

SECTION 1-101.
Short Title
This Act shall be known and may be cited as the <u>Maine Uniform</u> Probate Code
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

SECTION 1-102.
PURPOSES; RULE OF CONSTRUCTION
(a) This Code shall be liberally construed and applied to promote its underlying purposes and policies.
(b) The underlying purposes and policies of this Code are:
(1) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons;
(2) to discover and make effective the intent of a decedent in the distribution of his property;
(3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors;
(4) to facilitate use and enforcement of certain trusts;
(5) to make uniform the law among the various jurisdictions.

SECTION 1-103
SUPPLEMENTARY GENERAL PRINCIPLES OF LAW APPLICABLE
Unless displaced by the particular provisions of this Code, the principles of law and equity supplement its provisions.

SECTION 1-104
SEVERABILITY
If any provision of this Code or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the Code which can be given effect without the invalid provision or application, and to this end the provisions of this Code are declared to be severable.

SECTION 1-105.

CONSTRUCTION AGAINST IMPLIED REPEAL

This Code is a general act intended as a unified coverage of its subject matter and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided.

SECTION 1-106.

EFFECT OF FRAUD AND EVASION

Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person, other than a bona fide purchaser, benefitting from the fraud, whether innocent or not. Any proceeding must be commenced within 2 years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than ~~5~~ 6 years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

SECTION 1-107.

EVIDENCE AS TO DEATH OR STATUS

~~In addition to the rules of evidence in courts of general jurisdiction, the following rules relating to a determination of death and status apply: In proceedings under this Code, the rules of evidence in courts of general jurisdiction including any relating to simultaneous deaths, are applicable unless specifically displaced by the Code or by rules promulgated under section 1-304. In addition, notwithstanding Title 22, section 2707, the following rules relating to determination of death and status are applicable:~~

~~(1) Death occurs when an individual is determined to be dead under the Uniform Determination of Death Act, Title 22, section 2811. (1978/1980) [has sustained either (i) irreversible cessation of circulatory and respiratory functions or (ii) irreversible cessation of all functions of the entire brain, including the brain stem. A determination of death must be made in accordance with accepted medical standards].~~

~~(2) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie evidence of the fact, place, date, and time of death and the identity of the decedent.~~

~~(3) A certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that an individual is missing, detained, dead, or alive is prima facie evidence of the status and of the dates, circumstances,~~

and places disclosed by the record or report.

(4) In the absence of prima facie evidence of death under paragraph (2) or (3), the fact of death may be established by clear and convincing evidence, including circumstantial evidence.

(5) An individual whose death is not established under the preceding paragraphs who is absent for a continuous period of five years, during which ~~he~~ ~~or she~~ the individual has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. ~~His~~ ~~or her~~ Death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

(6) In the absence of evidence disputing the time of death stated on a document described in paragraph (2) or (3), a document described in paragraph (2) or (3) that states a time of death 120 hours or more after the time of death of another individual, however the time of death of the other individual is determined, establishes by clear and convincing evidence that the individual survived the other individual by 120 hours.

Maine Probate Code Proposed Comment Subsections (4) and (6) are new, with no previous counterparts in the MPC.

SECTION 1-108.

ACTS BY HOLDER OF GENERAL POWER.

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

Maine Probate Code Proposed Comment This section removes the reference to registration of a trust, due to the enactment of the Maine Uniform Trust Code and repeal of the former MPC provisions regarding trust registration.

1-109

COST OF LIVING ADJUSTMENT OF CERTAIN DOLLAR AMOUNTS

(a) In this section:

(1) “CPI” means the Consumer Price Index (Annual Average) for All Urban Consumers (CPI-U): U.S. City Average — All items, reported by the Bureau of Labor Statistics, United States Department of Labor or its successor or, if the index is discontinued, an equivalent index reported by a federal authority. If no such index is reported, the term means the substitute index chosen by [insert appropriate state agency]; and

(2) "Reference base index" means the CPI for calendar year [insert year immediately preceding the year in which this section takes effect].

(b) The dollar amounts stated in Sections 2-102, ~~[2-102A,] 2-202(b), 2-402, 2-403 and 2-405, and 3-1201~~ apply to the estate of a decedent who died in or after 2015, but for the estate of a decedent who died after 2014, these dollar amounts must be increased or decreased if the CPI for the calendar year immediately preceding the year of death exceeds or is less than the reference base index. The amount of any increase or decrease is computed by multiplying each dollar amount by the percentage by which the CPI for the calendar year immediately preceding the year of death exceeds or is less than the reference base index. If any increase or decrease produced by the computation is not a multiple of \$100, the increase or decrease is rounded down, if an increase, or up, if a decrease, to the next multiple of \$100, but for the purpose of Section 2-405, the periodic installment amount is the lump-sum amount divided by 12. If the CPI for 2014 is changed by the Bureau of Labor Statistics, the reference base index must be revised using the rebasing factor reported by the Bureau of Labor Statistics, or other comparable data if a rebasing factor is not reported.

~~[(c) Before February 1, [insert year after the year in which this section takes effect], and before February 1 of each succeeding year, the [insert appropriate state agency] shall publish a cumulative list, beginning with the dollar amounts effective for the estate of a decedent who died in [insert year after the year in which this section takes effect], of each dollar amount as increased or decreased under this section.]~~

Maine Probate Code Proposed Comment Section 1-109 was added to make it unnecessary in the future for the Legislature to continue to amend the UPC periodically to adjust certain dollar amounts for inflation. This section provides for an automatic adjustment of each of the above dollar amounts annually.

NONE (current MPC section 1-109)

MARRIED WOMEN'S STATUS

Maine Probate Code Proposed Comment Former section 1-109 was deleted for consistency with the UPC.

NONE (current MPC section 1-110)

TRANSFER FOR VALUE

§ 1-110 Transfer for value

Any recorded instrument described in this Code on which the register of deeds shall note by an appropriate stamp "Maine Real Estate Transfer Tax Paid" shall be prima facie evidence that such transfer was made for value.

Maine Probate Code Proposed Comments Section 1-110 is retained from prior Maine law as a non-uniform provision.

NONE (current MPC section 1-111)

POWERS OF FIDUCIARIES RELATING TO COMPLIANCE WITH ENVIRONMENTAL LAWS

§1-111. Powers of fiduciaries relating to compliance with environmental laws

(a). From the inception of the trust or estate, a fiduciary has the following powers, without court authorization, which the fiduciary may use in the fiduciary's sole discretion to comply with environmental law:

(1). To inspect and monitor property held by the fiduciary, including interests in sole proprietorships, partnerships or corporations and any assets owned by any such business enterprise, for the purpose of determining compliance with environmental law affecting the property and to respond to any actual or threatened violation of any environmental law affecting the property held by the fiduciary;

(2). To take, on behalf of the estate or trust, any action necessary to prevent, abate or otherwise remedy any actual or threatened violation of any environmental law affecting property held by the fiduciary, either before or after the initiation of an enforcement action by any governmental body;

(3). To refuse to accept property if the fiduciary determines that any property to be donated to the trust or estate either is contaminated by any hazardous substance or is being used or has been used for any activity directly or indirectly involving any hazardous substance that could result in liability to the trust or estate or otherwise impair the value of the assets held in the trust or estate, except nothing in this paragraph applies to property in the trust or estate at its inception;

(4). To settle or compromise at any time any claims against the trust or estate that may be asserted by any governmental body or private party involving the alleged violation of any environmental law affecting property held in trust or in an estate;

(5). To disclaim any power granted by any document, statute or rule of law that, in the sole discretion of the fiduciary, may cause the fiduciary to incur personal liability under any environmental law; or

(6). To decline to serve or to resign as a fiduciary if the fiduciary reasonably believes that there is or may be a conflict of interest between the fiduciary's fiduciary capacity and the fiduciary's individual capacity because of potential claims or liabilities that may be asserted against the fiduciary on behalf of the trust or estate because of the type or condition of assets held in the trust or estate.

(b). For purposes of this section, "environmental law" means any federal, state or local law, rule, regulation or ordinance relating to protection of the environment or human health. For purposes of this section, "hazardous substances" has the meaning set forth in Title 38, section 1362, subsection 1.

(c). The fiduciary may charge the cost of any inspection, review, abatement, response, cleanup or remedial action authorized in this section against the income or principal of the trust or estate. A fiduciary is not personally liable to any beneficiary or other party for any decrease in value of assets in trust or in an estate by reason of the fiduciary's compliance with any environmental law, specifically including any reporting requirement under the law. Neither the

acceptance by the fiduciary of property nor a failure by the fiduciary to inspect property creates an inference as to whether there is or may be any liability under any environmental law with respect to the property.
(d). This section applies to all estates and trusts in existence on and created after July 1, 1994.
(e). The exercise by a fiduciary of any of the powers granted in this section does not constitute a transaction that is affected by a substantial conflict of interest on the part of the fiduciary.

Maine Probate Code Proposed Comments The UPC has no provision concerning powers of fiduciaries relating to compliance with environmental laws.

NONE (current MPC section 1-112)

GUARDIAN AD LITEM

§1-112. Guardian ad litem

- (a). In any proceeding under this Title for which the court may appoint a guardian ad litem for a child involved in the proceeding, at the time of the appointment, the court shall specify the guardian ad litem's length of appointment, duties and fee arrangements.
- (b). A guardian ad litem appointed on or after October 1, 2005 must meet the qualifications established by the Supreme Judicial Court.
- (c). If, in order to perform the guardian ad litem's duties, the guardian ad litem needs information concerning the child or parents, the court may order the parents to sign an authorization form allowing the release of the necessary information. The guardian ad litem must be allowed access to the child by caretakers of the child, whether the caretakers are individuals, authorized agencies or child care providers.
- (d). The guardian ad litem shall use the standard of the best interest of the child as set forth in Title 19-A, section 1653, subsection 3. The guardian ad litem shall make the wishes of the child known to the court if the child has expressed them, regardless of the recommendation of the guardian ad litem.
- (e). If required by the court, the guardian ad litem shall make a final written report to the parties and the court reasonably in advance of a hearing. The report is admissible as evidence and subject to cross-examination and rebuttal, whether or not objected to by a party.
- (f). A person appointed by the court as a guardian ad litem acts as the court's agent and is entitled to quasi-judicial immunity for acts performed within the scope of the duties of the guardian ad litem.
- (g). A guardian ad litem must be given notice of all civil or criminal hearings and proceedings, including, but not limited to, grand juries, in which the child is a party or a witness. The guardian ad litem shall protect the best interests of the child in those hearings and proceedings, unless otherwise ordered by the court.

Maine Probate Code Proposed Comments The UPC has no provision concerning guardians ad litem.

GENERAL DEFINITIONS.

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

(1) “Agent” includes an attorney-in-fact under a durable or nondurable power of attorney, an individual authorized to make decisions concerning another’s health care, and an individual authorized to make decisions for another under ~~a natural death act~~ the Uniform Health Care Decisions Act.

(2) “Application” means a written request to the ~~Registrar~~ Register for an order of informal probate or appointment under Part 3 of Article III.

(3) “Beneficiary,” as it relates to a trust beneficiary, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer; as it relates to a charitable trust, includes any person entitled to enforce the trust; as it relates to a “beneficiary of a beneficiary designation,” refers to a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death; and, as it relates to a “beneficiary designated in a governing instrument,” includes a grantee of a deed, a devisee, a trust beneficiary, a beneficiary of a beneficiary designation, a donee, appointee, or taker in default of a power of appointment, and a person in whose favor a power of attorney or a power held in any individual, fiduciary, or representative capacity is exercised.

(4) “Beneficiary designation” refers to a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death.

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

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

(7) “Conservator” is as defined in Section 5-102.

(8) “Court” means ~~the [..... Court] or branch in this state having jurisdiction in matters relating to the affairs of decedents;~~ any one of the several courts of probate of this State established as provided in Title 4, sections 201 and 202.

(9) “Descendant” of an individual means all of his or her descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this Code.

(10) “Devise,” when used as a noun means a testamentary disposition of real or personal property and, when

used as a verb, means to dispose of real or personal property by will.

(11) "Devisee" means a person designated in a will to receive a devise. For the purposes of Article III, in the case of a devise to an existing trust or trustee, or to a trustee or trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

(12) "Distributee" means any person who has received property of a decedent from ~~his or her~~ the personal representative other than as creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in ~~his or her~~ the trustee's hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For the purposes of this provision, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

(12-A). "Domestic partner" means one of 2 unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other's welfare.

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

(14) "Exempt property" means that property of a decedent's estate which is described in Section 2-403

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

(16) "Foreign personal representative" means a personal representative appointed by another jurisdiction.

(17) "Formal proceedings" means proceedings within the exclusive jurisdiction of the court conducted before a judge with notice to interested persons.

(18) "Governing instrument" means a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), transfer on death (TOD) deed, pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

(19) "Guardian" is as defined in Section 5-102.

(20) "Heirs," except as controlled by Section 2-711 means persons, including the surviving spouse ~~and the state~~, who are entitled under the statutes of intestate succession to the property of a decedent.

(21) "Incapacitated person" means an individual described in Section 5-102.

(22) "Informal proceedings" means those conducted without notice to interested persons by an officer of the court acting as a ~~registrar~~ register for probate of a will or appointment of a personal representative.

(23) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. In any proceeding or hearing under Article 5 affecting a trust estate or estate, when the ward or protected person has received benefits from the Veterans Administration within 3 years, the administrator of Veterans Affairs of the United States is an "interested person." The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

(24) "Issue" of an individual means descendant.

(25) “Joint tenants with the right of survivorship” and “community property with the right of survivorship” includes co-owners of property held under circumstances that entitle one or more to the whole of the property on the death of the other or others, but excludes forms of co-ownership registration in which the underlying ownership of each party is in proportion to that party’s contribution.

(26) “Lease” includes an oil, gas, or other mineral lease.

(27) “Letters” includes letters of authority, letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(28) “Minor” has the meaning described in Section 5-102.

(29) “Mortgage” means any conveyance, agreement, or arrangement in which property is encumbered or used as security.

(30) “Nonresident decedent” means a decedent who was domiciled in another jurisdiction at the time of his or her death.

(31) “Organization” means a corporation, business trust, estate, trust, partnership, joint venture, association, government or governmental subdivision or agency, or any other legal or commercial entity.

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

(33) “Payor” means a trustee, insurer, business entity, employer, government, governmental agency or subdivision, or any other person authorized or obligated by law or a governing instrument to make payments.

(34) “Person” means an individual, or an organization.

(35) “Personal representative” includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

“General personal representative” excludes special administrator.

(36) “Petition” means a written request to the court for an order after notice.

(37) “Proceeding” includes any civil action in any court of competent jurisdiction ~~an action at law and suit in equity.~~

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

(39) “Protected person” is as defined in Section 5-102.

(40) “Protective proceeding” is as defined in Section 5-101.

(41) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(42) ~~“Registrar” refers to~~ “Register means” the official of the court elected or appointed as provided in section 1-501, or any other person performing the functions of register as provided in Article I, Part 5. ~~designated to perform the functions of Registrar as provided in.~~

(42-A). “Registered domestic partners” means domestic partners who are registered in accordance with Title 22, section 2710.

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

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

(45) "Sign" means, with present intent to authenticate or adopt a record other than a will:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

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

(46-A) "Spouse" means one who is lawfully married and includes registered domestic partners and individuals who are in a legal union that was validly formed in any State or jurisdiction that provides substantially the same rights, benefits, and responsibilities as a marriage.

(47) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

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

(49) "Successors" means persons, other than creditors, who are entitled to property of a decedent under ~~his or her~~ the decedent's will or this Code.

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

(51) "Survive" means that an individual has neither predeceased an event, including the death of another individual, nor is deemed to have predeceased an event under Section 2-104 or 2-702. The term includes its derivatives, such as "survives," "survived," "survivor," and "surviving."

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

(53) "Testator" includes an individual of either sex who has executed a will.

(54) "Trust" includes an express trust, private or charitable, with additions thereto, wherever and however created. The term also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. The term excludes other constructive trusts and excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in Article VI, custodial arrangements pursuant to the Maine Uniform Transfers to Minors Act, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

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

(56) "Ward" means an individual described in Section 5-102. (57) "Will" includes a codicil and any

testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.

Maine Probate Code Proposed Comments This section adds several definitions from the former MPC which do not appear in the UPC.

1-301

TERRITORIAL APPLICATION

Except as otherwise provided in this [code], this [code] applies to:

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

1-302

SUBJECT MATTER JURISDICTION

(a) To the full extent permitted by the ~~constitution~~ Maine statutes, the court has jurisdiction over all subject matter relating to

- (1) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons;
- (2) protection of minors and incapacitated persons; and
- (3) trusts.

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

(c) The court has jurisdiction over protective proceedings and guardianship proceedings.

(d) If both guardianship and protective proceedings as to the same person are commenced or pending in the same court, the proceedings may be consolidated.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

1-303
VENUE, MULTIPLE PROCEEDINGS, TRANSFER
<p>(a) Where a proceeding under this [code] could be maintained in more than one place in this state, the court in which the proceeding is first commenced has the exclusive right to proceed.</p> <p>(b) If proceedings concerning the same estate, protected person, ward, or trust are commenced in more than one court of this state, the court in which the proceeding was first commenced shall continue to hear the matter, and the other courts shall hold the matter in abeyance until the question of venue is decided, and if the ruling court determines that venue is properly in another court, it shall transfer the proceeding to the other court.</p> <p>(c) If a court finds that in the interest of justice a proceeding or a file should be located in another court of this state, the court making the finding may transfer the proceeding or file to the other court.</p>
Maine Probate Code Proposed Comments Adopt UPC

1-304
PRACTICE IN COURT
<p>Unless specifically provided to the contrary in this [code] or unless inconsistent with its provisions, the rules of civil procedure including the rules concerning vacation of orders and appellate review govern formal proceedings under this [code]. (a) <u>The Supreme Judicial Court shall have the power to prescribe by general rules the forms, practice and procedure, including rules of evidence, to be followed in all proceedings under this Code and all appeals therefrom; provided that the rules shall be consistent with the provisions of this Code and shall not abridge, enlarge or modify any substantive right.</u> (b) <u>After the effective date of the rules as promulgated or amended, all laws in conflict therewith shall be of no further force or effect, except that in the event of conflict with a provision of this Code, the Code provision shall prevail.</u></p>

1-305.
RECORDS AND CERTIFIED COPIES
<p>The [Clerk of Court] shall keep a record for each decedent, ward, protected person or trust involved in any document which may be filed with the court under this [code], including petitions and applications, demands for notices or bonds, trust registrations, and of any orders or responses relating thereto by the Registrar or court, and establish and maintain a system for indexing, filing or recording which is sufficient to enable users of the records to obtain adequate information. Upon payment of the fees required by law the clerk must issue certified copies of any</p>

~~probated wills, letters issued to personal representatives, or any other record or paper filed or recorded. Certificates relating to probated wills must indicate whether the decedent was domiciled in this state and whether the probate was formal or informal. Certificates relating to letters must show the date of appointment. The register shall maintain records and files and provide copies of documents as provided in sections 1-501 through 1-511 and such further records and copies as the Supreme Judicial Court may by rule provide. The register shall be subject to the supervision and authority of the judge of the court in which such register serves.~~

1-306

JURY TRIAL NO JURY TRIAL; REMOVAL.

- ~~(a) If duly demanded, a party is entitled to trial by jury in [a formal testacy proceeding and] any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury.~~
- ~~(b) If there is no right to trial by jury under subsection (a) or the right is waived, the court in its discretion may call a jury to decide any issue of fact, in which case the verdict is advisory only.~~
- ~~(a). The court shall sit without a jury.~~
- ~~(b). Upon timely demand by any party any proceeding not within the exclusive jurisdiction of the court may be removed for trial to the Superior Court under such procedures as the Supreme Judicial Court may by rule provide.~~

1-307

REGISTER REGISTER; POWERS

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

~~The register has the power to probate wills and appoint personal representatives as provided in sections 3-302 and 3-307 and to perform other duties as set out in this Title generally. The acts and orders that this Code specifies as performable by the register may also be performed by a judge of the court or by a deputy register appointed under the provisions of section 1-506.~~

1-308

APPEALS.

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

~~Appeals from all final judgments, orders and decrees of the court shall lie to the Supreme Judicial Court, sitting as the law court, as in other civil actions.~~

1-309

JUDGES

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

~~A judge of the court shall be chosen and serve as provided in Title 4, sections 301 to 311.~~

1-310

OATH OR AFFIRMATION ON FILED DOCUMENTS

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

1-401

NOTICE; METHOD OF TIME AND GIVING

1-402

NOTICE; WAIVER

A person, including a guardian ad litem, conservator or other fiduciary, may waive notice ~~by a writing signed by him~~

~~or his attorney and filed in the proceeding in such manner as the Supreme Judicial Court shall by rule provide. A person for whom a guardianship or other protective order is sought, a ward, or a protected person may not waive notice.~~

1-403

PLEADINGS; WHEN PARTIES BOUND BY OTHERS: NOTICE

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

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

(2) A person is bound by an order binding another in the following cases:

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

(B) To the extent there is no conflict of interest between them or among persons represented:

(i) an order binding a conservator binds the person whose estate the conservator controls;

(ii) an order binding a guardian binds the ward if no conservator of the ward's estate has been appointed;

(iii) an order binding a trustee binds beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a former fiduciary, and in proceedings involving creditors or other third parties;

(iv) an order binding a personal representative binds persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate; and

(v) an order binding a sole holder or all co-holders of a general testamentary power of appointment binds other persons to the extent their interests as objects, takers in default, or otherwise are subject to the power.

(C) Unless otherwise represented, a minor or an incapacitated, unborn, or unascertained person is bound by an order to the extent the person's interest is adequately represented by another party having a substantially identical interest in the proceeding.

(3) If no conservator or guardian has been appointed, a parent may represent a minor child.

(4) Notice is required as follows:

(A) The notice prescribed by Section 1-401 must be given to every interested person or to one who can bind an interested person as described in paragraph (2)(A) or (B). Notice may be given both to a person and to another who may bind the person.

(B) Notice is given to unborn or unascertained persons who are not represented under paragraph (2)(A) or (B) by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the

unborn or unascertained persons.

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

None

Part 5. REGISTERS OF PROBATE

§1-501. Election; bond; vacancies; salaries; copies

Registers of probate are elected or appointed as provided in the Constitution of Maine. Their election is effected and determined as is provided respecting county commissioners by Title 30-A, chapter 1, subchapter II, and they enter upon the discharge of their duties on the first day of January following their election; but the term of those appointed to fill vacancies commences immediately. All registers, before acting, shall give bond to the treasurer of their county with sufficient sureties in the sum of \$2,500, except that this sum must be \$10,000 for Cumberland County. Every register, having executed such bond, shall file it in the office of the clerk of the county commissioners of that register's county, to be presented to them at their next meeting for approval. After the bond has been so approved, the clerk shall record it and certify the fact thereon, and retaining a copy thereof, deliver the original to the register, who shall deliver it to the treasurer of the county within 10 days after its approval, to be filed in the treasurer's office. Vacancies caused by death, resignation, removal from the county, permanent incapacity as defined in Title 30-A, section 1, subsection 2-A or any other reason must be filled as provided in the Constitution of Maine. In the case of a vacancy in the term of a register of probate who was nominated by primary election before the general election, the register of probate appointed by the Governor to fill the vacancy until a successor is chosen at election must be enrolled in the same political party as the register of probate whose term is vacant. In making the appointment, the Governor shall choose from any recommendations submitted to the Governor by the county committee of the political party from which the appointment is to be made.

Registers of probate in the several counties are entitled to receive annual salaries as set forth in Title 30-A, section 2. The salaries of the registers of probate must be in full compensation for the performance of all duties required of registers of probate. They may make copies of wills, accounts, inventories, petitions and decrees and furnish the same to persons calling for them and may charge a reasonable fee for such service, which is considered a fee for the use of the county.

Exemplified copies of the record of the probate of wills and the granting of administrations, guardianships and conservatorships, copies of petitions and orders of notice thereon for personal service, appeal copies and the statutory

fees for abstracts and copies of the waiver of wills and other copies required to be recorded in the registry of deeds are considered official fees for the use of the county.

This section may not be construed to change or repeal any provisions of law requiring the furnishing of certain copies without charge.

§1-502. Condition of bond

The condition of such bond shall be to account, according to law, for all fees received by him or payable to him by virtue of his office and to pay the same to the county treasurer by the 15th day of every month following the month in which they were collected, as provided by law; to keep up, seasonably and in good order, the records of the court; to make and keep correct and convenient alphabets of the records and to faithfully discharge all other duties of the office. If such register forfeits his bond, he is thenceforth disqualified from holding said office, and neglect to complete his records for more than 6 months at any time, sickness or extraordinary casualty excepted, shall be adjudged a forfeiture.

§1-503. Duties; records; binding of papers

Registers of probate have the care and custody of all files, papers and books belonging to the probate office and shall duly record all wills probated formally or informally, letters of authority of a personal representative, guardianship or conservatorship issued, bonds approved, accounts filed or allowed, all informal applications and findings, all petitions, decrees, orders or judgments of the judge, including all petitions, decrees or orders relating to adoptions and changes of names and other matters, as the judge directs. Registers of probate shall keep a docket of all probate cases and, under the appropriate heading of each case, make entries of each motion, order, decree and proceeding so that at all times the docket shows the exact condition of each case. Any register may act as an auditor of accounts when requested to do so by the judge and the judge's decision is final unless appeal is taken in the same manner as other probate appeals. The records may be attested by the volume and it is deemed to be a sufficient attestation of those records when each volume bears the attest with the written signature of the register or other person authorized by law to attest those records. The registers of probate may bind in volumes of convenient size original inventories and accounts filed in their respective offices and, when bound and indexed, those inventories and accounts are deemed to be recorded in all cases when the law requires a record to be made and no further record is required.

A facsimile of the signature of the register of probate or deputy register of probate imprinted at his direction upon any instrument, certification or copy which is customarily certified by him or recorded in the probate office, shall have the same validity as his signature.

§1-504. Certification of wills, appointments of personal representatives and elective share petitions involving real estate

Within 30 days after a will has been proved or allowed, or an appointment of a personal representative has been made upon an assumption of intestate status and where the petition for the appointment indicates that the deceased owned real estate, or a petition for an elective share has been filed where the will or the petition upon which appointment of a personal representative has been granted indicates that the deceased owned real estate, the register shall make out and certify to the register of deeds in the county where any affected real estate is situated (1) a true

copy of so much of the will as devises real estate, (2) an abstract of the appointment of the personal representative, or (3) a true copy or abstract of the petition for an elective share, as the case may be. Each certification shall include a description of the real estate, so far as it can be furnished from the probated will or the petition upon which the appointment was made, and the name of the decedent and of the devisees or heirs. In the case of a will, the certification shall also set forth the date of the allowance of the will and designate whether it was probated formally or informally. In the case of the formal probate of a will that was previously informally probated, and of an informally probated will that was subsequently denied probate in formal proceedings, the register of probate shall certify such formal probate or formal denial of probate to the register of deeds to which the prior informally probated will was certified, setting forth the date of the formal probate or denial. The register of deeds receiving such copy or certification shall forthwith file the same, minuting thereon the time of the reception thereof, and record it in the same manner as a deed of real estate.

§1-505. Notice to beneficiaries; furnishing of copies

Registers of probate shall, within 30 days after any will is probated, notify by mail all beneficiaries under that will that devises have been made to them, stating the name of the testator and the name of the personal representative, if one has been appointed at the time this notification is sent. Beneficiaries in a will must, upon application to the register of probate, be furnished with a copy of the probated will upon payment of a fee of \$1 per page.

§1-506. Deputy register of probate

Any register of probate in this State may appoint a deputy register of probate for the county, subject to the requirements of Title 30-A, section 501. The deputy may perform any of the duties prescribed by law to be performed by the register of probate. His signature as the deputy shall have the same force and effect as the signature of the register. The deputy shall give bond to the county for the faithful discharge of his duties in such sum and in the same manner as the register of probate. The deputy register shall act as register in the event of a vacancy or absence of the register, until the register resumes his duties or another is qualified as register. The deputy register shall receive an annual salary as established by the register and approved by the county commissioners.

In case of the absence of the register in any county where no deputy has been appointed as above authorized, or a vacancy in the office of register of probate due to death, resignation or any other cause, the judge shall appoint a suitable person to act as register pro tempore until the register resumes his duties or another is qualified as register. He shall be sworn and, if the judge requires it, give bond as in the case of the register.

§1-507. Inspection of register's conduct of office

Every judge of probate shall constantly inspect the conduct of the register with respect to his records and the duties of his office, and give information in writing of any breach of his bond to the treasurer of his county, who shall bring civil action. The money thus recovered shall be applied toward the expenses of completing the records of such register under the direction of said judge and the surplus, if any, shall inure to the county. If it is not sufficient for that purpose, the treasurer may recover the deficiency from the register in a civil action.

§1-508. Register incapable or neglects duties

When a register is unable to perform his duties or neglects them, the judge shall certify such inability or neglect to

the county treasurer, the time of its commencement and termination, and what person has performed the duties for the time. Such person shall be paid by the treasurer in proportion to the time that he has served and the amount shall be deducted from the register's salary.

§1-509. Records in case of vacancy

When there is a vacancy in the office of register and the records are incomplete, they may be completed and certified by the person appointed to act as register or by the register's successor.

§1-510. Register or Probate Court employee; prohibited activities

1. Prohibited activities. A register may not:

A. Be an attorney or counselor in or out of court in an action or matter pending in the court of which the register is register or in an appeal in such action or matter;

B. Be administrator, guardian, commissioner of insolvency, appraiser or divider of an estate, in a case within the jurisdiction of the court of which the register is register, except as provided in Title 4, section 307, or be in any manner interested in the fees and emoluments arising from such an estate in that capacity; or

C. Commence or conduct, either personally or by agent or clerk, any matter, petition, process or proceeding in the court of which the register is register, in violation of this section.

2. Assistance in drafting. Except as otherwise provided in this section, a register may not draft or aid in drafting documents or paper that the register is by law required to record in full or in part. A register may aid in drafting applications in informal proceedings, petitions or sworn statements relating to the closing of decedents' estates that have not been contested prior to closing, applications for change of name and petitions for guardians of minors. A register or an employee of the Probate Court may not charge fees or accept anything of value for assisting in the drafting of documents to be used or filed in the court of which the person is the register or an employee.

3. Penalties. The following penalties apply to violations of this section.

A. A register who violates subsection 1 commits a Class E crime. Violation of subsection 1 is a strict liability crime as defined in Title 17-A, section 34, subsection 4-A.

B. A register or employee of the Probate Court who violates subsection 2 is subject to a civil penalty of not more than \$100, to be recovered by a complainant in a civil action for the complainant's benefit or by indictment for the benefit of the county.

§1-511. Fees for approved blanks and forms

For all approved blanks, forms or schedule paper required in probate court proceedings, the register shall charge fees which shall be set by the register and approved by the county commissioners, so as not to incur a loss to the county for such services. Such fees shall be payable by the register to the county treasurer for the use and benefit of the county.

