alienable, or claims which will or may  
19 be affected by the compromise. But execution by any person whose  
20 identity cannot be ascertained or whose whereabouts is un known and  
21 cannot after diligent search be ascertained is not required.

22           (2) Submission to court for execution by fiduciaries. Any

23 interested person may then submit the agreement to the court for its  
24 approval and for the purpose of directing the execution thereof by the  
25 personal representative, by the trustee of every testamentary trust

26 which will be affected by the compromise, and by the conservator-  
27 trustee of the estates of disabled persons and by the guardians ad  
28 litem of unborn and unascertained persons and of persons whose  
29 present existence or whereabouts is unknown and cannot after dili-  
30 gent search be ascertained, who might be affected by the compromise.

31 (3) Appointment of guardian ad litem. The court shall  
32 appoint a guardian ad litem to represent any person who has or may  
33 have an interest which may be affected by the compromise but whose  
34 present existence or whereabouts cannot after diligent search be  
35 ascertained, or who is unborn or who is a minor or otherwise dis-  
36 abled and has no conservator-trustee.

37 (4) Order approving agreement and directing execution by  
38 fiduciaries. Upon due notice, in the manner directed by the court,  
39 to all interested persons in being, or to their conservator trustees,  
40 and to the guardians ad litem of all unborn or missing persons, and  
41 to the personal representative of the estate and to all trustees of  
42 trusts which will be affected by the compromise, the court shall,  
43 if it finds that the contest or controversy is in good faith and that  
44 the effect of the agreement upon the interests of persons represented  
45 by fiduciaries is just and reasonable, make an order approving the  
46 agreement and directing all fiduciaries to execute the agreement.  
47 Upon the making of the order and the execution of the agreement, all  
48 further disposition of the estate shall be in accordance with the terms  
49 of the agreement.

ARTICLE III

Part 9

Collection of Personal Property by Affidavit and Summary  
Administration Procedure for Small Estates

1 SECTION 3-901. [Collection of Personal Property by Affidavit.]

2 (a) Thirty days after the death of a decedent, any person indebted  
3 to the decedent or having possession of tangible personal property or an  
4 instrument evidencing a debt, obligation, stock or chose in action belong-  
5 ing to the decedent shall make payment of the indebtedness or deliver the  
6 tangible personal property or the instrument evidencing the debt, obliga-  
7 tion, stock or chose in action to the successor or successors of the decedent  
8 upon an affidavit made by or on behalf of the successor or successors stating:

9 (1) the value of the entire estate, wherever located, less  
10 liens and encumbrances, does not exceed \$5,000; and

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

12 and

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

15 (4) the claiming successor or successors are entitled to the  
16 property.

17 (b) A transfer agent of any security shall change the registered  
18 ownership on the books of a corporation from the decedent to the successor  
19 or successors upon the presentation of an affidavit as provided in (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 3-901 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.

1           SECTION 3-902. [Effect of Affidavit.] The person paying, deliver-  
2   ing, transferring, or issuing personal property or the evidence thereof  
3   pursuant to affidavit shall be discharged and released to the same extent as  
4   if he dealt with a personal representative of the decedent, and he shall not  
5   be required to see to the application of the personal property or evidence  
6   thereof or to inquire into the truth of any statement in the affidavit. If any  
7   person to whom an affidavit is delivered refuses to pay, deliver, transfer,  
8   or issue any personal property or evidence thereof, it may be recovered or  
9   its payment, delivery, transfer, or issuance compelled in an action brought  
10  for the purpose by or on behalf of the persons entitled thereto upon proof of  
11  their right. Any person to whom payment, delivery, transfer or issuance is  
12  made shall be answerable and accountable therefor to any personal represen-  
13  tative of the estate or to any other person having a superior right.

#### Comment

Sections 3-901 and 3-902 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.

1           SECTION 3-903. [Small Estates; Summary Administrative Procedure.]  
2   If it appears from the inventory and appraisalment that the value of the entire  
3   estate, less liens and encumbrances, does not exceed homestead allowance,  
4   exempt property, family allowance, costs and expenses of administration,

5 reasonable funeral expenses, and reasonable and necessary medical and  
6 hospital expenses of the last illness of the decedent, the personal represen-  
7 tative may, without giving notice to creditors, immediately disburse and  
8 distribute the estate to the persons entitled thereto, and file a closing  
9 statement as described in section 3-904.

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.

1 SECTION 3-904. [Small Estates; Closing by Sworn Statement of  
2 Personal Representative.]

3 (a) Unless prohibited by order of the [probate] court and except  
4 for estates being administered by supervised personal representatives, a  
5 personal representative may close an estate administered under the summary  
6 procedures of section 3-903 by filing with the court, at any time after dis-  
7 bursement and distribution of the estate, a verified statement stating that:

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

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

17 (3) the personal representative has sent a copy of the closing

18 statement to all distributees of the estate and to all creditors or  
19 other claimants of whom he is aware whose claims are neither  
20 paid nor barred, and has furnished a full account in writing of his  
21 administration to the distributees whose interests are affected  
22 thereby.

23 (b) After one year has elapsed from the filing of a statement closing  
24 administration, and if no actions or proceedings involving the personal  
25 representative are then pending in the [probate] court the appointment of the  
26 personal representative terminates.

27 (c) A closing statement filed under this section shall have the same  
28 effect as provided in sections 3-704 and 3-706.

#### Comment

The personal representative may elect to close the estate under section 3-702 in order to secure the greater protection offered by that procedure.

## ARTICLE IV OF THE UNIFORM PROBATE CODE

### Foreign Personal Representatives; Ancillary Administration

(Professor Allan D. Vestal)

This Article presents the law applicable in estate problems which involve more than a single state. It covers the powers and responsibilities in the adopting state of personal representatives appointed in foreign states, that is, those personal representatives named in domiciliary administrations. It should be noted that Article IV applies only to personal representatives appointed in the United States and in certain countries, listed in Part 1, which have common law backgrounds.

The approach of the entire Article is to attempt to unify and simplify estate administration in spite of the involvement of more than one state.

The second part of Article IV deals with the powers of foreign personal representatives in a jurisdiction adopting the Uniform Probate Code. There are different types of power which may be exercised. First, a foreign personal representative has the power under section 4-201 to receive payments of debts owed to the decedent or to accept delivery of property belonging to the decedent. The foreign personal representative provides an affidavit indicating the date of death of the non-resident 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 three months after the death of the decedent. When made in good faith the payment operates as a discharge of the debtor. A protection for local creditors of the decedent is provided in section 4-203 under which local debtors of the non-resident decedent can be notified of the claims which local creditors have against the estate. This notification will prevent payment under this provision.

A second type of power is provided in section 4-204 to 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 provided for in section 4-208. Under this section, ancillary letters of administration can be granted in a formal proceeding. These can be granted either to a foreign personal representative, who then would become a foreign and local personal representative, or to one theretofore not connected with the estate. Section 4-210 provides for preference for the foreign representative in appointing the local representatives and thus promotes unified administration. Ancillary administration under Article IV is supervised administration as provided for in Section 3-109 and the personal representative is limited as provided in Section 3-110.

Several different sections of Article IV provide for transfer of assets and funds to the domiciliary administration in the foreign state. Provision is made for the filing of claims in an ancillary administration. Section 4-214 provides for a barring of claims in the ancillary administration if they are barred by a non-claim statute or a statute of limitations in the state where the creditor is domiciled.

The ancillary nature of the proceeding in the non-domiciliary jurisdiction is clearly recognized in section 4-217 which provides that, "Any valid action taken in a proceeding at the decedent's domicile may be implemented by a proceeding in this state at any time." This indicates that local limitations will not bar the local implementation of actions taken in the domiciliary jurisdiction.

Part 3 provides for power in the local court over ancillary and foreign personal representatives. In the case of ancillary administration letters will be issued only upon the filing of an irrevocable power of attorney for the acceptance of service of process. This establishes the jurisdiction of the court over the ancillary representative in all actions or proceedings related to the administration of the estate in the local state. It is also 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 the local or the local and foreign personal representative "unless it resulted from fraud or collusion . . . to the prejudice of the estate." This provision must be read with section 3-227 which deals with a finding concerning succession to the estate.

In conclusion it can be said that Article IV is designed to simplify the administration of multiple state estates, through unifying the administration and emphasizing the domiciliary administration insofar as possible.

## ARTICLE IV

### FOREIGN PERSONAL REPRESENTATIVES: ANCILLARY ADMINISTRATION

#### Comment

Part 1 includes definitions.

Part 2 establishes the power of foreign representatives in jurisdictions adopting the Probate Code. The Part provides three types of power. (1) the foreign personal representative has the power to receive payment of debts owed to the decedent or accept delivery of personal property belonging to the decedent. The payment or delivery discharges the debtor or person having possession of the personal property. There is a provision protecting the local creditors of the decedent if this is necessary. (2) The foreign personal representative can file copies of his papers in a court in the state under the probate code and he then has the powers of a local personal representative. (3) There is a provision for ancillary administration of the decedent's estate in the local state should this prove desirable. The foreign personal representative is to be preferred in the appointment of the local personal representative. This is to promote the unitary concept of administration of estates as far as possible.

In Part 2 are also found provisions dealing with the transfer of funds from the local administration to the domiciliary administration. Payment of claims in case of insolvency is also covered.

Part 3 deals with the power of the local jurisdiction over foreign personal representatives. The foreign personal representative who becomes the local personal representative in ancillary administration submits himself to the jurisdiction of the local courts. Additionally, it is provided that the foreign personal representative becomes subject to the jurisdiction of the local courts by filing copies of his papers in the local court, by collecting any money or property belonging to the decedent (jurisdiction here being limited to the assets collected), or by doing any act as a personal representative which would give the state jurisdiction over him as an individual. It is also provided that the personal representative is subject to the jurisdiction of the courts to the same extent that his decedent was immediately prior to death. (This is analogous to the typical non-resident motorist provision which reaches out and gets jurisdiction over the personal representative of the deceased non-resident motorist. See Note, 44 Iowa L. Rev. 402 (1959) ). A comparable provision is found in Article 3, Part 4, dealing with Duties and Powers of Personal Representatives.

Part 3 also provides the mechanical steps of service to be used.

Part 4 provides that a judgment for or against a personal representative in another jurisdiction will be binding on the local personal representative unless it results from fraud or collusion.

ARTICLE IV

FOREIGN PERSONAL REPRESENTATIVES: ANCILLARY ADMINISTRATION

Part 1

Definitions

1 SECTION 4-101. [Definitions.] In this Article

2 (1) "foreign personal representative" means any personal  
3 representative not appointed by a court of this state who has been  
4 appointed by the court of another jurisdiction, in which the decedent  
5 was domiciled at the time of his death, included in the following list:  
6 jurisdictions of the United States, its states, territories and possessions,  
7 Puerto Rico, England, Wales, Northern Ireland, the Republic of Ireland,  
8 the states of the Commonwealth of Australia, New Zealand, provinces of  
9 the Dominion of Canada other than Quebec, and the present or former  
10 British Colonies located on islands near the American continents.

11 (2) "local personal representative" means any personal  
12 representative who has been appointed as ancillary personal representative  
13 by a court of this state and who has not been appointed by the domiciliary  
14 court.

15 (3) "local and foreign personal representative" means any  
16 personal representative who has been appointed by both the domiciliary  
17 court and by a court of this state.

Comment

Adapted from the Uniform Ancillary Administration of Estates Act.

Part 2

Powers of Foreign Personal Representatives

1           SECTION 4-201. [Payment of Debt and Delivery of Property to  
2 Foreign Personal Representative Without Local Administration.] Three  
3 months after the death of a nonresident decedent, any person indebted to the  
4 estate of the nonresident decedent or having possession of tangible personal  
5 property or an instrument evidencing a debt, obligation, stock or chose in  
6 action belonging to the estate of the nonresident decedent may make payment  
7 of the indebtedness, in whole or in part, or deliver the tangible personal  
8 property or the instrument evidencing the debt, obligation, stock or chose  
9 in action to the foreign personal representative of the nonresident decedent  
10 upon an affidavit made by or on behalf of the representative stating:  
11           (1) the date of the death of the nonresident decedent,  
12           (2) that no local administration or application therefor is  
13 pending in this state,  
14           (3) that the foreign personal representative is entitled to pay-  
15 ment or delivery.

Comment

Section 3-204 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.

1           SECTION 4-202. [Payment or Delivery Discharges.] Payment or  
2 delivery made in good faith on the basis of the affidavit is discharge of the  
3 debtor or person having possession of the personal property.

1           SECTION 4-203. [Resident Creditor Notice.] Payment or delivery  
2 under Section 4-201 may not be made if a resident creditor of the nonresident  
3 decedent has notified the debtor of the nonresident decedent or the person having  
4 possession of the personal property belonging to the nonresident decedent that  
5 the debt should not be paid nor the property delivered to the foreign personal  
6 representative.

Comment

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

1           SECTION 4-204. [Proof of Authority-Bond.] When no local administration  
2 or application therefor is pending in this state, a foreign personal representative  
3 may file with a [probate] court in a [county] in which property belonging to the  
4 decedent is located, authenticated copies of his appointment and of his official  
5 bond if he has given a bond.

1           SECTION 4-205. [Powers.] A foreign personal representative who has  
2 met the requirements of Section 4-204 may exercise all powers of a local  
3 personal representative, and may maintain actions and proceedings in this state  
4 subject to any conditions imposed upon nonresident suitors generally.

1           SECTION 4-206. [Bond.] Any person apparently entitled to a share of  
2 the residue, or to a devise of personal property estimated to be worth in excess  
3 of \$500, or any creditor having a claim in excess of \$500, may make a written  
4 demand that the personal representative give bond or additional bond. The  
5 demand must be filed with the domiciliary court and a copy mailed to the per-  
6 sonal representative. Thereupon, bond or additional bond shall be required.