None

Part 6. COSTS AND FEES

MPC ARTICLE 1, PART 6. COSTS AND FEES

§1-601. Costs in contested cases in probate court

In contested cases in the original or appellate court of probate, costs may be allowed to either party, including reasonable witness fees, cost of depositions, hospital records or medical reports and attorney's fees, to be paid to either or both parties, out of the estate in controversy, as justice requires. In those cases where a will is being contested on the grounds of undue influence or mental capacity, attorney's fees and costs shall not be allowed to the party contesting the will if he is unsuccessful.

§1-602. Filing and certification fees

The register of probate must receive the following fees for filing or certifying documents:

(1). For making and certifying to the register of deeds copies of devises of real estate, abstracts of petitions for appointment of a personal representative or for an elective share and any other document for which certification is required, \$15, plus the fee for recording as provided by Title 33, section 751, except as otherwise expressly provided by law. The fee must be paid by the personal representative, petitioner or other person filing the document to be certified when the copy of the devise, abstract, petition for elective share or other document for which certification is required is requested. The register of probate shall deliver the certified document to the register of deeds together with the fee for recording as provided by Title 33, section 751;

(2). For receiving and entering each petition or application for all estates, testate and intestate, including foreign estates, and the filing of a notice by a domiciliary foreign personal representative, except for the filing of a successor personal representative, when the value of the estate is:

(i). (Deleted)

(i-a). For filing a will for no probate, no charge;

(ii). For filing a will to be probated and without an appointment, \$15;

(iii). \$10,000 and under, \$20;

(iv). \$10,001 to \$20,000, \$40;

(v). \$20,001 to \$30,000, \$60;

(vi). \$30,001 to \$40,000, \$75;

(vii). \$40,001 to \$50,000, \$95;

(viii). \$50,001 to \$75,000, \$125;

(ix). \$75,001 to \$100,000, \$190;

(x). \$100,001 to \$150,000, \$250;

(xi). \$150,001 to \$200,000, \$325;

(xii). \$200,001 to \$250,000, \$375;

(xiii). \$250,001 to \$300,000, \$450;

(xiv). \$300,001 to \$400,000, \$500;

(xv). \$400,001 to \$500,000, \$575;

(xvi). \$500,001 to \$750,000, \$625;

(xvii). \$750,001 to \$1,000,000, \$700;

- (xviii). \$1,000,001 to \$1,500,000, \$750;
(xix). \$1,500,001 to \$2,000,000, \$875; or
(xx). More than \$2,000,000, \$950, and continuing in steps of \$100 for every increase in value of \$500,000 or part thereof above \$2,500,000;
(3). For making copies from the records of the court, \$1 for each page;
(4). For each certificate, under seal of the court, of the appointment and qualification of a personal representative, guardian, conservator or trustee, \$5, and for each double certificate, \$10;
(5). For filing a petition for appointment as guardian, \$50;
(6). For filing application for involuntary hospitalization, \$10;
(7). For filing a joined petition for guardian and conservator, \$75;
(8). For filing any other formal proceeding, \$25;
(9). For filing a petition for appointment of conservator, \$50;
(10). For all other subsequent informal appointments, \$25; and
(11). For filing a petition for elective share, \$120.

§1-603. Registers to account monthly for fees

Registers of probate shall account for each calendar month under oath to the county treasurers for all fees received by them or payable to them by virtue of the office, specifying the items, and shall pay the whole amount for each calendar month to the treasurers of their respective counties not later than the 15th day of the following month.

§1-604. Expenses of partition

When a partition of real estate is made by order of a judge of probate, the expenses thereof shall be paid by the parties interested in proportion to their interests; but when such expenses accrue prior to the closing order or statement of the personal representative of the deceased owner of such real estate, having in his hands sufficient assets for the purpose, he may pay such expenses and allow the same in his account. In case of neglect or refusal of any person liable to pay such expenses, the judge may issue a warrant of distress against such delinquent for the amount due from him and costs of process.

§1-605. Compensation of reporters

Reporters appointed under Title 4, sections 751 to 756, shall, if a transcript is requested by the court or a party, file the original transcript with the court and receive the same compensation as provided by law for temporary court reporters, and travel at the rate of 10¢ a mile.

Transcript rates shall be in accordance with Title 4, section 651, for transcript furnished for the files of the court and shall be paid by the county in which the court or examination is held, after the reporter's bill has been allowed by the judge of the court in which the services were rendered. In probate matters, the personal representative, conservator or guardian shall, in each case out of the estate in his hands, pay to the register for the county the amount of the reporter's fees, giving such fees the same priority as provided in section 3-815 for other costs and expenses of administration, or as otherwise provided for in the case of insolvent estates, provided that the court can order payment by the county in case the estate assets are not sufficient.

§1-606. Reporters to furnish copies

Reporters shall furnish correct typewritten copies of the oral testimony taken at any hearing or examination, to any person calling for the same, upon payment of transcript rates prescribed in Title 4, section 651.

§1-607. Surcharge for restoration, storage and preservation of records

(1). In addition to any other fees required by law, a register of probate shall collect a surcharge of \$10 per petition, application or complaint, except for name changes, filed in the Probate Court.

(2). The surcharge imposed in subsection (1) must be transferred to the county treasurer, who shall deposit it in a separate, nonlapsing account within 30 days of receipt. Money in the account is not available for use as general revenue of the county. Interest earned on the account must be credited to the account.

(3). The money in the account established in subsection (2) must be used for the restoration, storage and preservation of the records filed in the office of the register of probate and in Probate Court. No withdrawals from this account may be made without the express written request or approval of the register of probate.

(4). The judge of probate may waive the surcharge in subsection (1) if the judge believes that it will prove a hardship for the individual filing the petition, application or complaint.

§1-608. Fees not established in statute

Unless otherwise specifically stated in statute or in the Rules of Probate Procedure as published by the Supreme Judicial Court, the Probate Court shall charge the same fee as charged by the District Court or the Superior Court for similar procedures.

NONE

PART 7. CHANGE OF NAME

PART 7. CHANGE OF NAME

§1-701. Petition to change name

(a). If a person desires to have that person's name changed, the person may petition the judge of probate in the county where the person resides. If the person is a minor, the person's legal custodian may petition in the person's behalf.

(b). The judge, after due notice, may change the name of the person. To protect the person's safety, the judge may limit the notice required if the person shows by a preponderance of the evidence that:

(1). The person is a victim of abuse; and

(2). The person is currently in reasonable fear of the person's safety.

(c). The judge shall make and preserve a record of the name change. If the judge limited the notice required under subsection (b), the judge may seal the records of the name change.

(d). The fee for filing the name change petition is \$40.

(e). The judge may require the person seeking a name change to undergo one or more of the following background checks: a criminal history record check; a motor vehicle record check; or a credit check. The judge may require the

person to pay the cost of each background check required.

(f). The judge may not change the name of the person if the judge has reason to believe that the person is seeking the name change for purposes of defrauding another person or entity or for purposes otherwise contrary to the public interest.

NONE

PART 8. PROBATE AND TRUST LAW ADVISORY COMMISSION

PROBATE AND TRUST LAW ADVISORY COMMISSION

§1-801. Commission established

The Probate and Trust Law Advisory Commission, established in Title 5, section 12004-I, subsection 73-B and referred to in this Part as "the commission," is created for the purpose of conducting a continuing study of the probate and trust laws of the State.

1. Membership. The commission is composed of 10 members who have experience in practicing probate and trust law or are knowledgeable about probate and trust law. The membership of the commission must include:

A. Two Probate Court Judges, appointed by the Chief Justice of the Supreme Judicial Court;

B. One Superior Court Justice, appointed by the Chief Justice of the Supreme Judicial Court;

C. Five members of the trusts and estates law section of the Maine State Bar Association, appointed by the Chief Justice of the Supreme Judicial Court;

D. One member representing the interests of older people, appointed by the Governor; and

E. The Attorney General, or the Attorney General's designee.

2. Terms. A member is appointed for a term of 3 years and may be reappointed.

3. Vacancies. In the event of the death or resignation of a member, the appointing authority under subsection 1 shall appoint a qualified person for the remainder of the term.

§1-802. Consultants; experts

Whenever it considers appropriate, the commission shall seek the advice of consultants or experts, including representatives of the legislative and executive branches, in fields related to the commission's duties.

§1-803. Duties

1. Examine, evaluate and recommend. The commission shall:

A. Examine this Title and Title 18-B and draft amendments that the commission considers advisable;

B. Evaluate the operation of this Title and Title 18-B and recommend amendments based on the evaluation;

C. Examine current laws pertaining to probate and trust laws and recommend changes based on the examination;
and

D. Examine any other aspects of the State's probate and trust laws, including substantive, procedural and administrative matters, that the commission considers relevant.
2. Propose changes. The commission may propose to the Legislature, at the start of each session, changes in the probate and trust laws and in related provisions that the commission considers appropriate.

§1-804. Organization

The Chief Justice of the Supreme Judicial Court shall notify all members of the commission of the time and place of the first meeting of the commission. At that time the commission shall organize, elect a chair, vice-chair and secretary-treasurer from its membership and adopt rules governing the administration of the commission and its affairs. The commission shall maintain financial records as required by the State Auditor.

§1-805. Federal funds

The commission may accept federal funds on behalf of the State.

2-101

INTESTATE ESTATE

- (a) Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this Code, except as modified by the decedent's will.
- (b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his (or her) intestate share.

Maine Probate Code Proposed Comments Subparagraph (b) is new and makes clear that a decedent may by will exclude or limit the right of an individual or class to succeed to property passing by intestate succession.

2-102

SHARE OF SPOUSE

The intestate share of a decedent's surviving spouse is:

- (1) the entire intestate estate if:
 - (A) no descendant or parent of the decedent survives the decedent; or
 - (B) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;
- (2) the first \$300,000, plus three-fourths of any balance of the intestate estate, if no descendant of the

decedent survives the decedent, but a parent of the decedent survives the decedent;

(3) the first ~~\$225~~ \$100,000, plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) If there are surviving issue one or more of whom are not issue of the surviving spouse, 1/2 of the intestate estate.

Maine Probate Code Proposed Comments This section changes the amounts payable to a surviving spouse.

2-103

SHARE OF HEIRS OTHER THAN SURVIVING SPOUSE

(a) Any part of the intestate estate not passing to a decedent's surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals who survive the decedent:

(1) to the decedent's descendants ~~by representation~~ per capita at each generation;

(2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent if only one survives;

(3) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them ~~by representation~~ per capita at each generation;

(4) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived on both the paternal and maternal sides by one or more grandparents or descendants of grandparents:

(A) half to the decedent's paternal grandparents equally if both survive, to the surviving paternal grandparent if only one survives, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants ~~taking by representation~~ per capita at each generation; and them if both are deceased, the descendants taking by representation;

(5) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents on the paternal but not the maternal side, or on the maternal but not the paternal side, to the decedent's relatives on the side with one or more surviving members in the manner described in paragraph (4).

(6) if there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, but the decedent is survived by one or more great-grandparents or issue of great-grandparents, half of the estate passes to the paternal great-grandparents who survive, or to the issue of the paternal great-grandparents if all are deceased, to be distributed per capita at each generation as defined in section 2-106; and the other half passes to the maternal relatives in the same manner, but if there is no surviving great-grandparent or issue of a great-grandparent on either the paternal or maternal side, the entire estate passes to the relatives on the other side in the same manner as the

half.

(b) If there is no taker under subsection (a), but the decedent has:

(1) one deceased spouse who has one or more descendants who survive the decedent, the estate or part thereof passes to that spouse's descendants by representation per capita at each generation; or

(2) more than one deceased spouse who has one or more descendants who survive the decedent, an equal share of the estate or part thereof passes to each set of descendants by representation per capita at each generation.

Maine Probate Code Proposed Comments This section was modified to add descendants of a spouse as takers of last resort before an estate escheats to the state.

2-104

REQUIREMENT OF SURVIVAL BY 120 HOURS; INDIVIDUAL IN GESTATION

(a) For purposes of intestate succession, homestead allowance, and exempt property, and except as otherwise provided in subsection (b), the following rules apply:

(1) An individual born before a decedent's death who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent. If it is not established by clear and convincing evidence that an individual born before the decedent's death survived the decedent by 120 hours, it is deemed that the individual failed to survive for the required period.

(2) An individual in gestation at a decedent's death is deemed to be living at the decedent's death if the individual lives 120 hours after birth. If it is not established by clear and convincing evidence that an individual in gestation at the decedent's death lived 120 hours after birth, it is deemed that the individual failed to survive for the required period.

(b) **[Section Inapplicable If Estate Would Pass to State.]** This section does not apply if its application would cause the estate to pass to the state under Section 2-105.

Maine Probate Code Proposed Comments Section 2-104(a)(2) explicitly includes unborn individuals in gestation. Such individuals are deemed to be living as of the decedent's death if they live for 120 hours. The issue of afterborn heirs was previously addressed in former MPC Section 2-108.

2-105

NO TAKER.

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

2-106

REPRESENTATION—(PER CAPITA AT EACH GENERATION)

Section 2-106. Representation – Per Capita at Each Generation.

(a)[**Definitions.**] In this section:

(1)"Deceased descendant," "deceased parent," or "deceased grandparent" means a descendant, parent, or grandparent who either predeceased the decedent or is deemed to have predeceased the decedent under Section 2-104.

(2)"Surviving descendant" means a descendant who neither predeceased the decedent nor is deemed to have predeceased the decedent under Section 2-104.

(b)[**Decedent's Descendants.**] If, under Section 2-103(1), a decedent's intestate estate or a part thereof passes "~~by representation~~" "per capita at each generation" to the decedent's descendants, the estate or part thereof is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the decedent which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.

(c)[**Descendants of Parents or Grandparents.**] If, under Section 2-103(3) or (4), a decedent's intestate estate or a part thereof passes "~~by representation~~" "per capita at each generation" to the descendants of the decedent's deceased parents or either of them or to the descendants of the decedent's deceased paternal or maternal grandparents or either of them, the estate or part thereof is divided into as many equal shares as there are (i) surviving descendants in the generation nearest the deceased parents or either of them, or the deceased grandparents or either of them, that contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

2-107

KINDRED OF HALF BLOOD

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

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2-108
(Reserved)
2-109
ADVANCEMENTS
(a) If an individual dies intestate as to all or a portion of his [or her] estate, property the decedent gave during the decedent's lifetime to an individual who, at the decedent's death, is an heir is treated as an advancement against the heir's intestate share only if (i) the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement of (ii) the decedent's contemporaneous writing or the heir's written acknowledgment otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent's intestate estate.
(b) For purposes of subsection (a), property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of the decedent's death, whichever first occurs.
(c) If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the division and distribution of the decedent's intestate estate, unless the decedent's contemporaneous writing provides otherwise.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

2-110
DEBTS TO DECEDENT
A debt owed to a decedent is not charged against the intestate share of any individual except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's descendants.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

2-111
ALIENAGE.
No individual is disqualified to take as an heir because the individual or an individual through whom he [or she] claims is or has been an alien.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

2-112
DOWER AND CURTESY ABOLISHED
The estates of dower and curtesy are abolished.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

2-113
INDIVIDUALS RELATED TO DECEDENT THROUGH TWO LINES
An individual who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship that would entitle the individual to the larger share. <u>In cases where such an heir would take equal shares, he shall be entitled to the equivalent of a single share. The court shall equitably apportion the amount equivalent in value to the share denied such heir by the provision of this section.</u>
Maine Probate Code Proposed Comments The last two sentences in the section were previously adopted under the MPC and are retained for clarity. The language does not constitute a substantive change to Maine law.

2-114
PARENT BARRED FROM INHERITING
(a) A parent is barred from inheriting from or through a child of the parent if: (1) The parent’s parental rights were terminated and the parent-child relationship was not judicially reestablished; or (2) The child died before reaching [18] years of age and there is clear and convincing evidence that immediately before the child’s death the parental rights of the parent could have been terminated under law of this state other than this [code] on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child. (b) For the purpose of intestate succession from or through the deceased child, a parent who is barred from inheriting under this section is treated as if the parent predeceased the child.

Subpart 2. Parent-Child Relationship

SECTION 2-115.

DEFINITIONS.

- (1) “Adoptee” means an individual who is adopted.
- (2) “Assisted reproduction” means a method of causing pregnancy other than sexual intercourse.
- (3) “Divorce” includes an annulment, dissolution, and declaration of invalidity of a marriage.
- (4) “Functioned as a parent of the child” means behaving toward a child in a manner consistent with being the child’s parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual’s child, materially participating in the child’s upbringing, and residing with the child in the same household as a regular member of that household.
- (5) “Genetic father” means the man whose sperm fertilized the egg of a child’s genetic mother. If the father-child relationship is established under the presumption of paternity under [insert applicable state law], the term means only the man for whom that relationship is established.
- (6) “Genetic mother” means the woman whose egg was fertilized by the sperm of a child’s genetic father.
- (7) “Genetic parent” means a child’s genetic father or genetic mother.
- (8) “Incapacity” means the inability of an individual to function as a parent of a child because of the individual’s physical or mental condition.
- (9) “Relative” means a grandparent or a descendant of a grandparent.

Maine Probate Code Proposed Comments This subpart will treat children conceived through ARTs the same as children conceived through sexual intercourse. This subpart is not intended to change the parent-child relationship governed by Title 19.

SECTION 2-116.

EFFECT OF PARENT-CHILD RELATIONSHIP

Except as otherwise provided in Section 2-119(b) through (e), if a parent-child relationship exists or is established under this subpart or under [the Maine Parentage Act], the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession.

Maine Probate Code Proposed Comments This section will treat children conceived through ARTs the same as children conceived through sexual intercourse. This section is not intended to change the parent-child relationship governed by Title 19. [This section includes a reference to the Maine Parentage Act as a non-uniform provision, which will result in an expanded opportunity for establishing a parent-child relationship.] [NOTE: THE BRACKETED LANGUAGE SHOULD BE INCLUDED IN THE PROPOSED MAINE COMMENT ONLY IF

MAINE ENACTS THE MAINE PARENTAGE ACT]

SECTION 2-117.

NO DISTINCTION BASED ON MARITAL STATUS.

Except as otherwise provided in Sections 2-114, 2-119, 2-120, or 2-121, a parent-child relationship exists between a child and the child's genetic parents, regardless of the parents' marital status.

Maine Probate Code Proposed Comments This section is not intended to change the parent-child relationship governed by Title 19

SECTION 2-118

ADOPTEE AND ADOPTEE'S ADOPTIVE PARENT OR PARENTS.

(a) A parent-child relationship exists between an adoptee and the adoptee's adoptive parent or parents.

(b) For purposes of subsection (a):

- (1) an individual who is in the process of being adopted by a married couple when one of the spouses dies is treated as adopted by the deceased spouse if the adoption is subsequently granted to the decedent's surviving spouse; and
- (2) a child of a genetic parent who is in the process of being adopted by a genetic parent's spouse when the spouse dies is treated as adopted by the deceased spouse if the genetic parent survives the deceased spouse by 120 hours.

(c) If, after a parent-child relationship is established between a child of assisted reproduction and a parent under Section 2-120 or between a gestational child and a parent under Section 2-121, the child is in the process of being adopted by the parent's spouse when that spouse dies, the child is treated as adopted by the deceased spouse for the purpose of subsection (b)(2).

SECTION 2-119.

ADOPTEE AND ADOPTEE'S GENETIC PARENTS.

(a) Except as otherwise provided in subsections (b) through (e), a parent-child relationship does not exist between an adoptee and the adoptee's genetic parents.

(b) A parent-child relationship exists between an individual who is adopted by the spouse of either genetic parent and:

- (1) the genetic parent whose spouse adopted the individual; and
- (2) the other genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to

inherit from or through the other genetic parent.

(c) A parent-child relationship exists between both genetic parents and an individual who is adopted by a relative of a genetic parent, or by the spouse or surviving spouse of a relative of a genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through either genetic parent.

(d) A parent-child relationship exists between both genetic parents and an individual who is adopted after the death of both genetic parents, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit through either genetic parent.

(e) If, after a parent-child relationship is established between a child of assisted reproduction and a parent or parents under Section 2-120 or between a gestational child and a parent or parents under Section 2-121, the child is adopted by another or others, the child's parent or parents under Section 2-120 or 2-121 are treated as the child's genetic parent or parents for the purpose of this section.

(f) Regardless of whether a parent-child relationship is established or not, an adoptee shall inherit from his or her genetic parents if so provided in the adoption decree.

SECTION 2-120.

CHILD CONCEIVED BY ASSISTED REPRODUCTION OTHER THAN CHILD BORN TO GESTATIONAL CARRIER OR CHILD BORN TO SURROGATE.

(a) In this section:

(1) "Birth mother" means a woman, other than a gestational carrier or a Surrogate under Section 2-121, who gives birth to a child of assisted reproduction. The term is not limited to a woman who is the child's genetic mother.

(2) "Child of assisted reproduction" means a child conceived by means of assisted reproduction by a woman other than a gestational carrier or Surrogate under Section 2-121.

(3) "Third-party donor" means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include:

(A) a husband who provides sperm, or a wife who provides eggs, that are used for assisted reproduction by the wife;

(B) the birth mother of a child of assisted reproduction; or

(C) an individual who has been determined under subsection (e) or (f) to have a parent-child relationship with a child of assisted reproduction.

(b) A parent-child relationship does not exist between a child of assisted reproduction and a third-party donor.

(c) A parent-child relationship exists between a child of assisted reproduction and the child's birth mother.

(d) Except as otherwise provided in subsections (i) and (j), a parent-child relationship exists between a child of

assisted reproduction and the husband of the child's birth mother if the husband provided the sperm that the birth mother used during his lifetime for assisted reproduction.

(e) A birth certificate identifying an individual other than the birth mother as the other parent of a child of assisted reproduction presumptively establishes a parent-child relationship between the child and that individual.

(f) Except as otherwise provided in subsections (g), (i), and (j), and unless a parent-child relationship is established under subsection (d) or (e), a parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Consent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the individual:

(1) before or after the child's birth, signed a record that, considering all the facts and circumstances, evidences the individual's consent; or

(2) in the absence of a signed record under paragraph (1):

(A) functioned as a parent of the child no later than two years after the child's birth;

(B) intended to function as a parent of the child no later than two years after the child's birth but was prevented from carrying out that intent by death, incapacity, or other circumstances; or

(C) intended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence.

(f-1) A parent-child relationship is conclusively established by a court order designating the parent or parents of a child of assisted reproduction.

(g) For the purpose of subsection (f)(1), neither an individual who signed a record more than two years after the birth of the child, nor a relative of that individual who is not also a relative of the birth mother, inherits from or through the child unless the individual functioned as a parent of the child before the child reached [18] years of age.

(h) For the purpose of subsection (f)(2), the following rules apply:

(1) If the birth mother is married and no divorce proceeding is pending, in the absence of clear and convincing evidence to the contrary, her spouse satisfies subsection (f)(2)(A) or (B).

(2) If the birth mother is a surviving spouse and at her deceased spouse's death no divorce proceeding was pending, in the absence of clear and convincing evidence to the contrary, her deceased spouse satisfies subsection (f)(2)(B) or (C).

(i) If a married couple is divorced before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of the birth mother's former spouse, unless the former spouse consented in a record that if assisted reproduction were to occur after divorce, the child would be treated as the former spouse's child.

(j) If, in a record, an individual withdraws consent to assisted reproduction before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of that individual, unless the individual subsequently satisfies subsection (f)

(k) If, under this section, an individual is a parent of a child of assisted reproduction who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is:

- | |
|---|
| (1) in utero not later than 36 months after the individual's death; or
(2) born not later than 45 months after the individual's death. |
| |

SECTION 2-121.

CHILD BORN TO GESTATIONAL CARRIER.

(a) In this section:

(1) "Gestational agreement" means an enforceable or unenforceable agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent, intended parents, or an individual described in subsection (e).

(2) "Gestational carrier" means a woman who ~~is not an intended parent who~~ gives birth to a child under a gestational agreement (a) who has no genetic connection to the child and (b) who is not an intended parent. ~~The term is not limited to a woman who is the child's genetic mother.~~ (3) "Gestational child" means a child born to a gestational carrier under a gestational agreement.

(4) "Intended parent" means an individual who entered into a gestational agreement providing that the individual will be the parent of a child born to a gestational carrier by means of assisted reproduction. The term is not limited to an individual who has a genetic relationship with the child.

(5) "Surrogate" means a woman who gives birth to a child under a Gestational Agreement (a) who has a genetic connection to the child and (b) who is not an intended parent.

(b) A parent-child relationship is conclusively established by a court order designating the parent or parents of a gestational child.

(c) A parent-child relationship between a gestational child and the child's gestational carrier does not exist unless the gestational carrier is designated as a parent of the child in a court order described in subsection (b).

(c-1) A parent-child relationship between a Gestational child and the child's Surrogate does not exist unless the surrogate is

(1) designated as a parent of the child in a court order described in subsection (b); or

(2) the child's genetic mother and a parent-child relationship does not exist under this section with an individual other than the Surrogate~~gestational carrier~~.

(d) In the absence of a court order under subsection (b), a parent-child relationship exists between a gestational child and an intended parent who:

(1) functioned as a parent of the child no later than two years after the child's birth; or

(2) died while the gestational carrier or surrogate was pregnant if:

(A) there were two intended parents and the other intended parent functioned as a parent of the child no later than two years after the child's birth;

(B) there were two intended parents, the other intended parent also died while the gestational carrier or surrogate was

pregnant, and a relative of either deceased intended parent or the spouse or surviving spouse of a relative of either deceased intended parent functioned as a parent of the child no later than two years after the child's birth; or

(C) there was no other intended parent and a relative of or the spouse or surviving spouse of a relative of the deceased intended parent functioned as a parent of the child no later than two years after the child's birth.

(e) In the absence of a court order under subsection (b), a parent-child relationship exists between a gestational child and an individual whose sperm or eggs were used after the individual's death or incapacity to conceive a child under a gestational agreement entered into after the individual's death or incapacity if the individual intended to be treated as the parent of the child. The individual's intent may be shown by:

(1) a record signed by the individual which considering all the facts and circumstances evidences the individual's intent; or

(2) other facts and circumstances establishing the individual's intent by clear and convincing evidence.

(f) Except as otherwise provided in subsection (g), and unless there is clear and convincing evidence of a contrary intent, an individual is deemed to have intended to be treated as the parent of a gestational child for purposes of subsection (e)(2) if:

(1) the individual, before death or incapacity, deposited the sperm or eggs that were used to conceive the child;

(2) when the individual deposited the sperm or eggs, the individual was married and no divorce proceeding was pending; and

(3) the individual's spouse or surviving spouse functioned as a parent of the child no later than two years after the child's birth.

(g) The presumption under subsection (f) does not apply if there is:

(1) a court order under subsection (b); or

(2) a signed record that satisfies subsection (e)(1).

(h) If, under this section, an individual is a parent of a gestational child who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is:

(1) in utero not later than 36 months after the individual's death; or

(2) born not later than 45 months after the individual's death.

(i) This section does not affect law of this state other than this [code] regarding the enforceability or validity of a gestational agreement.

SECTION 2-122. RESERVED

EQUITABLE ADOPTION.

~~This [subpart] does not affect the doctrine of equitable adoption.~~

2-201

DEFINITIONS. In this [part]:

- (1) As used in sections other than Section 2-205, “decedent’s nonprobate transfers to others” means the amounts that are included in the augmented estate under Section 2-205.
- (2) “Fractional interest in property held in joint tenancy with the right of survivorship,” whether the fractional interest is unilaterally severable or not, means the fraction, the numerator of which is one and the denominator of which, if the decedent was a joint tenant, is one plus the number of joint tenants who survive the decedent and which, if the decedent was not a joint tenant, is the number of joint tenants.
- (3) “Marriage,” as it relates to a transfer by the decedent during marriage, means any marriage of the decedent to the decedent’s surviving spouse.
- (4) “Nonadverse party” means a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that he [or she] possesses respecting the trust or other property arrangement. A person having a general power of appointment over property is deemed to have a beneficial interest in the property.
- (5) “Power” or “power of appointment” includes a power to designate the beneficiary of a beneficiary designation.
- (6) “Presently exercisable general power of appointment” means a power of appointment under which, at the time in question, the decedent, whether or not he [or she] then had the capacity to exercise the power, held a power to create a present or future interest in himself [or herself], his [or her] creditors, his [or her] estate, or creditors of his [or her] estate, and includes a power to revoke or invade the principal of a trust or other property arrangement.
- (7) “Property” includes values subject to a beneficiary designation.
- (8) “Right to income” includes a right to payments under a commercial or private annuity, an annuity trust, a unitrust, or a similar arrangement.
- (9) “Transfer,” as it relates to a transfer by or of the decedent, includes:
 - (A) an exercise or release of a presently exercisable general power of appointment held by the decedent,
 - (B) a lapse at death of a presently exercisable general power of appointment held by the decedent, and
 - (C) an exercise, release, or lapse of a general power of appointment that the decedent created in himself [or herself] and of a power described in Section 2-205(2)(B) that the decedent conferred on a nonadverse party.

2-202
ELECTIVE SHARE.
<p>(a) [Elective-Share Amount.] The surviving spouse of a decedent who dies domiciled in this state has a right of election, under the limitations and conditions stated in this [part], to take an elective share amount equal to 50 percent of the value of the marital property portion of the augmented estate. (b) [Supplemental Elective Share Amount.] If the sum of the amounts described in Sections 2-207, 2-209(a)(1), and that part of the elective share amount payable from the decedent's net probate estate and nonprobate transfers to others under Section 2-209(e) and (d) is less than [\$75,000], the surviving spouse is entitled to a supplemental elective share amount equal to [\$75,000], minus the sum of the amounts described in those sections. The supplemental elective share amount is payable from the decedent's net probate estate and from recipients of the decedent's nonprobate transfers to others in the order of priority set forth in Section 2-209(e) and (d).</p> <p>(c) [Effect of Election on Statutory Benefits.] If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse's homestead allowance, exempt property, and family allowance, if any, are not charged against but are in addition to the elective share and supplemental share amounts. (d) [Non-Domiciliary.] The right, if any, of the surviving spouse of a decedent who dies domiciled outside this state to take an elective share in property in this state is governed by the law of the decedent's domicile at death.</p>
<p>Maine Probate Code Proposed Comments The UPC redefines the elective share and introduces the additional supplemental elective-share amount. The additional supplemental elective-share amount in UPC 2-202(b) is not adopted.</p>

2-203
COMPOSITION OF THE AUGMENTED ESTATE; MARITAL-PROPERTY PORTION.
<p>(a) Subject to Section 2-208, the value of the augmented estate, to the extent provided in Sections 2-204, 2-205, 2-206, and 2-207, consists of the sum of the values of all property, whether real or personal; movable or immovable, tangible or intangible, wherever situated, that constitute:</p> <ol style="list-style-type: none"> (1) the decedent's net probate estate; (2) the decedent's nonprobate transfers to others; (3) the decedent's nonprobate transfers to the surviving spouse; and (4) the surviving spouse's property and nonprobate transfers to others. <p>(b) The value of the marital-property portion of the augmented estate consists of the sum of the values of the four components of the augmented estate as determined under subsection (a) multiplied by the following percentage:</p> <p>If the decedent and the spouse were married to each other:</p> <p>Less than 1 year 3%</p>

1 year but less than 2 years	6%
2 years but less than 3 years	12%
3 years but less than 4 years	18%
4 years but less than 5 years	24%
5 years but less than 6 years	30%
6 years but less than 7 years	36%
7 years but less than 8 years	42%
8 years but less than 9 years	48%
9 years but less than 10 years	54%
10 years but less than 11 years	60%
11 years but less than 12 years	68%
12 years but less than 13 years	76%
13 years but less than 14 years	84%
14 years but less than 15 years	92%
15 years or more	100%

— ~~[Alternative Subsection (b) for States Preferring a Deferred Marital Property System]~~

~~(b) The value of the marital property portion of the augmented estate equals the value of that portion of the augmented estate that would be marital property at the decedent’s death under [the Model Marital Property Act] [copy in definition from Model Marital Property Act, including the presumption that all property is marital property] [copy in other definition chosen by the enacting state].~~

Maine Probate Code Proposed Comments The UPC defines the values to be considered in calculating the augmented estate with more clarity and specificity than the MPC. The UPC applies a partnership theory of marriage in calculating this marital property portion of the augmented estate which prevents inequitable results by taking in account the length of the marriage.

2-204
DECEDENT’S NET PROBATE ESTATE.
The value of the augmented estate includes the value of the decedent’s probate estate, reduced by funeral and administration expenses, homestead allowance, family allowances, exempt property, and enforceable claims.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

DECEDENT'S NONPROBATE TRANSFERS TO OTHERS.

The value of the augmented estate includes the value of the decedent's nonprobate transfers to others, not included under Section 2-204, of any of the following types, in the amount provided respectively for each type of transfer:

(1) Property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death. Property is included under this category only if it consists of any of the following types:

(A) Property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment. The amount included is the value of the property subject to the power, to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.

(B) The decedent's fractional interest in property held by the decedent in joint tenancy with the right of survivorship. The amount included is the value of the decedent's fractional interest, to the extent the fractional interest passed by right of survivorship at the decedent's death to a surviving joint tenant other than the decedent's surviving spouse.

(C) The decedent's ownership interest in property or accounts held in POD, TOD, or co-ownership registration with the right of survivorship. The amount included is the value of the decedent's ownership interest, to the extent the decedent's ownership interest passed at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(D) Proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned the insurance policy immediately before death or if and to the extent the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds. The amount included is the value of the proceeds, to the extent they were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(2) Property transferred in any of the following forms by the decedent during marriage:

(A) Any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or to the income from, the property if and to the extent the decedent's right terminated at or continued beyond the decedent's death. The amount included is the value of the fraction of the property to which the decedent's right related, to the extent the fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse.

(B) Any transfer in which the decedent created a power over income or property, exercisable by the decedent alone or in conjunction with any other person, or exercisable by a nonadverse party, to or for the benefit of the decedent, creditors of the decedent, the decedent's estate, or creditors of the decedent's estate. The amount included with respect to a power over property is the value of the property subject to the power, and the amount included with respect to a power over income is the value of the property that produces or produced the income, to the extent the power in either case was exercisable at the decedent's death to or for the benefit of any person other than the

decedent's surviving spouse or to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse. If the power is a power over both income and property and the preceding sentence produces different amounts, the amount included is the greater amount.

(3) Property that passed during marriage and during the two-year period next preceding the decedent's death as a result of a transfer by the decedent if the transfer was of any of the following types:

(A) Any property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the augmented estate under paragraph (1) (A), (B), or (C), or under paragraph (2), if the right, interest, or power had not terminated until the decedent's death. The amount included is the value of the property that would have been included under those paragraphs if the property were valued at the time the right, interest, or power terminated, and is included only to the extent the property passed upon termination to or for the benefit of any person other than the decedent or the decedent's estate, spouse, or surviving spouse. As used in this subparagraph, "termination," with respect to a right or interest in property, occurs when the right or interest terminated by the terms of the governing instrument or the decedent transferred or relinquished the right or interest, and, with respect to a power over property, occurs when the power terminated by exercise, release, lapse, default, or otherwise, but, with respect to a power described in paragraph (1)(A), "termination" occurs when the power terminated by exercise or release, but not otherwise.

(B) Any transfer of or relating to an insurance policy on the life of the decedent if the proceeds would have been included in the augmented estate under paragraph (1)(D) had the transfer not occurred. The amount included is the value of the insurance proceeds to the extent the proceeds were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(C) Any transfer of property, to the extent not otherwise included in the augmented estate, made to or for the benefit of a person other than the decedent's surviving spouse. The amount included is the value of the transferred property to the extent the transfers to any one donee in either of the two years exceeded 50 percent of ~~the~~ ~~amount~~ ~~excludable~~ ~~from~~ ~~taxable~~ ~~gifts~~ ~~under~~ ~~26~~ ~~U.S.C.~~ ~~Section~~ ~~2503(b)~~ ~~for~~ ~~its~~ ~~successor~~ on the date next preceding the date of the decedent's death.

Maine Probate Code Proposed Comments

UPC § 2-205 changes Maine law in several respects. Paragraph 1 includes in the augmented estate any property of which the decedent could have become the owner through the exercise of certain specific rights, regardless of who created those rights. Under prior Maine law, such property would be included in the augmented estate only if the decedent's rights were retained in connection with a transfer of the property made by the decedent during the marriage. Paragraph 1 also closes a perceived loophole in the elective share statute by including in the augmented estate proceeds of insurance on the life of the decedent that are payable to someone other than the surviving spouse. It also clarifies that Individual Retirement Accounts and qualified retirement assets payable to persons other than the surviving spouse are included in the gross estate.

Paragraph 2 expands the assets that would be included in the augmented estate under prior law by including powers that are exercisable by a “nonadverse party.” Prior law had included only powers exercisable by the decedent “either alone or in conjunction with any other person . . .”

Paragraph 3, subparagraph C increases the amount that is excluded from the augmented estate to the excess over 50 percent of the amount excludable from taxable gifts pursuant to 26 U.S.C. § 2503(b). The exclusion amount had been \$3,000 under prior law.

2-206

DECEDENT’S NONPROBATE TRANSFERS TO THE SURVIVING SPOUSE.

Excluding property passing to the surviving spouse under the federal Social Security system, the value of the augmented estate includes the value of the decedent’s nonprobate transfers to the decedent’s surviving spouse, which consist of all property that passed outside probate at the decedent’s death from the decedent to the surviving spouse by reason of the decedent’s death, including:

- (1) the decedent’s fractional interest in property held as a joint tenant with the right of survivorship, to the extent that the decedent’s fractional interest passed to the surviving spouse as surviving joint tenant,
- (2) the decedent’s ownership interest in property or accounts held in co-ownership registration with the right of survivorship, to the extent the decedent’s ownership interest passed to the surviving spouse as surviving co-owner, and
- (3) all other property that would have been included in the augmented estate under Section 2-205(1) or (2) had it passed to or for the benefit of a person other than the decedent’s spouse, surviving spouse, the decedent, or the decedent’s creditors, estate, or estate creditors.

2-207

SURVIVING SPOUSE’S PROPERTY AND NONPROBATE TRANSFERS TO OTHERS.

(a) [Included Property.] Except to the extent included in the augmented estate under Section 2-204 or 2-206, the value of the augmented estate includes the value of:

- (1) property that was owned by the decedent’s surviving spouse at the decedent’s death, including
 - (A) the surviving spouse’s fractional interest in property held in joint tenancy with the right of survivorship,
 - (B) the surviving spouse’s ownership interest in property or accounts held in co-ownership registration with the right of survivorship, and
 - (C) property that passed to the surviving spouse by reason of the decedent’s death, but not including the spouse’s right to homestead allowance, family allowance, exempt property, or payments under the federal Social

Security system; and

(2) property that would have been included in the surviving spouse's nonprobate transfers to others, other than the spouse's fractional and ownership interests included under subsection (a)(1)(A) or (B), had the spouse been the decedent.

(b) [Time of Valuation.] Property included under this section is valued at the decedent's death, taking the fact that the decedent predeceased the spouse into account, but, for purposes of subsection (a)(1)(A) and (B), the values of the spouse's fractional and ownership interests are determined immediately before the decedent's death if the decedent was then a joint tenant or a co-owner of the property or accounts. For purposes of subsection (a)(2), proceeds of insurance that would have been included in the spouse's nonprobate transfers to others under Section 2-205(1)(D) are not valued as if he [or she] were deceased.

(c) [Reduction for Enforceable Claims.] The value of property included under this section is reduced by enforceable claims against the surviving spouse.

Maine Probate Code Proposed Comments UPC § 2-207 modifies Maine law by including in the augmented estate all of the surviving spouse's property, regardless of whether it was derived from the decedent. Prior Maine law only included property owned by the surviving spouse at the decedent's death that was derived from the decedent. Prior Maine law also included property transferred by the surviving spouse during marriage that would have been included in the augmented estate had the surviving predeceased the decedent. UPC § 2-207 modifies this by including in the augmented estate any property that would have constituted the surviving spouse's nonprobate transfers to others applying the expanded rules under UPC§ 2-205 had the surviving spouse been the decedent.

2-208

EXCLUSIONS, VALUATION, AND OVERLAPPING APPLICATION.

(a) [Exclusions.] The value of any property is excluded from the decedent's nonprobate transfers to others:
(1) to the extent the decedent received adequate and full consideration in money or money's worth for a transfer of the property; or

(2) if the property was transferred with the written joinder of, or if the transfer was consented to in writing before or after the transfer by, the surviving spouse.

(b) [Valuation.] The value of property:

(1) Included in the augmented estate under Section 2-205, 2-206, or 2-207 is reduced in each category by enforceable claims against the included property; and

disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal Social Security system(c) [Overlapping Application; No Double Inclusion.] In case of overlapping application to the same property of the paragraphs or subparagraphs of Section 2-205, 2-206, or 2-207, the property is included in the

augmented estate under the provision yielding the greatest value, and under only one overlapping provision if they all yield the same value.

Maine Probate Code Proposed Comments Although the UPC provides that the value of property includes the commuted value of present or future interests and amounts payable under trusts and various contractual arrangements, it provides no guidance in terms of valuing beneficial interest in fully discretionary trusts for which commuted values are not readily determinable. In adopting UPC 2-208(b), the MPC is modified to establish a rebuttable presumption that the value of a beneficial interest in a fully discretionary trust is 50 percent of the value of the trust assets. This provision is similar to the presumption under MPC 2-207(a) with respect to the value of an electing spouse's beneficial interest in a life estate or trust.

2-209

SOURCES FROM WHICH ELECTIVE SHARE PAYABLE.

(a) [Elective-Share Amount Only.] In a proceeding for an elective share, the following are applied first to satisfy the elective-share amount and to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others:

(1) amounts included in the augmented estate under Section 2-204 which pass or have passed to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under Section 2-206; and
(2) the marital-property portion of amounts included in the augmented estate under Section 2-207.

(b) [Marital Property Portion.] The marital-property portion under subsection (a)(2) is computed by multiplying the value of the amounts included in the augmented estate under Section 2-207 by the percentage of the augmented estate set forth in the schedule in Section 2-203(b) appropriate to the length of time the spouse and the decedent were married to each other.

(c) [Unsatisfied Balance of Elective-Share Amount; ~~Supplemental Elective-Share Amount.~~] If, after the application of subsection (a), the elective-share amount is not fully satisfied, ~~or the surviving spouse is entitled to a supplemental elective share amount,~~ amounts included in the decedent's net probate estate, other than assets passing to the surviving spouse by testate or intestate succession, and in the decedent's nonprobate transfers to others under Section 2-205(1), (2), and (3)(B) are applied first to satisfy the unsatisfied balance of the elective-share amount ~~or the supplemental elective share amount.~~ The decedent's net probate estate and that portion of the decedent's nonprobate transfers to others are so applied that liability for the unsatisfied balance of the elective-share amount ~~or for the supplemental elective share amount~~ is apportioned among the recipients of the decedent's net probate estate and of that portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

(d) [Unsatisfied Balance of Elective-Share and ~~Supplemental Elective-Share Amounts.~~] If, after the application of subsections (a) and (c), the elective-share ~~or supplemental elective share amount~~ is not fully satisfied, the remaining portion of the decedent's nonprobate transfers to others is so applied that liability for the unsatisfied

balance of the elective-share or supplemental elective-share amount is apportioned among the recipients of the remaining portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

(e) [Unsatisfied Balance Treated as General Pecuniary Devise.] The unsatisfied balance of the elective-share or supplemental elective-share amount as determined under subsection (c) or (d) is treated as a general pecuniary devise for purposes of Section 3-904.

2-210

PERSONAL LIABILITY OF RECIPIENTS.

(a) Only original recipients of the decedent's nonprobate transfers to others, and the donees of the recipients of the decedent's nonprobate transfers to others, to the extent the donees have the property or its proceeds, are liable to make a proportional contribution toward satisfaction of the surviving spouse's elective-share or supplemental elective-share amount. A person liable to make contribution may choose to give up the proportional part of the decedent's nonprobate transfers to him {or her} or to pay the value of the amount for which he {or she} is liable.

(b) If any section or part of any section of this [part] is preempted by federal law with respect to a payment, an item of property, or any other benefit included in the decedent's nonprobate transfers to others, a person who, not for value, receives the payment, item of property, or any other benefit is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of that item of property or benefit, as provided in Section 2-209, to the person who would have been entitled to it were that section or part of that section not preempted.

2-211

PROCEEDING FOR ELECTIVE SHARE; TIME LIMIT.

(a) Except as provided in subsection (b), the surviving spouse or the surviving spouse's conservator or agent under authority of a power of attorney the election must be made must make the election by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within nine months after the date of the decedent's death, or within six months after the probate of the decedent's will, whichever limitation later expires. Notice The surviving spouse must give notice of the time and place set for hearing must be given to persons interested in the estate and to the distributees and recipients of portions of the augmented estate whose interests will be adversely affected by the taking of the elective share. Except as provided in subsection (b), the decedent's nonprobate transfers to others are not included within the augmented estate for the purpose of computing the elective share, if the petition is filed more than nine months after the decedent's death.

(b) Within nine months after the decedent's death, the surviving spouse may a petition the court for an

extension of time for making an election may be filed by the surviving spouse or the surviving spouse's conservator or agent under the authority of a power of attorney. If, within nine months after the decedent's death, ~~the spouse gives notice is given~~ of the petition to all persons interested in the decedent's nonprobate transfers to others, the court for cause shown ~~by the surviving spouse~~ may extend the time for election. If the court grants the ~~spouse's~~ petition for an extension, the decedent's nonprobate transfers to others are not excluded from the augmented estate for the purpose of computing the elective-share ~~and supplemental elective-share~~ amounts, if the ~~spouse makes an~~ election is made by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within the time allowed by the extension.

(c) ~~The surviving spouse may withdraw his [or her]~~ A demand for an elective share may be withdrawn at any time before entry of a final determination by the court.

(d) After notice and hearing, the court shall determine the elective-share ~~and supplemental elective-share~~ amounts, and shall order its payment from the assets of the augmented estate or by contribution as appears appropriate under Sections 2-209 and 2-210. If it appears that a fund or property included in the augmented estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he [or she] would have been under Sections 2-209 and 2-210 had relief been secured against all persons subject to contribution.

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

2-212

RIGHT OF ELECTION PERSONAL TO SURVIVING SPOUSE; INCAPACITATED SURVIVING SPOUSE.

(a) ~~[Surviving Spouse Must Be Living at Time of Election.]~~ The right of election may be exercised only by a surviving spouse who is living when the petition for the elective share is filed in the court under Section 2-211(a). If the election is not exercised by the surviving spouse personally, it may be exercised on the surviving spouse's behalf by his [or her] conservator, ~~guardian~~, or agent under the authority of a power of attorney.

(b) ~~[Incapacitated Surviving Spouse.]~~ ~~If the election is exercised on behalf of a surviving spouse who is an incapacitated person, that portion of the elective share and supplemental elective share amounts due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others under Section 2-209(c) and (d) must be placed in a custodial trust for the benefit of the surviving spouse under the provisions of the [Enacting state] Uniform Custodial Trust Act, except as modified below. For the purposes of this subsection, an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. For purposes of the custodial trust established by this subsection, (i) the electing guardian, conservator, or agent is the custodial trustee, (ii) the surviving spouse is the beneficiary, and (iii) the custodial trust is deemed to have been created by the decedent spouse by written transfer that takes effect at the~~

decedent spouse's death and that directs the custodial trustee to administer the custodial trust as for an incapacitated beneficiary.

~~(c) [Custodial Trust.] For the purposes of subsection (b), the [Enacting state] Uniform Custodial Trust Act must be applied as if Section 6(b) thereof were repealed and Sections 2(c), 9(b), and 17(a) were amended to read as follows:~~

~~(1) Neither an incapacitated beneficiary nor anyone acting on behalf of an incapacitated beneficiary has a power to terminate the custodial trust; but if the beneficiary regains capacity, the beneficiary then acquires the power to terminate the custodial trust by delivering to the custodial trustee a writing signed by the beneficiary declaring the termination. If not previously terminated, the custodial trust terminates on the death of the beneficiary.~~

~~(2) If the beneficiary is incapacitated, the custodial trustee shall expend so much or all of the custodial trust property as the custodial trustee considers advisable for the use and benefit of the beneficiary and individuals who were supported by the beneficiary when the beneficiary became incapacitated, or who are legally entitled to support by the beneficiary. Expenditures may be made in the manner, when, and to the extent that the custodial trustee determines suitable and proper, without court order but with regard to other support, income, and property of the beneficiary [exclusive of] [and] benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the beneficiary must qualify on the basis of need.~~

~~(3) Upon the beneficiary's death, the custodial trustee shall transfer the unexpended custodial trust property, in the following order: (i) under the residuary clause, if any, of the will of the beneficiary's predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the beneficiary; or (ii) to that predeceased spouse's heirs under Section 2-711 of [this state's] Uniform Probate Code.~~

~~[STATES THAT HAVE NOT ADOPTED THE UNIFORM CUSTODIAL TRUST ACT SHOULD ADOPT THE FOLLOWING ALTERNATIVE SUBSECTION (b) AND NOT ADOPT SUBSECTION (b) or (a) ABOVE]~~

~~(b) [Incapacitated Surviving Spouse.] If the election is exercised on behalf of a surviving spouse who is an incapacitated person, the court must set aside that portion of the elective share and supplemental elective share amounts due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others under Section 2-209(c) and (d) and must appoint a trustee to administer that property for the support of the surviving spouse. For the purposes of this subsection, an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. The trustee must administer the trust in accordance with the following terms and such additional terms as the court determines appropriate:~~

~~(1) Expenditures of income and principal may be made in the manner, when, and to the extent that the trustee determines suitable and proper for the surviving spouse's support, without court order but with regard to other support, income, and property of the surviving spouse [exclusive of] [and] benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the surviving spouse must qualify~~

on the basis of need.

~~(2) During the surviving spouse's incapacity, neither the surviving spouse nor anyone acting on behalf of the surviving spouse has a power to terminate the trust; but if the surviving spouse regains capacity, the surviving spouse then acquires the power to terminate the trust and acquire full ownership of the trust property free of trust, by delivering to the trustee a writing signed by the surviving spouse declaring the termination.~~

~~(3) Upon the surviving spouse's death, the trustee shall transfer the unexpended trust property in the following order: (i) under the residuary clause, if any, of the will of the predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the surviving spouse; or (ii) to the predeceased spouse's heirs under Section 2-711.~~

Maine Probate Code Proposed Comments This section is revised in three significant respects. First, it makes it clear that the right of election may be exercised only by or on behalf of a living surviving spouse. Second, the election can be pursued on behalf of the surviving spouse by the spouse's conservator or agent. In any case, the surviving spouse must be alive when the election is made and cannot be pursued on behalf of a decedent. Third, it treats incapacitated spouses the same as spouses with capacity. Previously, if spouse was incapacitated, the court exercised the share on behalf of the incapacitated spouse only after a judicial proceeding to determine the necessity of the share for the incapacitated spouse's life expectancy. A spouse with capacity was able to elect regardless of need.

Treating incapacitated spouses the same as spouses with capacity is a deviation from the Uniform Probate Code (1990) which provides that the incapacitated spouse's share is to be distributed to a custodial trust for the surviving spouse's life, the remainder beneficiaries of which are the predeceased spouse's residuary devisees or heirs.

Eliminating the disparate treatment between incapacitated spouses and spouses with capacity is consistent with the revised elective share law which attempts to more closely align the amounts that a spouse receives upon divorce to that which the spouse receives upon death. Under this partnership theory of marriage, which forms the basis of much of the revisions to elective share law, an incapacitated spouse in a divorce proceeding does not receive less of an equitable distribution solely due to the incapacity. This section therefore applies the partnership theory of marriage equitably to all surviving spouses.

2-213

WAIVER OF RIGHT TO ELECT AND OF OTHER RIGHTS.

(a) The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage,

by a written contract, agreement, or waiver signed by the surviving spouse.

(b) A surviving spouse's waiver is not enforceable if the surviving spouse proves that:

(1) he {for she} did not execute the waiver voluntarily; or

(2) the waiver was unconscionable when it was executed and, before execution of the waiver, he or she:

(A) was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;

(B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided; and

(C) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent.

(c) An issue of unconscionability of a waiver is for decision by the court as a matter of law.

(d) Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to him {for her} from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.

2-214

PROTECTION OF PAYORS AND OTHER THIRD PARTIES.

(a) Although under Section 2-205 a payment, item of property, or other benefit is included in the decedent's nonprobate transfers to others, a payor or other third party is not liable for having made a payment or transferred an item of property or other benefit to a beneficiary designated in a governing instrument, or for having taken any other action in good faith reliance on the validity of a governing instrument, upon request and satisfactory proof of the decedent's death, before the payor or other third party received written notice from the surviving spouse or spouse's representative of an intention to file a petition for the elective or that a petition for the elective share has been filed. A payor or other third party is liable for payments made or other actions taken after the payor or other third party received written notice that a petition for the elective share has been filed.

(b) A written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to

decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property, and, upon its determination under Section 2-211(d), shall order disbursement in accordance with the determination. If no petition is filed in the court within the specified time under Section 2-211(a) or, if filed, the demand for an elective share is withdrawn under Section 2-211(c), the court shall order disbursement to the designated beneficiary. Payments or transfers to the court or deposits made into court discharge the payor or other third party from all claims for amounts so paid or the value of property so transferred or deposited.

(c) Upon petition to the probate court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this [part].

Maine Probate Code Proposed Comments This section is new, with no previous counterpart in the MPC.

2-301

ENTITLEMENT OF SPOUSE; PREMARITAL WILL.

(a) If a testator's surviving spouse married the testator after the testator executed his {or her} will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate he {or she} would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised to a descendant of such a child or passes under Sections 2-603 or 2-604 to such a child or to a descendant of such a child, unless:

(1) it appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;

(2) the will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or

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

(b) In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises, other than a devise to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift under Sections 2-603 or 2-604 to a descendant of such a child, abate as provided in Section 3-902.

Maine Probate Code Proposed Comments The language does not constitute a substantive change in Maine law.

2-302

OMITTED CHILDREN.

(a) Except as provided in subsection (b), if a testator fails to provide in his [or her] will for any of his [for her] children born or adopted after the execution of the will, the omitted after-born or after-adopted child receives a share in the estate as follows:

(1) If the testator had no child living when he [or she] executed the will, an omitted after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate, unless the will devised all or substantially all of the estate to the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will.

(2) If the testator had one or more children living when he [or she] executed the will, and the will devised property or an interest in property to one or more of the then-living children, an omitted after-born or after-adopted child is entitled to share in the testator's estate as follows:

(A) The portion of the testator's estate in which the omitted after-born or after-adopted child is entitled to share is limited to devises made to the testator's then-living children under the will.

(B) The omitted after-born or after-adopted child is entitled to receive the share of the testator's estate, as limited in subparagraph (A), that the child would have received had the testator included all omitted after-born and after-adopted children with the children to whom devises were made under the will and had given an equal share of the estate to each child.

(C) To the extent feasible, the interest granted an omitted after-born or after-adopted child under this section must be of the same character, whether equitable or legal, present or future, as that devised to the testator's then-living children under the will.

(D) In satisfying a share provided by this paragraph, devises to the testator's children who were living when the will was executed abate ratably. In abating the devises of the then-living children, the court shall preserve to the maximum extent possible the character of the testamentary plan adopted by the testator.

(b) Neither subsection (a)(1) nor subsection (a)(2) applies if:

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

(2) the testator provided for the omitted after-born or after-adopted child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(c) If at the time of execution of the will the testator fails to provide in his or her- will for a living child solely because he [or she] believes the child to be dead, the child is entitled to share in the estate as if the child were an omitted after-born or after-adopted child.

(d) In satisfying a share provided by subsection (a)(1), devises made by the will abate under Section 3-902.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

2-401
APPLICABLE LAW
This part applies to the estate of the decedent who dies domiciled in this state. Rights to homestead allowance, exempt property, and family allowance for a decedent who dies not domiciled in this state are governed by the law of the decedent's domicile at death.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

2-402
HOMESTEAD ALLOWANCE
A decedent's surviving spouse is entitled to a homestead allowance of \$22,500. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to \$22,500 divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective share.
Maine Probate Code Proposed Comment This section increases the homestead allowance to \$22,500 from the previous \$10,000. The homestead allowance is subject to cost of living adjustments as provided in section 1-109.

2-403
EXEMPT PROPERTY
In addition to the homestead allowance, the decedent's surviving spouse is entitled from the estate to a value, not exceeding \$15,000 in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, the decedent's children are entitled jointly to the same value. <u>However, the decedent, by will, may exclude one or more adult children from the receipt of exempt property.</u> If encumbered chattels are selected and the value in excess of security interests, plus that of other exempt property, is less than \$15,000, or if there is not \$15,000 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the \$15,000 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, but the right to any assets to make out a deficiency of exempt property abates as necessary to permit earlier payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the decedent's will, unless otherwise provided, by intestate succession, or by way of elective share.

Maine Probate Code Proposed Comment This section increases exempt property to \$15,000 from the previous \$7,000. Exempt property is subject to cost of living adjustments as provided in section 1-109. The section now provides a specific listing of the types of property available to satisfy the exempt property entitlement, in lieu of referencing Title 14, section 4421 et seq. The section has been modified to permit the decedent, by will, to exclude one or more adult children from the receipt of exempt property.

2-404

FAMILY ALLOWANCE

(a) In addition to the right to homestead allowance and exempt property, the decedent's surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by the decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody. If a minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his [or her] guardian or other person having the child's care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims except the homestead allowance.

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

Maine Probate Code Proposed Comment The language does not constitute a substantive change to Maine law.

2-405

Source, Determination, and Documentation.

If the estate is otherwise sufficient, property specifically devised may not be used to satisfy rights to homestead allowance or exempt property. Subject to this restriction, the surviving spouse, guardians of minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make those selections if the surviving spouse, the children, or the guardians of the minor children are unable or fail to do so within a reasonable time or there is no guardian of a minor child. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as

homestead allowance or exempt property. The personal representative may determine the family allowance in a lump sum not exceeding \$27,000 or periodic installments not exceeding \$2,250 per month for one year, and may disperse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. The personal representative or an interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief, which may include a family allowance other than that which the personal representative determined or could have determined. ~~(b) If the right to an elective share is exercised on behalf of a surviving spouse who is an incapacitated person, the personal representative may add any unexpended portions payable under the homestead allowance, exempt property, and family allowance to the trust established under section 2-212 (b).~~

Maine Probate Code Proposed Comment Maine’s adoption of section 2-405 represents a deviation from the UPC by eliminating the discretion of the personal representative to add any unexpended portions payable under the homestead allowance, exempt property, and family allowance to a custodial trust established under section 2-212(b). Maine has chosen not to treat an incapacitated surviving spouse different from a surviving spouse with capacity for purposes of the elective share and therefore has not adopted section 2-212(b) of the UPC. See Maine Comment to section 2-212. This same concept is applied in this section 2-405 to amounts payable under the homestead allowance, exempt property and family allowance, with no distinction made between a surviving incapacitated spouse and a surviving spouse with capacity.

This section increases the family allowance to a lump sum not exceeding \$27,000 from the previous \$12,000, and increases periodic installments to an amount not exceeding \$2,250 per month from the previous \$1,000. The family allowance is subject to cost of living adjustments as provided in section 1-109.

2-501

WHO MAY MAKE A WILL

SECTION 2-501. WHO MAY MAKE A WILL. An individual of sound mind, who is 18 or more years of age or a legally emancipated minor, who is of sound mind may make a will.

Maine Probate Code Proposed Comment This section has been modified to make it clear that a legally emancipated minor under the age of 18 may make a will.

2-502

EXECUTION; WITNESSED OR NOTARIZED WILLS; HOLOGRAPHIC WILLS

SECTION 2-502. EXECUTION; ~~WITNESSED OR NOTARIZED WILLS; HOLOGRAPHIC WILLS.~~

- (a) ~~{Witnessed or Notarized Wills.}~~ Except as otherwise provided in subsection (b) and in Sections 2-506, and 2-513, a will must be:
- (1) in writing;
 - (2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and
 - (3) ~~either:~~
 - (A) signed by at least two individuals, each of whom signed within a reasonable time after the individual witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgement of the will; ~~or~~
 - (B) ~~acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgements.~~
- (b) ~~{Holographic Wills.}~~ A will that does not comply with subsection (a) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.
- (c) ~~{Extrinsic Evidence.}~~ Intent that a document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting.

Maine Probate Code Proposed Comment This section does not adopt the UPC's alternative method of will execution of acknowledgement by a notary in lieu of execution by two witnesses. The section adopts the "conscious presence" test of the UPC. Under the "conscious presence" test, a signing is sufficient if it was done within the range of the testator's senses such as hearing; the signing need not have occurred within the testator's line of sight. The Maine Supreme Judicial Court held in In Re Estate of Gonzalez 855 A.2d 1146 2004 ME 109 (Me. 2004) that a pre-printed form filled in with the testator's handwriting can qualify as a holographic will.

The section departs from the UPC by not referencing the harmless error standard of the UPC, which standard is not adopted in Maine.

2-503

HARMLESS ERROR

SECTION 2-503. RESERVEDHARMLESS ERROR. ~~Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:~~

- ~~(1) the decedent's will,~~
- ~~(2) a partial or complete revocation of the will,~~
- ~~(3) an addition to or an alteration of the will, or~~

(4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.

Maine Probate Code Proposed Comment Maine has chosen not to adopt UPC §2-503.

2-504

SELF-PROVED WILL

SECTION 2-504. SELF-PROVED WILL.