7 From the time of receipt of notice and until the filing of the bond or additional  
8 bond, the personal representative shall refrain from exercising any powers in  
9 this state except as necessary to preserve the estate.

Comment

This is similar to section 3-306. For the amount of bond required, see section 3-305. For order restraining personal representative, see section 3-308.

1 SECTION 4-207. [Power of Representatives in Transition.] The power  
2 of a foreign personal representative shall be exercised only when there is no  
3 administration or application therefor pending in this state. An application for  
4 local administration of the estate terminates the power of the foreign personal  
5 representative to act under section 4-205, however, the local [judge] may allow  
6 the foreign personal representative to exercise limited powers to preserve the  
7 estate. No person who before receiving actual notice of local administration or  
8 application therefor, has changed his position by relying on the powers of a  
9 foreign personal representative shall be prejudiced by reason of the application  
10 for, or grant of, local administration. The local personal representative or the  
11 local and foreign personal representative shall be subject to all duties and obli-  
12 gations which have accrued by virtue of the exercise of the powers by the foreign  
13 personal representative and may be substituted for him in any action or pro-  
14 ceedings in this state.

1 SECTION 4-208. [Application for Ancillary Letters and Notice Thereof.]

2 (a) Granting of Ancillary Letters. Subject to the provisions in (b),  
3 ancillary letters of administration may be granted in formal proceedings in the  
4 same manner as provided for the appointment of personal representatives in

5 Section 3-234, and subject to the requirement of bond as provided in sections  
6 3-304 to 3-306.

7 (b) Qualification of and Preference for Foreign Personal Representative.

8 (1) Any foreign personal representative upon the filing of an  
9 authenticated copy of the domiciliary letters and the power of attorney  
10 required by section 4-301 with the [probate] court may be granted  
11 ancillary letters in this state notwithstanding that the representative is  
12 a nonresident or is a foreign corporation.

13 (2) If the foreign personal representative is a foreign corporation,  
14 it need not qualify under any other law of this state to authorize it to act  
15 as local and foreign personal representative.

16 (3) If application is made for the issuance of ancillary letters,  
17 any interested person may intervene and pray for the appointment of any  
18 person who is eligible to act as personal representative.

19 (c) Notice to foreign representative. When application is made for  
20 issuance of ancillary letters to any person other than the foreign personal repre-  
21 sentative, the applicant shall send notice of the application by registered or  
22 certified mail to the foreign personal representative if the latter's name and  
23 address are known and to the court which appointed him if the court is known.  
24 These notices shall be mailed upon filing the application if the necessary facts  
25 are then known, or as soon thereafter as the facts are known. If notices are not  
26 given prior to the appointment of the local personal representative, he shall give  
27 similar notices of his appointment as soon as the necessary facts are known to  
28 him. Notice by ordinary mail is sufficient if registered or certified mail service  
29 to the addressee is unavailable.

### 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). Adapted from Uniform Ancillary Administration of Estates Act, sections 2 and 4.

1           SECTION 4-209. [Denial of Application.] The [probate] court may  
2 deny the application for ancillary letters if it appears that the estate may be  
3 settled conveniently without ancillary administration. The denial is without  
4 prejudice to any subsequent application if it later appears that ancillary  
5 administration is needed.

### Comment

Uniform Ancillary Administration of Estates Act, section 3.

1           SECTION 4-210. [Substitution of Foreign for Local Personal Representative.]  
2           (a) Application and procedure. If any other person has been appointed  
3 local personal representative, the foreign person representative, not later  
4 than [twenty] days after the mailing of notice to him under section 4-208 (c),  
5 unless this period is extended by the court for cause which the court deems  
6 adequate, may apply for revocation of the appointment and for grant of ancillary  
7 letters to himself. [Ten] days written notice of hearing shall be given to the  
8 local personal representative. If the court finds that it is for the best interests  
9 of the estate, it may grant the application and direct the local personal represen-  
10 tative to deliver all assets, documents, books and papers pertaining to the  
11 estate in his possession and make a full report of his administration to the local  
12 and foreign personal representative as soon as the letters are issued and he is  
13 qualified. The local personal representative shall also account to the court.

14 Upon compliance with the court's directions, the local personal representative  
15 shall be discharged.

16 (b) Effect of Substitution. Upon qualification, the local and foreign  
17 personal representative shall be substituted in all actions and proceedings  
18 brought by or against the local personal representative in his representative  
19 capacity, and shall have all of the authority and be entitled to all of the rights  
20 and be subject to all of the duties and obligations arising out of the uncompleted  
21 administration in all respects as if it had been continued by the local personal  
22 representative. If the latter has served or been served with any process or  
23 notice or delivered any statement of claim, no further service or delivery  
24 shall be necessary nor shall the time within which any steps may or must be  
25 taken be extended unless the court in which the action or proceedings are  
26 pending so order.

Comment

Adapted from Uniform Ancillary Administration of Estates Act, section 6.

1 SECTION 4-211. [Ancillary Administration; Powers and Limitations;  
2 Supervised Administration.] Ancillary administration shall be supervised ad-  
3 ministration as provided in Section 3-107, and, except as provided otherwise  
4 in this Article, the personal representative in ancillary administration shall  
5 have the powers and be subject to the limitations of a supervised personal  
6 representative as provided in Section 3-108.

1 SECTION 4-212. [Preliminary Transfer of Assets.]

2 (a) Application. Prior to the final disposition of the estate in ancillary  
3 administration and upon giving written notice to interested persons, a personal

4 representative may apply for leave to transfer all or any part of the assets  
5 from this state to the domiciliary jurisdiction for the purpose of administration  
6 and distribution.

7 (b) Prerequisite to Granting Application. Before granting the application  
8 the court, if it finds that additional security is necessary, may require the  
9 representative to furnish a bond or additional bond in the domiciliary jurisdiction.

10 (c) Granting application -- terms and consequences. Upon compliance  
11 with this section, the court shall grant the application upon any conditions as it  
12 sees fit unless it finds cause for denial or postponement. The granting of the  
13 application shall not terminate any proceedings in this state unless the court  
14 finds that further proceedings are unnecessary, in which case it may order the  
15 administration in this state closed.

#### Comment

Adapted from Uniform Ancillary Administration of Estates Act, section 7.

1 SECTION 4-213. [Liability of Local Assets.] All local assets are sub-  
2 ject to the payment of all claims, allowances and charges, whether they are  
3 established or incurred in this state or elsewhere. For this purpose local  
4 assets may be sold in this state and the proceeds forwarded to the personal  
5 representative in the jurisdiction where the claim was established or the charge  
6 incurred.

1 SECTION 4-214. [Limitations.] Any claim which is barred by nonclaim  
2 statute or the statute of limitations in the state where the creditor, if an  
3 individual, is domiciled, or where the claim arose in the case of claims due  
4 corporate claimants or their assignees, is barred in an ancillary administration  
5 in this state.

1           SECTION 4-215. [Payment of Claims in Case of Insolvency.]

2           (a) Equality subject to preferences and security. If the estate either in  
3 this state or as a whole is insolvent, it shall be disposed of so that, as far as  
4 possible, each creditor whose claim has been allowed, either in this state or  
5 elsewhere, shall receive payment of an equal proportion of his claim subject to  
6 preferences and priorities and to any security which a creditor has as to par-  
7 ticular assets. If a preference, priority or security is allowed in another  
8 jurisdiction but not in this state, the creditor so benefited shall receive dividends  
9 from local assets only upon the balance of his claim after deducting the amount  
10 of such benefit. Creditors who have secured claims upon property not exempt  
11 from the claims of general creditors and who have not released or surrendered  
12 them shall have the value of the security determined according to the terms of  
13 the security agreement, or by agreement, arbitration, or litigation as the  
14 court may direct, and the value so determined shall be credited upon the claim,  
15 and dividends shall be computed and paid only on the unpaid balance.

16           (b) Procedure. In case of insolvency and if local assets permit, each  
17 claim allowed in this state shall be paid its proportion, and any balance of  
18 assets shall be disposed of in accordance with section 4-216. If local assets are  
19 not sufficient to pay all claims allowed in this state the amount to which they are  
20 entitled, local assets shall be marshalled so that each claim allowed in this  
21 state shall be paid its proportion as far as possible, after taking into account all  
22 dividends on claims allowed in this state from assets in other jurisdictions.

1           SECTION 4-216. [Final Transfer of Residue to Domiciliary Representative.]

2 After the payment of all claims allowed in this state and of all taxes and charges

3 levied or incurred in this state, the moveable assets remaining on hand shall  
4 be transferred to the personal representative in the domiciliary jurisdiction  
5 unless the court shall order distribution in this state for good cause shown.  
6 The court, if it finds that additional security is necessary, may require the  
7 representative to furnish a bond or additional bond in the domiciliary jurisdiction.

1           SECTION 4-217. [Implementation.] Any valid action taken in a pro-  
2 ceeding at the decedent's domicile may be implemented by a proceeding in this  
3 state at any time.

ARTICLE IV

Part 3

Jurisdiction Over Ancillary and Foreign Representatives

1 SECTION 4-301. [Service of Process in Ancillary Administration.]

2 Ancillary letters of administration shall be granted only if the personal repre-  
3 sentative shall file in the [probate] court an irrevocable power of attorney  
4 constituting the [clerk of the court] as his agent for the acceptance of service  
5 of process in any action or proceeding relating to the administration of the  
6 estate in this state. Any process received by the [clerk of the court] shall be  
7 forwarded to the local or local and foreign personal representative at his  
8 last known address by registered or certified mail. Notice by ordinary mail  
9 is sufficient if registered or certified mail service to the addressee is  
10 unavailable.

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).

1 SECTION 4-302. [Jurisdiction by Act of Foreign Personal Representa-

2 tive.] A foreign personal representative submits himself to the jurisdiction  
3 of the courts of this state by (1) filing authenticated copies of his appointment  
4 as provided in Section 4-204, (2) collecting money or personal property under  
5 Section 4-201, or (3) doing any act as a personal representative in this state  
6 which would have given the state jurisdiction over him as an individual. Juris-  
7 diction 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 states.

1           SECTION 4-303. [Jurisdiction by Act of Decedent.] In addition to  
2 jurisdiction conferred by Section 4-302, a foreign personal representative  
3 shall be subject to the jurisdiction of the courts of this state to the same  
4 extent that his decedent was subject to jurisdiction immediately prior to death.

1           SECTION 4-304. [Service on Foreign Personal Representative.]

2           (a) Manner. Service may be made upon the foreign personal represen-  
3 tative by registered or certified mail, addressed to his last known address,  
4 requesting a return receipt signed by addressee only. Notice by ordinary mail  
5 is sufficient if registered or certified mail service to the addressee is  
6 unavailable.

7           Service may be made upon a foreign personal representative in the  
8 manner in which service could have been made under other laws of this state  
9 on either the foreign personal representative or his decedent immediately prior  
10 to death.

11           (b) Time to answer. When service is made upon a foreign personal  
12 representative as provided in subsection (a), he shall be given at least 30 days  
13 within which to answer or move.

### 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).

ARTICLE IV

Part 4

Judgments and Personal Representative

1           SECTION 4-401. [Effect of Adjudication for or Against Personal  
2 Representative.] A prior adjudication rendered in any jurisdiction for or  
3 against any personal representative of the estate shall be as conclusive as  
4 to the local or the local and foreign personal representative as if he were a  
5 party to the adjudication unless it resulted from fraud or collusion of the  
6 personal representative to the prejudice of the estate.

Comment

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

## ARTICLE V OF THE UNIFORM PROBATE CODE

(The following is a summary of Article V based largely on Professor Fratcher's comments on August 4, 1967.)

Article V entitled "Protection of Persons Under Disability and Their Property" embodies separate systems of guardianship to protect persons of minors and mental incompetents.<sup>5</sup> 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 5 of the Article offers a system of protective proceedings 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 such arrangements as may become necessary for care of persons or their property. The power of attorney which confers authority notwithstanding later incompetence is one example of the former. Another is a facility of payment provision which 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. For an example of a new idea tending to simplify necessary protective proceedings, one could note that in Part 5 the new draft contains provisions permitting a judge to make appropriate orders concerning the property of one whose property needs management or disposition without appointing a fiduciary.

of a conservator-trustee, 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 Section 5-520. Among other kinds of expenditures and disbursements authorized by this section, 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-trustee, if there is no guardian, are approved. Gifts of not to exceed twenty percent (20%) of any year's income to charity or other objects as the protected person might have been likely to make 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 5 round out the relationship of protective proceedings to creditors of the protected person and persons who deal with a conservator-trustee. Claims are handled by the conservator-trustee who is given a fiduciary responsibility to claimants and suitable discretion concerning allowance. If questions arise, the appointing court has all needed power to deal with disputes with creditors. The draft changes the common law rule that contracts of a guardian are his personal responsibility. A conservator-trustee is not liable personally on contracts made for the estate unless he agrees to such liability. Section 5-529 buttresses the managerial powers given to conservator-trustees by protecting all persons who deal with them.

g) Section 5-532 should be noted. It seeks to reduce the importance of state lines in respect to the authority of conservator-trustees by permitting appointees of foreign courts to act locally. Also, it follows the pattern of Article IV dealing with ancillary administration of decedents' estates by giving the conservator-trustee

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 5 would provide a single system for the protection of property of minors and others unable to manage their own property, thus superseding the Uniform Veterans Guardianship Act. It would preserve the right of the Veterans Administration to appear in protective proceedings involving the property of its beneficiaries and would permit the imposition of the same safeguards provided by the superseded Uniform Veterans Guardianship Act.