~~(a) A will that is executed with attesting witnesses may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form:~~

~~I, _____, the testator, sign my name to this instrument this _____ day of _____, _____, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am [18] years of age or older or am a legally emancipated minor, of sound mind, and under no constraint or undue influence.~~

Testator

~~We, _____, _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as (his)(her) will and that (he)(she) signed it willingly (or willingly directed another to sign for (hims)(her)), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is [18] years of age or older or is a legally emancipated minor, of sound mind, and under no constraint or undue influence.~~

Witness

Witness

State of _____

County of _____

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

(Seal) _____

(Signed) _____

(Official capacity of officer)

~~(b) A will that is executed with attesting witnesses may be made self proved at any time after its execution by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which the acknowledgment occurs and evidenced by the officer's certificate, under official seal, attached or annexed to the will in substantially the following form:~~

~~The State of _____~~

~~County of _____~~

~~We, _____, _____, and _____,~~

~~the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that (he)(she) had signed willingly (or willingly directed another to sign for (him)(her)), that (he)(she) executed it as (his)(her) free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of (his)(her) knowledge the testator was at that time [18] years of age or older or was a legally emancipated minor, of sound mind, and under no constraint or undue influence.~~

Testator

Witness

Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before

me by _____, and _____, witnesses, this _____ day of _____.

(Seal) _____

(Signed) _____

(Official capacity of officer)

(a) Any will may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate in substantially the following form:

I, _____, the testator, on this _____ day of _____, 20.., being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), as my free and voluntary act and that I am eighteen years of age or older or am a legally emancipated minor, of sound mind, and under no constraint or undue influence.

Testator

We, _____, _____ the witnesses, being first duly sworn, do hereby declare to the undersigned authority that the testator has signed and executed this instrument as (his)(her) last will and that (he)(she) signed it willingly (or willingly directed another to sign for (him)(her)), and that each of us, in the presence and hearing of the testator, signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older or is a legally emancipated minor, of sound mind and under no constraint or undue influence.

Witness

Witness

The State of _____

County of _____

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

(Signed) _____

(Official capacity of officer)

(b) An attested will may at any time subsequent to its execution be made self-proved by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where the acknowledgment occurs and evidenced by the officer's certificate, attached or annexed to

the will in substantially the following form:

The State of

County of

We,, and, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as (his)(her) last will and that (he)(she) had signed willingly (or willingly directed another to sign for (him)(her)), as (his)(her) free and voluntary act, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of (his)(her) knowledge the testator was at that time eighteen years of age or older or was a legally emancipated minor, of sound mind and under no constraint or undue influence.

.....

Testator

.....

Witness

.....

Witness

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

(Signed)

(Official capacity of officer)

(c) A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will's due execution.

Maine Probate Code Proposed Comment The section modifies the previous Maine statute in three respects: it adds references where appropriate to a legally emancipated minor, adds male/female gender options where appropriate to update the single male pronoun, and deletes references to a notary seal as unnecessary.

The section adopts a new paragraph (c) from the UPC to make clear that it is not necessary for a testator, who is simultaneously self-proving his/her will, to sign the will twice - - once on the will itself, and again on the self-proving provisions. A single signature by the testator, on the self-proving provisions, is sufficient.

WHO MAY WITNESS A WILL

SECTION 2-505. WHO MAY WITNESS.

- (a) An individual generally competent to be a witness may act as a witness to a will.
- (b) The signing of a will by an interested witness does not invalidate the will or any provision of it.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

2-506

CHOICE OF LAW AS TO EXECUTION

SECTION 2-506. CHOICE OF LAW AS TO EXECUTION.

A written will is valid if executed in compliance with Section 2-502 ~~or 2-503~~ or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national or if executed in compliance with 10 United States Code, Section 1044d.

Maine Probate Code Proposed Comment The language does not constitute a substantive change to Maine law. The omission of a reference to section 2-503 is a result of Maine’s former holographic will provision being moved to section 2-502(b).

2-507

REVOCAION BY WRITING OR BY ACT

SECTION 2-507. REVOCATION BY WRITING OR BY ACT.

- (a) A will or any part thereof is revoked:
 - (1) by executing a subsequent will that revokes the previous will or part expressly or by inconsistency; or
 - (2) by performing a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will or part or if another individual performed the act in the testator’s conscious presence and by the testator’s direction. For purposes of this paragraph, “revocatory act on the will” includes burning, tearing, canceling, obliterating, or destroying the will or any part of it. A burning, tearing, or canceling is a “revocatory act on the will,” whether or not the burn, tear, or cancellation touched any of the words on the will.
- (b) If a subsequent will does not expressly revoke a previous will, the execution of the subsequent will wholly revokes the previous will by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will.
- (c) The testator is presumed to have intended a subsequent will to replace rather than supplement a previous

will if the subsequent will makes a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the previous will is revoked; only the subsequent will is operative on the testator's death.

(d) The testator is presumed to have intended a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the subsequent will revokes the previous will only to the extent the subsequent will is inconsistent with the previous will; each will is fully operative on the testator's death to the extent they are not inconsistent.

Maine Probate Code Proposed Comments The section expands the category of acts that constitute revocation to include any act performed by the testator with the intent and for the purpose of revoking the will in whole or in part.

2-508

REVOCATION BY CHANGE OF CIRCUMSTANCES

SECTION 2-508. REVOCATION BY CHANGE OF CIRCUMSTANCES.

Except as provided in Sections 2-803, 2-803A and 2-804, a change of circumstances does not revoke a will or any part of it.

Maine Probate Code Proposed Comments The exceptions referenced in the section are 2-803 (Effect of Homicide); 2-803A (Effect of Criminal Conviction), formerly 2-806); and 2-804 (Revocation by Divorce), formerly 2-508.

2-509

Revival of Revoked Will

SECTION 2-509. REVIVAL OF REVOKED WILL.

(a) If a subsequent will that wholly revoked a previous will is thereafter revoked by a revocatory act under Section 2-507(a)(2), the previous will remains revoked unless it is revived. The previous will is revived if it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator intended the previous will to take effect as executed.

(b) If a subsequent will that partly revoked a previous will is thereafter revoked by a revocatory act under Section 2-507(a)(2), a revoked part of the previous will is revived unless it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator did not intend the revoked part to take effect as executed.

(c) If a subsequent will that revoked a previous will in whole or in part is thereafter revoked by another, later will, the previous will remains revoked in whole or in part, unless it or its revoked part is revived. The previous will or its revoked part is revived to the extent it appears from the terms of the later will that the testator intended the previous will to take effect.

Maine Probate Code Proposed Comment The language does not constitute a substantive change to Maine law.

2-510

INCORPORATION BY REFERENCE

SECTION 2-510. INCORPORATION BY REFERENCE.

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

Maine Probate Code Proposed Comment The language does not constitute a substantive change to Maine law.

2-511

TESTAMENTARY ADDITIONS TO TRUSTS

SECTION 2-511. UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT (1991).

(a) A will may validly devise property to the trustee of a trust established or to be established (i) during the testator's lifetime by the testator, by the testator and some other person, or by some other person, including a funded or unfunded life insurance trust, although the settlor has reserved any or all rights of ownership of the insurance contracts, or (ii) at the testator's death by the testator's devise to the trustee, if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will, executed before, concurrently with, or after the execution of the testator's will or in another individual's will if that other individual has predeceased the testator, regardless of the existence, size, or character of the corpus of the trust. The devise is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or the testator's death.

(b) Unless the testator's will provides otherwise, property devised to a trust described in subsection (a) is not held under a testamentary trust of the testator, but it becomes a part of the trust to which it is devised, and must be administered and disposed of in accordance with the provisions of the governing instrument setting forth the terms of the trust, including any amendments thereto made before or after the testator's death.

(c) Unless the testator's will provides otherwise, a revocation or termination of the trust before the testator's death causes the devise to lapse.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

2-512

EVENTS OF INDEPENDENT SIGNIFICANCE

SECTION 2-512. EVENTS OF INDEPENDENT SIGNIFICANCE.

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

2-513

SEPARATE WRITING IDENTIFYING DEVISE OF CERTAIN TYPES OF TANGIBLE PERSONAL PROPERTY

SECTION 2-513. SEPARATE WRITING IDENTIFYING DEVISE OF CERTAIN TYPES OF TANGIBLE PERSONAL PROPERTY.

Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money. To be admissible under this section as evidence of the intended disposition, the writing must be in the handwriting of the testator or signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing that has no significance apart from its effect on the dispositions made by the will.

Maine Probate Code Proposed Comment The language does not constitute a substantive change to Maine law. Maine deviates from the UPC by not requiring the testator's signature if the separate writing is in the testator's handwriting.

2-514

CONTRACTS CONCERNING SUCCESSION

SECTION 2-514. CONTRACTS CONCERNING SUCCESSION.

A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective

date of this [article], may be established only by (1) provisions of a will stating material provisions of the contract, (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law. The same provision previously existed as MPC section 2-701.

2-515

DEPOSIT OF WILL WITH COURT IN TESTATOR'S LIFETIME

SECTION 2-515. DEPOSIT OF WILL WITH COURT IN TESTATOR'S LIFETIME.

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

DISPOSITION OF WILL DEPOSITED WITH COURT

A will deposited for safekeeping with the court in the office of the register of probate before September 19, 1997 may be delivered only to the testator or to a person authorized in writing signed by the testator to receive the will. A conservator may be allowed to examine a deposited will of a protected testator under procedures designed to maintain the confidential character of the document to the extent possible and to ensure that it will be resealed and left on deposit after the examination. Upon being informed of the testator's death, the court shall notify any person designated to receive the will and deliver it to that designated person on request; or the court may deliver the will to the appropriate court. The court may not accept a will for safekeeping after September 19, 1997.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law. The same provision previously existed as MPC section 2-901.

2-516

DUTY OF CUSTODIAN OF WILLS; LIABILITY

SECTION 2-516. DUTY OF CUSTODIAN OF WILL; LIABILITY.

~~After the death of a testator and on request of an interested person, a person having custody of a will of the testator~~

~~shall deliver it with reasonable promptness to a person able to secure its probate and if none is known, to an appropriate court. A person who wilfully fails to deliver a will is liable to any person aggrieved for any damages that may be sustained by the failure. A person who wilfully refuses or fails to deliver a will after being ordered by the court in a proceeding brought for the purpose of compelling delivery is subject to penalty for contempt of court.~~
After the death of a testator, any person having custody of a will of the testator shall deliver it with reasonable promptness to a person able to secure its probate and if none is known, to an appropriate court for filing and recording until probate is sought. Any person having custody of a will is not liable, to any person aggrieved, for failure to learn of the death of the testator of that will and the failure, therefore, to deliver that will as required. Any person who willfully fails to deliver a will, or who willfully defaces or destroys any will of a deceased person, is liable to any person aggrieved for the damages, which may be sustained by such failure to deliver, or by such defacement or destruction. Any person who willfully refuses or fails to deliver a will, or who so defaces or destroys it, after being ordered by the court in a proceeding brought for the purpose of compelling delivery is subject to penalty for contempt of court.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law. The same provision previously existed as MPC section 2-902.

2-517

PENALTY CLAUSE FOR CONTEST

SECTION 2-517. PENALTY CLAUSE FOR CONTEST.

A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law. The same provision previously existed as MPC section 3-905.

None

2-518 STATUTORY WILLS

None.

It is recommended that the Maine statutory will provision, modified as shown below, be adopted, and renumbered from section 2-514 to 2-518.

Maine Probate Code Proposed Comments The statutory will form is revised to add an optional self-proving

provision. The statutory will provision previously existed as MPC section 2-514.

2-601
SCOPE
In the absence of a finding of a contrary intention, the rules of construction in this part control the construction of a will.
Maine Probate Code Proposed Comment The new language of Section 2-601 reflects the broad theme of the new UPC to discern the intent of the testator and a willingness to look outside the four corners of the will itself to determine an intent that would rebut the statutory rules of construction.

2-602
WILL MAY PASS ALL PROPERTY AND AFTER-ACQUIRED PROPERTY
A will may provide for the passage of all property the testator owns at death and all property acquired by the estate after the testator's death.
Maine Probate Code Proposed Comment The removal of the second sentence ("A devise of property conveys all the estate of a devisor unless it appears by his will that he intended to convey a lesser estate.") from MPC section 2-604 is not intended to create an inference that Maine is changing a long-standing presumption that a devise passes the testator's full interest in the property.

2-603
ANTILAPSE; DECEASED DEVISEE; CLASS GIFTS
(a) {Definitions.} In this section: (1) "Alternative devise" means a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause constitutes an alternative devise with respect to a nonresiduary devise only if the will specifically provides that, upon lapse or failure, the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause. (2) "Class member" includes an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had he [or she] survived the testator. (3) "Descendant of a grandparent", as used in subsection (b), means an individual who qualifies as a

descendant of a grandparent of the testator or of the donor of a power of appointment under the (i) rules of construction applicable to a class gift created in the testator's will if the devise or exercise of the power is in the form of a class gift or (ii) rules for intestate succession if the devise or exercise of the power is not in the form of a class gift.

(4) "Descendants", as used in the phrase "surviving descendants" of a deceased devisee or class member in subsections (b)(1) and (2), mean the descendants of a deceased devisee or class member who would take under a class gift created in the testator's will.

(5) "Devise" includes an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment.

(6) "Devisee" includes (i) a class member if the devise is in the form of a class gift, (ii) an individual or class member who was deceased at the time the testator executed his [or her] will as well as an individual or class member who was then living but who failed to survive the testator, and (iii) an appointee under a power of appointment exercised by the testator's will.

(7) "Stepchild" means a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment, and not of the testator or donor.

(8) "Surviving", in the phrase "surviving devisees" or "surviving descendants", means devisees or descendants who neither predeceased the testator nor are deemed to have predeceased the testator under Section 2-702.

(9) "Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

(b) ~~Substitute Gift.~~ If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:

(1) Except as provided in paragraph (4), if the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee's surviving descendants. They take per capita at each generation~~by representation~~ the property to which the devisee would have been entitled had the devisee survived the testator.

(2) Except as provided in paragraph (4), if the devise is in the form of a class gift, other than a devise to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased devisee. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which he [or she] would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take per capita at each generation~~by representation~~ the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For the purposes of this paragraph, "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants.

(3) For the purposes of Section 2-601, words of survivorship, such as in a devise to an individual "if he survives me," or in a devise to "my surviving children," are, in the absence of additional evidence, a sufficient

indication of an intent contrary to the application of this section.

(4) If the will creates an alternative devise with respect to a devise for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative devise if:

(A) the alternative devise is in the form of a class gift and one or more members of the class is entitled to take under the will; or

(B) the alternative devise is not in the form of a class gift and the expressly designated devisee of the alternative devise is entitled to take under the will.

(5) Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee under this section, whether or not the descendant is an object of the power.

(c) ~~[More Than One Substitute Gift; Which One Takes.]~~ If, under subsection (b), substitute gifts are created and not superseded with respect to more than one devise and the devises are alternative devises, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) Except as provided in paragraph (2), the devised property passes under the primary substitute gift.

(2) If there is a younger-generation devise, the devised property passes under the younger-generation substitute gift and not under the primary substitute gift.

(3) In this subsection:

(A) “Primary devise” means the devise that would have taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator.

(B) “Primary substitute gift” means the substitute gift created with respect to the primary devise.

(C) “Younger-generation devise” means a devise that (i) is to a descendant of a devisee of the primary devise, (ii) is an alternative devise with respect to the primary devise, (iii) is a devise for which a substitute gift is created, and (iv) would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise.

(D) “Younger-generation substitute gift” means the substitute gift created with respect to the younger-generation devise.

Maine Probate Code Proposed Comment The phrase “by representation” in the UPC has been changed to “per capita at each generation” in the MPC. The phrase “by representation” is synonymous with “per stirpes”. See section 2-709. Maine has long considered inheritance by right of representation to be synonymous with inheritance per stirpes. *Fiduciary Trust Co. v. Hope Wheeler Brown*, 131 A.2d 191 (Me. 1957).

Maine has reversed the presumption of paragraph (b)(3) of the UPC, which created a rebuttable presumption that using words of survivorship, such as a devise to an individual “if he survives me,” or in a devise to “my surviving children,” are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of the anti-lapse provisions. Under the MPC words of survivorship will create a rebuttable presumption of the testator’s intent to not have the anti-lapse provisions apply. For example, in a devise to “my surviving children,” if

the testator had three children, X, Y and Z, and child X predeceased the testator leaving GC1 and GC2, the devise will be distributed in equal shares to Y and Z, with no distribution to GC1 and GC2.

2-604

FAILURE OF TESTAMENTARY PROVISION

(a) Except as provided in Section 2-603, a devise, other than a residuary devise, that fails for any reason becomes a part of the residue.

(b) Except as provided in Section 2-603, if the residue is devised to two or more persons, the share of a residuary devisee that fails for any reason passes to the other residuary devisee, or to other residuary devisees in proportion to the interest of each in the remaining part of the residue.

Maine Probate Code Proposed Comment The language does not constitute a substantive change to Maine law.

2-605

Increase in Securities; accessions

(a) If a testator executes a will that devises securities and the testator then owned securities that meet the description in the will, the devise includes additional securities owned by the testator at death to the extent the additional securities were acquired by the testator after the will was executed as a result of the testator's ownership of the described securities and are securities of any of the following types:

- (1) securities of the same organization acquired by reason of action initiated by the organization or any successor, related, or acquiring organization, excluding any acquired by exercise of purchase options;
- (2) securities of another organization acquired as a result of a merger, consolidation, reorganization, or other distribution by the organization or any successor, related, or acquiring organization; or
- (3) securities of the same organization acquired as a result of a plan of reinvestment.

(b) Distributions in cash before death with respect to a described security are not part of the devise.

Maine Probate Code Proposed Comment The language does not constitute a substantive change to Maine law.

2-606

NONADEMPTION OF SPECIFIC DEVISES; UNPAID PROCEEDS OF SALE, CONDEMNATION, OR INSURANCE; SALE BY CONSERVATOR OR AGENT

(a) A specific devisee has a right to specifically devised property in the testator's estate at the testator's death

and to:

- (1) any balance of the purchase price, together with any security agreement, owed by a purchaser at the testator's death by reason of sale of the property;
 - (2) any amount of a condemnation award for the taking of the property unpaid at death;
 - (3) any proceeds unpaid at death on fire or casualty insurance on or other recovery for injury to the property;
 - (4) any property owned by the testator at death and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically devised obligation;
 - (5) any real property or tangible personal property owned by the testator at death which the testator acquired as a replacement for specifically devised real property or tangible personal property; and
 - (6) if not covered by paragraphs (1) through (5), a pecuniary devise equal to the value as of its date of disposition of other specifically devised property disposed of during the testator's lifetime but only to the extent it is established that ademption would be inconsistent with the testator's manifested plan of distribution or that at the time the will was made, the date of disposition or otherwise, the testator did not intend ademption of the devise.
- (b) If specifically devised property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal, or a condemnation award, insurance proceeds, or recovery for injury to the property is paid to a conservator or to an agent acting within the authority of a durable power of attorney for an incapacitated principal, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds, or the recovery.
- (c) The right of a specific devisee under subsection (b) is reduced by any right the devisee has under subsection (a).
- (d) For the purposes of the references in subsection (b) to a conservator, subsection (b) does not apply if, after the sale, mortgage, condemnation, casualty, or recovery, it was adjudicated that the testator's incapacity ceased and the testator survived the adjudication for at least one year.
- (e) For the purposes of the references in subsection (b) to an agent acting within the authority of a durable power of attorney for an incapacitated principal, (i) "incapacitated principal" means a principal who is an incapacitated person, (ii) no adjudication of incapacity before death is necessary, and (iii) the acts of an agent within the authority of a durable power of attorney are presumed to be for an incapacitated principal.

Maine Probate Code Proposed Comment Subparagraphs (a)5 and (a)(6) reflect an adoption of the "intent" theory of ademption in certain circumstances.

2-607

NONEXONERATION

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

Maine Probate Code Proposed Comment The language does not constitute a substantive change to Maine law. The same provision previously existed as section 2-609.

See section 3-814 empowering the personal representative to pay an encumbrance under some circumstances. The last sentence of that section makes it clear that payment of the encumbrance does not increase the right of the specific devisee. The present section governs the substantive rights of the devisee. The common law rule of exoneration of the specific devise is abolished by this section, and the contrary rule is adopted.

2-608

EXERCISE OF POWER OF APPOINTMENT

In the absence of a requirement that a power of appointment be exercised by a reference, or by an express or specific reference, to the power, a general residuary clause in a will, or a will making general disposition of all of the testator's property, expresses an intention to exercise a power of appointment held by the testator only if (i) the power is a general power exercisable in favor of the powerholder's estate and the creating instrument does not contain an effective gift if the power is not exercised or (ii) the testator's will manifests an intention to include the property subject to the power.

Maine Probate Code Proposed Comment If the document creating a power of appointment does not require a specific reference to the power in order for it to be exercised, the general rule remains unchanged in stating that a general residuary clause is not effective to exercise the power unless the testator's will manifests an intention to have the residuary clause include the property subject to the power. This section adds one circumstance where a residuary clause will be presumed to include the property subject to the power of appointment - - if "the power is a general power and the creating instrument does not contain a gift if the power is not exercised."

2-609

ADEMPITION BY SATISFACTION

(a) Property a testator gave in his or her lifetime to a person is treated as a satisfaction of a devise in whole or in part, only if (i) the will provides for deduction of the gift, (ii) the testator declared in a contemporaneous writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise, or (iii) the devisee acknowledged in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise.

(b) For purposes of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or at the testator's death, whichever occurs first.

(c) If the devisee fails to survive the testator, the gift is treated as a full or partial satisfaction of the devise, as

appropriate, in applying Sections 2-603 and 2-604, unless the testator's contemporaneous writing provides otherwise.

2-701

SCOPE

In the absence of a finding of a contrary intention, the rules of construction in this part control the construction of a governing instrument. The rules of construction in this part apply to a governing instrument of any type, except as the application of a particular section is limited by its terms to a specific type or types of provision or governing instrument.

Maine Probate Code Proposed Comments The rules of construction in this part apply to governing instruments of any type – not just wills.

2-702

REQUIREMENT OF SURVIVAL BY 120 HOURS.

(a) ~~[Requirement of Survival by 120 Hours Under Probate Code.]~~ For the purposes of this [code], except as provided in subsection (d), an individual who is not established by clear and convincing evidence to have survived an event, including the death of another individual, by 120 hours is deemed to have predeceased the event.

(b) ~~[Requirement of Survival by 120 Hours under Governing Instrument.]~~ Except as provided in subsection (d), for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event, by 120 hours is deemed to have predeceased the event.

(c) ~~[Co-owners With Right of Survivorship; Requirement of Survival by 120 Hours.]~~ Except as provided in subsection (d), if (i) it is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by 120 hours, one-half of the property passes as if one had survived by 120 hours and one-half as if the other had survived by 120 hours and (ii) there are more than two co-owners and it is not established by clear and convincing evidence that at least one of them survived the others by 120 hours, the property passes in the proportion that one bears to the whole number of co-owners. For the purposes of this subsection, “co-owners with right of survivorship” includes joint tenants, tenants by the entireties, and other co-owners of property or accounts held under circumstances that entitles one or more to the whole of the property or account on the death of the other or others.

(d) ~~[Exceptions.]~~ Survival by 120 hours is not required if:

(1) the governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case;

(2) the governing instrument expressly indicates that an individual is not required to survive an event,

including the death of another individual, by any specified period or expressly requires the individual to survive the event by a specified period; but survival of the event or the specified period must be established by clear and convincing evidence;

(3) the imposition of a 120-hour requirement of survival would cause a nonvested property interest or a power of appointment to fail to qualify for validity under Section 2-901(a)(1), (b)(1), or (c)(1) or to become invalid under Section 2-901(a)(2), (b)(2), or (c)(2); but survival must be established by clear and convincing evidence; or

(4) the application of a 120-hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition; but survival must be established by clear and convincing evidence.

(e) ~~[Protection of Payors and Other Third Parties.]~~

(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument who, under this section, is not entitled to the payment or item of property, or for having taken any other action in good faith reliance on the beneficiary's apparent entitlement under the terms of the governing instrument, before the payor or other third party received written notice of a claimed lack of entitlement under this section. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed lack of entitlement under this section.

(2) Written notice of a claimed lack of entitlement under paragraph (1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed lack of entitlement under this section, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(f) ~~[Protection of Bona Fide Purchasers; Personal Liability of Recipient.]~~

(1) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment,

item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

Maine Probate Code Proposed Comments This section includes what was formerly the Uniform Simultaneous Death Act in section 2-805.

2-703

CHOICE OF LAW AS TO MEANING AND EFFECT OF GOVERNING INSTRUMENT

The meaning and legal effect of a governing instrument is determined by the local law of the state selected in the governing instrument, unless the application of that law is contrary to the provisions relating to the elective share described in Part 2, the provisions relating to exempt property and allowances described in Part 4, or any other public policy of this state otherwise applicable to the disposition.

2-704

POWER OF APPOINTMENT; COMPLIANCE WITH SPECIFIC REFERENCE REQUIREMENT

A powerholder's substantial compliance with a formal requirement of appointment imposed in a governing instrument by the donor, including a requirement that the instrument exercising the power of appointment make reference or specific reference to the power is sufficient if:

- (1) the powerholder knows of and intends to exercise the power; and
- (2) the powerholder's manner of attempted exercise does not impair a material purpose of the donor in imposing the requirement.

Maine Probate Code Proposed Comments This section is new, with no previous counterpart in the Maine Probate Code.

2-705

CLASS GIFTS CONSTRUED TO ACCORD WITH INTESTATE SUCCESSION; EXCEPTIONS

- (a) ~~{Definitions.}~~ In this section:
- (1) "Adoptee" has the meaning set forth in Section 2-115.
 - (2) "Child of assisted reproduction" has the meaning set forth in Section 2-120.
 - (3) "Distribution date" means the date when an immediate or postponed class gift takes effect in possession or enjoyment.
 - (4) "Functioned as a parent of the adoptee" has the meaning set forth in Section 2-115, substituting "adoptee"

for “child” in that definition.

(5) “Functioned as a parent of the child” has the meaning set forth in Section 2-115.

(6) “Genetic parent” has the meaning set forth in Section 2-115.

(7) “Gestational child” has the meaning set forth in Section 2-121.

(8) “Relative” has the meaning set forth in Section 2-115.

(b) ~~{Terms of Relationship.}~~ A class gift that uses a term of relationship to identify the class members includes a child of assisted reproduction, a gestational child, and, except as otherwise provided in subsections (e) and (f), an adoptee and a child born to parents who are not married to each other, and their respective descendants if appropriate to the class, in accordance with the rules for intestate succession regarding parent-child relationships. For the purpose of determining whether a contrary intention exists under Section 2-701, a provision in a governing instrument that relates to the inclusion or exclusion in a class gift of a child born to parents who are not married to each other but does not specifically refer to a child of assisted reproduction or a gestational child does not apply to a child of assisted reproduction or a gestational child.

(c) ~~{Relatives by Marriage.}~~ Terms of relationship in a governing instrument that do not differentiate relationships by blood from those by marriage, such as uncles, aunts, nieces, or nephews, are construed to exclude relatives by marriage, unless:

(1) when the governing instrument was executed, the class was then and foreseeably would be empty; or

(2) the language or circumstances otherwise establish that relatives by marriage were intended to be included.

(d) ~~{Half-Blood Relatives.}~~ Terms of relationship in a governing instrument that do not differentiate relationships by the half blood from those by the whole blood, such as brothers, sisters, nieces, or nephews, are construed to include both types of relationships.

(e) ~~{Transferor Not Genetic Parent.}~~ In construing a dispositive provision of a transferor who is not the genetic parent, a child of a genetic parent is not considered the child of that genetic parent unless the genetic parent, a relative of the genetic parent, or the spouse or surviving spouse of the genetic parent or of a relative of the genetic parent functioned as a parent of the child before the child reached [18] years of age.

(f) ~~{Transferor Not Adoptive Parent.}~~ In construing a dispositive provision of a transferor who is not the adoptive parent, an adoptee is not considered the child of the adoptive parent unless:

(1) the adoption took place before the adoptee reached [18] years of age;

(2) the adoptive parent was the adoptee’s stepparent or foster parent; or

(3) the adoptive parent functioned as a parent of the adoptee before the adoptee reached [18] years of age.

(g) ~~{Class-Closing Rules.}~~ The following rules apply for purposes of the class-closing rules:

(1) A child in utero at a particular time is treated as living at that time if the child lives 120 hours after birth.

(2) If a child of assisted reproduction or a gestational child is conceived posthumously and the distribution date is the deceased parent’s death, the child is treated as living on the distribution date if the child lives 120 hours after birth and was in utero not later than 36 months after the deceased parent’s death or born not later than 45 months after the deceased parent’s death.

(3) An individual who is in the process of being adopted when the class closes is treated as adopted when the

class closes if the adoption is subsequently granted.

Maine Probate Code Proposed Comments This section establishes a comprehensive reformulation of rules of construction for class gifts that identify the recipient by reference to a relationship to another individual.

2-706

LIFE INSURANCE; RETIREMENT PLAN; ACCOUNT WITH POD DESIGNATION; TRANSFER-ON-DEATH REGISTRATION; DECEASED BENEFICIARY.

(a) ~~{Definitions.}~~ In this section:

(1) “Alternative beneficiary designation” means a beneficiary designation that is expressly created by the governing instrument and, under the terms of the governing instrument, can take effect instead of another designation on the happening of one or more events, including survival of the decedent or failure to survive the decedent, whether an event is expressed in condition-precedent, condition-subsequent, or any other form.

(2) “Beneficiary” means the beneficiary of a beneficiary designation under which the beneficiary must survive the decedent and includes (i) a class member if the beneficiary designation is in the form of a class gift and (ii) an individual or class member who was deceased at the time the beneficiary designation was executed as well as an individual or class member who was then living but who failed to survive the decedent, but excludes a joint tenant of a joint tenancy with the right of survivorship and a party to a joint and survivorship account.

(3) “Beneficiary designation” includes an alternative beneficiary designation and a beneficiary designation in the form of a class gift.

(4) “Class member” includes an individual who fails to survive the decedent but who would have taken under a beneficiary designation in the form of a class gift had he [or she] survived the decedent.

(5) “Descendant of a grandparent”, as used in subsection (b), means an individual who qualifies as a descendant of a grandparent of the decedent under the (i) rules of construction applicable to a class gift created in the decedent’s beneficiary designation if the beneficiary designation is in the form of a class gift or (ii) rules for intestate succession if the beneficiary designation is not in the form of a class gift.

(6) “Descendants”, as used in the phrase “surviving descendants” of a deceased beneficiary or class member in subsections (b)(1) and (2), mean the descendants of a deceased beneficiary or class member who would take under a class gift created in the beneficiary designation.

(7) “Stepchild” means a child of the decedent’s surviving, deceased, or former spouse, and not of the decedent.

(8) “Surviving”, in the phrase “surviving beneficiaries” or “surviving descendants”, means beneficiaries or descendants who neither predeceased the decedent nor are deemed to have predeceased the decedent under Section 2-702.

(b) ~~{Substitute Gift.}~~ If a beneficiary fails to survive the decedent and is a grandparent, a descendant of a grandparent, or a stepchild of the decedent, the following apply:

(1) Except as provided in paragraph (4), if the beneficiary designation is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take per capita at each generation~~by representation~~ the property to which the beneficiary would have been entitled had the beneficiary survived the decedent.

(2) Except as provided in paragraph (4), if the beneficiary designation is in the form of a class gift, other than a beneficiary designation to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary. The property to which the beneficiaries would have been entitled had all of them survived the decedent passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which he [or she] would have been entitled had the deceased beneficiaries survived the decedent. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take per capita at each generation~~by representation~~ the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the decedent. For the purposes of this paragraph, "deceased beneficiary" means a class member who failed to survive the decedent and left one or more surviving descendants.

(3) For the purposes of Section 2-701, words of survivorship, such as in a beneficiary designation to an individual "if he survives me," or in a beneficiary designation to "my surviving children," are, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.

(4) If a governing instrument creates an alternative beneficiary designation with respect to a beneficiary designation for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative beneficiary designation if:

(A) the alternative beneficiary designation is in the form of a class gift and one or more members of the class is entitled to take; or

(B) the alternative beneficiary designation is not in the form of a class gift and the expressly designated beneficiary of the alternative beneficiary designation is entitled to take.

(c) ~~[More Than One Substitute Gift; Which One Takes.]~~ If, under subsection (b), substitute gifts are created and not superseded with respect to more than one beneficiary designation and the beneficiary designations are alternative beneficiary designations, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) Except as provided in paragraph (2), the property passes under the primary substitute gift.

(2) If there is a younger-generation beneficiary designation, the property passes under the younger-generation substitute gift and not under the primary substitute gift.

(3) In this subsection:

(A) "Primary beneficiary designation" means the beneficiary designation that would have taken effect had all the deceased beneficiaries of the alternative beneficiary designations who left surviving descendants survived the decedent.

(B) "Primary substitute gift" means the substitute gift created with respect to the primary beneficiary designation.

(C) “Younger-generation beneficiary designation” means a beneficiary designation that (i) is to a descendant of a beneficiary of the primary beneficiary designation, (ii) is an alternative beneficiary designation with respect to the primary beneficiary designation, (iii) is a beneficiary designation for which a substitute gift is created, and (iv) would have taken effect had all the deceased beneficiaries who left surviving descendants survived the decedent except the deceased beneficiary or beneficiaries of the primary beneficiary designation.

(D) “Younger-generation substitute gift” means the substitute gift created with respect to the younger-generation beneficiary designation.

(d) ~~[Protection of Payors.]~~

(1) A payor is protected from liability in making payments under the terms of the beneficiary designation until the payor has received written notice of a claim to a substitute gift under this section. Payment made before the receipt of written notice of a claim to a substitute gift under this section discharges the payor, but not the recipient, from all claims for the amounts paid. A payor is liable for a payment made after the payor has received written notice of the claim. A recipient is liable for a payment received, whether or not written notice of the claim is given.

(2) The written notice of the claim must be mailed to the payor’s main office or home by registered or certified mail, return receipt requested, or served upon the payor in the same manner as a summons in a civil action. Upon receipt of written notice of the claim, a payor may pay any amount owed by it to the court having jurisdiction of the probate proceedings relating to the decedent’s estate or, if no proceedings have been commenced, to the court having jurisdiction of probate proceedings relating to decedents’ estates located in the county of the decedent’s residence. The court shall hold the funds and, upon its determination under this section, shall order disbursement in accordance with the determination. Payment made to the court discharges the payor from all claims for the amounts paid.

(e) ~~[Protection of Bona Fide Purchasers; Personal Liability of Recipient.]~~

(1) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

Maine Probate Code Proposed Comments This section parallels section 2-603 and extends that comprehensive revision of the antilapse statute into the area of “beneficiary designations” as defined in UPC section 1-201.

The phrase “by representation” in the UPC has been changed to “per capita at each generation” in the MPC. The phrase “by representation” is synonymous with “per stirpes”. See section 2-709. Maine has long considered inheritance by right of representation to be synonymous with inheritance per stirpes. *Fiduciary Trust Co. v. Hope Wheeler Brown*, 131 A.2d 191 (Me. 1957).

Maine has reversed the presumption of paragraph (b)(3) of the UPC, which created a rebuttable presumption that using words of survivorship, such as a beneficiary designation to an individual “if he survives me,” or in a beneficiary designation to “my surviving children,” are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of the anti-lapse provisions. Under the MPC words of survivorship will create a rebuttable presumption of the testator’s intent to not have the anti-lapse provisions apply. For example, in a devise to “my surviving children,” if the testator had three children, X, Y and Z, and child X predeceased the testator leaving GC1 and GC2, the devise will be distributed in equal shares to Y and Z, with no distribution to GC1 and GC2.

2-707

SURVIVORSHIP WITH RESPECT TO FUTURE INTERESTS UNDER TERMS OF TRUST; SUBSTITUTE TAKERS.

(a) ~~Definitions.~~ In this section:

(1) “Alternative future interest” means an expressly created future interest that can take effect in possession or enjoyment instead of another future interest on the happening of one or more events, including survival of an event or failure to survive an event, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause in a will does not create an alternative future interest with respect to a future interest created in a nonresiduary devise in the will, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause.

(2) “Beneficiary” means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.

(3) “Class member” includes an individual who fails to survive the distribution date but who would have taken under a future interest in the form of a class gift had he [or she] survived the distribution date.

(4) “Descendants”, in the phrase “surviving descendants” of a deceased beneficiary or class member in subsections (b)(1) and (2), mean the descendants of a deceased beneficiary or class member who would take under a class gift created in the trust.

(5) “Distribution date,” with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but can occur at a time during the course of a day.

(6) “Future interest” includes an alternative future interest and a future interest in the form of a class gift.

(7) “Future interest under the terms of a trust” means a future interest that was created by a transfer creating a trust or to an existing trust or by an exercise of a power of appointment to an existing trust, directing the continuance

of an existing trust, designating a beneficiary of an existing trust, or creating a trust.

(8) “Surviving”, in the phrase “surviving beneficiaries” or “surviving descendants”, means beneficiaries or descendants who neither predeceased the distribution date nor are deemed to have predeceased the distribution date under Section 2-702.

(b) ~~[Survivorship Required; Substitute Gift.]~~ A future interest under the terms of a trust is contingent on the beneficiary’s surviving the distribution date. If a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, the following apply:

(1) Except as provided in paragraph (4), if the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary’s surviving descendants. They take per capita at each generation~~by representation~~ the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date.

(2) Except as provided in paragraph (4), if the future interest is in the form of a class gift, other than a future interest to “issue,” “descendants,” “heirs of the body,” “heirs,” “next of kin,” “relatives,” or “family,” or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary. The property to which the beneficiaries would have been entitled had all of them survived the distribution date passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which he [or she] would have been entitled had the deceased beneficiaries survived the distribution date. Each deceased beneficiary’s surviving descendants who are substituted for the deceased beneficiary take per capita at each generation~~by representation~~ the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date. For the purposes of this paragraph, “deceased beneficiary” means a class member who failed to survive the distribution date and left one or more surviving descendants.

(3) For the purposes of Section 2-701, words of survivorship attached to a future interest are ~~not~~, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. Words of survivorship include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed in condition-precedent, condition-subsequent, or any other form.

(4) If the governing instrument creates an alternative future interest with respect to a future interest for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative future interest if:

(A) the alternative future interest is in the form of a class gift and one or more members of the class is entitled to take in possession or enjoyment; or

(B) the alternative future interest is not in the form of a class gift and the expressly designated beneficiary of the alternative future interest is entitled to take in possession or enjoyment.

(c) ~~[More Than One Substitute Gift; Which One Takes.]~~ If, under subsection (b), substitute gifts are created and not superseded with respect to more than one future interest and the future interests are alternative future interests, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) Except as provided in paragraph (2), the property passes under the primary substitute gift.

(2) If there is a younger-generation future interest, the property passes under the younger-generation substitute

gift and not under the primary substitute gift.

(3) In this subsection:

(A) “Primary future interest” means the future interest that would have taken effect had all the deceased beneficiaries of the alternative future interests who left surviving descendants survived the distribution date.

(B) “Primary substitute gift” means the substitute gift created with respect to the primary future interest.

(C) “Younger-generation future interest” means a future interest that (i) is to a descendant of a beneficiary of the primary future interest, (ii) is an alternative future interest with respect to the primary future interest, (iii) is a future interest for which a substitute gift is created, and (iv) would have taken effect had all the deceased beneficiaries who left surviving descendants survived the distribution date except the deceased beneficiary or beneficiaries of the primary future interest.

(D) “Younger-generation substitute gift” means the substitute gift created with respect to the younger-generation future interest.

(d) ~~[If No Other Takers, Property Passes Under Residuary Clause or to Transferor’s Heirs.]~~ Except as provided in subsection (e), if, after the application of subsections (b) and (c), there is no surviving taker, the property passes in the following order:

(1) if the trust was created in a nonresiduary devise in the transferor’s will or in a codicil to the transferor’s will, the property passes under the residuary clause in the transferor’s will; for purposes of this section, the residuary clause is treated as creating a future interest under the terms of a trust.

(2) if no taker is produced by the application of paragraph (1), the property passes to the transferor’s heirs under Section 2-711.

(e) ~~[If No Other Takers and If Future Interest Created by Exercise of Power of Appointment.]~~ If, after the application of subsections (b) and (c), there is no surviving taker and if the future interest was created by the exercise of a power of appointment:

(1) the property passes under the donor’s gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust; and

(2) if no taker is produced by the application of paragraph (1), the property passes as provided in subsection

(d). For purposes of subsection (d), “transferor” means the donor if the power was a nongeneral power and means the donee if the power was a general power.

Maine Probate Code Proposed Comments This section parallels section 2-603 and extends that comprehensive revision of the antilapse statute into the area of future interests under the terms of a trust.

The phrase “by representation” in the UPC has been changed to “per capita at each generation” in the MPC. The phrase “by representation” is synonymous with “per stirpes”. See section 2-709.

Maine has reversed the presumption of paragraph (b)(3) of the UPC, which created a rebuttable presumption that using words of survivorship attached to a future interest are not, in the absence of additional evidence, a sufficient

indication of an intent contrary to the application of the anti-lapse provisions. Under the MPC, words of survivorship will create a rebuttable presumption of the testator's intent to not have the anti-lapse provisions apply.

2-708

CLASS GIFTS TO “DESCENDANTS,” “ISSUE,” OR “HEIRS OF THE BODY”; FORM OF DISTRIBUTION IF NONE SPECIFIED

If a class gift in favor of “descendants,” “issue,” or “heirs of the body” does not specify the manner in which the property is to be distributed among the class members, the property is distributed among the class members who are living when the interest is to take effect in possession or enjoyment, in such shares as they would receive, under the applicable law of intestate succession, if the designated ancestor had then died intestate owning the subject matter of the class gift.

Maine Probate Code Proposed Comments This section is new and had no previous counterpart in the MPC.

2-709

REPRESENTATION; PER CAPITA AT EACH GENERATION; PER STIRPES

SECTION 2-709. REPRESENTATION; PER CAPITA AT EACH GENERATION; PER STIRPES; REPRESENTATION

(a) ~~Definitions.~~ In this section:

(1) “Deceased child” or “deceased descendant” means a child or a descendant who either predeceased the distribution date or is deemed to have predeceased the distribution date under Section 2-702.

(2) “Distribution date,” with respect to an interest, means the time when the interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but can occur at a time during the course of a day.

(3) “Surviving ancestor,” “surviving child,” or “surviving descendant” means an ancestor, a child, or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under Section 2-702.

(b) ~~Representation; Per Capita at Each Generation.~~ If an applicable statute or a governing instrument calls for property to be distributed “~~by representation~~” or “per capita at each generation,” the property is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants (ii) and deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased

<p>descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the distribution date.</p> <p>(c) [Per Stirpes; Representation.] If a governing instrument calls for property to be distributed “per stirpes” or “by representation,” the property is divided into as many equal shares as there are (i) surviving children of the designated ancestor and (ii) deceased children who left surviving descendants. Each surviving child, if any, is allocated one share. The share of each deceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.</p> <p>(d) [Deceased Descendant With No Surviving Descendant Disregarded.] For the purposes of subsections (b) and (c), an individual who is deceased and left no surviving descendant is disregarded, and an individual who leaves a surviving ancestor who is a descendant of the designated ancestor is not entitled to a share.</p>
<p>Maine Probate Code Proposed Comments The phrase “by representation” in Maine is synonymous with “per stirpes.”</p>

<p>2-710</p>
<p>WORTHIER-TITLE DOCTRINE ABOLISHED</p>
<p>The doctrine of worthier title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor’s “heirs,” “heirs at law,” “next of kin,” “distributees,” “relatives,” or “family,” or language of similar import, does not create or presumptively create a reversionary interest in the transferor.</p>
<p>Maine Probate Code Proposed Comments The doctrine of worthier title, as articulated in <u>Randall v. Marble</u>, 69 Me. 310, 313 (1879), is abolished.</p>

<p>2-711</p>
<p>INTERESTS IN “HEIRS” AND LIKE</p>
<p>If an applicable statute or a governing instrument calls for a present or future distribution to or creates a present or future interest in a designated individual’s “heirs,” “heirs at law,” “next of kin,” “relatives,” or “family,” or language of similar import, the property passes to those persons, including the state, and in such shares as would succeed to the designated individual’s intestate estate under the intestate succession law of the designated individual’s domicile if the designated individual died when the disposition is to take effect in possession or enjoyment. If the designated individual’s surviving spouse is living but is remarried at the time the disposition is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual.</p>

Maine Probate Code Proposed Comments This section is new and had no previous counterpart in the MPC.

2-801
RESERVED
§ 2-801. Reserved.

2-802
EFFECT OF DIVORCE, ANNULMENT, AND DECREE OF SEPARATION
<p>(a) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he or she is married to the decedent at the time of death. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.</p> <p>(b) For purposes of Parts 1, 2, 3 and 4 of this article, and of Section 3-203, a surviving spouse does not include:</p> <ul style="list-style-type: none">(1) an individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless subsequently they participate in a marriage ceremony purporting to marry each to the other or live together as husband and wife;(2) an individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual; or(3) an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

2-803
EFFECT OF HOMICIDE ON INTTESTATE SUCCESSION, WILLS, TRUSTS, JOINT ASSETS, LIFE INSURANCE, AND BENEFICIARY DESIGNATIONS.
<p>(a) Definitions. In this section:</p> <ul style="list-style-type: none">(1) “Disposition or appointment of property” includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.(2) “Governing instrument” means a governing instrument executed by the decedent.(3) “Revocable,” with respect to a disposition, appointment, provision, or nomination, means one under which the decedent, at the time of or immediately before death, was alone empowered, by law or under the governing

instrument, to cancel the designation in favor of the killer, whether or not the decedent was then empowered to designate himself or herself in place of his or her killer and whether or not the decedent then had capacity to exercise the power.

(b) Forfeiture of Statutory Benefits. An individual who feloniously and intentionally kills the decedent forfeits all benefits under this article with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his or her intestate share.

(c) Revocation of Benefits Under Governing Instruments.

The felonious and intentional killing of the decedent:

(1) revokes any revocable (i) disposition or appointment of property made by the decedent to the killer in a governing instrument, (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the killer, and (iii) nomination of the killer in a governing instrument, nominating or appointing the killer to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, or agent; and

(2) severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship ~~for as community property with the right of survivorship~~, transforming the interests of the decedent and killer into equal tenancies in common.

(d) Effect of Severance. A severance under subsection (c)(2) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the killer unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(e) Effect of Revocation. Provisions of a governing instrument are given effect as if the killer disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent.

(f) Wrongful Acquisition of Property. A wrongful acquisition of property or interest by a killer not covered by this section must be treated in accordance with the principle that a killer cannot profit from his [or her] wrong.

(g) Felonious and Intentional Killing; How Determined. After all right to appeal has been exhausted, a judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section. In the absence of a conviction, the court, upon the petition of an interested person, must determine whether, under the preponderance of evidence standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent. If the court determines that, under that standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent, the determination conclusively establishes that individual as the decedent's killer for purposes of this section.

(h) Protection of Payors and Other Third Parties.

(1) A payor or other third party is not liable for having made a payment or transferred an item of property or

any other benefit to a beneficiary designated in a governing instrument affected by an intentional and felonious killing, or for having taken any other action in good faith reliance on the validity of the governing instrument, upon request and satisfactory proof of the decedent's death, before the payor or other third party received written notice of a claimed forfeiture or revocation under this section. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section.

(2) Written notice of a claimed forfeiture or revocation under paragraph (1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed forfeiture or revocation under this section, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(i) Protection of Bona Fide Purchasers; Personal Liability of Recipient.

(1) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

NONE (MAINE PROPOSED 18A M.R.S.A. § 2-803A)

EFFECT OF CRIMINAL CONVICTION ON INTESTATE SUCCESSION, WILLS, JOINT ASSETS, BENEFICIARY DESIGNATIONS AND OTHER PROPERTY ACQUISITION WHEN RESTITUTION IS OWED TO THE DECEDENT

Effect of criminal conviction on intestate succession, wills, joint assets, beneficiary designations and other property acquisition when restitution is owed to the decedent

A person who has been convicted of a crime of which the decedent was a victim is not entitled to the following benefits to the extent that the benefits do not exceed the amount of restitution the person owes to the decedent as a result of the sentence for the crime:]

(a). Any benefits under the decedent's will or under this Article;

(b). Any property owned jointly with the decedent;

(c). Any benefit as a beneficiary of a bond, life insurance policy or other contractual arrangement in which the principal obligee or the person upon whose life the policy is issued is the decedent; and

(d). Any benefit from any acquisition of property in which the decedent had an interest.

2-804

REVOCATION OF PROBATE AND NONPROBATE TRANSFERS BY DIVORCE; NO REVOCATION BY OTHER CHANGES OF CIRCUMSTANCES.

(a) Definitions. In this section:

(1) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(2) "Divorce or annulment" means any divorce or annulment, or any dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a surviving spouse within the meaning of Section 2-802. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.

(3) "Divorced individual" includes an individual whose marriage has been annulled.

(4) "Governing instrument" means a governing instrument executed by the divorced individual before the divorce or annulment of his or her marriage to his or her former spouse.

(5) "Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.

(6) "Revocable," with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of his or her former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate himself or herself in place of his or her former spouse or in

place of his or her former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.

(b) Revocation Upon Divorce. Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:

(1) revokes any revocable

(A) disposition or appointment of property made by a divorced individual to his or her former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse,

(B) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse, and

(C) nomination in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian; and

(2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship ~~for as community property with the right of survivorship~~, transforming the interests of the former spouses into equal tenancies in common.

(c) Effect of Severance. A severance under subsection (b)(2) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(d) Effect of Revocation. Provisions of a governing instrument are given effect as if the former spouse and relatives of the former spouse disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.

(e) Revival if Divorce Nullified. Provisions revoked solely by this section are revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment.

(f) No Revocation for Other Change of Circumstances. No change of circumstances other than as described in this section and in Section 2-803 effects a revocation.

(g) Protection of Payors and Other Third Parties.

(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received written notice of the divorce, annulment, or remarriage. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section.

(2) Written notice of the divorce, annulment, or remarriage under subsection (g)(1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of the divorce, annulment, or remarriage, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement or transfer in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(h) Protection of Bona Fide Purchasers; Personal Liability of Recipient.

(1) A person who purchases property from a former spouse, relative of a former spouse, or any other person for value and without notice, or who receives from a former spouse, relative of a former spouse, or any other person a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a former spouse, relative of a former spouse, or other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a former spouse, relative of the former spouse, or any other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

§ 2-805

REFORMATION TO CORRECT MISTAKES.

The court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence what the transferor's intention was and that the terms of the governing instrument were affected by a mistake of fact or law, whether expression or inducement.

Maine Probate Code Proposed Comments This Section is new, with no previous counterpart in the MPC. This Section constitutes a substantial change to Maine law, but provides consistency between the Maine Trust Code (18B M.R.S.A. §415) and Maine laws that govern wills.

§ 2-806

MODIFICATION TO ACHIEVE TRANSFEROR'S TAX OBJECTIVES

To achieve the transferor's tax objectives, the court may modify the terms of a governing instrument in a manner that is not contrary to the transferor's probable intention. The court may provide that the modification has retroactive effect.

Maine Probate Code Proposed Comments This section is new, with no previous counterpart in the MPC, but it provides consistency between the Maine Trust Code (18B M.R.S.A. §416) and Maine laws that govern wills.

NONE (CURRENTLY MPC 18A M.R.S.A. 2-807)

ACTIONS FOR WRONGFUL DEATH

[There is no UPC Section, The following reflects changes to the current Maine Wrongful Death statute]

(a). Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then the person or the corporation that would have been liable if death had not ensued shall be liable for damages as provided in this section, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as shall amount to a felony.

B) Every wrongful death action must be brought by and in the name of the personal representative or special administrator of the deceased person, and shall be distributable, after payment for funeral expenses and the costs of recovery including attorney fees, directly to the decedent's heirs without becoming part of the probate estate, except as may be specifically provided below. The amount recovered in every wrongful death action, except as specifically provided below, is for the exclusive benefit of the surviving spouse if no minor children, of the children if no surviving spouse, one-half for the exclusive benefit of the surviving spouse and one-half for the exclusive benefit of the minor children to be divided equally among them if there are both surviving spouse and minor children and to the deceased's heirs to be distributed to the individuals and in the proportions as provided in 18A M.R.S.A. §2-102 and §2-103 if there is neither surviving spouse nor minor children. The jury may give damages as it determines a fair and just compensation with reference to the pecuniary injuries resulting from the death. Damages are payable to the estate of the deceased person only if the jury specifically makes an award and in addition shall give such damages that will

compensate the estate of the deceased person for payable to the estate for reasonable expenses of medical, surgical and hospital care and treatment and for reasonable funeral expenses; or if in the case of a settlement, the settlement documents specifically provide for such an allocation to the estate for the same. In addition, the jury may give damages not exceeding \$500,000 for the loss of comfort, society and companionship of the deceased, including any damages for emotional distress arising from the same facts as those constituting the underlying claim, to the persons for whose benefit the action is brought. The jury may also give punitive damages not exceeding \$250,000. An action under this section must be commenced within 2 years after the decedent's death. If a claim under this section is settled without an action having been commenced, the amount paid in settlement must be distributed as provided in this subsection. A settlement on behalf of minor children is not valid unless approved by the court, as provided in Title 14, section 1605.

(c). Whenever death ensues following a period of conscious suffering, as a result of personal injuries due to the wrongful act, neglect or default of any person, the person who caused the personal injuries resulting in such conscious suffering and death shall, in addition to the action at common law and damages recoverable therein, be liable in damages in a separate count in the same action for such death, brought, commenced and determined and subject to the same limitation as to the amount recoverable for such death and exclusively for the beneficiaries in the manner set forth in subsection (b), separately found, but in such cases there shall be only one recovery for the same injury.

(d). Any action under this section brought against a governmental entity under Title 14, sections 8101 to 8118, shall be limited as provided in those sections.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law on wrongful death claims. It does, however, affect the procedures for distribution of the proceeds from wrongful death claims, and ties the beneficiaries to those named in the Maine intestacy statutes.

UPC 2-901 / To be: 33 M.R.S.A. § 101

STATUTORY RULE AGAINST PERPETUITIES

~~Section 2-901~~ 33 M.R.S.A. § 101. **STATUTORY RULE AGAINST PERPETUITIES.**

- (a) Validity of Nonvested Property Interest. A nonvested property interest is invalid unless:
- (1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or
 - (2) the interest either vests or terminates within 90 years after its creation.
- (b) Validity of General Power of Appointment Subject to a Condition Precedent. A general power of appointment not presently exercisable because of a condition precedent is invalid unless:
- (1) when the power is created, the condition precedent is certain to be satisfied or becomes impossible to satisfy no later than 21 years after the death of an individual then alive; or
 - (2) the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its

creation.

(c)Validity of Nongeneral or Testamentary Power of Appointment. A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

(1)when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or

(2)the power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(d)Possibility of Post-death Child Disregarded. In determining whether a nonvested property interest or a power of appointment is valid under subsection (a)(1), (b)(1), or (c)(1), the possibility that a child will be born to an individual after the individual's death is disregarded.

(e)Effect of Certain "Later-of" Type Language. If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument (i) seeks to disallow the vesting or termination of any interest or trust beyond, (ii) seeks to postpone the vesting or termination of any interest or trust until, or (iii) seeks to operate in effect in any similar fashion upon, the later of (A) the expiration of a period of time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement or (B) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives.

None. MPC Current 33 M.R.S.A. § 101

APPLICATION OF RULE

None / Repeal current Maine Statue 33 M.R.S.A. § 101

2-902; To be: 33 M.R.S.A. § 102

WHEN NON VESTED PROPERTY INTEREST OR POWER OF APPOINTMENT CREATED

~~SECTION 2-902~~§ 102. WHEN NONVESTED PROPERTY INTEREST OR POWER OF APPOINTMENT CREATED.

(a) Except as provided in subsections (b) and (c) and in Section ~~2-905(a)~~105(a), the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(b) For purposes of ~~{Subpart} 1 of this {part}~~this chapter, if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (i) a nonvested property interest or (ii) a property interest subject to a power of appointment described in Section 101(b) or (c), the nonvested property

interest or power of appointment is created when the power to become the unqualified beneficial owner terminates. ~~[For purposes of [Subpart] 1 of this [part], a joint power with respect to community property or to marital property under the Uniform Marital Property Act held by individuals married to each other is a power exercisable by one person alone.]~~(c) For purposes of ~~[Subpart] 1 of this [part]~~this chapter, a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

NONE. MPC CURRENT 33 M.R.S.A. § 102

AGE MAY BE REDUCED TO 21

None / Repeal current Maine Statute 33 M.R.S.A. § 102

UPC 2-903 / TO BE: 33 M.R.S.A. § 103

REFORMATION

~~SECTION 2-903~~§ 103. REFORMATION.

Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by Section ~~2-901101~~(a)(2), ~~2-901101~~(b)(2), or ~~2-901101~~(c)(2) if:

- (1) a nonvested property interest or a power of appointment becomes invalid under Section ~~2-901101~~ (statutory rule against perpetuities);
- (2) a class gift is not but might become invalid under Section ~~2-901101~~ (statutory rule against perpetuities) and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or
- (3) a nonvested property interest that is not validated by Section ~~2-901101~~(a)(1) can vest but not within 90 years after its creation.

UPC 2-904 / TO BE: 33 M.R.S.A. § 104

EXCLUSION FROM STATUTORY RULE AGAINST PERPETUITIES

~~SECTION 2-904~~§ 104. EXCLUSIONS FROM STATUTORY RULE AGAINST PERPETUITIES.

Section ~~2-901101~~ (statutory rule against perpetuities) does not apply to:

(1) a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of

- (A) a premarital or postmarital agreement,
- (B) a separation or divorce settlement,
- (C) a spouse's election,
- (D) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties,
- (E) a contract to make or not to revoke a will or trust,
- (F) a contract to exercise or not to exercise a power of appointment,
- (G) a transfer in satisfaction of a duty of support, or
- (H) a reciprocal transfer;

(2) a fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(3) a power to appoint a fiduciary;

(4) a discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

(5) a nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

~~(6) a nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; or~~

(6) a property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this state; or

(7) a trust in which the governing instrument states that the rule against perpetuities does not apply to the trust and under which the trustee or other person to whom the power is properly granted or delegated has the power under the governing instrument, applicable statute or common law to sell, mortgage or lease property for any period of time beyond the period that is required for an interest created under the governing instrument to vest. This subdivision shall apply to all trusts created by will or inter vivos agreement executed or amended on or after September 18, 1999, and to all trusts created by exercise of power of appointment granted under instruments executed or amended on or after September 18, 1999.

UPC 2-905 / TO BE: 33 M.R.S.A. § 105

APPLICATION

SECTION 2-905§ 105. PROSPECTIVE APPLICATION.

- (a) Nonvested property interest or a power of appointment created prior to effective date of this chapter.
- (1) Except as provided in the first sentence of section 106, this chapter shall not be construed to invalidate or modify the terms of any limitation which would have been valid prior to August 20, 1955.
 - (2) This chapter shall apply only to inter vivos instruments taking effect after August 20, 1955, to wills where the testator dies after August 20, 1955, and to appointments made after August 20, 1955, including appointments by inter vivos instruments or wills under powers created before said August 20th.
 - (3) Section 104(7) shall apply to all trusts created by will or inter vivos agreement executed or amended on or after September 18, 1999, and to all trusts created by exercise of power of appointment granted under instruments executed or amended on or after September 18, 1999.
- (b) Nonvested property interest or a power of appointment created on or after effective date of this chapter.
- (1) Except as extended by subsection (b2), ~~Subpart 1 of this part~~chapter applies to a nonvested property interest or a power of appointment that is created on or after the effective date of ~~Subpart 1 of this part~~chapter. For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.
 - (2) If a nonvested property interest or a power of appointment was created before the effective date of ~~Subpart 1 of this part~~this chapter and is determined in a judicial proceeding, commenced on or after the effective date of ~~Subpart 1 of this part~~this chapter, to violate this state's rule against perpetuities as that rule existed before the effective date of ~~Subpart 1 of this part~~this chapter, a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

NONE. TO BE: 33 M.R.S.A. § 106

CONTINGENT INTERESTS

33 M.R.S.A. §106. Contingent interests.

A fee simple determinable in land or a fee simple in land subject to a right of entry for condition broken shall become a fee simple absolute if the specified contingency does not occur within 30 years from the date when such fee simple determinable or such fee simple subject to a right of entry becomes possessory. If such contingency occurs within said 30 years the succeeding interest, which may be an interest in a person other than the person creating the interest or his heirs, shall become possessory or the right of entry exercisable notwithstanding the rule against perpetuities. But if a fee simple determinable in land or a fee simple in land subject to a right of entry for condition broken is so limited that the specified contingency must occur, if at all, within the period of the rule against perpetuities, said interests shall take effect as limited. This section shall not apply where both such fee simple determinable and such succeeding interest, or both such fee simple and such right of entry are for public, charitable or religious purposes; nor shall it apply to a deed, gift or grant to the State or any political subdivision thereof.

Maine Probate Code Proposed Comment The language does not contain a substantive change to Maine law.

NONE / TO BE: 33 M.R.S.A. § 107

APPLICATION OF PROVISIONS

§107. Application of provisions

This chapter shall apply to both legal and equitable interests.

2-906 TO BE: 33 M.R.S.A. § 108

SUPERSESION AND REPEAL

SECTION 2-906. §108. ~~{SUPERSESION.} AND REPEAL.~~ Subpart 1 of this part This chapter {supersedes the rule of the common law known as the rule against perpetuities} and it {repeals and replaces Title 33, Chapter 5 (list statutes to be repealed)}.

2-907

HONORARY TRUSTS; TRUSTS FOR PETS.