(Not approved by all reporters)

ARTICLE V

PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY

Part 1

General Provisions

1           SECTION 5-101. [Definitions and Use of Terms.] When used in  
2 Article V, unless otherwise apparent from the context:

3           (1) a "minor" is a person who has not reached his twenty-first  
4 birthday;

5           (2) a "minor ward" is a minor for whom a guardian has been  
6 named by will of his parent;

7           (3) a "minor's guardian" or "guardian of a minor" is one who  
8 has qualified as testamentary guardian of a minor;

9           (4) a "guardian ad litem" is one appointed by a court, in which  
10 particular litigation is pending, to represent a minor, incompetent,  
11 unborn or unascertained person in that particular litigation;

12           (5) a "disabled person" is one who, for reasons other than  
13 minority, has been adjudged to be unable to manage his property and  
14 affairs effectively, and for whose estate a conservator-trustee has  
15 been appointed, or other protective order entered;

16           (6) a "protected person" is a disabled person or a minor for  
17 whose estate a conservator-trustee has been appointed, or other  
18 protective order entered;

19                   (7) a "conservator-trustee" is one appointed by a court  
20 to manage the property and affairs of a protected person;

21                   (8) "estate" is the property of a protected person which  
22 is, or might be, subject to a protective proceeding;

23                   (9) a "protective proceeding" is a proceeding to determine  
24 that a person who has an estate cannot effectively manage or apply  
25 the same to necessary ends, either because he lacks the ability or  
26 is otherwise inconvenienced, or because he is a minor, and to  
27 secure administration of such person's estate by a conservator-  
28 trustee, or other appropriate relief;

29                   (10) a "conservator-trusteeship proceeding" is a protec-  
30 tive proceeding wherein a conservator-trustee is appointed to  
31 manage or apply the estate of a protected person.

#### Comment

There is need for a precise, yet familiar, terminology in dealing with the problems of caring for the person and managing property of those who are not sui juris. When dealing with the care of the person, the terms "minor" and "incompetent" are used when a fiduciary has not been appointed. The fiduciary appointed by will to care for the person of a minor is known as a testamentary "guardian". Once a guardian has been appointed, the term "minor ward" is used to describe the person in his care.

The problems of managing the property of minors and disabled persons, whether or not incompetent, are the same. The sections of the Code dealing with these problems have been placed in Part 4. Before the appointment of a fiduciary to manage the property of a person, the terms "minor" and "alleged disabled person" are used to refer to persons for whom protection is sought. The term "protected person" is a generic term referring to either a minor or disabled person who has received the protection of the probate court either through the appointment of a fiduciary to manage his property or the issuance of a protective order.

The term "conservator-trustee" is used to describe the fiduciary appointed by the court to manage the property of a protected person. While this term may at first seem cumbersome, it is fully descriptive of the functions of this fiduciary. Its use emphasizes that the fiduciary is a trustee who holds legal title to the property of the protected person, conserves his property, and acts as a statutory trustee independent of the probate court once he has been appointed.

A "protective proceeding" is a generic term used to describe both a "conservator-trusteeship proceeding" and a proceeding to obtain a protective order for a disabled person where the full conservator-trusteeship is unnecessary.

1           SECTION 5-102. [Jurisdiction of Subject Matter; Consolidation of  
2           Proceedings.]

3           (a) Jurisdiction. The [probate] court has exclusive jurisdiction  
4 over guardianship and protective proceedings.

5           (b) Other forms of guardianship of estate abolished. All forms of  
6 guardianship of property or estate not provided for in this Code are abolished.  
7 Nothing in this section affects guardians ad litem.

1           SECTION 5-103. [Facility of Payment.] Any person under a duty  
2 to pay or deliver money or tangible chattels to a minor may perform such  
3 duty, in amounts not exceeding \$5,000 per annum, by paying or delivering  
4 the money or chattels to, (i) the minor, if he has attained the age of 18 years  
5 or is married; (ii) a parent or grandparent of the minor with whom the minor  
6 resides; or (iii) a testamentary guardian of the minor; or (iv) a financial  
7 institution in a federally insured account in the sole name of such minor and  
8 without retaining power to withdraw. This section does not apply if the per-  
9 son making such payment or delivery has actual knowledge that protective  
10 proceedings with respect to the estate of the minor are pending. The persons,  
11 other than the minor, receiving such payments are obligated to apply the same

12 to the support and education of the minor, excluding any payments to them-  
13 selves except by way of reimbursement for out-of-pocket expenses for  
14 goods and services furnished by third persons which were necessary for  
15 the minor's support. Any excess sums shall be preserved for future support  
16 of the minor and any balance not so used shall be turned over to the minor  
17 when he attains majority. Persons owing money or property to minors who  
18 pay or deliver it in accordance with provisions (ii) and (iii) above shall not  
19 be responsible for the proper application thereof.

#### Comment

Where a minor or incompetent has only a small amount of property, it would be wasteful to require that a conservator-trustee be appointed to deal with the property. This section makes it possible for other persons, such as any testamentary guardian, to handle the less complicated property affairs of the ward, whether minor or adult. Protective proceedings, including the possible establishment of a conservator-trusteeship, will be sought where substantial property is involved. Disabled persons, for whom such protective proceedings are sought, may or may not be incompetent.

ARTICLE V

Part 2

Testamentary Guardians of Minor

Foreword

Part 2 deals primarily with custody of the person of a minor, although the testamentary guardian has some limited powers concerning property of the minor under section 5-203. If the minor has substantial property, separate proceedings under Part 4 to protect the property would be necessary.

This part has the following principal features:

- (1) Parents may appoint, by will, a testamentary guardian for a minor child; no court action is required in such case.
- (2) The powers and duties of a minor's testamentary guardian-- a vague area under present law in most states--are carefully delineated.
- (3) There is a new provision permitting a parent as well as a guardian to execute a power of attorney delegating his powers for a temporary period, as where parents must be out of the country.
- (4) Guardianship status arising from appointment of a testamentary guardian will follow the minor regardless of location.

1           SECTION 5-201. [Status of Testamentary Guardian; General.]

2   A testamentary guardian is a person who accepts a testamentary appointment  
3   under section 5-202 and thereby acknowledges that he has accepted responsi-  
4   bility, as defined and limited in this Part, for the care, custody and education  
5   of a minor in place of the minor's parent or parents. The relationship con-  
6   tinues until terminated, without regard to the location, from time to time, of  
7   the guardian and minor ward.

Comment

A testamentary guardian has the rights and duties provided in section 5-203; he is subject to all other provisions of part 2 of this Article. The purpose of these sections is to facilitate a continued family relationship

as desired by deceased parents, without the necessity of court intervention. The relationship so created exists wherever the parties to it may be located. Accordingly, a court in any state where the parties are which has jurisdiction of matters relating to the custody of children could deal with the relationship without disturbing any continuing jurisdiction of a court of the state where the status originated.

1           SECTION 5-202. [Testamentary Appointment of Guardian of  
2 Minor.]   The parent of a minor who has not been deprived of the power  
3 to make a testamentary appointment by order of a competent court made  
4 in connection with a divorce or separate maintenance action, or in a  
5 proceeding affecting the custody of the child, may by will appoint a guardian  
6 of an unmarried minor. Subject to any pending judicial proceedings con-  
7 cerning the custody or welfare of the minor, a testamentary appointment  
8 becomes effective upon filing written acceptance in the court in which the  
9 will is informally or formally probated, if both parents are dead or the  
10 surviving parent is adjudged incompetent. If both parents are dead appoint-  
11 ment by the parent who died later has priority. The person appointed  
12 testamentary guardian may be a resident or nonresident. Appointment  
13 under an informally probated will terminates if the will is later denied  
14 probate in formal proceedings. This state shall recognize a testamentary  
15 appointment effected by filing acceptance under a will probated at the  
16 testator's domicile in another state.

#### Comment

In the preparation of wills, it is common practice even now for parents to attempt to name a guardian of the person of their children. Most courts recognize the wisdom of the parent's choice and appoint the individual nominated; but the present law treats the will as merely a nomination and requires a court appointment.

This section provides that the appointment is made by the will, without any necessity for court appointment. The appointment must be accepted by the guardian by filing with the probate court a written acceptance; this is informal, however, since no notice or court hearing or order is contemplated. Acceptance carries consent to service under section 5-207. In the unusual case where circumstances have changed since the will was executed, so that the appointed person is unsuitable if the appointed person insists on accepting the appointment, a formal proceeding to remove the testamentary guardian could be brought under section 5-206, or other legislation

1           SECTION 5-203. [Powers and Duties of Testamentary Guardian  
2 of Minor.] A testamentary guardian of a minor has the powers and duties  
3 of a natural parent who has not been deprived of custody, in respect to the  
4 care, custody and education of the minor ward except that a guardian shall  
5 not be legally obligated to provide from his own funds for the ward and shall  
6 not be liable to third persons for acts of the minor ward solely by reason of  
7 the parental relationship. In particular, and without qualifying the foregoing,  
8 a testamentary guardian has the following powers and duties:

9                   (1) He shall take reasonable care of his ward's effects  
10                   and commence protective proceedings if necessary to protect  
11                   other property of the ward.

12                   (2) He may receive money and property deliverable to the  
13                   ward's parent, guardian or custodian under the terms of any  
14                   statutory benefit or insurance system, or any private contract,  
15                   devise, trust or custodianship, for the support of the minor. Any  
16                   sums so received shall be applied to the ward's current needs for  
17                   support, care, and education; any excess shall be conserved by the  
18                   t estamentary guardian for the ward's future needs unless a

19 conservator-trustee has been appointed for the estate of the ward,  
20 in which case excess shall be paid over at least annually to the  
21 conservator-trustee. Sums so received by the testamentary guard-  
22 ian shall not be used for compensation for his services or for room  
23 and board which he personally furnishes the ward, except as  
24 approved by order of court or as determined by a duly appointed  
25 conservator-trustee other than the testamentary guardian. He may  
26 institute proceedings to compel the performance by any person of a  
27 duty to support the ward or to pay sums for the welfare of the ward.

28 (3) If a conservator-trustee has been appointed, the testa-  
29 mentary guardian shall determine the extent to which funds shall be  
30 paid from the ward's estate by the conservator-trustee to third per-  
31 sons to provide educational and training opportunities for the ward.  
32 If there is no guardian, the determination shall be made by the  
33 conservator-trustee.

34 (4) He may, but need not except as otherwise ordered by  
35 court, give consent to facilitate the ward's participation in educa-  
36 tion, social or other activities or to enable him to receive medical  
37 or other professional care, treatment, or advice. He shall not be  
38 liable by reason of this consent for injury to the ward resulting  
39 from the negligence or acts of third persons unless it would have  
40 been illegal for a parent to have consented. He may consent to the  
41 marriage of his ward.

42                   (5) He shall be liable for losses of a ward's estate or  
43                   for injury to his person only as follows:  
44                   (i) for losses or damage to the ward's estate to  
45                   the extent he fails to comply with this section;  
46                   (ii) for injury to the ward's person to the extent that  
47                   a parent would be liable under similar circumstances.  
48                   (6) He shall report the condition of his ward and of the  
49                   ward's estate which has been subject to his possession or control,  
50                   as ordered by court on petition of any person interested in the  
51                   minor's welfare.

#### Comment

The powers and duties of testamentary guardians are governed by this section. Also, if section 5-204 applies, guardians of minors appointed under other legislation may have the powers and duties described herein, and if section 5-419(a) applies, the powers and duties described here may be applicable to a conservator-trustee of a minor's estate. The first sentence is intended to give the guardian broad powers and responsibilities. The following provisions deal with specific problems. In general the testamentary guardian is treated the same as a parent, except that he does not have the parent's duty of support out of personal funds nor is he liable to third persons for acts of the minor (as a parent may be for torts of his child), unless of course the guardian himself is at fault or undertakes liability.

The testamentary guardian has limited property control. He must take reasonable care of the minor's personal effects (clothing and other tangible personalty). If the minor has investment property which requires protection, the guardian must initiate protective proceedings under Part 4. The guardian may receive and expend funds for the support, care and education of the minor. To prevent any conflict of interest, the guardian must obtain a court order approving expenditure of sums as compensation for his own services or room and board furnished by him to the minor. The education of the minor is the primary responsibility of the guardian and not a conservator-trustee if both have been appointed; hence the guardian may determine the amount of funds to be spent on education out of the minor's property held by a conservator-trustee.

Whenever consent of a parent is customarily or legally necessary in order to enable a minor to participate in various activities (school sponsored trips, for example) or to receive medical or other care, the guardian may give consent; however, he is not required to do so unless ordered by court. If consent by a parent would be illegal (such as consent to performance of an abortion on a minor female under local law), the guardian may incur liability for giving such consent; but in other cases he is not liable by reason of consent if the minor is injured by third persons.

Basically the guardian's liability to his minor ward is limited to loss or damage to the ward's property by reason of failure to comply with this section 5-203, and injury to the ward's person to the extent the parent would be liable. Thus a guardian would be liable if he failed to commence protective proceedings when necessary to protect investments of the minor, as required by section 5-203(1); or if he misapplied funds of the minor under section 5-203(2). He would be liable for damages to the minor if he negligently or intentionally caused injury to the person of the minor under circumstances such that a parent would be liable. Thus if a minor riding in a car driven by the guardian is injured and the guardian's negligence were a cause of the injury, the guardian could be held liable.

1           SECTION 5-204. [Court Appointed Guardian of Minor to Have Same  
2           Powers and Duties as Testamentary Guardian; Exceptions.] Any guardian  
3           of a minor appointed by court order has the same powers and duties as a  
4           testamentary guardian unless otherwise expressly provided by court order  
5           or the legislation under which the appointment is made.

1           SECTION 5-205. [Delegation of Powers by Parent or Testamentary  
2           Guardian.] A parent or testamentary guardian entitled to custody of a  
3           minor may, by a properly executed power of attorney, delegate to another  
4           person, for a period not exceeding six months, any of his powers regarding  
5           custody, consent or property except power to consent to marriage or adoption  
6           of the minor ward.

Comment

This section is broader than guardianship as such, because the section applies to parents as well as guardians. It permits a temporary delegation of powers. For example, parents (or a 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. They could execute an appropriate power of attorney giving the uncle custody and power to consent. Then if an emergency operation were required, the uncle could consent on behalf of the child; as a practical matter he would of course attempt to communicate with the parents before acting.