(a) ~~{Honorary Trust.}~~ Subject to subsection (c), if (i) a trust is for a specific lawful noncharitable purpose or for lawful noncharitable purposes to be selected by the trustee and (ii) there is no definite or definitely ascertainable beneficiary designated, the trust may be performed by the trustee for [21] years but no longer, whether or not the terms

of the trust contemplate a longer duration:

(b) ~~[Trust for Pets.] Subject to this subsection and subsection (c), a trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument must be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent.~~

(c) ~~[Additional Provisions Applicable to Honorary Trusts and Trusts for Pets.] In addition to the provisions of subsection (a) or (b), a trust covered by either of those subsections is subject to the following provisions:~~

(1) ~~Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the trust's purposes or for the benefit of a covered animal.~~

(2) ~~Upon termination, the trustee shall transfer the unexpended trust property in the following order:~~

(A) ~~as directed in the trust instrument;~~

(B) ~~if the trust was created in a nonresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will; and~~

(C) ~~if no taker is produced by the application of subparagraph (A) or (B), to the transferor's heirs under Section 2-711.~~

(3) ~~For the purposes of Section 2-707, the residuary clause is treated as creating a future interest under the terms of a trust.~~

(4) ~~The intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual.~~

(5) ~~Except as ordered by the court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the fiduciary relationship of the trustee.~~

(6) ~~A court may reduce the amount of the property transferred, if it determines that that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (c)(2).~~

(7) ~~If no trustee is designated or no designated trustee is willing or able to serve, a court shall name a trustee. A court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. A court may also make such other orders and determinations as shall be advisable to carry out the intent of the transferor and the purpose of this section.]~~

2-1001

DEFINITIONS

SECTION 2-1001. DEFINITIONS. In this [part:]

(1) ~~“International will” means a will executed in conformity with Sections 2-1002 through 2-1005.~~

(2) ~~“Authorized person” and “person authorized to act in connection with international wills” mean a person who by Section 2-1009, or by the laws of the United States including members of the diplomatic and consular service of the United States designated by Foreign Service Regulations, is empowered to supervise the execution of international wills.~~

2-1002

INTERNATIONAL WILLS; VALIDITY

~~(a) A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile, or residence of the testator, if it is made in the form of an international will complying with the requirements of this [part].~~

~~(b) The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.~~

~~(c) This [part] shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.~~

2-1003

INTERNATIONAL WILLS; REQUIREMENTS

~~(a) The will shall be made in writing. It need not be written by the testator himself. It may be written in any language, by hand or by any other means.~~

~~(b) The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof. The testator need not inform the witnesses, or the authorized person, of the contents of the will.~~

~~(c) In the presence of the witnesses, and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.~~

~~(d) When the testator is unable to sign, the absence of his signature does not affect the validity of the international will if the testator indicates the reason for his inability to sign and the authorized person makes note thereof on the will. In these cases, it is permissible for any other person present, including the authorized person or one of the witnesses, at the direction of the testator to sign the testator’s name for him, if the authorized person makes note of this also on the will, but it is not required that any person sign the testator’s name for him.~~

~~(e) The witnesses and the authorized person shall there and then attest the will by signing in the presence of the~~

testator:

2-1004

INTERNATIONAL WILL; OTHER POINTS OF FORM.

- (a) ~~The signatures shall be placed at the end of the will. If the will consists of several sheets, each sheet will be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.~~
- (b) ~~The date of the will shall be the date of its signature by the authorized person. That date shall be noted at the end of the will by the authorized person.~~
- (c) ~~The authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall be mentioned in the certificate provided for in Section 2-1005.~~
- (d) ~~A will executed in compliance with Section 2-1003 shall not be invalid merely because it does not comply with this section.~~

2-1005

INTERNATIONAL WILL; CERTIFICATE

The authorized person shall attach to the will a certificate to be signed by him establishing that the requirements of this [part] for valid execution of an international will have been complied with. The authorized person shall keep a copy of the certificate and deliver another to the testator. The certificate shall be substantially in the following form:

CERTIFICATE

(Convention of October 26, 1973)

- 1. I, _____ (name, address and capacity), a person authorized to act in connection with international wills
- 2. Certify that on _____ (date) at _____ (place)
- 3. (testator) _____ (name, address, date and place of birth) in my presence and that of the witnesses
- 4. (a) _____ (name, address, date and place of birth)
- (b) _____ (name, address, date and place of birth) has declared that the attached document is his will and that he knows the contents thereof.
- 5. I furthermore certify that:
- 6. (a) in my presence and in that of the witnesses

<p>_____ (1) the testator has signed the will or has acknowledged his signature previously affixed.</p> <p>_____ *(2) following a declaration of the testator stating that he was unable to sign his will for the following reason</p> <p style="text-align: center;">_____</p> <p>_____ I have mentioned this declaration on the will</p> <p>_____ *the signature has been affixed by _____ <div style="text-align: center;">(name, address)</div></p> <p>7. (b) the witnesses and I have signed the will;</p> <p>8. *(c) each page of the will has been signed by _____ and numbered;</p> <p>9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;</p> <p>10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;</p> <p>11. *(f) the testator has requested me to include the following statement concerning the safekeeping of his will:</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>*To be completed if appropriate</p> <p>12. PLACE</p> <p>13. DATE</p> <p>14. SIGNATURE and, if necessary, SEAL</p>

2-1006
INTERNATIONAL WILL; EFFECT OF CERTIFICATE
In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this [part]. The absence or irregularity of a certificate shall not affect the formal validity of a will under this [part].

2-1007
INTERNATIONAL WILLS; REVOCATION
The international will shall be subject to the ordinary rules of revocation of wills.

2-1008
SOURCE AND CONSTRUCTION

~~Sections 2-1001 through 2-1007 derive from Annex to Convention of October 26, 1973, Providing a Uniform Law on the Form of an International Will. In interpreting and applying this [part], regard shall be had to its international origin and to the need for uniformity in its interpretation.~~

2-1009

PERSONS AUTHORIZED TO ACT IN RELATIONSHIP TO INTERNATIONAL WILL; ELIGIBILITY; RECOGNITION BY AUTHORIZING AGENCY.

~~Individuals who have been admitted to practice law before the courts of this state and who are in good standing as active law practitioners in this state, are hereby declared to be authorized persons in relation to international wills.~~

2-1010

INTERNATIONAL WILL INFORMATION REGISTRATION

~~The [Secretary of State] shall establish a registry system by which authorized persons may register in a central information center, information regarding the execution of international wills, keeping that information in strictest confidence until the death of the maker and then making it available to any person desiring information about any will who presents a death certificate or other satisfactory evidence of the testator's death to the center. Information that may be received, preserved in confidence until death, and reported as indicated is limited to the name, social security or any other individual identifying number established by law, address, and date and place of birth of the testator, and the intended place of deposit or safekeeping of the instrument pending the death of the maker. The [Secretary of State], at the request of the authorized person, may cause the information it receives about execution of any international will to be transmitted to the registry system of another jurisdiction as identified by the testator, if that other system adheres to rules protecting the confidentiality of the information similar to those established in this state.]~~

2-1102

DEFINITIONS

(1) "Disclaimant" means the person to whom a disclaimed interest or power would have passed had the disclaimer not been made.

(2) "Disclaimed interest" means the interest that would have passed to the disclaimant had the disclaimer not

been made.

(3) “Disclaimer” means the refusal to accept an interest in or power over property.

(4) “Fiduciary” means a personal representative, trustee, agent acting under a power of attorney, or other person authorized to act as a fiduciary with respect to the property of another person.

(5) “Jointly held property” means property held in the name of two or more persons under an arrangement in which all holders have concurrent interests and under which the last surviving holder is entitled to the whole of the property.

(6) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(7) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, recognized by federal law or formally acknowledged by a state.

(8) “Trust” means:

(A) an express trust, charitable or noncharitable, with additions thereto, whenever and however created; and

(B) a trust created pursuant to a statute, judgment, or decree which requires the trust to be administered in the manner of an express trust.

Maine Probate Code Proposed Comments This section is new, with no previous counterpart in the MPC.

2-1103

SCOPE

This part applies to disclaimers of any interest in or power over property, whenever created.

2-1104

PART SUPPLEMENTED BY OTHER LAW.

(a) Unless displaced by a provision of this part, the principles of law and equity supplement this part.

(b) This part does not limit any right of a person to waive, release, disclaim, or renounce an interest in or power over property under a law other than this part.

2-1105

POWER TO DISCLAIM; GENERAL REQUIREMENTS; WHEN IRREVOCABLE

(a) A person may disclaim, in whole or part, any interest in or power over property, including a power of appointment. A person may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim.

(b) Except to the extent a fiduciary’s right to disclaim is expressly restricted or limited by another statute of this state or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or part, any interest in or power over property, including a power of appointment, whether acting in a personal or representative capacity. A fiduciary may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim or an instrument other than the instrument that created the fiduciary relationship imposed a restriction or limitation on the right to disclaim.

(c) To be effective, a disclaimer must be in a writing or other record, declare the disclaimer, describe the interest or power disclaimed, be signed by the person making the disclaimer, and be delivered or filed in the manner provided in Section 2-1112. In this subsection:

(1) “record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and

(2) “signed” means, with present intent to authenticate or adopt a record, to;

(A) execute or adopt a tangible symbol; or

(B) attach to or logically associate with the record an electronic sound, symbol, or process.

(d) A partial disclaimer may be expressed as a fraction, percentage, monetary amount, term of years, limitation of a power, or any other interest or estate in the property.

(e) A disclaimer becomes irrevocable when it is delivered or filed pursuant to Section 2-1112 or when it becomes effective as provided in Sections 2-1106 through 2-1111, whichever occurs later.

(f) A disclaimer made under this part is not a transfer, assignment, or release.

Maine Probate Code Proposed Comments This section removes ambiguity under previous Maine law regarding delivery.

2-1106

DISCLAIMER OF INTEREST IN PROPERTY.

(a) In this section:

(1) “Future interest” means an interest that takes effect in possession or enjoyment, if at all, later than the time

of its creation.

(2) “Time of Distribution” means the time when a disclaimed interest would have taken effect in possession or enjoyment.

(b) Except for a disclaimer governed by Section 2-1107 or 2-1108, the following rules apply to a disclaimer of an interest in property:

(1) The disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable, or, if the interest arose under the law of intestate succession, as of the time of the intestate’s death.

(2) The disclaimed interest passes according to any provision in the instrument creating the interest providing for the disposition of the interest, should it be disclaimed, or of disclaimed interests in general.

(3) If the instrument does not contain a provision described in paragraph (2), the following rules apply:

(A) If the disclaimant is not an individual, the disclaimed interest passes as if the disclaimant did not exist.

(B) If the disclaimant is an individual, except as otherwise provided in subparagraphs (C) and (D), the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution.

(C) If by law or under the instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time of distribution, the disclaimed interest passes only to the descendants of the disclaimant who survive the time of distribution.

(D) If the disclaimed interest would pass to the disclaimant’s estate had the disclaimant died before the time of distribution, the disclaimed interest instead passes by representation to the descendants of the disclaimant who survive the time of distribution. If no descendant of the disclaimant survives the time of distribution, the disclaimed interest passes to those persons, including the state but excluding the disclaimant, and in such shares as would succeed to the transferor’s intestate estate under the intestate succession law of the transferor’s domicile had the transferor died at the time of distribution. However, if the transferor’s surviving spouse is living but is remarried at the time of distribution, the transferor is deemed to have died unmarried at the time of distribution.

(4) Upon the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died or ceased to exist immediately before the time of distribution, but a future interest held by the disclaimant is not accelerated in possession or enjoyment.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law, but removes existing ambiguities and adds clarity and direction.

2-1107

DISCLAIMER OF RIGHTS OF SURVIVORSHIP IN JOINTLY HELD PROPERTY.

(a) Upon the death of a holder of jointly held property, a surviving holder may disclaim, in whole or part, the greater of:

(1) a fractional share of the property determined by dividing the number one by the number of joint holders alive immediately before the death of the holder to whose death the disclaimer relates; or

(2) all of the property except that part of the value of the entire interest attributable to the contribution furnished by the disclaimant.

(b) A disclaimer under subsection (a) takes effect as of the death of the holder of jointly held property to whose death the disclaimer relates.

(c) An interest in jointly held property disclaimed by a surviving holder of the property passes as if the disclaimant predeceased the holder to whose death the disclaimer relates.

Maine Probate Code Proposed Comments This section removes ambiguity under previous Maine law and adds clarity.

2-1108

DISCLAIMER OF INTEREST BY TRUSTEE

If a trustee disclaims an interest in property that otherwise would have become trust property, the interest does not become trust property.

Maine Probate Code Proposed Comments This section is new, with no previous counterpart in the MPC.

2-1109

DISCLAIMER OF POWER OF APPOINTMENT OR OTHER POWER NOT HELD IN FIDUCIARY CAPACITY.

If a holder disclaims a power of appointment or other power not held in a fiduciary capacity, the following rules apply:

(1) If the holder has not exercised the power, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

(2) If the holder has exercised the power and the disclaimer is of a power other than a presently exercisable general power of appointment, the disclaimer takes effect immediately after the last exercise of the power.

(3) The instrument creating the power is construed as if the power expired when the disclaimer became effective.

Maine Probate Code Proposed Comments This section is new, with no previous counterpart in the MPC.

2-1110

DISCLAIMER BY APPOINTEE, OBJECT, OR TAKER IN DEFAULT OF EXERCISE OF POWER OF

APPOINTMENT.

(a) A disclaimer of an interest in property by an appointee of a power of appointment takes effect as of the time the instrument by which the holder exercises the power becomes irrevocable.

(b) A disclaimer of an interest in property by an object or taker in default of an exercise of a power of appointment takes effect as of the time the instrument creating the power becomes irrevocable.

Maine Probate Code Proposed Comments This section is new, with no previous counterpart in the MPC.

2-1111

DISCLAIMER OF POWER HELD IN FIDUCIARY CAPACITY.

(a) If a fiduciary disclaims a power held in a fiduciary capacity which has not been exercised, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

(b) If a fiduciary disclaims a power held in a fiduciary capacity which has been exercised, the disclaimer takes effect immediately after the last exercise of the power.

(c) A disclaimer under this section is effective as to another fiduciary if the disclaimer so provides and the fiduciary disclaiming has the authority to bind the estate, trust, or other person for whom the fiduciary is acting.

Maine Probate Code Proposed Comments This section is new, with no previous counterpart in the MPC.

2-1112

DELIVERY OR FILING.

(a) In this section, “beneficiary designation” means an instrument, other than an instrument creating a trust, naming the beneficiary of:

- (1) an annuity or insurance policy;
- (2) an account with a designation for payment ;
- (3) a security registered in beneficiary form;
- (4) a pension, profit-sharing, retirement, or other employment-related benefit plan; or
- (5) any other nonprobate transfer at death

(b) Subject to subsections (c) through (l), delivery of a disclaimer may be affected by personal delivery, first-class mail, or any other method likely to result in its receipt.

(c) In the case of an interest created under the law of intestate succession or an interest created by will, other than

an interest in a testamentary trust:

- (1) a disclaimer must be delivered to the personal representative of the decedent's estate, or the special administrator of the decedent's estate; or
 - (2) if no personal representative is then serving, it must be filed with the Probate Court ~~court~~ having jurisdiction to appoint the personal representative.
- (d) In the case of an interest in a testamentary trust:
- (1) a disclaimer must be delivered to the trustee then serving, or if no trustee is then serving, to the personal representative of the decedent's estate; or
 - (2) if no trustee or personal representative is then serving, it must be filed with the Probate Court having jurisdiction to enforce the trust.
- (e) In the case of an interest in an inter vivos trust:
- (1) a disclaimer must be delivered to the trustee then serving;
 - (2) if no trustee is then serving, it must be filed with the Probate Court having jurisdiction to enforce the trust;
or
 - (3) if the disclaimer is made before the time the instrument creating the trust becomes irrevocable, it must be delivered to the settlor of a revocable trust or the transferor of the interest.
- (f) In the case of an interest created by a beneficiary designation which is disclaimed before the time the designation becomes irrevocable, the disclaimer must be delivered to the person making the beneficiary designation. In the case of an interest created by a beneficiary designation which is disclaimed after the designation becomes irrevocable:
- (1) the disclaimer of an interest in personal property must be delivered to the person obligated to distribute the interest; and
 - (2) the disclaimer of an interest in real property must be recorded in the office of the county recorder of deeds of the county where the real property that is the subject of the disclaimer is located.
- (g) In the case of a disclaimer by a surviving holder of jointly held property, the disclaimer must be delivered to the person to whom the disclaimed interest passes.
- (h) In the case of a disclaimer by an object or taker in default of exercise of a power of appointment at any time after the power was created:
- (1) the disclaimer must be delivered to the holder of the power or to the fiduciary acting under the instrument that created the power; or
 - (2) if no fiduciary is then serving, it must be filed with the Probate Court having authority to appoint the fiduciary.
- (i) In the case of a disclaimer by an appointee of a nonfiduciary power of appointment:
- (1) the disclaimer must be delivered to the holder, the personal representative of the holder's estate or to the fiduciary under the instrument that created the power; or
 - (2) if no fiduciary is then serving, it must be filed with the Probate Court having authority to appoint the fiduciary

- (j) In the case of a disclaimer by a fiduciary of a power over a trust or estate, the disclaimer must be delivered as provided in subsection (c), (d), or (e), as if the power disclaimed were an interest in property.
- (k) In the case of a disclaimer of a power by an agent, the disclaimer must be delivered to the principal or the principal's representative.

Maine Probate Code Proposed Comments The section no longer contains a 9 month time limit on disclaimers.

2-1113

WHEN DISCLAIMER BARRED OR LIMITED.

- (a) A disclaimer is barred by a written waiver of the right to disclaim.
- (b) A disclaimer of an interest in property is barred if any of the following events occur before the disclaimer becomes effective:
 - (1) the disclaimant accepts the interest sought to be disclaimed;
 - (2) the disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers the interest sought to be disclaimed or contracts to do so; or
 - (3) a judicial sale of the interest sought to be disclaimed occurs.
- (c) A disclaimer, in whole or part, of the future exercise of a power held in a fiduciary capacity is not barred by its previous exercise.
- (d) A disclaimer, in whole or part, of the future exercise of a power not held in a fiduciary capacity is not barred by its previous exercise unless the power is exercisable in favor of the disclaimant.
- (e) A disclaimer is barred or limited if so provided by law other than this part.
- (f) A disclaimer of a power over property which is barred by this section is ineffective. A disclaimer of an interest in property which is barred by this section takes effect as a transfer of the interest disclaimed to the persons who would have taken the interest under this part had the disclaimer not been barred.

2-1114

TAX QUALIFIED DISCLAIMER.

Notwithstanding any other provision of this part, if as a result of a disclaimer or transfer the disclaimed or transferred interest is treated pursuant to the provisions of Title 26 of the United States Code, as now or hereafter amended, or any successor statute thereto, and the regulations promulgated thereunder, as never having been transferred to the disclaimant, then the disclaimer or transfer is effective as a disclaimer under this part.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

2-1115
RECORDING OF DISCLAIMER.
If an instrument transferring an interest in or power over property subject to a disclaimer is required or permitted by law to be filed, recorded, or registered, the disclaimer may be so filed, recorded, or registered. Except as otherwise provided in Section 2-1112(g)(2), failure to file, record, or register the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

2-1116
SECTION 2-1116. APPLICATION TO EXISTING RELATIONSHIPS.
Except as otherwise provided in Section 2-1113, an interest in or power over property existing on the effective date of this part as to which the time for delivering or filing a disclaimer under law superseded by this part has not expired may be disclaimed after the effective date of this part.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

2-1117
RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT
This part modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001, et seq.) but does not modify, limit, or supersede Section 101(c) of that act (15 U.S.C. Section 7001(c)) or authorize electronic delivery of any of the notices described in Section 103(b) of that act (15 U.S.C. Section 7003(b)).
Maine Probate Code Proposed Comments This section is new, with no previous counterpart in the Maine Probate Code.

§3-101
DEVOLUTION OF ESTATE AT DEATH; RESTRICTIONS
The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this code to facilitate the prompt settlement of estates. Upon

§3-101
DEVOLUTION OF ESTATE AT DEATH; RESTRICTIONS
the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estate, or in the absence of testamentary disposition, to his heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to homestead allowance, exempt property and family allowance, to rights of creditors, elective share of the surviving spouse and to administration.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law

§3-102
NECESSITY OF ORDER OF PROBATE FOR WILL
Except as provided in Section 3-1201, to be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of informal probate by the Registrar, or an adjudication of probate by the court.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-103
NECESSITY OF APPOINTMENT FOR ADMINISTRATION
Except as otherwise provided in Article IV, to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the court or Registrar, qualify and be issued letters. Administration of an estate is commenced by the issuance of letters.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-104
CLAIMS AGAINST DECEDENT; NECESSITY OF ADMINISTRATION
No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this article. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in Section 3-

§3-104
CLAIMS AGAINST DECEDENT; NECESSITY OF ADMINISTRATION
1004 or from a former personal representative individually liable as provided in Section 3-1005. This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-105
PROCEEDINGS AFFECTING DEVOLUTION AND ADMINISTRATION; JURISDICTION OF SUBJECT MATTER
Persons interested in decedents' estates may apply to the Registrar for determination in the informal proceedings provided in this article, and may petition the court for orders in formal proceedings within the court's jurisdiction including but not limited to those described in this article. The court has exclusive jurisdiction of formal proceedings to determine how decedents' estates subject to the laws of this state are to be administered, expended and distributed. The court has concurrent jurisdiction of any other action or proceeding concerning a succession or to which an estate, through a personal representative, may be a party, including actions to determine title to property alleged to belong to the estate, and of any action or proceeding in which property distributed by a personal representative or its value is sought to be subjected to rights of creditors or successors of the decedent.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-106
PROCEEDINGS WITHIN THE JURISDICTION OF COURT; SERVICE; JURISDICTION OVER PERSONS
In proceedings within the exclusive jurisdiction of the court where notice is required by this code or by rule, and in proceedings to construe probated wills or determine heirs which concern estates that have not been and cannot now be opened for administration, interested persons may be bound by the orders of the court in respect to property in or subject to the laws of this state by notice in conformity with Section 1-401. An order is binding as to all who are given notice of the proceeding though less than all interested persons are notified.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-107

SCOPE OF PROCEEDINGS; PROCEEDINGS INDEPENDENT; EXCEPTION

Unless supervised administration as described in Part 5 is involved,

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-108

PROBATE, TESTACY AND APPOINTMENT PROCEEDINGS; ULTIMATE TIME LIMIT

(a) No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the decedent's death, except:

- (1) if a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred before the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding;
- (2) appropriate probate, appointment or testacy proceedings may be maintained in relation to the estate of an absent, disappeared or missing person for whose estate a conservator has been appointed, at any time within three years after the conservator becomes able to establish the death of the protected person;
- (3) a proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful, may be commenced within the later of twelve months from the informal probate or three years from the decedent's death;
- (4) an informal appointment or a formal testacy or appointment proceeding may be commenced thereafter if no proceedings concerning the succession or estate administration has occurred within the three year period after decedent's death, but the personal representative has no right to possess estate assets as provided in Section 3-709 beyond that necessary to confirm title thereto in the successors to the estate and claims other than expenses of

administration may not be presented against the estate; and
(5) a formal testacy proceeding may be commenced at any time after three years from the decedent's death for the purpose of establishing an instrument to direct or control the ownership of property passing or distributable after the decedent's death from one other than the decedent when the property is to be appointed by the terms of the decedent's will or is to pass or be distributed as a part of the decedent's estate or its transfer is otherwise to be controlled by the terms of the decedent's will.
(b) These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate.
(c) In cases under subsection (a)(1) or (2), the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitations provisions of this code which relate to the date of death.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-109

STATUTES OF LIMITATION ON DECEDENT'S CAUSE OF ACTION

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-110

DISCOVERY OF PROPERTY

UPC has no such provision

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-201

VENUE FOR FIRST AND SUBSEQUENT ESTATE PROCEEDINGS; LOCATION OF PROPERTY

(a) Venue for the first informal or formal testacy or appointment proceedings after a decedent's death is:
(1) in the county where the decedent had his domicile at the time of his death; or

§3-201
VENUE FOR FIRST AND SUBSEQUENT ESTATE PROCEEDINGS; LOCATION OF PROPERTY
<p>(2) if the decedent was not domiciled in this state, in any county where property of the decedent was located at the time of his death.</p> <p>(b) Venue for all subsequent proceedings within the exclusive jurisdiction of the court is in the place where the initial proceeding occurred, unless the initial proceeding has been transferred as provided in Section 1-303 or subsection (c).</p> <p>(c) If the first proceeding was informal, on application of an interested person and after notice to the proponent in the first proceeding, the court, upon finding that venue is elsewhere, may transfer the proceeding and the file to the other court.</p> <p>(d) For the purpose of aiding determinations concerning location of assets which may be relevant in cases involving non-domiciliaries, a debt, other than one evidenced by investment or commercial paper or other instrument in favor of a non-domiciliary is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its principal office. Commercial paper, investment paper and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued.</p>
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-202
APPOINTMENT OR TESTACY PROCEEDINGS; CONFLICTING CLAIM OF DOMICILE IN ANOTHER STATE
<p>If conflicting claims as to the domicile of a decedent are made in a formal testacy or appointment proceeding commenced in this state, and in a testacy or appointment proceeding after notice pending at the same time in another state, the court of this state must stay, dismiss, or permit suitable amendment in, the proceeding here unless it is determined that the local proceeding was commenced before the proceeding elsewhere. The determination of domicile in the proceeding first commenced must be accepted as determinative in the proceeding in this state.</p>
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-203
PRIORITY AMONG PERSONS SEEKING APPOINTMENT AS PERSONAL REPRESENTATIVE
<p>(a) Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:</p> <p>(1) the person with priority as determined by a probated will including a person nominated by a power conferred in a will;</p>

(2) the surviving spouse of the decedent who is a devisee of the decedent;

(3) other devisees of the decedent;

(4) the surviving spouse of the decedent;

(5) other heirs of the decedent;

(6) 45 days after the death of the decedent, any creditor.

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

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

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

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

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

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

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

(1) under the age of 18;

(2) a person whom the court finds unsuitable in formal proceedings.

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

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-204

DEMAND FOR NOTICE OF ORDER OR FILING CONCERNING DECEDENT'S ESTATE

Any person desiring notice of any order or filing pertaining to a decedent's estate in which he has a financial or property interest, may file a demand for notice with the court at any time after the death of the decedent stating the name of the decedent, the nature of his interest in the estate, and the demandant's address or that of his attorney. The clerk shall mail a copy of the demand to the personal representative, if one has been appointed. After filing of a demand, no order or filing to which the demand relates shall be made or accepted without notice as prescribed in Section 1-401 to the demandant or his attorney. The validity of an order which is issued or filing which is accepted without compliance with this requirement shall not be affected by the error, but the petitioner receiving the order or the person making the filing may be liable for any damage caused by the absence of notice. The requirement of notice arising from a demand under this provision may be waived in writing by the demandant and shall cease upon the termination of his interest in the estate.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-301

INFORMAL PROBATE OR APPOINTMENT PROCEEDINGS; APPLICATION; CONTENTS

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

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

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

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

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

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

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

(F) that the time limit for informal probate or appointment as provided in this article has not expired either because

three years or less have passed since the decedent's death, or, if more than three years from death have passed, circumstances as described by Section 3-108 have occurred authorizing tardy probate or appointment.

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

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

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

(C) that after the exercise of reasonable diligence, the applicant is unaware of any instrument revoking the will, and that the applicant believes that the instrument which is the subject of the application is the decedent's last will.

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

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

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

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

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

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

(b) By verifying an application for informal probate or informal appointment, the applicant submits personally to the jurisdiction of the court in any proceeding for relief from fraud relating to the application, or for perjury, that may be instituted against him.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-302

INFORMAL PROBATE; DUTY OF REGISTRAR; EFFECT OF INFORMAL PROBATE

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

Maine Probate Code Proposed Comments The language does not constitute substantive change to Maine law.

§3-303

INFORMAL PROBATE; PROOF AND FINDINGS REQUIRED

- (a) In an informal proceeding for original probate of a will, the Registrar shall determine whether:
- (1) the application is complete;
 - (2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;
 - (3) the applicant appears from the application to be an interested person as defined in Section 1-201(23);
 - (4) on the basis of the statements in the application, venue is proper;
 - (5) an original, duly executed and apparently unrevoked will is in the Registrar's possession;
 - (6) any notice required by Section 3-204 has been given and that the application is not within Section 3-304; and
 - (7) it appears from the application that the time limit for original probate has not expired.
- (b) The application shall be denied if it indicates that a personal representative has been appointed in another county of this state or except as provided in subsection (d) below, if it appears that this or another will of the decedent has been the subject of a previous probate order.
- (c) A will which appears to have the required signatures and which contains an attestation clause showing that requirements of execution under Section 2-502, 2-503 or 2-506 have been met shall be probated without further proof. In other cases, the Registrar may assume execution if the will appears to have been properly executed, or he may accept a sworn statement or affidavit of any person having knowledge of the circumstances of execution, whether or not the person was a witness to the will.
- (d) Informal probate of a will which has been previously probated elsewhere may be granted at any time upon written application by any interested person, together with deposit of an authenticated copy of the will and of the statement probating it from the office or court where it was first probated.
- (e) A will from a place which does not provide for probate of a will after death and which is not eligible for probate under subsection (a) above, may be probated in this state upon receipt by the Registrar of a duly authenticated copy of the will and a duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has

become operative under the law of the other place.

Maine Probate Code Proposed Comments The language does not constitute substantive change to Maine law.

§3-304
INFORMAL PROBATE; UNAVAILABLE IN CERTAIN CASES.
Applications for informal probate which relate to one or more of a known series of testamentary instruments (other than a will and one or more codicils thereto) the latest of which does not expressly revoke the earlier, shall be declined.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-305
INFORMAL PROBATE; REGISTRAR NOT SATISFIED
If the Registrar is not satisfied that a will is entitled to be probated in informal proceedings because of failure to meet the requirements of Sections 3-303 and 3-304 or any other reason, he may decline the application. A declination of informal probate is not an adjudication and does not preclude formal probate proceedings.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-306
INFORMAL PROBATE; NOTICE REQUIREMENTS
(a) The moving party must give notice as described by Section 1-401 of his application for informal probate to any person demanding it pursuant to Section 3-204, and to any personal representative of the decedent whose appointment has not been terminated. No other notice of informal probate is required. If the decedent was 55 years of age or older, the moving party shall give notice as described in section 1-401 to the Department of Health and Human Services. No other notice of informal probate is required.
~~{(b) If an informal probate is granted, within 30 days thereafter the applicant shall give written information of the probate to the heirs and devisees. The information shall include the name and address of the applicant, the name and location of the court granting the informal probate, and the date of the probate. The information shall be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the applicant. No duty to give information is incurred if a personal representative is appointed who is required to give the written information required by Section 3-705. An applicant's failure to give information as required by this section is a breach of his duty to the heirs and devisees but does not affect the validity of the probate.}~~

~~* This paragraph becomes subsection (a) if optional subsection (b) is accepted.~~

Maine Probate Code Proposed Comments The language (in this chosen UPC option) does not constitute a substantive change to Maine law.

§3-307

INFORMAL APPOINTMENT PROCEEDINGS; DELAY IN ORDER; DUTY OF REGISTRAR; EFFECT OF APPOINTMENT

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

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-308

INFORMAL APPOINTMENT PROCEEDINGS; PROOF AND FINDINGS REQUIRED

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

- (1) the application for informal appointment of a personal representative is complete;
- (2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;
- (3) the applicant appears from the application to be an interested person as defined in Section 1-201(23);
- (4) on the basis of the statements in the application, venue is proper;
- (5) any will to which the requested appointment relates has been formally or informally probated; but this requirement does not apply to the appointment of a special administrator;
- (6) any notice required by Section 3-204 has been given;
- (7) from the statements in the application, the person whose appointment is sought has priority entitling him to the appointment.

(b) Unless Section 3-612 controls, the application must be denied if it indicates that a personal representative who has

not filed a written statement of resignation as provided in Section 3-610(c) has been appointed in this or another county of this state, that (unless the applicant is the domiciliary personal representative or his nominee) the decedent was not domiciled in this state and that a personal representative whose appointment has not been terminated has been appointed by a court in the state of domicile, or that other requirements of this section have not been met.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-309

INFORMAL APPOINTMENT PROCEEDINGS; REGISTRAR NOT SATISFIED

If the ~~Registrar~~ Register is not satisfied that a requested informal appointment of a personal representative should be made because of failure to meet the requirements of Sections 3-307 and 3-308, or for any other reason, he may decline the application. A declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-310

INFORMAL APPOINTMENT PROCEEDINGS; NOTICE REQUIREMENTS

The moving party must give notice as described by Section 1-401 of his intention to seek an appointment informally: (i) to any person demanding it pursuant to Section 3-204; and (ii) to any person having a prior or equal right to appointment not waived in writing and filed with the court. No other notice of an informal appointment proceeding is required. If the decedent was 55 years of age or older, the moving party shall give notice as described in section 1-401 to the Department of Health and Human Services. No other notice of informal appointment proceeding is required.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-311

INFORMAL APPOINTMENT UNAVAILABLE IN CERTAIN CASES

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-312

UNIVERSAL SUCCESSION; IN GENERAL

The heirs of an intestate or the residuary devisees under a will, excluding minors and incapacitated, protected, or unascertained persons, may become universal successors to the decedent's estate by assuming personal liability for (i) taxes, (ii) debts of the decedent, (iii) claims against the decedent or the estate, and (iv) distributions due other heirs, devisees, and persons entitled to property of the decedent as provided in Sections 3-313 through 3-322.

Maine Probate Code Proposed Comments Maine has chosen not to adopt Universal Succession, as detailed in UPC §312 *et seq.*

Note to Revisor: Though Maine has chosen not to adopt universal succession, please reserve §3-312 through §3-322.

§3-313

UNIVERSAL SUCCESSION; APPLICATION; CONTENTS

~~(a) An application to become universal successors by the heirs of an intestate or the residuary devisees under a will must be directed to the Registrar, signed by each applicant, and verified to be accurate and complete to the best of the applicant's knowledge and belief as follows:~~

~~(1) An application by heirs of an intestate must contain the statements required by Section 3-301(a)(1) and (4)(i) and state that the applicants constitute all the heirs other than minors and incapacitated, protected, or unascertained persons.~~

~~(2) An application by residuary devisees under a will must be combined with a petition for informal probate if the will has not been admitted to probate in this State and must contain the statements required by Section 3-301(a)(1) and (2). If the will has been probated in this state, an application by residuary devisees must contain the statements required by Section 3-301 (a) (2)~~

~~(iii). An application by residuary devisees must state that the applicants constitute the residuary devisees of the decedent other than any minors and incapacitated, protected, or unascertained persons. If the estate is partially intestate, all of the heirs other than minors and incapacitated, protected, or unascertained persons must join as applicants.~~

~~(b) The application must state whether letters of administration are outstanding, whether a petition for appointment of a personal representative of the decedent is pending in any court of this state, and that the applicants waive their right to seek appointment of a personal representative.~~

~~(c) The application may describe in general terms the assets of the estate and must state that the applicants accept responsibility for the estate and assume personal liability for (1) taxes, (2) debts of the decedent, (3) claims against the decedent or the estate and (4) distributions due other heirs, devisees, and persons entitled to property of the decedent as provided in Sections 3-316 through 3-322.~~

Maine Probate Code Proposed Comments Maine has chosen not to adopt Universal Succession, as detailed in UPC §312 et seq.

§3-314

UNIVERSAL SUCCESSION; PROOF AND FINDINGS REQUIRED

- ~~(a) The [Registrar] shall grant the application if:
 - ~~(1) the application is complete in accordance with Section 3-313;~~
 - ~~(2) all necessary persons have joined and have verified that the statements contained therein are true, to the best knowledge and belief of each;~~
 - ~~(3) venue is proper;~~
 - ~~(4) any notice required by Section 3-204 has been given or waived;~~
 - ~~(5) the time limit for original probate or appointment proceedings has not expired and the applicants claim under a will;~~
 - ~~(6) the application requests informal probate of a will, the application and findings conform with Sections 3-301(a)(2) and 3-303(a)(c)(d) and (e) so the will is admitted to probate; and~~
 - ~~(7) none of the applicants is a minor or an incapacitated or protected person.~~~~
- ~~(b) The [Registrar] shall deny the application if letters of administration are outstanding.~~
- ~~(c) Except as provided in Section 3-322, the [Registrar] shall deny the application if any creditor, heir, or devisee who is qualified by Section 3-605 to demand bond files an objection.~~

Maine Probate Code Proposed Comments Maine has chosen not to adopt Universal Succession, as detailed in UPC §312 *et seq.*

§3-315

UNIVERSAL SUCCESSION; DUTY OF REGISTRAR; EFFECT OF STATEMENT OF UNIVERSAL SUCCESSION

~~Upon receipt of an application under Section 3-313, if at least 120 hours have elapsed since the decedent's death, the Registrar, upon granting the application, shall issue a written statement of universal succession describing the estate as set forth in the application and stating that the applicants~~

- ~~(i) ——— are the universal successors to the assets of the estate as provided in Section 3-312,~~
- ~~(ii) ——— (ii) have assumed liability for the obligations of the decedent, and~~
- ~~(iii) (iii) have acquired the powers and liabilities of universal successors. The statement of universal succession is evidence of the universal successors' title to the assets of the estate. Upon its issuance, the powers and liabilities of universal successors provided in Sections 3-316 through 3-322 attach and are assumed by the applicants.~~

Maine Probate Code Proposed Comments Maine has chosen not to adopt Universal Succession, as detailed in UPC §312 *et seq.*

§3-316

UNIVERSAL SUCCESSION; UNIVERSAL SUCCESSORS' POWERS

~~Upon the [Registrar's] issuance of a statement of universal succession:~~

~~(1) Universal successors have full power of ownership to deal with the assets of the estate subject to the limitations and liabilities in this [Act]. The universal successors shall proceed expeditiously to settle and distribute the estate without adjudication but if necessary may invoke the jurisdiction of the court to resolve questions concerning the estate.~~

~~(2) Universal successors have the same powers as distributees from a personal representative under Sections 3-908 and 3-909 and third persons with whom they deal are protected as provided in Section 3-910.~~

~~(3) For purposes of collecting assets in another state whose law does not provide for universal succession, universal successors have the same standing and power as personal representatives or distributees in this State.~~

Maine Probate Code Proposed Comments Maine has chosen not to adopt Universal Succession, as detailed in UPC §312 *et seq.*

§3-317

UNIVERSAL SUCCESSION; UNIVERSAL SUCCESSORS' LIABILITY TO CREDITORS, OTHER HEIRS, DEVISEES AND PERSONS ENTITLED TO DECEDENT'S PROPERTY; LIABILITY OF OTHER PERSONS ENTITLED TO PROPERTY

~~(a) In the proportions and subject to limits expressed in Section 3-321, universal successors assume all liabilities of the decedent that were not discharged by reason of death and liability for all taxes, claims against the decedent or the estate, and charges properly incurred after death for the preservation of the estate, to the extent those items, if duly presented, would be valid claims against the decedent's estate.~~

~~(b) In the proportions and subject to the limits expressed in Section 3-321, universal successors are personally liable to other heirs, devisees, and persons entitled to property of the decedent for the assets or amounts that would be due those heirs, were the estate administered, but no allowance having priority over devisees may be claimed for attorney's fees or charges for preservation of the estate in excess of reasonable amounts properly incurred.~~

~~(c) Universal successors are entitled to their interests in the estate as heirs or devisees subject to priority and abatement pursuant to Section 3-902 and to agreement pursuant to Section 3-912.~~

~~(d) Other heirs, devisees, and persons to whom assets have been distributed have the same powers and liabilities as distributees under Sections 3-908, 3-909, and 3-910.~~

~~(e) Absent breach of fiduciary obligations or express undertaking, a fiduciary's liability is limited to the assets received by the fiduciary.~~

Maine Probate Code Proposed Comments Maine has chosen not to adopt Universal Succession, as detailed in UPC §312 *et seq.*

§3-318

UNIVERSAL SUCCESSION; UNIVERSAL SUCCESSORS' SUBMISSION TO JURISDICTION; WHEN HEIRS OR DEVISEES MAY NOT SEEK ADMINISTRATION.

~~(a) Upon issuance of the statement of universal succession, the universal successors become subject to the personal jurisdiction of the Courts of this state in any proceeding that may be instituted relating to the estate or to any liability assumed by them.~~

~~(b) Any heir or devisee who voluntarily joins in an application under Section 3-313 may not subsequently seek appointment of a personal representative.~~

Maine Probate Code Proposed Comments Maine has chosen not to adopt Universal Succession, as detailed in UPC §312 *et seq.*

§3-319

UNIVERSAL SUCCESSION; DUTY OF UNIVERSAL SUCCESSORS; INFORMATION TO HEIRS AND DEVISEES.

~~Not later than thirty days after issuance of the statement of universal succession, each universal successor shall inform the heirs and devisees who did not join in the application of the succession without administration. The information must be delivered or be sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the universal successors. The information must include the names and addresses of the universal successors, indicate that it is being sent to persons who have or may have some interest in the estate, and describe the court where the application and statement of universal succession has been filed. The failure of a universal successor to give this information is a breach of duty to the persons concerned but does not affect the validity of the approval of succession without administration or the powers or liabilities of the universal successors. A universal successor may inform other persons of the succession without administration by delivery or by ordinary first class mail.~~

Maine Probate Code Proposed Comments Maine has chosen not to adopt Universal Succession, as detailed in UPC §312 *et seq.*

§3-320

UNIVERSAL SUCCESSION; UNIVERSAL SUCCESSORS' LIABILITY FOR RESTITUTION TO ESTATE.

~~If a personal representative is subsequently appointed, universal successors are personally liable for restitution of any property of the estate to which they are not entitled as heirs or devisees of the decedent and their liability is the same as a distributee under Section 3-909, subject to the provisions of Sections 3-317 and 3-321 and the limitations of Section 3-1006.~~

Maine Probate Code Proposed Comments Maine has chosen not to adopt Universal Succession, as detailed in UPC §312 *et seq.*

§3-321

UNIVERSAL SUCCESSION; LIABILITY OF UNIVERSAL SUCCESSORS FOR CLAIMS, EXPENSES, INTESTATE SHARES AND DEVISEES.

~~The liability of universal successors is subject to any defenses that would have been available to the decedent. Other than liability arising from fraud, conversion, or other wrongful conduct of a universal successor, the personal liability of each universal successor to any creditor, claimant, other heir, devisee, or person entitled to decedent's property may not exceed the proportion of the claim that the universal successor's share bears to the share of all heirs and residuary devisees.~~

Maine Probate Code Proposed Comments Maine has chosen not to adopt Universal Succession, as detailed in UPC §312 *et seq.*

§3-322

UNIVERSAL SUCCESSION; REMEDIES OF CREDITORS, OTHER HEIRS, DEVISEES OR PERSONS ENTITLED TO DECEDENT'S PROPERTY

~~In addition to remedies otherwise provided by law, any creditor, heir, devisee, or person entitled to decedent's property qualified under Section 3-605, may demand bond of universal successors. If the demand for bond precedes the granting of an application for universal succession, it must be treated as an objection under Section 3-314(e) unless it is withdrawn, the claim satisfied, or the applicants post bond in an amount sufficient to protect the demandant. If the demand for bond follows the granting of an application for universal succession, the universal successors, within 10 days after notice of the demand, upon satisfying the claim or posting bond sufficient to protect the demandant, may disqualify the demandant from seeking administration of the estate.~~

Maine Probate Code Proposed Comments Maine has chosen not to adopt Universal Succession, as detailed in UPC §312 *et seq.*

§3-401

FORMAL TESTACY PROCEEDINGS; NATURE; WHEN COMMENCED.

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

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

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

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-402

FORMAL TESTACY OR APPOINTMENT PROCEEDINGS; PETITION; CONTENTS

(a) Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal representative, must be directed to the court, request a judicial order after notice and hearing and contain further statements as indicated in this section and contain such other information and be in such form as the Supreme Judicial Court may by rule provide. A petition for formal probate of a will

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

(2) contains the statements required for informal applications as stated in the six subparagraphs under Section 3-301(a)(1), the statements required by subparagraphs (B) and (C) of Section 3-301(a)(2), and

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

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

(b) A petition for adjudication of intestacy and appointment of an administrator in intestacy must request a judicial finding and order that the decedent left no will and determining the heirs, contain the statements required by paragraphs (1) and (4) of Section 3-301(a) and indicate whether supervised administration is sought and contain such other information and be in such form as the Supreme Judicial Court may by rule provide. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case, the statements required by subparagraph (B) of Section 3-301(a)(4) above may be omitted.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-403

FORMAL TESTACY PROCEEDINGS; NOTICE OF HEARING ON PETITION.

(a) Upon commencement of a formal testacy proceeding, the court shall fix a time and place of hearing. Notice shall be given in the manner prescribed by Section 1-401 by the petitioner to the persons herein enumerated and to any additional person who has filed a demand for notice under Section 3-204 of this code. Notice shall be given to the following persons: the surviving spouse, children, and other heirs of the decedent, the devisees and executors named in any will that is being, or has been, probated, or offered for informal or formal probate in the county, or that is known by the petitioner to have been probated, or offered for informal or formal probate elsewhere, and any personal representative of the decedent whose appointment has not been terminated. If the decedent was 55 years of age or older, the petitioner shall give notice as described in section 1-401 to the Department of Health and Human Services.

Notice may be given to other persons. In addition, the petitioner shall give notice by publication to all unknown persons and to all known persons whose addresses are unknown who have any interest in the matters being litigated.

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

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

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

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-404

FORMAL TESTACY PROCEEDINGS; WRITTEN OBJECTIONS TO PROBATE.

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

M.R.S.A. § 3-405

FORMAL TESTACY PROCEEDINGS; UNCONTESTED CASES; HEARINGS AND PROOF

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

The language does not constitute a substantive change to Maine law.

§3-406

FORMAL TESTACY PROCEEDINGS; CONTESTED CASES

In a contested case in which the proper execution of a will is at issue, the following rules apply:

- (1) If the will is self-proved pursuant to Section 2-504, the will satisfies the requirements for execution without the testimony of any attesting witness, upon filing the will and the acknowledgment and affidavits annexed or attached to it, unless there is evidence of fraud or forgery affecting the acknowledgment or affidavit.
- (2) If the will is notarized pursuant to Section 2-502(a)(3)(B), but not self-proved, there is a rebuttable presumption that the will satisfies the requirements for execution upon filing the will.
- (3) If the will is witnessed pursuant to Section 2-502(a)(3)(A), but not notarized or self-proved, the testimony of at least one of the attesting witnesses is required to establish proper execution if the witness is within this state,

competent, and able to testify. Proper execution may be established by other evidence, including an affidavit of an attesting witness. An attestation clause that is signed by the attesting witnesses raises a rebuttable presumption that the events recited in the clause occurred.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-407

FORMAL TESTACY PROCEEDINGS; BURDENS IN CONTESTED CASES

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-408

FORMAL TESTACY PROCEEDINGS; WILL CONSTRUCTION; EFFECT OF FINAL ORDER IN ANOTHER JURISDICTION

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-409

FORMAL TESTACY PROCEEDINGS; ORDER; FOREIGN WILL

After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, if the court finds that the testator is dead, venue is proper and that the proceeding was commenced within the

limitation prescribed by Section 3-108, it shall determine the decedent's domicile at death, his heirs and his state of testacy. Any will found to be valid and unrevoked shall be formally probated. Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by Section 3-612. The petition shall be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead. A will from a place which does not provide for probate of a will after death, may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become effective under the law of the other place.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-410

FORMAL TESTACY PROCEEDINGS; PROBATE OF MORE THAN ONE INSTRUMENT

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-411

FORMAL TESTACY PROCEEDINGS; PARTIAL INTESTACY

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-412

FORMAL TESTACY PROCEEDINGS; EFFECT OF ORDER; VACATION.

Subject to appeal and subject to vacation as provided in this section and in Section 3-413, a formal testacy order under Sections 3-409 to 3-411, including an order that the decedent left no valid will and determining heirs, is final as to all

persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:

(1) The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will:

(A) were unaware of its existence at the time of the earlier proceeding; or

(B) were unaware of the earlier proceeding and were given no notice thereof, except by publication.

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

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

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

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

(C) twelve months after the entry of the order sought to be vacated.

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

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

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-413

FORMAL TESTACY PROCEEDINGS; VACATION OF ORDER FOR OTHER CAUSE

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

§ 3-413

FORMAL TESTACY PROCEEDINGS; VACATION OF ORDER FOR OTHER CAUSE

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-414

FORMAL PROCEEDINGS CONCERNING APPOINTMENT OF PERSONAL REPRESENTATIVE

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

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-501

SUPERVISED ADMINISTRATION; NATURE OF PROCEEDING

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-502

SUPERVISED ADMINISTRATION; PETITION; ORDER

A petition for supervised administration may be filed by any interested person or by a personal representative at any time or the prayer for supervised administration may be joined with a petition in a testacy or appointment proceeding. If the testacy of the decedent and the priority and qualification of any personal representative have not been adjudicated previously, the petition for supervised administration shall include the matters required of a petition in a formal testacy proceeding and the notice requirements and procedures applicable to a formal testacy proceeding apply. If not previously adjudicated, the court shall adjudicate the testacy of the decedent and questions relating to the priority and qualifications of the personal representative in any case involving a request for supervised administration, even though the request for supervised administration may be denied. After notice to interested persons, the court shall order supervised administration of a decedent's estate:

- (1) if the decedent's will directs supervised administration, it shall be ordered unless the court finds that circumstances bearing on the need for supervised administration have changed since the execution of the will and that there is no necessity for supervised administration;
- (2) if the decedent's will directs unsupervised administration, supervised administration shall be ordered only upon a finding that it is necessary for protection of persons interested in the estate; or
- (3) in other cases if the court finds that supervised administration is necessary under the circumstances.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-503

SUPERVISED ADMINISTRATION; EFFECT ON OTHER PROCEEDINGS.

- (a) The pendency of a proceeding for supervised administration of a decedent's estate stays action on any informal application then pending or thereafter filed.
- (b) If a will has been previously probated in informal proceedings, the effect of the filing of a petition for supervised administration is as provided for formal testacy proceedings by Section 3-401.
- (c) After he has received notice of the filing of a petition for supervised administration, a personal representative who has been appointed previously shall not exercise his power to distribute any estate. The filing of the petition does not affect his other powers and duties unless the court restricts the exercise of any of them pending full hearing on the petition.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§3-504

SUPERVISED ADMINISTRATION; POWERS OF PERSONAL REPRESENTATIVE

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-505

SUPERVISED ADMINISTRATION; INTERIM ORDERS; DISTRIBUTION AND CLOSING ORDERS

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

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-601

QUALIFICATION

Prior to receiving letters, a personal representative shall qualify by filing with the appointing court any required bond and a statement of acceptance of the duties of the office.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-602

ACCEPTANCE OF APPOINTMENT; CONSENT TO JURISDICTION

By accepting appointment, a personal representative submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be

delivered to the personal representative, or mailed to him by ordinary first class mail at his address as listed in the application or petition for appointment or as thereafter reported to the court and to his address as then known to the petitioner.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-603

BOND NOT REQUIRED WITHOUT COURT ORDER, EXCEPTIONS

No bond is required of a personal representative appointed in informal proceedings, except (i) upon the appointment of a special administrator; (ii) when an executor or other personal representative is appointed to administer an estate under a will containing an express requirement of bond or (iii) when bond is required under Section 3-605. Bond may be required by court order at the time of appointment of a personal representative appointed in any formal proceeding except that bond is not required of a personal representative appointed in formal proceedings if the will relieves the personal representative of bond, unless bond has been requested by an interested party and the court is satisfied that it is desirable, or as provided in section 3-619, subsection (g). Bond required by any will may be dispensed with in formal proceedings upon determination by the court that it is not necessary. No bond is required of any personal representative who, pursuant to statute, has deposited cash or collateral with an agency of this state to secure performance of his duties.

Maine Probate Code Proposed Comments The language does not constitute substantive change to former Maine section 3-603, with the exception of Maine’s retained exemption for a “public administration” (for estates without heirs and for whom no estate administration has commenced, as detailed in sections 3-619(g)). Also, former Maine section 3-603 had exemption level of \$200.

§3-604

BOND AMOUNT; SECURITY; PROCEDURE; REDUCTION.

If bond is required and the provisions of the will or order do not specify the amount, unless stated in his application or petition, the person qualifying shall file a statement under oath with the Registrar indicating his best estimate of the value of the personal estate of the decedent and of the income expected from the personal and real estate during the next year, and he shall execute and file a bond with the Registrar, or give other suitable security, in an amount not less than the estimate. The Registrar shall determine that the bond is duly executed by a corporate surety, or one or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property or other adequate security. The Registrar may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic financial institution (as defined in Section 6-101) in a manner that prevents their

unauthorized disposition. On petition of the personal representative or another interested person the court may excuse a requirement of bond, increase or reduce the amount of the bond, release sureties, or permit the substitution of another bond with the same or different sureties.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-605

DEMAND FOR BOND BY INTERESTED PERSON

Any person apparently having an interest in the estate worth in excess of \$5,000, or any creditor having a claim in excess of \$5,000, may make a written demand that a personal representative give bond. The demand must be filed with the Registrar and a copy mailed to the personal representative, if appointment and qualification have occurred. Thereupon, bond is required, but the requirement ceases if the person demanding bond ceases to be interested in the estate, or if bond is excused as provided in Section 3-603 or 3-604. After he has received notice and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of his office except as necessary to preserve the estate. Failure of the personal representative to meet a requirement of bond by giving suitable bond within 30 days after receipt of notice is cause for his removal and appointment of a successor personal representative.

Maine Probate Code Proposed Comments The threshold financial interest for requesting a bond is increased from \$1000 to \$5000.

§3-606

TERMS AND CONDITIONS OF BONDS.

(a) The following requirements and provisions apply to any bond required by this part:

- (1) Bonds shall name the State of Maine as obligee for the benefit of the persons interested in the estate and shall be conditioned upon the faithful discharge by the fiduciary of all duties according to law.
- (2) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the personal representative and with each other. The address of sureties shall be stated in the bond.
- (3) By executing an approved bond of a personal representative, the surety consents to the jurisdiction of the probate court which issued letters to the primary obligor in any proceedings pertaining to the fiduciary duties of the personal representative and naming the surety as a party. Notice of any proceeding shall be delivered to the surety or mailed to

him by registered or certified mail at his address as listed with the court where the bond is filed and to his address as then known to the petitioner.

(4) On petition of a successor personal representative, any other personal representative of the same decedent, or any interested person, a proceeding in the court may be initiated against a surety for breach of the obligation of the bond of the personal representative.

(5) The bond of the personal representative is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(b) No action or proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-607

ORDER RESTRAINING PERSONAL REPRESENTATIVE.

(a) On petition of any person who appears to have an interest in the estate, the court by temporary order may restrain a personal representative from performing specified acts of administration, disbursement or distribution, or exercise of any powers or discharge of any duties of his office, or make any other order to secure proper performance of his duty, if it appears to the court that the personal representative otherwise may take some action which would jeopardize unreasonably the interest of the applicant or of some other interested person. Persons with whom the personal representative may transact business may be made parties.

~~(b) The matter shall be set for hearing within 10 days unless the parties otherwise agree. Notice as the court directs shall be given to the personal representative and his attorney of record, if any, and to any other parties named defendant in the petition.~~

Maine Probate Code Proposed Comments The language does not constitute substantive change to former Maine section 3-607, as Maine does not adopt UPC §607(b) (additional requirement that a court schedule a hearing within 10 days).

§ 3-608

TERMINATION OF APPOINTMENT; GENERAL

Termination of appointment of a personal representative occurs as indicated in Sections 3-609 to 3-612 inclusive. Termination ends the right and power pertaining to the office of personal representative as conferred by this code or any will, except that a personal representative, at any time prior to distribution or until restrained or enjoined by court order, may perform acts necessary to protect the estate and may deliver the assets to a successor representative.

Termination does not discharge a personal representative from liability for transactions or omissions occurring before termination, or relieve him of the duty to preserve assets subject to his control, to account therefor and to deliver the assets. Termination does not affect the jurisdiction of the court over the personal representative, but terminates his authority to represent the estate in any pending or future proceeding.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-609

TERMINATION OF APPOINTMENT; DEATH OR DISABILITY

The death of a personal representative or the appointment of a conservator for the estate of a personal representative, terminates his appointment. Until appointment and qualification of a successor or special representative to replace the deceased or protected representative, the representative of the estate of the deceased or protected personal representative, if any, has the duty to protect the estate possessed and being administered by his decedent or ward at the time his appointment terminates has the power to perform acts necessary for protection and shall account for and deliver the estate assets to a successor or special personal representative upon his appointment and qualification.

Maine Probate Code Proposed Comments The language does not constitute substantive change to Maine law.

§ 3-610

TERMINATION OF APPOINTMENT; VOLUNTARY

- (a) An appointment of a personal representative terminates as provided in Section 3-1003, one year after the filing of a closing statement.
- (b) An order closing an estate as provided in Section 3-1001 or 3-1002 terminates an appointment of a personal representative.
- (c) A personal representative may resign his position by filing a written statement of resignation with the Registrar after he has given at least 15 days written notice to the persons known to be interested in the estate. If no one applies or petitions for appointment of a successor representative within the time indicated in the notice, the filed statement of resignation is ineffective as a termination of appointment, and in any event is effective only upon the appointment and qualification of a successor representative and delivery of the assets to him.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-611

TERMINATION OF APPOINTMENT BY REMOVAL; CAUSE; PROCEDURE

(a) A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the court may order. Except as otherwise ordered as provided in Section 3-607, after receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration or preserve the estate. If removal is ordered, the court also shall direct by order the disposition of the assets remaining in the name of, or under the control of, the personal representative being removed.

(b) Cause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment, intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office. Unless the decedent's will directs otherwise a personal representative appointed at the decedent's domicile, incident to securing appointment of himself or his nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this state to administer local assets.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-612

TERMINATION OF APPOINTMENT; CHANGE OF TESTACY STATUS

Except as otherwise ordered in formal proceedings, the probate of a will subsequent to the appointment of a personal representative in intestacy or under a will which is superseded by formal probate of another will, or the vacation of an informal probate of a will subsequent to the appointment of the personal representative thereunder, does not terminate the appointment of the personal representative although his powers may be reduced as provided in Section 3-401. Termination occurs upon appointment in informal or formal appointment proceedings of a person entitled to appointment under the later assumption concerning testacy. If no request for new appointment is made within 30 days after expiration of time for appeal from the order in formal testacy proceedings, or from the informal probate, changing the assumption concerning testacy, the previously appointed personal representative upon request may be appointed personal representative under the subsequently probated will, or as in intestacy as the case may be.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-613

SUCCESSOR PERSONAL REPRESENTATIVE

Parts 3 and 4 of this article govern proceedings for appointment of a personal representative to succeed one whose appointment has been terminated. After appointment and qualification, a successor personal representative may be substituted in all actions and proceedings to which the former personal representative was a party, and no notice, process or claim which was given or served upon the former personal representative need be given to or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative. Except as otherwise ordered by the court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-614

SPECIAL ADMINISTRATOR; APPOINTMENT

A special administrator may be appointed:

- (1) informally by the Registrar on the application of any interested person when necessary to protect the estate of a decedent prior to the appointment of a general personal representative, or if a prior appointment has been terminated as provided in Section 3-609;
- (2) in a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-615

SPECIAL ADMINISTRATOR; WHO MAY BE APPOINTED

- (a) If a special administrator is to be appointed pending the probate of a will which is the subject of a pending application or petition for probate, the person named executor in the will shall be appointed if available, and qualified.
- (b) In other cases, any proper person may be appointed special administrator.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-616

SPECIAL ADMINISTRATOR; APPOINTED INFORMALLY; POWERS AND DUTIES
A special administrator appointed by the Registrar in informal proceedings pursuant to Section 3-614(1) has the duty to collect and manage the assets of the estate, to preserve them and to account therefor and to deliver them to the general personal representative upon his qualification. The special administrator has the power of a personal representative under the code necessary to perform his duties.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-617
SPECIAL ADMINISTRATOR; FORMAL PROCEEDINGS; POWER AND DUTIES.
A special administrator appointed by order of the court in any formal proceeding has the power of a general personal representative except as limited in the appointment and duties as prescribed in the order. The appointment may be for a specified time, to perform particular acts or on other terms as the court may direct.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.
§ 3-618
TERMINATION OF APPOINTMENT; SPECIAL ADMINISTRATOR
The appointment of a special administrator terminates in accordance with the provisions of the order of appointment, or on the appointment of a general personal representative. In other cases, the appointment of a special administrator is subject to termination as provided in Sections 3-608 through 3-611.
Maine Probate Code Proposed Comments The language does not constitute substantive change to Maine law.

§3-619
PUBLIC ADMINSTRATORS
(a). <u>The Governor shall appoint in each county for a term of 4 years, unless sooner removed, a public administrator who shall, upon petition to the court and after notice and hearing, be appointed to administer the estates of persons who die intestate within the county, or who die intestate elsewhere leaving property within the county, and who are not known to have within the state any heirs who can lawfully inherit the estate, and for whom no other administration has been commenced. The public administrator shall have the same powers and duties of a personal representative under supervised administration as provided in section 3-504, and except as provided in subsection (g), shall give bond as provided for other personal representatives in cases of ordinary administration under sections 3-603 through 3-606. If any person entitled to appointment as personal representative under section 3-203 shall, prior to the appointment of the public administrator, file a petition for informal or formal appointment as personal representative,</u>

the court shall withhold any appointment of the public administrator pending denial of the petition for the appointment of the private personal representative.

(b). The public administrator may be allowed fees and compensation for his services as in the case of ordinary administration as provided in sections 3-719, 3-720 and 3-721, except that no fee for his own services shall be paid without prior approval by the court.

(c). Pending the appointment of the public administrator, and in the absence of any local administration or any administration by a domiciliary foreign personal representative under sections 4-204 and 4-205, the public administrator may proceed to conserve the property of the estate when it appears necessary or expedient.

(d). If, before the estate of such deceased in the hands of the public administrator is fully settled, any last will and testament of the decedent is granted informal or formal probate, or if any person entitled under section 3-203 to appointment as personal representative is informally or formally appointed, the appointment of the public administrator is terminated as provided in section 3-608, and he shall account for and deliver the assets of the estate to the private personal representative as provided therein, or to the successors under the will as provided by law if no private personal representative has been appointed.