1           SECTION 5-206. [Termination of Appointment of Testamentary  
2 Guardian.] A testamentary guardian's powers and duties terminate upon  
3 the death, resignation or removal of the guardian or upon the minor's  
4 death, adoption, emancipation or attainment of majority. A testamentary  
5 guardian may resign by petition to the court in which his acceptance of  
6 appointment is filed or to any court having jurisdiction over appointment  
7 of guardians for minors. A testamentary guardian may be removed for  
8 good cause, upon petition of a person interested in the minor ward's wel-  
9 fare, either by the court in which the acceptance of testamentary appoint-  
10 ment is filed or by any court having jurisdiction over appointment of  
11 guardians for minors. After notice and hearing, the court may terminate  
12 the testamentary guardianship and make such further order as may be  
13 appropriate.

Comment

Resignation or removal of a testamentary guardian requires court action under this section. Local law determines emancipation of a minor [or attainment of majority].

1           SECTION 5-207. [Consent to Service by Acceptance of Testa-  
2 mentary Appointment.] By filing acceptance of a testamentary appointment,  
3 a testamentary guardian irrevocably constitutes the clerk of court receiving  
4 acceptance as his agent to receive service of process or notice relating  
5 to any proceeding commenced in any court of this state relating to the  
6 guardianship. A copy shall also be sent by the petitioner by regular mail  
7 to the guardian at his address as listed in the court records and to his  
8 address as then known to the petitioner.

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.

ARTICLE V

Part 3

Powers of Attorney

1           SECTION 5-301. [When Power of Attorney Not Terminated by Disability.]

2   When a principal designates another his attorney in fact or agent by a power of  
3   attorney in writing and the writing contains the words "This power of attorney  
4   shall not terminate on disability of the principal" or similar words showing the  
5   intent of the principal that the power shall not terminate on his disability, then  
6   the powers of the attorney in fact or agent shall be exercisable by him on behalf  
7   of the principal notwithstanding later disability or incompetence of the principal  
8   at law. All acts done by the attorney in fact or agent, pursuant to the power  
9   during any period of disability or incompetence shall have the same effect and  
10   shall inure to the benefit of and bind the principal as if the principal were not  
11   disabled or incompetent. If a conservator-trustee shall thereafter be appointed  
12   for the principal, the attorney in fact or agent shall, during the continuance of  
13   the appointment, account to the conservator-trustee rather than the principal.  
14   The conservator-trustee shall have the same power, which the principal would  
15   have but for his disability or incompetence, to revoke, suspend, or terminate  
16   all or any part of the power of attorney or agency.

Comment

    This section permits a person who is sui juris to execute a power of attorney which will remain effective in the event he should later become disabled. If the court should subsequently appoint a conservator-trustee, the latter may either permit the attorney in fact to continue to act or revoke the power of attorney. The section is based on Code of Va. (1950), Sec. 11-9.1.

1           SECTION 5-302. [Powers of Attorney Not Revoked Until Notice of Death  
2     or Disability.]

3           (a) Powers of Attorney not revoked. The death, disability, or incom-  
4     petence of any principal who has executed a power of attorney in writing shall  
5     not revoke or terminate the agency as to the attorney in fact, agent or other  
6     person who, without actual knowledge of the death, disability, or incompetence  
7     of the principal, acts in good faith under the power of attorney or agency. Any  
8     action so taken, unless otherwise invalid or unenforceable, shall bind the  
9     principal and his heirs, devisees, and personal representatives.

10          (b) Proof of nonrevocation. An affidavit, executed by the attorney in fact  
11     or agent stating that he did not have, at the time of doing an act pursuant to the  
12     power of attorney, actual knowledge of the revocation or termination of the power  
13     of attorney by death, disability or incompetence, shall, in the absence of fraud,  
14     be conclusive proof of the nonrevocation or nontermination of the power at such  
15     time. If the exercise of the power requires execution and delivery of any instru-  
16     ment which is recordable, the affidavit when authenticated for record shall  
17     likewise be recordable.

18          (c) Provisions for revocation unaffected. This section shall not be con-  
19     strued to alter or affect any provision for revocation or termination contained in  
20     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 V

Part 4

Protection of Property of Disabled Persons and Minors

1 SECTION 5-401. [Protective Proceedings.] Upon petition and after  
2 notice and hearing, in accordance with the provisions of this Part, the [probate]  
3 court may appoint a conservator-trustee or make other protective order for  
4 cause as follows:

5 (1) Minors. Appointment of a conservator-trustee or other  
6 protective order shall be made in relation to the estate and affairs of a  
7 minor if the court determines that the alleged minor is a minor, that he  
8 owns or is entitled to money or property that requires management or  
9 protection pending the time when he attains majority which he is unable  
10 adequately to provide, or that funds are needed for his support and educa-  
11 tion and that protection is necessary or desirable to obtain or provide funds.

12 (2) Disability other than minority. Appointment of a conservator-  
13 trustee or other protective order shall be made in relation to the estate  
14 and affairs of a person if the court determines that (i) the person is unable  
15 to manage his property and affairs effectively because of physical or  
16 mental disability, senility, disease, habitual drunkenness, addiction to  
17 drugs, imprisonment, compulsory hospitalization, confinement, detention  
18 by a foreign power, disappearance, or other reason or combination of  
19 reasons; and (ii) the person has property which will be wasted or dis-  
20 sipated unless proper management is provided, or that funds are needed

21 for the support, care and welfare of the person or those entitled to be  
22 supported by him and that protection is necessary or desirable to obtain  
23 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 conservator-trusteeships 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.

1 SECTION 5-402. [Venue.] Venue for proceedings under this Part shall be:

2 (1) Resident. In the county in this state where the alleged disabled  
3 person or minor resides whether or not a guardian has been appointed in  
4 another county;

5 (2) Non-resident. If the alleged disabled person or minor does  
6 not reside in this state, in any county where he has property.

7 (3) Proceedings in more than one county. If proceedings are com-  
8 menced in more than one county, they shall be stayed except in the county  
9 where first commenced until final determination of venue is made there.  
10 In the case of a non-resident the protective proceeding first commenced  
11 in a proper county shall extend to all of the property of the estate of the  
12 protected person in this state.

13 (4) Transfer of proceeding. Upon petition of any interested person,  
14 if it appears to the court at any time after the adjudication of need for  
15 protection that it would be for the best interest of the protected person and

16 his estate, the court, in its discretion, may order the proceedings with  
17 files therein transferred to the equivalent court of another county in this  
18 state, which court shall proceed as if originally commenced therein.

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 5-402 (4)) and easy collection of assets by foreign conservator-trustees (section 5-432).

1 SECTION 5-403. [Protective Proceedings; Jurisdiction of Affairs of  
2 Protected Persons.] From the service of notice in a proceeding seeking the  
3 appointment of a conservator-trustee or other protective order until termination  
4 of the proceeding, the jurisdiction of [probate] court in which the petition is filed  
5 over the property and affairs of the alleged disabled person or minor is as follows:  
6 (1) exclusive jurisdiction to determine the need for a conservator-  
7 trustee or other protective order until the proceedings are terminated;  
8 (2) exclusive jurisdiction of questions concerning how the assets  
9 or income of the protected person which are subject to the laws of this  
10 state shall be managed, expended or distributed to or for the use of the  
11 protected person or any of his dependents;  
12 (3) concurrent jurisdiction of questions concerning the validity of  
13 claims against the person or estate of the protected person, and of  
14 questions concerning his title to any property or claim.

Comment

While the bulk of all judicial proceedings involving the conservator-trustee will be in the court supervising the conservator-trusteeship, third parties may bring suit against the conservator-trustee or the protected person

on some matters in other courts. Claims against the conservator-trustee after his appointment are handled in accordance with Section 5-425.

1           SECTION 5-404. [Permissible Court Orders.] The [probate] court  
2 shall have the following powers in respect to the estate and affairs of alleged  
3 disabled persons and minors:

4                   (1) Preliminary order. While a petition for appointment of a  
5 conservator-trustee or other protective order is pending, the court, after  
6 preliminary hearing and without notice to others, shall have power to  
7 preserve and apply the property of the alleged disabled person or minor  
8 as may be required.

9                   (2) Orders warranted by minority. After hearing and upon deter-  
10 mining that grounds for an appointment or other protective order exist in  
11 respect to a minor without other disability, the court shall have all those  
12 powers over the estate and affairs of the minor which are or might be  
13 necessary to secure the maximum advantage of the estate for the benefit  
14 of the minor and his dependents.

15                   (3) Orders warranted for disability. After hearing and upon  
16 determining that grounds for an appointment or other protective order  
17 exist in respect to a disabled person, the court shall have all the powers  
18 over the estate and affairs of the disabled person which he could exercise  
19 if not disabled and present. These powers include, but are not limited to,  
20 power to make gifts, to convey or release the disabled person's contingent  
21 and expectant interests in property including inchoate dower, curtesy  
22 initiate, and the right of survivorship incident to joint tenancy and tenancy  
23 by the entirety, to exercise or release his powers as trustee, personal

24 representative, custodian for minors, conservator-trustee, or donee of  
25 a power of appointment, to enter into contracts, to create revocable or  
26 irrevocable trusts of property of the estate which may last longer than  
27 his disability or life, to sue for divorce or annulment of his marriage,  
28 to exercise the options of the disabled person to purchase securities or  
29 other property, to exercise his rights to elect options and change bene-  
30 ficiaries under insurance and annuity policies and to surrender the policies  
31 for their cash value, to exercise his right to elect to take against the will  
32 of his deceased spouse and to renounce any interest by testate or intestate  
33 succession or by inter vivos transfer.

34 (4) Exercise of powers; manner; limitations upon. The powers  
35 of the court enumerated in subsections (2) and (3) may be exercised in  
36 response to petition, directly by the court or through a conservator-  
37 trustee. The court shall exercise, or direct the exercise of, its authority  
38 to exercise or release powers of appointment of which the protected person  
39 is donee, to renounce interests, to make gifts exceeding 20 percent of  
40 any year's income of the estate of a protected person, or to create trusts  
41 of property of the estate of a protected person, and to sue for dissolution  
42 of his marriage, only if satisfied, after notice and hearing, that it is in  
43 the best interests of the protected person.

#### Comment

The court, which is supervising a conservator-trusteeship, 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.

It seems desirable to give the court power to authorize the conservator-trustee to sue for divorce or annulment. An estate plan may become very much

out-of-date due to changes in the family and property of a person who is under disability for an extended period. Changes in tax legislation may also make an old estate plan disadvantageous. It should be possible for the conservator-trustee by express court authorization to sue for divorce of the spouse of a protected person who has abandoned or maltreated a minor or disabled person. Such divorce would cut off the spouse's right to support, forced share and other marital rights in property.

1           SECTION 5-405. [Notice Requirements Applicable to Various Kinds of  
2 Requests.] Unless the court orders additional notice, or unless a request has  
3 been filed under Section 5-406, the only persons who need to be notified of  
4 hearings on petitions seeking orders, relating to the estate and affairs of an  
5 alleged disabled person or minor, other than orders for temporary support, are:

6           (1) on a petition requesting original determination that grounds  
7 as described in Section 5-401 exist for appointment of a conservator-  
8 trustee or other protective order: (i) the alleged disabled person or  
9 minor, if he has attained the age of 14 years; (ii) his spouse and at  
10 least one of his parents if one or more are living; (iii) any guardian;  
11 (iv) if there is no guardian, any person who is actually furnishing care for  
12 him, or with whom he resides; (v) any governmental agency which is  
13 paying him benefits; and (vi) his children or, if none, at least two persons  
14 who would be his devisees or heirs if he were dead if so many can be found;

15           (2) on matters relating to the dissolution of the marriage of the  
16 protected person: the person, his spouse, parents and children, his  
17 guardian and his conservator-trustee;

18           (3) on matters relating to the making of gifts exceeding 20 per  
19 cent of one year's income of the estate, the creation or modification of  
20 trusts of property of the estate of a protected person which may last longer  
21 than his minority, disability or life, the exercise or release of general

22 powers of appointment of which the protected person is donee, and the  
23 renunciation of interests: the person, his spouse and children, the  
24 persons who would be his devisees and heirs if he were dead, the takers  
25 in default of exercise of the power of appointment who are in being and  
26 ascertainable, his guardian and his conservator-trustee;

27 (4) on matters relating to the exercise or release of a special  
28 power of appointment of which the protected person is donee: the possible  
29 appointees and takers in default of appointment who are in being and  
30 ascertainable, his guardian and his conservator-trustee;

31 (5) on matters relating to the affairs of a protected person as  
32 trustee, personal representative, custodian for minors, of conservator-  
33 trustee or another: his guardian, his conservator-trustee, any co-  
34 fiduciaries of the protected person as to any trust or estate involved and,  
35 to the extent directed by the court, persons beneficially interested under  
36 the trust, estate, custodianship or conservator-trusteeship involved;

37 (6) on matters relating to claims against the protected person, or  
38 the estate, other than a suit brought by his spouse for dissolution of their  
39 marriage: his guardian his conservator-trustee and the claimant;

40 (7) on a request for allowance of intermediate accounts of the  
41 conservator-trustee, questions concerning allowances for the care, sup-  
42 port and education of the protected person and his dependents, and questions  
43 relating to the administration, investment and disposition of property of  
44 the estate: his guardian, his conservator-trustee and, to the extent di-  
45 rected by the court, other interested persons;

46 (8) on matters relating to the transfer of property of the estate to

49 another state, termination of a conservator-trusteeship and other  
50 matters not enumerated elsewhere in this section: (i) if a minor's estate  
51 is involved and the minor is alive and under 21, or if the estate of a  
52 disabled person is involved and the cessation of his disability has not  
53 been determined, the persons entitled to notice under subsection (1); (ii)  
54 if the protected person has died, his personal representative, his guardian,  
55 and his conservator-trustee; and (iii) if the former minor has attained  
56 majority or the formerly disabled person has been adjudicated to be able  
57 to handle his estate and affairs, the formerly protected person, his  
58 guardian and his conservator-trustee.

#### Comment

This section sets out all of those persons who should receive notice with respect to a variety of matters relating to the property of protected persons.

1 SECTION 5-406. [Protective Proceedings; Request for Notice.] Any  
2 interested person who desires to be notified before any order is made in a pro-  
3 tective proceeding may file a request for notice together with any fee required by  
4 court rule, with the [registrar]. A request is not effective unless it contains a  
5 statement showing the interest of the person making it and his address, or that of  
6 his attorney, and is effective only as to matters occurring thereafter. Any  
7 governmental agency paying or planning to pay benefits to the alleged disabled  
8 person or survivor to an interested person in protective proceedings.

#### Comment

A provision is made for any interested person to obtain notice in a manner similar to that provided for in the administration of decedents' estates. See section 3-207.

1           SECTION 5-407. [Manner of Giving Notice.]

2           (a) Initial proceedings. On a petition under section 5-405 (1), the  
3           alleged disabled person or minor, his spouse and parents, shall be served per-  
4           sonally at least 7 days before the date of hearing if they can be found within the  
5           state. Notice to the alleged disabled person or minor, his spouse and parents,  
6           if outside the state, and to all other persons may be by registered or certified  
7           mail, mailed at least 14 days before the date of hearing. Notice by ordinary  
8           mail is sufficient if registered or certified mail service to the addressee is  
9           unavailable. If the location of any person entitled to notice is unknown or he  
10          cannot be notified by personal service or by mail, the court may authorize  
11          service by publication once each week for three consecutive weeks in a newspaper  
12          circulating in the county, the first day of publication to be at least 30 days before  
13          the date of hearing. Notice of hearing may be waived in writing and is deemed to  
14          be waived by any person who signs the petition, except that a waiver by the  
15          alleged disabled person or minor, if he is within the state, is not effective un-  
16          less he attends the hearing or his waiver of notice is confirmed in an interview  
17          with the visitor as described in section 5-409. Representation of the alleged  
18          disabled person or minor by a guardian ad litem is not necessary if the court has  
19          appointed a lawyer to represent him or sent a visitor to interview him.

20          (b) Subsequent proceedings. A person who has once been served with  
21          notice of any hearing in the manner prescribed by subsection (a), has participated  
22          in any hearing, or is serving as conservator-trustee may be notified of any sub-  
23          sequent hearing by ordinary mail, or, if his location is unknown or he cannot be  
24          notified by personal service or by mail, by publication once in a newspaper cir-  
25          culating in the county, the mailing or publication to be at least 14 days before the  
26          date of hearing. Other persons may be notified of any subsequent hearing in the  
27          manner prescribed in subsection (a).     -276-

Comment

Once a person has been given legal notice or has otherwise participated in protective proceedings, a more informal procedure is provided for subsequent notifications.

1           SECTION 5-408. [Protective Arrangements and Single Transactions  
2 Authorized.] When it has been established in a proper proceeding that a basis  
3 exists as described in section 5-401, for affecting the property and affairs of a  
4 protected person, the court, without appointing a conservator-trustee, may  
5 authorize or direct any transaction necessary or desirable to achieve any  
6 security, service, or care arrangement meeting the foreseeable needs of the  
7 protected person. Protective arrangements include, but are not limited to, pay-  
8 ment, delivery, deposit or retention of funds or property, sale, mortgage, lease  
9 or other transfer of property, entry into an annuity contract, a contract for life  
10 care, a deposit contract, a contract for training and education, or addition to  
11 or establishment of a suitable trust. Before approving a protective arrangement  
12 under this section, the court shall consider the interests of creditors and de-  
13 pendants of the protected person and, in view of his disability, whether the pro-  
14 tected person needs the continuing protection provided by the conservator-trustee.

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 conservator-trusteeship. 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.

1           SECTION 5-409. [Original Petition for Appointment or Protective Order.]  
2           (a) The alleged disabled person or minor, any person who is interested in  
3 his estate, affairs or welfare including his guardian or custodian, or any person

4 who would be adversely affected by lack of effective management of his property  
5 and affairs may petition for the appointment of a conservator-trustee or for  
6 other appropriate protective order.

7 (b) The petition shall set forth to the extent known, the interest of the  
8 petitioner; the name, age, residence and address of the alleged disabled per-  
9 son or minor; the name and address of his guardian, if any; a general state-  
10 ment of his property with an estimate of the value thereof, including any com-  
11 pensation, insurance, pension or allowance to which he is entitled; and the  
12 reason why appointment of a conservator-trustee or other protective order is  
13 necessary.

14 (c) If the appointment of a conservator-trustee is proposed, the petition  
15 also shall set forth the name and address of the person whose appointment is  
16 sought and the basis of his priority for appointment.

#### Comment

The petition in a protective proceeding will normally be a simple document.

#### 1 SECTION 5-410. [Procedure Concerning Hearing and Order on Original 2 Petition.]

3 (a) For minor. Upon receipt of a petition for appointment of a conser-  
4 vator-trustee or other protective order because of minority, the court shall set a  
5 date for hearing on the matters alleged in the petition. Unless the minor has  
6 counsel of his own choice, or counsel chosen by a natural or adoptive parent with  
7 whom he resides, the court shall appoint a lawyer to represent him who shall  
8 have the powers and duties of a guardian ad litem. All persons entitled to notice  
9 are entitled to attend the hearing and to be heard, but the hearing may be conducted

10 informally unless a person entitled to be heard requests that a full record be  
11 made. After hearing, the court, upon finding that grounds for the appointment  
12 of a conservator-trustee or other protective order have been established, shall  
13 make an appointment or other appropriate protective order.

14 (b) For disabled persons.

15 (1) Date for hearing. Upon receipt of a petition for appointment  
16 of a conservator-trustee or other protective order for an alleged dis-  
17 abled person, the court shall set a date for hearing on the matters  
18 alleged in the petition.

19 (2) Persons appointed. Unless the alleged disabled person has  
20 counsel of his own choice, the court shall appoint a lawyer to represent  
21 him who shall have the powers and duties of a guardian ad litem. If  
22 the alleged disability is physical or mental disability, senility, disease,  
23 habitual drunkenness, addiction to drugs, or spendthrift tendencies, the  
24 alleged disabled person, if within the state, shall be examined by a  
25 physician appointed by the court, preferably a physician who is not con-  
26 nected with any institution in which the alleged disabled person is a  
27 patient or is detained. If the disabled person can be found within the  
28 state and is not expected to attend the hearing, the court shall send a  
29 visitor to interview him; in other cases it may do so. The visitor shall  
30 be a lawyer and one who is a judge, officer, employee or a special ap-  
31 pointee of the court. He may be the lawyer appointed by the court to repre-  
32 sent the alleged disabled person, but not counsel retained by or for him  
33 privately.

1 SECTION 5-411. [Significance of Adjudication Concerning Need for  
2 Protection.] Adjudications under this Part shall have no bearing on the issue  
3 of competence of the alleged disabled person to care for his own person.

Comment

Many persons who are in need of a conservator-trusteeship or other protective arrangement may be completely competent insofar as the care of their own person is concerned.

1 SECTION 5-412. [Conservator-trustees.] The court may appoint a  
2 natural person or a corporation with general power to serve as trustee, as  
3 conservator-trustee of the property and affairs of the protected person. The  
4 appointment of a conservator-trustee vests in him title to all property, money  
5 and choses in action of the protected person, presently held or thereafter acquired,  
6 including title to any property theretofore held for the protected person by cus-  
7 todians or attorneys in fact. The appointment of a conservator-trustee is not a  
8 transfer or alienation within the meaning of the provisions of any federal or  
9 state statute or regulation, insurance policy, pension plan, contract, will or  
10 trust instrument, imposing restrictions upon or penalties for transfer or  
11 alienation by the protected person of his rights or interest. A conservator-  
12 trustee holds title to property under a statutory power and shall utilize powers  
13 conferred by this Part to perform the services, exercise the discretion and dis-  
14 charge the duties herein described for the best interests of the protected person  
15 and his dependents. In addition to filing fiduciary tax returns for the trust, the  
16 conservator-trustee shall be deemed to be the statutory agent of the protected  
17 person for the purpose of filing his individual tax returns.

Comment

This section permits independent administration of the property of protected persons once the appointment of a conservator-trustee has been obtained. Any interested person may require the conservator-trustee to account in accordance with section 5-416. The term conservator-trustee is used in order to emphasize that this fiduciary is indeed a trustee. As such, he holds title to the property of the protected person. The appointment of a conservator-trustee 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.

1           SECTION 5-413. [Priorities for Appointment as Conservator-trustee.]

2           The following, in the order listed, are entitled to priority for appointment as  
3           conservator-trustee for a protected person:

4                       (1) a conservator-trustee, guardian of property or other like  
5                       fiduciary appointed by the appropriate court of any jurisdiction listed  
6                       in section 4-101 (1) in which the protected person resides;

7                       (2) a person or corporation nominated by the protected person  
8                       if he has passed his eighteenth birthday and has, in the opinion of the  
9                       court, sufficient mental capacity to make an intelligent choice;

10                      (3) his spouse;

11                      (4) his parents;

12                      (5) a person or corporation nominated by the will of a deceased  
13                      parent;

14                      (6) his children;

15                      (7) the persons who would be his devisees or heirs if he were dead;

16                      (8) a person or corporation nominated by a person who, or insti-  
17                      tution, organization, or public agency which, is caring for him;

18                      (9) a person or corporation nominated by a governmental agency  
19                      which is paying benefits to him.

20           A person in priorities (1), (3), (4), (6), or (7) may nominate in writing  
21 a person or corporation to serve in his stead. As among persons with equal  
22 priority, the court shall select the one who is best qualified of those willing to  
23 serve. The court may, for good cause, pass over a person with priority and  
24 appoint a person with less priority or no priority.

Comment

A flexible system of priorities for appointment as conservator-trustee has been provided. A parent may name a conservator-trustee for his minor children in his will if he deems this desirable.

1           SECTION 5-414. [Bond.] The court may require a natural person ap-  
2 pointed conservator-trustee to furnish a bond conditioned upon faithful dis-  
3 charge of all duties of the trust according to law, with sureties as it shall  
4 specify. The bond will, unless otherwise directed, be in the amount of the  
5 aggregate capital value of the property of the estate in his control plus one  
6 year's estimated income but less the value of securities deposited with a bank  
7 under arrangements requiring an order of the court for their removal, and  
8 the value of any land which the fiduciary, by express limitation of power, lacks  
9 power to sell or convey without court authorization. The court may, in lieu of  
10 sureties on a bond, accept other security for the performance of the bond,  
11 including a pledge of securities or a mortgage of land.

Comment

The bond requirements for conservator-trustees are somewhat more strict than the requirements for personal representatives. Cf. Section 3-304.

1           SECTION 5-415. [Terms and Requirements of Bonds.] The following  
2 requirements and provisions shall apply to any bond required under section 5-414:

3 (1) Joint and several liability. Unless otherwise provided by the  
4 terms of the approved bond, sureties shall be jointly and severally liable  
5 with the conservator-trustee and with each other.

6 (2) Enforcing liability of surety.

7 (i) Execution of bond is consent to suit. By executing an  
8 approved bond of a conservator-trustee, the surety consents to  
9 the jurisdiction of the court which issued letters to the primary  
10 obligor in any proceeding pertaining to the fiduciary duties of the  
11 conservator-trustee and naming the surety as a party defendant,  
12 provided that notice of the proceeding is delivered to the surety or  
13 mailed to him by ordinary mail at his address as listed with the  
14 court where the bond is filed.

15 (ii) Proceeding on bond. On petition of a successor con-  
16 servator-trustee or any interested person, a proceeding may be  
17 initiated against a surety for breach of the obligation of the bond  
18 of the conservator-trustee.

19 (iii) Bond not void upon first recovery. The bond of the  
20 conservator-trustee is not void after the first recovery but may be  
21 proceeded upon from time to time until the whole penalty is  
22 exhausted.

23 (3) Limitation of action on bond. No action or proceeding shall be  
24 commenced against the surety on any matter as to which an action or pro-  
25 ceeding against the primary obligor is barred by adjudication or limitation.

#### Comment

Once a bond has been required, its terms are much the same as those for a bond of a personal representative. Cf. Section 3-307.

1           SECTION 5-416. [Inventory and Accounting.] Every conservator-  
2 trustee shall prepare and file with the appointing court a complete inventory of  
3 the estate of the protected person together with his oath or affirmation that it is  
4 complete and accurate so far as he is informed. He shall provide a copy there-  
5 of to the protected person if he can be located, has reached his fourteenth  
6 birthday and has sufficient mental capacity to understand these matters, and to  
7 any parent or guardian with whom the protected person resides. The conser-  
8 vator-trustee shall keep suitable records of his administration and exhibit the  
9 same on request of any interested person. Every conservator-trustee shall  
10 account to the court for his administration of the trust upon his resignation or  
11 removal, upon the termination of the protected person's disability and at other  
12 times as the court may direct. On termination, in lieu of accounting to the  
13 court, he may account to the former protected person or his personal represen-  
14 tative. Subject to appeal or vacation within the time permitted, an order, after  
15 notice and hearing, allowing an intermediate account of a conservator-trustee is  
16 conclusive as to his liabilities concerning the matters considered in connection  
17 therewith and an order, after notice and hearing, allowing a final account is  
18 conclusive as to all previously unsettled liabilities of the conservator-trustee to  
19 the protected person or his successors relating to the conservator-trusteeship.  
20 The court may require, at the time of making or filing any account, a conservator-  
21 trustee to submit to a physical check of the property of the estate in his control,  
22 to be made in any manner the court may specify.

#### Comment

Interested persons are entitled to copies of the inventory of the estate of the protected person. They may appeal to the court if there is any question as to the management of the trust. A final accounting is required upon termination.

The last sentence of the section is included specifically to comply with regulations of the Veterans' Administration.

1           SECTION 5-417. [Petitions for Orders Subsequent to Appointment.]

2           (a) Any person interested in the welfare of a person for whom a conser-  
3 vator-trustee has been appointed may file a petition in the appointing court for  
4 an order (i) requiring bond or security or additional bond or security, (ii) re-  
5 quiring an accounting for the administration of the trust, (iii) directing distri-  
6 bution, (iv) removing the conservator-trustee and appointing a temporary or  
7 successor conservator-trustee, or (v) granting other appropriate relief.

8           (b) A conservator-trustee may petition the appointing court for instruc-  
9 tions concerning his fiduciary responsibility.

10          (c) On hearing after notice, the court may give appropriate instructions  
11 or make any order needed.

Comment

Once a conservator-trustee has been appointed, the court supervising the trust acts only upon the request of some moving party.

1           SECTION 5-418. [Duties of Conservator-trustee in Administration.] In

2 the administration of the trust and the exercise of his powers, a conservator-  
3 trustee is under a duty to exercise the care and skill of a man of ordinary pru-  
4 dence. If the conservator-trustee has, or procures his appointment as a con-  
5 servator-trustee by representing that he has, greater skill than a man of  
6 ordinary prudence, he is under a duty to exercise that skill. He shall supervise  
7 carefully the conduct of agents to whom he delegates the performance of acts of  
8 administration and he shall not delegate to others matters which the conservator-  
9 trustee can reasonably be required to perform personally. A breach of any duty

10 imposed by this Code, including the duty to refrain from transactions in-  
11 volving a division of his loyalties without approval of the court, shall not impair  
12 the effectiveness of any act of a conservator-trustee to the detriment of a  
13 third party who relies upon the effectiveness of the act without actual knowledge  
14 of the breach.

Comment

The conservator-trustee owes the same duties to the protected person that a trustee of a private trust owes to his beneficiary.

1 SECTION 5-419. [Powers of Conservator-trustee in Administration.]

2 (a) In general. A conservator-trustee has all of the powers enumerated  
3 herein and any additional powers conferred by law on trustees in this state,  
4 except as limited under section 5-421. In addition, unless a testamentary or  
5 other guardian has been appointed, a conservator-trustee of the estate of an un-  
6 married minor under the age of 18 years, who has no parent whose rights as  
7 parent have not been terminated, has the duties and powers of a testamentary  
8 guardian described in section 5-203.

9 (b) Investment power. A conservator-trustee has power, notwithstanding  
10 statutes restricting investments by fiduciaries, without court authorization or  
11 confirmation, to invest and reinvest funds of the estate as would a prudent man of  
12 discretion and intelligence who is seeking a reasonable income and the preserva-  
13 tion and prudent growth of his capital.

14 (c) Other powers in administration. A conservator-trustee, acting  
15 reasonably in efforts to accomplish the purpose for which he was appointed, may  
16 act without court authorization or confirmation, as indicated in the following  
17 subsections:

18 (1) to collect, hold and retain assets of the estate until, in the  
19 judgment of the conservator-trustee, disposition of the assets should  
20 be made;

21 (2) to receive additions to the assets of the estate;

22 (3) to continue or participate in the operation of any business or  
23 other enterprise, and to effect incorporation, dissolution, or other change  
24 in the form of the organization of the business or enterprise;

25 (4) to acquire an undivided interest in an estate asset in which the  
26 conservator-trustee, in any trust capacity, holds an undivided interest;

27 (5) to invest and reinvest trust assets in accordance with sub-  
28 section (b);

29 (6) to deposit estate funds in a bank;

30 (7) to acquire or dispose of an asset, for cash or on credit, at  
31 public or private sale; and to manage, develop, improve, exchange, par-  
32 tition, change the character of, or abandon an estate asset or any interest  
33 therein; and to encumber, mortgage or pledge an estate asset for a term  
34 within or extending beyond the term of the conservator-trusteeship in  
35 connection with the exercise of any power vested in the conservator-  
36 trustee;

37 (8) to make ordinary or extraordinary repairs or alterations in  
38 buildings or other structures, to demolish any improvements, to raze  
39 existing or erect new party walls or buildings;

40 (9) to subdivide, develop, or dedicate land to public use; to make  
41 or obtain the vacation of plats and adjust boundaries; or to adjust dif-  
42 ferences in valuation on exchange or to partition by giving or receiving con-  
43 siderations; or to dedicate easements to public use without consideration.

44                   (10) to enter for any purpose into a lease as lessor or lessee with  
45 or without option to purchase or renew for a term within or extending be-  
46 yond the term of the conservator-trusteeship;

47                   (11) to enter into a lease or arrangement for exploration and re-  
48 moval of minerals or other natural resources or enter into a pooling or  
49 unitization agreement;

50                   (12) to grant an option involving disposition of an estate asset, or  
51 to take an option for the acquisition of any asset;

52                   (13) to vote a security, in person or by general or limited proxy;

53                   (14) to pay calls, assessments, and any other sums chargeable  
54 or accruing against or on account of securities;

55                   (15) to sell or exercise stock subscription or conversion rights;  
56 to consent, directly or through a committee or other agent, to the re-  
57 organization, consolidation, merger, dissolution, or liquidation of a  
58 corporation or other business enterprise;

59                   (16) to hold a security in the name of a nominee or in other form  
60 without disclosure of the conservator-trusteeship so that title to the se-  
61 curity may pass by delivery, but the conservator-trustee is liable for any  
62 act of the nominee in connection with the stock so held;

63                   (17) to insure the assets of the estate against damage or loss, and  
64 the conservator-trustee against liability with respect to third persons;

65                   (18) to borrow money to be repaid from estate assets or other-  
66 wise; to advance money for the protection of the estate or the protected  
67 person, and for all expenses, losses, and liability sustained in the admin-  
68 istration of the trust or because of the holding or ownership of any estate  
69 assets, for which advances with any interest the conservator-trustee has a  
70 lien on the estate as against the protected person; -288-

71           (19) to pay or contest any claim; to settle a claim by or against  
72 the estate or the protected person by compromise, arbitration, or other-  
73 wise; and to release, in whole or in part, any claim belonging to the  
74 estate to the extent that the claim is uncollectible;

75           (20) to pay taxes, assessments, compensation of the conservator-  
76 trustee, and other expenses incurred in the collection, care, administra-  
77 tion and protection of the estate;

78           (21) to allocate items of income or expense to either estate in-  
79 come or principal, as provided by law, including creation of reserves  
80 out of income for depreciation, obsolescence, or amortization, or for  
81 depletion in mineral or timber properties;

82           (22) to pay any sum distributable to a protected person or a  
83 dependent of the person who is a minor or incompetent, without liability  
84 to the conservator-trustee, by paying the sum to the distributee or by  
85 paying the sum for the use of the distributee either to his guardian or if  
86 none, to a relative or other person with custody of his person;

87           (23) to effect distribution of property and money in divided or un-  
88 divided interests and to adjust resulting differences in valuation;

89           (24) to employ persons, including attorneys, auditors, investment  
90 advisors, or agents, to advise or assist the conservator-trustee in the  
91 performance of his administrative duties; to act without independent in-  
92 vestigation upon their recommendations; and instead of acting personally,  
93 to employ one or more agents to perform any act of administration,  
94 whether or not discretionary;

95 (25) to prosecute or defend actions, claims or proceedings in any  
96 jurisdiction for the protection of estate assets and of the conservator-  
97 trustee in the performance of his duties; and

98 (26) to execute and deliver all instruments which will accomplish  
99 or facilitate the exercise of the powers vested in the conservator-trustee.

#### Comment

Subsection (b) is a paraphrase of section 4 (e) of the Uniform Gifts to Minors Act. The clause in that section relating to retention of securities is included in subsection (c).

Subsection (c) is Section 3 of Uniform Trustee's Powers Act, modified to reflect the peculiar situation of the conservator-trustee.

1 SECTION 5-420. [Duties and Powers of Conservator-trustee in Distribu-  
2 tion.]

3 (a) In general. A conservator-trustee may distribute or disburse funds  
4 or properties of the estate without court authorization or confirmation in ac-  
5 cordance with this section.

6 (b) Support of minor with guardian. A conservator-trustee of the estate  
7 of a minor ward shall pay income and principal as needed from the estate (i) to  
8 the guardian for his expenses incurred on behalf of the minor ward, including the  
9 reasonable value of room and board furnished personally by the guardian; and (ii)  
10 to third persons, the amount of their charges for clothing, room and board, pro-  
11 fessional care, training, education or articles provided by them to the minor  
12 ward by order of the guardian. The conservator-trustee shall not be surcharged  
13 for sums paid to the guardian or third persons unless (i) the conservator-trustee  
14 has reason to know that the guardian is receiving undisclosed personal financial  
15 benefit as a result of the payments; or (ii) the amount of the payments is clearly

16 in excess of the amount reasonably needed for the minor ward's support and  
17 education considering the size of the estate.

18 (c) Support of minor without guardian. A conservator-trustee of the  
19 estate of a minor who has no guardian shall apply sums as needed from income  
20 and principal of the estate to provide necessary or desirable support, social  
21 and other training, and education for the minor which cannot be made available  
22 to the minor by other persons legally obligated to provide for him. The con-  
23 servator-trustee may initiate actions or proceedings to compel persons legally  
24 obligated to support the minor, to perform their duty and to secure reimbur-  
25 sement to the estate of sums expended to support the minor.

26 (d) Support of disabled person. A conservator-trustee of the estate of a  
27 disabled person shall apply sums from income and principal to provide necessary  
28 support, care, protection and rehabilitation for the disabled person, giving con-  
29 sideration to the following: (i) the support and care of the disabled person during  
30 the probable period of the trust; (ii) the opinion of a duly appointed guardian con-  
31 cerning his ward's needs; and (iii) the needs of persons dependent upon the  
32 disabled person.

33 (e) Support for dependents of protected persons. To the extent the  
34 estate of a protected person is adequate to meet his probable needs for the year  
35 next ensuing, income and principal of the estate not needed for his support during  
36 the period may be paid or applied for the maintenance and support of persons  
37 legally dependent upon the protected person and, with the approval of the court,  
38 for the maintenance and support of other persons who had been maintained and  
39 supported in whole or in part by the protected person prior to the appointment of  
40 a conservator-trustee.

41 (f) Small gifts. If the estate is ample to provide for the purposes im-  
42 plicit in the distributions authorized by the preceding subsections, a conservator-  
43 trustee for a protected person has power to make gifts to charity and other ob-  
44 jects as the protected person might have been expected to make, in amounts  
45 which do not exceed in total for any year 20 percent of the income from the estate.

46 (g) Other distributions.

47 (1) On attainment of majority. When a protected minor who has  
48 not been adjudged unable properly to manage his property and affairs for  
49 reasons other than his minority attains his majority, his conservator-  
50 trustee, after meeting all prior claims and expenses of administration,  
51 including reasonable compensation for his services and payment of sums  
52 due any guardian, shall pay over and distribute all funds and properties  
53 to the former protected person as soon as possible. The distribution  
54 normally shall be in kind.

55 (2) On cessation of disability. When the conservator-trustee is  
56 satisfied that the disability of the disabled person has ceased or when the  
57 court has found in a proceeding under section 5-531 that the disability has  
58 ceased, the conservator-trustee, after meeting all prior claims and ex-  
59 penses of administration, including reasonable compensation for his  
60 services and payment of sums due any guardian, shall pay over and distri-  
61 bute all funds and properties to the former protected person as soon as  
62 possible. The distribution normally shall be in kind.

63 (3) On death. When a protected person dies, the conservator-trus-  
64 tee shall deliver to the [probate] court any will of the deceased protected  
65 person which may have come into his possession, inform the executor or a

66 beneficiary named therein that he has done so, and retain the estate for  
67 delivery to a duly appointed personal representative of the decedent.

68 (4) On other termination. If a conservator-trusteeship is termina-  
69 ted for reasons other than the attainment of majority, cessation of dis-  
70 ability, or death of the protected person, the conservator-trustee shall  
71 distribute the estate in accordance with the order of the court terminating  
72 the conservator-trusteeship.

#### Comment

This section sets out those situations wherein the conservator-trustee may distribute property or disburse funds during the continuance of or on termination of the trust.

1 SECTION 5-421. [Enlargement or Limitation of Powers of Conservator-  
2 trustee.] Subject to the restrictions in sections 5-404 (4), the court may confer  
3 on a conservator-trustee at the time of appointment or later, in addition to the  
4 powers conferred on him by sections 5-419 and 5-420, any power which the  
5 court itself could exercise under sections 5-404 (2) and 5-404 (3). The court  
6 may, at the time of appointment or later, limit the powers of a conservator-  
7 trustee otherwise conferred by sections 5-419 and 5-420, or previously conferred  
8 by the court, and may at any time relieve him of each limitation. If the court  
9 limits any power conferred on the conservator-trustee by section 5-419 or  
10 section 5-420, 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-trustee 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 conservator-trustees title as trustees is to ensure that the provisions for protection of third parties made in section 5-420 have full effect. Probably the Veterans Administration will insist that, when it is paying benefits to a minor or disabled, the letters of conservator-trusteeship limit powers to those of a guardian under the Uniform Veterans' Guardianship Act and require the conservator-trustee to file annual accounts.

The court may not only limit the powers of the conservator-trustee but may expand his powers so as to make it possible for him to act as the court itself might act.

1           SECTION 5-422. [Liability for Breach of Fiduciary Duty.] The liability  
2 of a conservator-trustee to the protected person or his estate for breach of  
3 fiduciary duty is compensatory only. He is not liable for losses or failure to  
4 make profits which are not caused by the breach of fiduciary duty.

Comment

Under a good many decisions a trustee or guardian who fails to invest is liable to the beneficiary or ward for interest at a rate in excess of that which could have been earned by proper investment. It is usually held that a fiduciary who fails to earmark trust property, wrongfully delegates control over it, or purchases his own property for the trust is liable for losses which occur to that property even though there is no casual connection between the breach of duty and the loss. This section would overrule both lines of decision.

1           SECTION 5-423. [Recording of Letters and Orders.] Letters of conser-  
2 vator-trusteeship may be recorded in the land records of the county of residence  
3 of the protected person and of any other county where there is land in which the  
4 estate has an interest and, when so recorded, shall have the same effect as notice  
5 as would recording of a conveyance from the protected person to the conservator-  
6 trustee. Orders of the court modifying or terminating letters of conservator-  
7 trusteeeship or authorizing the making of a conveyance or the doing of any other act  
8 with respect to interests in land constituting part of the estate may be recorded in  
9 like manner and with like effect.

Comment

In order to protect the chain of title to land of a protected person provision is made for recordation of letters and court orders affecting the conservator-trusteeship.

1           SECTION 5-424. [Transactional Disabilities of Person for Whom Con-  
2 servator-trustee is Appointed.]

3           (a) During Conservator-trusteeship. After appointment of conservator-  
4 trustee and until termination of the conservator-trusteeship, the protected person  
5 is incapable of making a gift, conveyance, encumbrance or charge on his property  
6 by any contract, other than a contract for necessaries for himself or his depen-  
7 dents, unless the gift, conveyance, encumbrance, charge or contract is confirmed  
8 by the court or the conservator-trustee who has power to make the gift, conveyance,  
9 encumbrance, charge or contract. The protected person lacks capacity to sue or  
10 be sued, to exercise, except by will, or release a power of appointment to exercise  
11 powers as trustee, conservator-trustee, personal representative, custodian for a  
12 minor or attorney in fact, and to create, modify or terminate a trust, without  
13 authorization or confirmation by the court. The existence of a conservator-  
14 trusteeeship has no bearing on the capacity of the protected person to marry.

15           (b) Incident to protective arrangement. Action by the court under section  
16 5-408 without appointment of a conservator-trustee does not restrict the capacity  
17 of the protected person, except insofar as restriction is imposed by the order.

18           (c) Confirmation and ratification by protected person. After the removal  
19 of disability or the attainment of majority the former protected person may  
20 ratify or confirm his own previous acts.

21           (d) Confirmation and ratification by court. The court may ratify or confirm

22 any transaction entered into or act done by a protected person, after his death  
23 or other termination of his minority or disability, as well as before.

Comment

There is a considerable confusion in the cases over the extent to which an adjudication of disability deprives the disabled person of capacity to bind himself and his property during a lucid interval. It is desirable that the law be definite on this point. As the grounds for an appointment set forth in section 5-401, contemplate that there may be a conservator-trusteeship for persons who are perfectly sane and who may have no knowledge of their adjudication (e. g., missing persons and persons imprisoned or detained in a foreign country) it is necessary to make provision for validation by confirmation at any time of acts done by them.

1           SECTION 5-425. [Claims.] The conservator-trustee shall perform all  
2 contracts and pay or compromise all obligations entered into or incurred by the  
3 protected person prior to the appointment under section 5-410, and all claims  
4 for torts committed by the protected person before or after the appointment,  
5 unless there appears to be a defense. The conservator-trustee shall be sub-  
6 stituted for the protected person as defendant in any action or suit commenced  
7 prior to appointment and pending at the time of appointment, and shall defend or  
8 compromise the same. After appointment, any proceeding for annulment or  
9 divorce, or to enforce a contract, obligation or claim against the protected person,  
10 the estate or the conservator-trustee in his fiduciary capacity shall be, by claim,  
11 filed in the conservator-trusteeship proceeding unless the court in which that  
12 proceeding is pending authorizes prosecution of a separate action or suit. If the  
13 conservator-trustee is a claimant or otherwise interested in a claim the court  
14 may remove him or appoint a special conservator-trustee for the purpose of  
15 defending the claim. The court may, in its discretion, authorize a jury trial of  
16 the claim if the claimant would have been entitled to a jury trial in the absence of

17 conservator-trusteeship proceedings. Writs of execution and garnishment may  
18 not be levied on property of the estate and it may not be reached by judicial  
19 process issued other than in the conservator-trusteeship proceeding. When the  
20 court allows the claim in a conservator-trusteeship proceeding or a judgment is  
21 rendered against the protected person or the conservator-trustee in his fiduciary  
22 capacity, the court may direct the conservator-trustee to perform the contract or  
23 pay the obligation or judgment unless to do so would reduce the estate to an  
24 amount insufficient to support the protected person and his dependents. In this  
25 event, the court may defer payment and may direct the conservator-trustee to  
26 give the claimant a mortgage or other security on the estate or part of it to  
27 secure payment of the claim at some future date.

#### Comment

This section establishes the procedure for enforcing a claim against the conservator-trustee in his fiduciary capacity with reference to the estate of the protected person. The conservator-trustee's personal liability is provided for in section 5-426.

#### 1 SECTION 5-426. [Individual Liability of Conservator-trustee.]

2 (a) In general. The individual liability of a conservator-trustee to third  
3 parties, as distinguished from his fiduciary accountability to the estate arising  
4 from the administration of the estate, is that of an agent for a disclosed principal.

5 (b) Contract liability. A conservator-trustee is not individually liable on  
6 any contract property entered into in his fiduciary capacity in the course of admin-  
7 istration of the estate unless he expressly agrees to be.

8 (c) Tort liability. The conservator-trustee is not individually liable for  
9 obligations arising from possession or control of property of the estate or for  
10 torts committed in the course of administration of the estate unless he is  
11 personally at fault.

12           (d) Liability of estate. Claims based upon contracts, obligations and  
13 torts of the types described in subsections (b) and (c) may be allowed against  
14 the estate whether or not the conservator-trustee is individually liable therefor.

15           (e) Consolidation of suits. The individual liability of the conservator-  
16 trustee to third parties arising from the administration of the estate may be  
17 determined in the same action, suit or court proceeding in which a claim  
18 against the estate is considered.

19           (f) Notice. When there is doubt whether a claim should be allowed against  
20 the estate or against the conservator-trustee as an individual, or both, a court  
21 in which a proceeding or action to enforce the claim is pending shall direct that  
22 notice be given to dependents or major creditors of the protected person whose  
23 interests will be affected by the result and give them an opportunity to be heard.

24           (g) Individual liability. When the court allows a claim against the con-  
25 servator-trustee in his individual capacity, the allowance has the same effect as  
26 a judgment against him individually.

#### Comment

In the absence of statute a fiduciary owner of property 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 fiduciary property 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 conservator-trustee 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.

1           SECTION 5-427. [Advertising for Claims.] A conservator-trustee may  
2 give notice by advertisement, in the manner prescribed in section 5-402, to

3 claimants against the protected person and the estate. All claims existing when  
4 the advertisement is first published will be barred unless presented to the con-  
5 servator-trustee or filed in the conservator-trusteeship proceeding within four  
6 months after the first publication. The provisions of the part of this Code relating  
7 to administration of decedents' estates govern types of claims barred, counter-  
8 claims, and presentation of claims to the conservator-trustee or court under  
9 this section and shall be read for this purpose with any changes in terminology as  
10 are appropriate to their application to conservator-trusteeship proceedings.

#### Comment

Notice with regard to claims is in accordance with the procedure established for claims against decedents' estates.

1 SECTION 5-428. [Compensation and Expenses.] If he is not otherwise  
2 compensated for his services in any of these capacities, the court may allow  
3 reasonable compensation from the estate to any visitor, lawyer, physician, tem-  
4 porary conservator-trustee or special conservator-trustee appointed in a con-  
5 servator-trusteeship proceeding. A conservator-trustee is entitled to indemnity  
6 from the estate for his actual and necessary expenses, including fees paid to  
7 attorneys, in managing the estate and the affairs of the protected person. A  
8 conservator-trustee who is a spouse, parent or child of the protected person is  
9 not entitled to compensation for his services. Any other conservator-trustee is  
10 entitled to reasonable compensation.

#### Comment

As in the case of other fiduciaries under the Code compensation is based on what is reasonable.

1           SECTION 5-429. [Protection of Third Parties.]

2           (a) Transactions ordered by court. Notwithstanding that the alleged  
3 disabled person or minor was not in fact disabled or a minor, that the form,  
4 content or verification of any petition was defective, or that any notice required  
5 by law was omitted or defectively served, every disposition and encumbrance of  
6 any interest, and every exercise of any power, made or directed by the court  
7 while it has jurisdiction of the estate and affairs as described in section 5-403,  
8 shall bind the alleged disabled person or minor and all persons claiming through  
9 him, to the same extent as if it had been done by him while an adult and not  
10 disabled. As between a purchaser who relies on the record and the protected  
11 person, and all persons who claim through them, the recording of letters of con-  
12 servator-trusteeship or of an order of the court authorizing or confirming a trans-  
13 action, creates a conclusive presumption that the court had jurisdiction to issue  
14 the letters or orders.

15           (b) Parties dealing with conservator-trustee. With respect to a third party  
16 dealing with or assisting a conservator-trustee while the court appointing the  
17 fiduciary has jurisdiction as described in section 5-403, the existence of all  
18 powers conferred on conservator-trustees by sections 5-419 and 5-420 and their  
19 proper exercise by the conservator-trustee may be assumed without inquiry.  
20 The third party is not bound to inquire whether the conservator-trustee has power  
21 to act or is properly exercising the power; and a third party, without knowledge  
22 that the conservator-trustee is exceeding his powers or improperly exercising  
23 them is fully protected in dealing with the conservator-trustee as if the conservator-  
24 trustee possessed and properly exercised the powers he purports to exercise. A  
25 third person is not bound to assure the proper application of money or assets paid  
26 or delivered to a conservator-trustee.

Comment

Subsection (b) is section 7 of the Uniform Trustees' Powers Act, modified to fit the situation of the conservator-trustee. It is not incumbent upon third parties to check the scope of the powers of the conservator-trustee. As to land, recordation provides the necessary knowledge of any limitations on the conservator-trustee's powers. As to securities, the Uniform Commercial Code makes it clear that third parties need not inquire as to any limitations on the powers of the fiduciary. Subsection (b) makes it possible for the third parties to deal with the conservator-trustee with respect to tangible personal property without having to investigate the extent of his powers.

1           SECTION 5-430. [Death, Resignation or Removal of Conservator-trustee.]

2     The court may, after notice and hearing, accept the resignation of a conservator-  
3     trustee or remove him for good cause. After his death, resignation or removal,  
4     the court may appoint another conservator-trustee. A conservator-trustee so  
5     appointed has the same title and powers as one originally appointed for the  
6     protected person.

Comment

Self-explanatory.

1           SECTION 5-431. [Termination of Proceeding.] The protected person,

2     his personal representative, the conservator-trustee or any other interested per-  
3     son may petition the court to terminate the conservator-trusteeship proceeding.  
4     The court, upon determining, after notice and hearing, that the minority or  
5     disability of the protected person has ceased, that he is presumptively dead, or  
6     that he has died, shall terminate the conservator-trusteeship proceeding. Upon  
7     termination, title to the estate property shall pass to the former protected per-  
8     son or to his successors. A protected person seeking termination is entitled to  
9     the same rights, protections, and procedures as in an original proceeding for a  
10    protective order or appointment of a conservator-trustee. If a protected person

11 resides in or changes his residence to another jurisdiction, the court may  
12 authorize the conservator-trustee to transfer all movable property of the estate  
13 to a conservator-trustee, guardian of property or like fiduciary appointed by the  
14 appropriate court of the state of residence of the protected person. The transfer  
15 will terminate the proceedings if the estate does not include any interest in  
16 land in this state.

#### Comment

Any interested person may seek the termination of a conservator-trusteeship when there is some question as to whether the trust is still needed. In some situations (e. g., the individual who returns after being missing) it may be perfectly clear that he is no longer in need of a conservator-trusteeship.

1 SECTION 5-432. [Powers of Foreign Fiduciaries.] When no conservator-  
2 trusteeship proceeding is pending in this state, a conservator-trustee, guardian of  
3 property or other like fiduciary appointed by the appropriate court of another juris-  
4 diction listed in section 4-101 to manage the property of a protected person who is  
5 a resident of that jurisdiction may collect, receipt for, and take possession of  
6 money due, tangible personal property, or an instrument evidencing a debt, obliga-  
7 tion, stock or chose in action, the estate, located in this state, and remove it to  
8 the other jurisdiction. No person who, before receiving actual notice of the pen-  
9 dency of a conservator-trusteeship proceeding in this state, has changed his po-  
10 sition by relying on the powers herein granted shall be prejudiced by the pendency  
11 of the proceeding. Nothing in this section shall be deemed to derogate from the  
12 powers conferred by Article IV of this Code.

#### Comment

Section 5-413(a) gives a foreign conservator-trustee or guardian of property, appointed by the state where the disabled person resides, first priority for appointment as conservator-trustee in this state. A foreign conservator-trustee may easily obtain any property located in this state and take it to the residence of the protected person for management.

ARTICLE VI

NON-PROBATE TRANSFERS

Part 1

Multiple-Party Accounts

1 SECTION 6-101. [Definitions.] As used in this part, unless the context  
2 otherwise requires:

3 (1) "account" means a contract of deposit of funds between de-  
4 positors and financial institutions, and includes checking and savings  
5 accounts, certificates of deposit, share accounts and other like  
6 arrangements.

7 (2) "beneficiary" means any person named a beneficial owner  
8 when an account provides that it is payable to a trustee for the beneficial  
9 owner.

10 (3) "demand" means a request for withdrawal or for payment  
11 according to check or order in compliance with all conditions of the  
12 account and regulations of the financial institution.

13 (4) "financial institution" means any organization authorized to do  
14 business in this state under state or federal laws relating to financial  
15 institutions, including, without limitation, banks and trust companies,  
16 savings banks, building and loan associations, savings and loan companies  
17 or associations, and credit unions.

18 (5) A "multiple-party account" is an account in the names of two or  
19 more persons either or all of whom may make withdrawals or an account in  
20 the name of one or more parties as trustee for one or more beneficiaries  
21 even though no mention is made of a right of withdrawal by a beneficiary.

22 Accounts established for deposit of funds of a partnership, joint venture  
23 or other association for business purposes, or accounts controlled by two  
24 or more persons as the duly authorized agents or trustees for a corpora-  
25 tion, unincorporated association, charitable or civic organization or any  
26 trust (except trusts of deposits evidenced only by the form of the deposit)  
27 are excluded from the meaning of the term and from the provisions of  
28 this part.

29 (6) "net contribution" of a party to a multiple-party account as of  
30 any given time is the sum of all deposits made by or for him, less all  
31 withdrawals made by or for him which have not been paid to or applied to  
32 the use of any other party, plus a pro rata share of any interest or dividends  
33 included in the current balance. It includes, in addition, any deposit life  
34 insurance proceeds added to the account by reason of the death of the  
35 party whose net contribution is in question.

36 (7) "party" means a person who, alone or in conjunction with  
37 another, by the terms of the account or as a surviving beneficiary of a  
38 trust account, has a present right of withdrawal in a multiple-party  
39 account. Unless the context indicates otherwise, it includes a guardian,  
40 conservator-trustee, personal representative, or assignee, including an  
41 attaching creditor, of a party. It also includes a person identified as a  
42 trustee of an account for another whether or not a beneficiary is named,  
43 but it does not include any named beneficiary unless he has a present  
44 right of withdrawal.

45 (8) "payment" of sums on deposit includes withdrawal and payment  
46 on check or other directive of a party.

47                   (9) "proof of death" includes a death certificate or other state-  
48                   ment issued by an appropriate official which indicates that a named  
49                   person is dead.

50                   (10) "sums on deposit" means the balance payable on a multiple-  
51                   party account including interest, dividends, and in addition any deposit  
52                   life insurance proceeds added to the account by reason of the death of a  
53                   party.

54                   (11) "withdrawal" includes payment to a third person pursuant to  
55                   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. No effort is made to deal with so-called "pay-on-death" accounts, for the purpose of persons desiring a pay-on-death account may be achieved by use of the trust account transaction described in this Part.

As may be seen from examination of the sections that follow, the "net contribution" concept defined by subsection (6) 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.

1                   SECTION 6-102. [Presumptions of Ownership. Parties, Beneficiaries;  
2                   General.] The presumptions created by sections 6-103 through 6-107 concerning  
3                   beneficial ownership as between parties, or as between parties and beneficiaries  
4                   of multiple-party accounts are relevant only to controversies between these  
5                   persons and their creditors and other successors, and shall have no bearing on  
6                   the rights of withdrawal of such persons as determined by the terms of account  
7                   contracts. The provisions of sections 6-112 to 6-117 govern the liability of  
8                   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 expect 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 do so without involving themselves in 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.

1           SECTION 6-103. [Presumption of Ownership During Lifetime; Proof of  
2 Net Contributions.] During the lifetime of all parties, a multiple-party account  
3 which provides that sums on deposit may be paid on the demand of either of two  
4 or more parties is presumed to belong to the parties in proportion to the net  
5 contributions by each to the sums on deposit.

### 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 constituting 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," and with section 6-104 which applies when net contributions cannot be proved, 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 all parties are alive. Section 6-105 and 6-106 prescribe what happens to individual rights of 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 6-111 and 6-114 protect a financial institution in such circumstances without reference to whether a withdrawing party is 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.

1           SECTION 6-104. [Presumption of Ownership During Lifetime; Absence  
2 of Proof of Net Contributions.] In the absence of satisfactory proof of the net  
3 contributions, those who are parties from time to time shall be presumed to own  
4 a multiple-party account in equal undivided interests.

Comment

If the parties cannot, or do not wish to, prove net contributions, they occupy the position of tenants in common in relation to the value of the accounts. The basic relationship, however, is that of individual owners of whatever values are shown to have been attributable to their respective deposits and withdrawals. Hence, the right of survivorship which attaches unless negated by the form of the account really is a right 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.

1           SECTION 6-105. [Ownership on Death; Non-Survivorship Account.] The  
2 death of any party to a multiple-party account shall have no effect on the beneficial  
3 ownership of the account (other than to transfer the decedent's right to his estate)  
4 unless the account is a survivorship account or trust account, as provided in  
5 section 6-106 and 6-108.

Comment

This section prescribes what happens on the death of an account owner when survivorship has been negated. It should be read with section 6-112 which protects a financial institution making payment to a party without regard to the equities between the parties and even though a party is then disabled or deceased. The two sections provide a safe and explicit arrangement for those who want the convenience of a withdrawal power in another, but who do not want the other party to be able to keep any balance remaining at his death. Unlike a power of attorney that may be used to provide some joint account advantages without risk that the surviving party will claim all, the device made possible by this section and section 6-112 permits a financial institution to be indifferent about whether the non-withdrawing party is competent or alive at the date of a withdrawal.

1           SECTION 6-106. [Presumption of Right of Survivorship.] A multiple-  
2 party account payable to two or more persons, jointly or severally, which does  
3 not expressly provide that there is no right of survivorship, though there be no  
4 mention of survivorship or joint tenancy, is presumed to be a survivorship  
5 account. At the death of a party, sums on deposit in a survivorship account  
6 belong to the surviving party or parties as against the estate of the decedent.  
7 Where there are two or more survivors, their respective ownerships shall be in  
8 proportion to their previous net contributions augmented by an equal share for  
9 each survivor of any interest the decedent may have owned in the account im-  
10 mediately before his death. The right of survivorship continues between survivors.

Comment

The assumption underlying this section is that most persons who use multiple-party accounts payable to either of two or more persons 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 (1963). But, with sections 6-105 and 6-112 providing a safe non-survivorship account form, the presumption stated by this section should become increasingly defensible.

This section 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 non-survivorship accounts into unwanted survivorship arrangements is meliorated by various considerations. First of all, there is doubt that many persons using any form of joint account would not want survivorship rights to attach. Secondly, the survivorship incident described by this section is merely presumptive. Hence, it may be rebutted by evidence which should be available in the "hard" cases. 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 changes in plans that may be desirable because of the legislation.

1           SECTION 6-107. [Trust Account; Presumed Rights of Trustees and  
2 Beneficiaries.] An account which states that a party is a "trustee" for one or

3 more other identified persons is a trust account. Except where there is  
4 evidence of a trust other than as provided by the form of the account, the  
5 account and any sums withdrawn therefrom are presumed to belong beneficially  
6 to the trustee until his death. At the death of the trustee or surviving trustee  
7 any sums remaining on deposit are presumed to belong to the person or persons  
8 named as beneficiaries, if living, or to the survivor of them if one or more have  
9 died before the trustee. The death thereafter of any beneficiary has no effect on  
10 the equal ownership of all who survived the trustee, as no right of survivorship  
11 is presumed to attend the relationship of several beneficiaries who survive a  
12 trustee. If no beneficiary survives the trustee, the sums are presumed to belong  
13 to the estate of the last trustee to die. If two or more parties are named as trustees  
14 on an account, and there is no evidence of trust except as provided by the form of  
15 the account, the account is presumed to be a survivorship account as between  
16 trustees. It is presumed to be owned between trustees as provided by this part.

#### Comment

This section accepts the New York view that an account opened by "A" in his name as "trustee for B" is usually 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 would apply to such an account during the lifetimes of "all parties". "Parties" 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. The result would be that a trust account with two or more trustees would be owned by the trustees as provided in sections 6-103 and 6-104.

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 section 6-113 which gives the financial institution protection only if it pays equally 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 and the gathering of approvals by all beneficiaries to withdrawal. The situation concerning further survivorship between two or more surviving parties to a non-trust, multiple-party account is different. See section 6-106.

1           SECTION 6-108. [Effect of Presumptions; Rebuttal by Contrary Evidence.]

2     The presumptions stated herein are based upon inferences of the intention of  
3     parties to multiple-party accounts arising from the form of the account and the  
4     usual expectations of people using these accounts. The presumptions are re-  
5     buttable by clear and convincing evidence of a different intention. The presump-  
6     tions of survivorship are not subject to change by will, but may be rebutted by a  
7     written order received by the financial institution to change the form of account or  
8     directing that payment not be made in accordance with the account which is signed  
9     by a party and is received by the financial institution during the party's lifetime.

Comment

          This section applies to the presumptions stated in the preceding sections.  
It is to be noted that only a "party" may issue an effective "written order" to a  
financial institution. "Party" is defined by section 6-101 (7).

1           SECTION 6-109. [Accounts and Transfers Nontestamentary.] Where not

2     rebutted by clear and convincing evidence, the presumptions provided herein are  
3     effective to establish beneficial ownership. Any transfers resulting from the  
4     application of these presumptions are effective by reason of the account contracts  
5     involved and this statute and are not to be considered as testamentary or subject  
6     to Articles I-IV of this Code.

Comment

          The purpose of classifying the transactions contemplated by Article VI  
as non-testamentary 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 complements section 2-702 of the Code.

1           SECTION 6-110. [Rights of Creditors.] No survivorship or trust account

2     will be effective against an insolvent estate of a deceased party to transfer to a

3 survivor sums needed to pay debts, taxes, and expenses of administration, in-  
4 cluding allowances to the surviving spouse and minor children. A surviving  
5 party or beneficiary who receives payment from any financial institution after  
6 the death of a deceased party which includes amounts the decedent owned im-  
7 mediately before his death shall be liable to account therefore to the personal  
8 representative of the deceased party to the extent necessary to discharge the  
9 claims and charges mentioned above after application of the decedent's estate.  
10 No action to assert this liability shall be commenced unless the personal repre-  
11 sentative has received a written demand by a surviving spouse, a creditor or one  
12 acting for a minor child of the decedent, and no action shall be commenced later  
13 than one year following the death of the decedent. Sums recovered by the personal  
14 representative shall be administered as part of the decedent's estate. This  
15 section shall not affect the rights of a financial institution to make payment on  
16 multiple-party accounts according to the terms thereof, or make it liable to the  
17 estate of a deceased party, unless the institution has been served with process  
18 in a proceeding by the personal representative before payment.

#### 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 the transactions authorized by Article VI cannot be used to reduce the essential protection they would be entitled to if the transactions were classified as a preferred form of specific devise. A surviving spouse does not need to assert a right to an elective share under section 2-201 et seq. in order to gain some protection against a multiple-party account under this section. At the same time, the rights of a surviving spouse that may be asserted by a personal representative under this section are limited to sums due as allowances under sections 2-401 and 2-404 that cannot be paid from the estate of the decedent.

1           SECTION 6-111. [Financial Institution Protection; Payment on Sig-  
2 nature of One Party.] Financial institutions may enter into multiple-party  
3 accounts to the same extent that they may enter into single-party accounts.  
4 Any multiple-party account may be paid, on demand, to any one or more of  
5 the parties unless the terms of the account stipulate that joint signatures are  
6 required. No financial institution shall be required to inquire as to the source  
7 of funds received for deposit to a multiple-party account, or to inquire as to the  
8 proposed application of any sum withdrawn from an account for purposes of  
9 establishing net contributions.

1           SECTION 6-112. [Financial Institution Protection; Payment After Death  
2 or Disability.] Any sums in a multiple-party account which does not include a  
3 stipulation requiring joint signatures for withdrawals may be paid, on demand,  
4 to any party without regard to whether any other party is disabled or deceased  
5 at the time the payment is demanded, except, if the account is one presumed to  
6 be a survivorship account under section 6-106 or 6-107, payment may not be  
7 made to the personal representative or heirs of a deceased party unless proofs  
8 of death are presented to the financial institution showing that the decedent was  
9 the last surviving party.

1           SECTION 6-113. [Financial Institution Protection; Payment of Trust  
2 Account.] Any account payable to a trustee for another person may be paid, on  
3 demand, to the trustee. Unless the financial institution has received written  
4 notice of the terms of any trust other than the form of the account, (1) payment  
5 may be made to the personal representative or heirs of a deceased trustee if  
6 proof of death is presented to the financial institution showing that his decedent

7 was the survivor of all other persons named on the account either as trustee or  
8 beneficiary; and (2) payment may be made, on demand, to the beneficiary upon  
9 presentation to the financial institution of proof of death showing that the  
10 beneficiary or beneficiaries survived all persons named as trustees.

1 SECTION 6-114. [Financial Institution Protection; Discharge.] Payment  
2 made pursuant to sections 6-111, 6-112 or 6-113 discharges the financial insti-  
3 tution from all claims for amounts so paid whether or not the payment is con-  
4 sistent with the beneficial ownership of the account as between parties, or  
5 beneficiaries, or their successors. The protection here given does not extend  
6 to payments made after a financial institution has received written notice from  
7 any party who has a present right of withdrawal to the effect that withdrawals  
8 in accordance with the terms of the account should not be permitted. Unless the  
9 notice is withdrawn by the person giving it, the death of any party after notice  
10 has no effect on withdrawal rights, and the personal representative, or heirs, of  
11 the decedent must concur in any demand for withdrawal if the financial institution  
12 is to be protected under this section. No other notice or any other information  
13 shown to have been available to a financial institution shall affect its right to the  
14 protection provided here. The protection here provided shall have no bearing on  
15 the rights of parties in disputes between themselves or their successors con-  
16 cerning the beneficial ownership of funds in, or withdrawn from, multiple-party  
17 accounts.

1 SECTION 6-115. [Financial Institution Protection; Set-off.] Without  
2 qualifying any other statutory right to set-off or lien and subject to any contractual  
3 provision when a party to a multiple-party account is indebted to a financial

4 institution, the financial institution has a right of set-off against the account  
5 in which the party has or had, immediately before his death, a present right  
6 of withdrawal. The amount of the account subject to set-off is that proportion  
7 to which the debtor is, or was immediately before his death, beneficially entitled.