(e). When there are assets, other than real property, remaining in the hands of such public administrator after the payment of the decedent's debts and all costs of administration and no heirs have been discovered, the public administrator must be ordered by the judge to deposit them with the Treasurer of State, who shall receive them and dispose of them according to Title 33, chapter 41. These assets must, for the purposes of Title 33, chapter 41, be presumed unclaimed when the judge orders the public administrator to deposit them with the Treasurer of State.

(f). In all cases where a public administrator is appointed, the register shall immediately send to the Treasurer of State a copy of the petition and the decree thereon, and in all cases where the public administrator is ordered to pay the balance of the estate as provided in subsection (e) the judge shall give notice to the county treasurer of the amount and from what estate it is receivable. If the public administrator neglects for 3 months after the order of the judge to deposit the money, the county treasurer shall petition the court for enforcement of the order or bring a civil action upon any bond of the public administrator for the recovery thereof. The records and accounts of the public administrator shall be audited annually by the Office of the State Auditor.

(g). Estates administered under this section having a value at the decedent's death not exceeding \$200 5,000 shall be exempt from all notice and filing costs and from giving bond. The cost of notice shall be paid by the court.

Maine Probate Code Proposed Comments The UPC has no section concerning public administration.

§ 3-701

TIME OF ACCRUAL OF DUTIES AND POWERS

The duties and powers of a personal representative commence upon his appointment. The powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. Prior to appointment, a person named executor in a

will may carry out written instructions of the decedent relating to his body, funeral and burial arrangements. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.

Maine Probate Code Proposed Comments The language does not constitute substantive change to Maine law.

§ 3-702

PRIORITY AMONG DIFFERENT LETTERS

A person to whom general letters are first issued has exclusive authority under the letters until his appointment is terminated or modified. If, through error, general letters are afterwards issued to another, the first appointed representative may recover any property of the estate in the hands of the representative subsequently appointed, but the acts of the latter done in good faith before notice of the first letters, are not void for want of validity of appointment.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-703

GENERAL DUTIES; RELATION AND LIABILITY TO PERSONS INTERESTED IN ESTATE; STANDING TO SUE

(a) A personal representative is a fiduciary who shall observe the standards of care applicable to trustees. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate. A personal representative is a fiduciary who shall observe the standards of care applicable to trustees as described in Title 18-B, sections 802, 803, 805, 806 and 807 and Title 18-B, chapter 9, except as follows.

(1). A personal representative, in developing an investment strategy, shall take into account the expected duration of the period reasonably required to effect distribution of the estate's assets.

(2). Except as provided in section 3-906, subsection (a), paragraphs (1) and (2), a personal representative may make distribution of an estate's assets in cash or in kind, in accordance with the devisees' best interests, and is not required either to liquidate the estate's assets or to preserve them for distribution.

(3). If all devisees whose devises are to be funded from the residue of an estate agree, in a written instrument signed by each of them and presented to the personal representative, on an investment manager to direct the investment of the estate's residuary assets, the personal representative may, but need not, rely on the investment advice of the investment

manager so identified or delegate the investment management of the estate's residuary assets to such manager and, in either case, may pay reasonable compensation to the manager from the residue of the estate. A personal representative who relies on the advice of, or delegates management discretion to, an investment manager in accordance with the terms of this section is not liable for the investment performance of the assets invested in the discretion of, or in accordance with the advice of, such investment manager.

(b) A personal representative ~~shall~~ may not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will is authority to administer and distribute the estate according to its terms. An order of appointment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning his appointment or fitness to continue, or a supervised administration proceeding. This section does not affect the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants whose claims have been allowed, the surviving spouse, any minor and dependent children and any pretermitted child of the decedent as described elsewhere in this Code.

(c) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to former Maine law.

§ 3-704

PERSONAL REPRESENTATIVE TO PROCEED WITHOUT COURT ORDER; EXCEPTION

A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified or ordered in regard to a supervised personal representative, do so without adjudication, order, or direction of the court, but he may invoke the jurisdiction of the court, in proceedings authorized by this code, to resolve questions concerning the estate or its administration.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-705

DUTY OF PERSONAL REPRESENTATIVES: INFORMATION TO HEIRS AND DEVISEES

Not later than 30 days after his appointment every personal representative, except any special administrator, shall give

information of his appointment to the heirs and devisees, including, if there has been no formal testacy proceeding and if the personal representative was appointed on the assumption that the decedent died intestate, the devisees in any will mentioned in the application for appointment of a personal representative ~~and, in any case where there has been no formal testacy proceedings, to the devisees in any purported will whose existence and the names of the devisees thereunder are known to the personal representative.~~ The information shall be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the personal representative. The duty does not extend to require information to persons who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate. The information shall include the name and address of the personal representative, indicate that it is being sent to persons who have or may have some interest in the estate being administered, indicate whether bond has been filed, and describe the court where papers relating to the estate are on file. The information shall state that the estate is being administered by the personal representative under the Maine Probate Code without supervision by the court but that recipients are entitled to information regarding the administration from the personal representative and can petition the court in any matter relating to the estate, including distribution of assets and expenses of administration. The personal representative's failure to give this information is a breach of his duty to the persons concerned but does not affect the validity of his appointment, his powers or other duties. A personal representative may inform other persons of his appointment by delivery or ordinary first class mail.

Maine Probate Code Proposed Comments This section adds the UPC's additional information requirements from the personal representative to heirs (including intestate heirs) and devisees in any will mentioned in the application for appointment.

Also, this section removes former Maine section 3-705 requirements that the personal representative provide information to heirs and devisees "in any purported will whose existence . . . [was] known to the personal representative."

§ 3-706

DUTY OF PERSONAL REPRESENTATIVE; INVENTORY AND APPRAISEMENT

Within three months after his appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall prepare and file or furnish mail an inventory of property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item. The inventory shall also include a schedule of credits of the decedent, with the names of the obligors, the amounts due, a description of the nature of the obligation, and the amount of all such credits, exclusive of expenses and risk of settlement or collection.

The personal representative shall furnish send a copy of the inventory to interested persons who request it. He may also file the original of the inventory with the court.

When an inventory has not been filed or furnished as required under this section and an interested party makes a prima facie case that property that should have been inventoried is now missing, the personal representative has the burden of proving by a preponderance of the evidence that the specific property would properly be excluded from the inventory.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-707

EMPLOYMENT OF APPRAISERS

The personal representative may employ a qualified and disinterested appraiser to assist him in ascertaining the fair market value as of the date of the decedent's death ~~of all assets as of the date of the decedent's death; but shall employ an appraiser for determining the value of real estate or securities not regularly traded on recognized exchanges. of any asset the value of which may be subject to reasonable doubt.~~ Different persons may be employed to appraise different kinds of assets included in the estate. The names and addresses of any appraiser shall be indicated on the inventory with the item or items he appraised.

Maine Probate Code Proposed Comments This section tracks the UPC and now requires appraisal of “any asset the value of which may be subject to reasonable doubt.”

§ 3-708

DUTY OF PERSONAL REPRESENTATIVE; SUPPLEMENTARY INVENTORY

If any property not included in the original inventory comes to the knowledge of a personal representative or if the personal representative learns that the value or description indicated in the original inventory for any item is erroneous or misleading, he shall make a supplementary inventory or appraisal showing the market value as of the date of the decedent's death of the new item or the revised market value or descriptions, and the appraisers or other data relied upon, if any, and file it with the court if the original inventory was filed, or furnish copies thereof or information thereof to persons interested in the new information.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ -3-709

DUTY OF PERSONAL REPRESENTATIVE; POSSESSION OF ESTATE

Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take

possession or control of the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by him will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection and preservation of, the estate in his possession. He may maintain an action to recover possession of property or to determine the title thereto.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-710

POWER TO AVOID TRANSFERS

The property liable for the payment of unsecured debts of a decedent includes all property transferred by him by any means which is in law void or voidable as against his creditors, and subject to prior liens, the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative. The personal representative is not required to institute such an action unless requested by creditors, who must pay or secure the cost and expenses of litigation.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-711

POWERS OF PERSONAL REPRESENTATIVES; IN GENERAL

Until termination of his appointment a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.

Maine Probate Code Proposed Comments This section removes the requirement under former Maine section 3-711 that the personal representative provide a ten-day notice for sale of real estate.

§ 3-712

IMPROPER EXERCISE OF POWER; BREACH OF FIDUCIARY DUTY

If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust. The rights of purchasers and others dealing with a personal representative shall be determined as provided in Sections 3-

713 and 3-714.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-713
SALE, ENCUMBRANCE OR TRANSACTION INVOLVING CONFLICT OF INTEREST; VOIDABLE; EXCEPTIONS
Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has a substantive beneficial interest, or any transaction which is affected by a substantive conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one who has consented after fair disclosure, unless (1) the will or a contract entered into by the decedent expressly authorized the transaction; or (2) the transaction is approved by the court after notice to interested persons.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-714
PERSONS DEALING WITH PERSONAL REPRESENTATIVE; PROTECTION
A person who in good faith either assists a personal representative or deals with him for value is protected as if the personal representative properly exercised his power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise. Except for restrictions on powers of supervised personal representatives which are endorsed on letters as provided in Section 3-504 no provision in any will or order of court purporting to limit the power of a personal representative is effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters, including a case in which the alleged decedent is found to be alive. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-715

TRANSACTIONS AUTHORIZED FOR PERSONAL REPRESENTATIVES; EXCEPTIONS

Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in Section 3-902, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

- (1) retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment;
- (2) receive assets from fiduciaries, or other sources;
- (3) perform, compromise or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:
 - (A) execute and deliver a deed of conveyance, for cash payment of all sums remaining due, or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or
 - (B) deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement;
- (4) satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims if, in the judgment of the personal representative, the decedent would have wanted the pledges completed under the circumstances;
- (5) if funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit or invest liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements or other prudent investments which would be reasonable for use by trustees generally;
- (6) acquire or dispose of an asset, including land in this or another state, for cash or on credit, at public or private sale; and manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;
- (7) make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, raze existing or erect new party walls or buildings;
- (8) subdivide, develop or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; or adjust differences in valuation on exchange or partition by giving or receiving considerations; or dedicate easements to public use without consideration;
- (9) enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the period of administration;
- (10) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;
- (11) abandon property when, in the opinion of the personal representative, it is valueless, or is so encumbered, or is in condition that it is of no benefit to the estate;
- (12) vote stocks or other securities in person or by general or limited proxy;
- (13) pay calls, assessments, and other sums chargeable or accruing against or on account of securities, unless barred by the provisions relating to claims;

- (14) hold a security in the name of a nominee or in other form without disclosure of the interest of the estate but the personal representative is liable for any act of the nominee in connection with the security so held;
- (15) insure the assets of the estate against damage, loss and liability and himself against liability as to third persons;
- (16) borrow money with or without security to be repaid from the estate assets or otherwise; and advance money for the protection of the estate;
- (17) effect a fair and reasonable compromise with any debtor or obligor, or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner thereof in satisfaction of the indebtedness secured by lien;
- (18) pay taxes, assessments, compensation of the personal representative, and other expenses incident to the administration of the estate;
- (19) sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;
- (20) allocate items of income or expense to either estate income or principal, as permitted or provided by law;
- (21) employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; act without independent investigation upon their recommendations; and instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary;
- (22) prosecute or defend claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties;
- (23) sell, mortgage, or lease any real or personal property of the estate or any interest therein for cash, credit, or for part cash and part credit, and with or without security for unpaid balances;
- (24) continue any unincorporated business or venture in which the decedent was engaged at the time of his death (i) in the same business form for a period of not more than 4 months from the date of appointment of a general personal representative if continuation is a reasonable means of preserving the value of the business including good will, (ii) in the same business form for any additional period of time that may be approved by order of the court in a formal proceeding to which the persons interested in the estate are parties; or (iii) throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate;
- (25) incorporate any business or venture in which the decedent was engaged at the time of his death;
- (26) provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate;
- (27) satisfy and settle claims and distribute the estate as provided in this code.
- (28) exercise any power described in Title 18-A M.R.S.A. §1-111 relating to compliance with environmental laws.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law. Additional reference in §§(28) simply provides a reference to applicable fiduciary section in Art. 1.

§ 3-716
POWERS AND DUTIES OF SUCCESSOR PERSONAL REPRESENTATIVE
A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate, as expeditiously as possible, but he shall not exercise any power expressly made personal to the executor named in the will.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-717
CO-REPRESENTATIVES; WHEN JOINT ACTION REQUIRED
If two or more persons are appointed co-representatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate. This restriction does not apply when any co-representative receives and receipts for property due the estate, when the concurrence of all cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate, or when a co-representative has been delegated to act for the others. Persons dealing with a co-representative if actually unaware that another has been appointed to serve with him or if advised by the personal representative with whom they deal that he has authority to act alone for any of the reasons mentioned herein, are as fully protected as if the person with whom they dealt had been the sole personal representative.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-718
POWERS OF SURVIVING PERSONAL REPRESENTATIVE
Unless the terms of the will otherwise provide, every power exercisable by personal co-representatives may be exercised by the one or more remaining after the appointment of one or more is terminated, and if one of two or more nominated as co-executors is not appointed, those appointed may exercise all the powers incident to the office.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.
§ 3-719
COMPENSATION OF PERSONAL REPRESENTATIVE
A personal representative is entitled to reasonable compensation for his services. If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, he may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative also may renounce

his right to all or any part of the compensation. A written renunciation of fee may be filed with the court.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-720
EXPENSES IN ESTATE LITIGATION
If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-721
PROCEEDINGS FOR REVIEW OF EMPLOYMENT OF AGENTS AND COMPENSATION OF PERSONAL REPRESENTATIVES AND EMPLOYEES OF ESTATE
After notice to all interested persons or on petition of an interested person or on appropriate motion if administration is supervised, the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.
(b) Factors to be considered as guides in determining the reasonableness of a fee include the following:
(1). The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the service properly;
(2). The likelihood, if apparent to the personal representative, that the acceptance of the particular employment will preclude the person employed from other employment;
(3). The fee customarily charged in the locality for similar services;
(4). The amount involved and the results obtained;
(5). The time limitations imposed by the personal representative or by the circumstances;
(6). The experience, reputation and ability of the person performing the services.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-801

NOTICE TO CREDITORS

(a) Unless notice has already been given under this section, a personal representative upon appointment ~~may~~ shall publish a notice to creditors once a week for ~~three~~ two successive weeks in a newspaper of general circulation in the county announcing the appointment and the personal representative's address and notifying creditors of the estate to present their claims within four months after the date of the first publication of the notice or be forever barred.

(b) A personal representative may give written notice by mail or other delivery to a creditor, notifying the creditor to present his [or her] claim within four months after the published notice, if given as provided in subsection (a), or within 60 days after the mailing or other delivery of the notice, whichever is later, or be forever barred. Written notice must be the notice described in subsection (a) above or a similar notice.

(c) The personal representative is not liable to a creditor or to a successor of the decedent for giving or failing to give notice under this section.

§ 3-802

STATUTES OF LIMITATIONS.

(a) Unless an estate is insolvent, the personal representative, with the consent of all successors whose interests would be affected, may waive any defense of limitations available to the estate. If the defense is not waived, no claim barred by a statute of limitations at the time of the decedent's death may be allowed or paid.

(b) The running of a statute of limitations measured from an event other than death or the giving of notice to creditors is suspended for four months after the decedent's death, but resumes thereafter as to claims not barred by other sections.

(c) For purposes of a statute of limitations, the presentation of a claim pursuant to Section 3-804 is equivalent to commencement of a proceeding on the claim.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-803

LIMITATIONS ON PRESENTATION OF CLAIMS

(a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any political subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or non-claim statute, are barred against the estate, the personal representative, the heirs and devisees, and nonprobate transferees of the decedent, unless presented within the earlier of the following:

- (1) ~~one year~~ Nine months after the decedent's death; or
- (2) the time provided by Section 3-801(b) for creditors who are given actual notice, and within the time provided in Section 3-801(a) for all creditors barred by publication.
- (b) A claim described in subsection (a) which is barred by the non-claim statute of the decedent's domicile before the giving of notice to creditors in this state is barred in this state.
- (c) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:
- (1) a claim based on a contract with the personal representative, within four months after performance by the personal representative is due; or
- (2) any other claim, within the later of four months after it arises, or at the time specified in subsection (a)(1).
- (d) Nothing in this section affects or prevents:
- (1) any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate;
- (2) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance; or
- (3) collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.

§ 3-804

MANNER OF PRESENTATION OF CLAIMS

Claims against a decedent's estate may be presented as follows:

- (1) The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed or may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. The claim is deemed presented on the first to occur of receipt of the written statement of claim by the personal representative, or the filing of the claim with the court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made.
- (2) The claimant may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction, to obtain payment of his claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of

his death.

(3) If a claim is presented under paragraph (1), no proceeding thereon may be commenced more than 60 days after the personal representative has mailed a notice of disallowance; but, in the case of a claim which is not presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the 60 day period, or to avoid injustice the court, on petition, may order an extension of the 60 day period, but in no event shall the extension run beyond the applicable statute of limitations.

(4). When a decedent's estate has not been commenced at the time a claimant wishes to present a claim, a claim is deemed presented when the claimant files with the clerk of the court a written statement of claim meeting the requirements of subsection (1) and a demand for notice pursuant to section 3-204. The provisions of subsection (3) apply upon the appointment of a personal representative.

§ 3-805

CLASSIFICATION OF CLAIMS

(a) If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

(1) costs and expenses of administration;

(2) reasonable funeral expenses;

(3) debts and taxes with preference under federal law;

(4) Medicaid benefits recoverable under Title 22, section 14, subsection 2-I and reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him;

(5) debts and taxes with preference under other laws of this state;

(6) all other claims.

(b) No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due.

§ 3-806

ALLOWANCE OF CLAIMS

(a) As to claims presented in the manner described in Section 3-804 within the time limit prescribed in 3-803, the personal representative may mail a notice to any claimant stating that the claim has been disallowed. If, after allowing or disallowing a claim, the personal representative changes his decision concerning the claim, he shall notify the claimant. The personal representative may not change a disallowance of a claim after the time for the claimant to file a petition for allowance or to commence a proceeding on the claim has run and the claim has been barred. Every

claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than 60 days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar. Failure of the personal representative to mail notice to a claimant of action on his claim for 60 days after the time for original presentation of the claim has expired has the effect of a notice of allowance.

(b) After allowing or disallowing a claim the personal representative may change the allowance or disallowance as hereafter provided. The personal representative may prior to payment change the allowance to a disallowance in whole or in part, but not after allowance by a court order or judgment or an order directing payment of the claim. He shall notify the claimant of the change to disallowance, and the disallowed claim is then subject to bar as provided in subsection (a). The personal representative may change a disallowance to an allowance, in whole or in part, until it is barred under subsection (a); after it is barred, it may be allowed and paid only if the estate is solvent and all successors whose interests would be affected consent.

(c) Upon the petition of the personal representative or of a claimant in a proceeding for the purpose, the court may allow in whole or in part any claim or claims presented to the personal representative or filed with the clerk of the court in due time and not barred by subsection (a). Notice in this proceeding shall be given to the claimant, the personal representative and those other persons interested in the estate as the court may direct by order entered at the time the proceeding is commenced.

(d) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

~~(e) Unless otherwise provided in any judgment in another court entered against the personal representative, allowed claims bear interest at the legal rate for the period commencing 60 days after the time for original presentation of the claim has expired unless based on a contract making a provision for interest, in which case they bear interest in accordance with that provision.~~ (e) Unless otherwise provided in any judgment in another court entered against the personal representative, allowed claims bear prejudgment interest at the rate specified in Title 14, section 1602-B for the period commencing 60 days after the time for original presentation of the claim has expired unless based on a contract making a provision for interest, in which case they bear interest in accordance with that provision.

(1). Interest may not accrue on any allowed claims, however allowed, against an insolvent estate, except to the extent that insurance coverage or other nonprobate assets are available to pay the claim in full. This paragraph is effective for estates of decedents who die on or after October 1, 1997.

(2). To the extent that an allowed claim against an insolvent estate is secured by property, the value of which, as determined under section 3-809, is greater than the amount of the claim, the holder of the claim may receive interest on the principal amount of the claim and any reasonable fees, costs or charges provided for under an agreement under which the claim arose. This paragraph is effective for estates of decedents who die on or after October 1, 1997

PAYMENT OF CLAIMS

(a) Upon the expiration of the earlier of the time limitations provided in Section 3-803 for the presentation of claims, the personal representative shall proceed to pay the claims allowed against the estate in the order of priority prescribed, after making provision for homestead, family and support allowances, for claims already presented that have not yet been allowed or whose allowance has been appealed, and for unbarred claims that may yet be presented, including costs and expenses of administration. By petition to the court in a proceeding for the purpose, or by appropriate motion if the administration is supervised, a claimant whose claim has been allowed but not paid may secure an order directing the personal representative to pay the claim to the extent funds of the estate are available to pay it.

(b) The personal representative at any time may pay any just claim that has not been barred, with or without formal presentation, but is personally liable to any other claimant whose claim is allowed and who is injured by its payment if:

- (1) payment was made before the expiration of the time limit stated in subsection (a) and the personal representative failed to require the payee to give adequate security for the refund of any of the payment necessary to pay other claimants; or
- (2) payment was made, due to negligence or willful fault of the personal representative, in such manner as to deprive the injured claimant of priority

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-808

INDIVIDUAL LIABILITY OF PERSONAL REPRESENTATIVE

(a) Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.

(b) A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(c) Claims based on contracts entered into by a personal representative in his fiduciary capacity, on obligations arising from ownership or control of the estate or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor.

(d) Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-809
SECURED CLAIMS
<p>Payment of a secured claim is upon the basis of the amount allowed if the creditor surrenders his security; otherwise payment is upon the basis of one of the following:</p> <p>(1) if the creditor exhausts his security before receiving payment, unless precluded by other law upon the amount of the claim allowed less the fair value of the security; or</p> <p>(2) if the creditor does not have the right to exhaust his security or has not done so, upon the amount of the claim allowed less the value of the security determined by converting it into money according to the terms of the agreement pursuant to which the security was delivered to the creditor, or by the creditor and personal representative by agreement, arbitration, compromise or litigation.</p>
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-810
CLAIMS NOT DUE AND CONTINGENT OR UNLIQUIDATED CLAIMS
<p>(a) If a claim which will become due at a future time or a contingent or unliquidated claim, becomes due, or certain, before the distribution of the estate, and if the claim has been allowed or established by a proceeding it is paid in the same manner as presently due and absolute claims of the same class.</p> <p>(b) In other cases the personal representative or, on petition of the personal representative or the claimant in a special proceeding for the purpose, the court, may provide for payment as follows:</p> <p>(1) if the claimant consents, he may be paid the present or agreed value of the claim, taking any uncertainty into account;</p> <p>(2) arrangement for future payment or possible payment on the happening of the contingency or on liquidation may be made by creating a trust, giving a mortgage, obtaining a bond or security from a distributee or otherwise.</p>
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-811
COUNTERCLAIMS
In allowing a claim the personal representative may deduct any counterclaim which the estate has against the claimant. In determining a claim against an estate a court shall reduce the amount allowed by the amount of any counterclaims and, if the counterclaims exceed the claim, render a judgment against the claimant in the amount of the

excess. A counterclaim, liquidated or unliquidated, may arise from a transaction other than that upon which the claim is based. A counterclaim may give rise to relief exceeding in amount or different in kind from that sought in the claim.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-812

EXECUTION AND LEVIES PROHIBITED

No execution may issue upon nor may any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but this section shall not be construed to prevent the enforcement of mortgages, pledges or liens upon real or personal property in an appropriate proceeding.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-813

COMPROMISE OF CLAIMS

When a claim against the estate has been presented in any manner, the personal representative may, if it appears for the best interest of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-814

ENCUMBERED ASSETS

If any assets of the estate are encumbered by mortgage, pledge, lien or other security interest, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance or convey or transfer the assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has presented a claim, if it appears to be for the best interest of the estate. Payment of an encumbrance does not increase the share of the distributee entitled to the encumbered assets unless the distributee is entitled to exoneration.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-815

ADMINISTRATION IN MORE THAN ONE STATE; DUTY OF PERSONAL REPRESENTATIVE

(a) All assets of estates being administered in this state are subject to all claims, allowances and charges existing or established against the personal representative wherever appointed.

(b) If the estate either in this state or as a whole is insufficient to cover all family exemptions and allowances determined by the law of the decedent's domicile, prior charges and claims after satisfaction of the exemptions, allowances and charges, each claimant whose claim has been allowed either in this state or elsewhere in administrations of which the personal representative is aware, is entitled to receive payment of an equal proportion of his claim. If a preference or security in regard to a claim is allowed in another jurisdiction but not in this state, the creditor so benefited is to receive dividends from local assets only upon the balance of his claim after deducting the amount of the benefit.

(c) In case the family exemptions and allowances, prior charges and claims of the entire estate exceed the total value of the portions of the estate being administered separately and this state is not the state of the decedent's last domicile, the claims allowed in this state shall be paid their proportion if local assets are adequate for the purpose, and the balance of local assets shall be transferred to the domiciliary personal representative. If local assets are not sufficient to pay all claims allowed in this state the amount to which they are entitled, local assets shall be marshalled so that each claim allowed in this state is paid its proportion as far as possible, after taking into account all dividends on claims allowed in this state from assets in other jurisdictions.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-816

FINAL DISTRIBUTION TO DOMICILIARY REPRESENTATIVE

The estate of a non-resident decedent being administered by a personal representative appointed in this state shall, if there is a personal representative of the decedent's domicile willing to receive it, be distributed to the domiciliary personal representative for the benefit of the successors of the decedent unless (i) by virtue of the decedent's will, if any, and applicable choice of law rules, the successors are identified pursuant to the local law of this state without reference to the local law of the decedent's domicile; (ii) the personal representative of this state, after reasonable inquiry, is unaware of the existence or identity of a domiciliary personal representative; or (iii) the court orders otherwise in a proceeding for a closing order under Section 3-1001 or incident to the closing of a supervised administration. In other cases, distribution of the estate of a decedent shall be made in accordance with the other parts of this article.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

3-817

SURVIVAL OF ACTIONS

(a). No personal action or cause of action is lost by the death of either party, but the same survives for and against the personal representative of the deceased, except that actions or causes of action for the recovery of penalties and forfeitures of money under penal statutes do not survive the death of the defendant. A personal representative may seek relief from a judgment in an action to which the deceased was a party to the same extent that the deceased might have done so.

(b). When the only plaintiff or defendant dies while an action that survives is pending, or after its commencement and before entry of judgment, his personal representative may appear and enter the action or any appeal that has been made, and suggest on the record the death of the party. If the personal representative does not appear within 90 days after his appointment, he may be cited to appear, and after due notice judgment may be entered against him by dismissal or default if no such appearance is made

(c). When either of several plaintiffs or defendants in an action that survives dies, the death may be suggested on the record, and the personal representative of the deceased may appear or be cited to appear as provided in subsection (b). The action may be further prosecuted or defended by the survivors and the personal representative jointly or by either of them. The survivors, if any, on both sides of the action may testify as witnesses

(d). When a judgment creditor dies before the first execution issues or before an execution issued in his lifetime is fully satisfied, such execution may be issued or be effective in favor of the deceased judgment creditor's personal representative, but no execution shall issue or be effective beyond the time within which it would have been effective or issued if the party had not died.

(e). An execution issued under subsection (d) shall set forth the fact that the judgment creditor has died since the rendition of the judgment and that the substituted party is the personal representative of the decedent's estate.

(f). The personal representative proceeding under this section shall be liable, and shall hold any recovered property or award, in his representative capacity, except as otherwise provided in section 3-808.

Maine Probate Code Proposed Comments The UPC has no section concerning survival of actions.

3-818

DAMAGES LIMITED TO ACTUAL DAMAGES

In any tort action against the personal representative of a decedent's estate, in his representative capacity, the plaintiff can recover only the value of the goods taken or damage actually sustained.

Maine Probate Code Proposed Comments UPC has no section concerning damages limited to actual damages.

§ 3-901

SUCCESSORS' RIGHTS IF NO ADMINISTRATION

In the absence of administration, the heirs and devisees are entitled to the estate in accordance with the terms of a probated will or the laws of intestate succession. Devisees may establish title by the probated will to devised property. Persons entitled to property by homestead allowance, exemption or intestacy may establish title thereto by proof of the decedent's ownership, his death, and their relationship to the decedent. Successors take subject to all charges incident to administration, including the claims of creditors and allowances of surviving spouse and dependent children, and subject to the rights of others resulting from abatement, retainer, advancement, and ademption.

§ 3-902

DISTRIBUTION; ORDER IN WHICH ASSETS APPROPRIATED; ABATEMENT

- (a) Except as provided in subsection (b) and except as provided in connection with the share of the surviving spouse who elects to take an elective share, shares of distributees abate, without any preference or priority as between real and personal property, in the following order: (1) property not disposed of by the will; (2) residuary devises; (3) general devises; (4) specific devises. For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.
- (b) If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.
- (c) If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

§ 3-902-A

DISTRIBUTION; ORDER IN WHICH ASSETS APPROPRIATED; ABATEMENT. ((addendum for adoption in community property states))

~~[(a) and (b) as above.]~~

~~(c) If an estate of a decedent consists partly of separate property and partly of community property, the debts and expenses of administration shall be apportioned and charged against the different kinds of property in proportion to the relative value thereof.~~

~~[(d) same as (c) in common law state.]]~~

Maine Probate Code Proposed Comments Not being a community property state, Maine does not adopt UPC §3-902-A.

§ 3-903

RIGHTS OF RETAINER

The amount of a non-contingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest; but the successor has the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt. Such debt constitutes a lien on the successor's interest in favor of the estate, having priority over any attachment or transfer of the interest by the successor.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-904

INTEREST ON GENERAL PECUNIARY DEVISE

General pecuniary devises bear interest at the legal rate of 5% beginning one year after the first appointment of a personal representative until payment, unless a contrary intent is indicated by the will.

Maine Probate Code Proposed Comments This section removes language allowing a lower than 5% rate for underproductive property.

§ 3-905

PENALTY CLAUSE FOR CONTEST

A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-906

DISTRIBUTION IN KIND; VALUATION; METHOD

(a) Unless a contrary intention is indicated by the will, the distributable assets of a decedent's estate shall be distributed in kind to the extent possible through application of the following provisions:

(1) A specific devisee is entitled to distribution of the thing devised to him, and a spouse or child who has selected particular assets of an estate as provided in Section ~~2-403~~ 2-402 shall receive the items selected.

(2) Any homestead or family allowance or devise of a stated sum of money may be satisfied in kind, in the personal representative's discretion, provided

(i) the person entitled to the payment has not demanded payment in cash;

(ii) the property distributed in kind is valued at fair market value as of the date of its distribution, and

(iii) no residuary devisee has requested that the asset in question remain a part of the residue of the estate or if, a residuary devisee has requested that the asset to be distributed remain a part of the residue of the estate, there are insufficient other assets to which no residuary devisee has made such a request to permit satisfaction of the estate's obligations and funding of all pecuniary devises made under the decedent's will.

(3) For the purpose of valuation under paragraph (2) securities regularly traded on recognized exchanges, if distributed in kind, are valued at the price for the last sale of like securities traded on the business day prior to distribution, or if there was no sale on that day, at the median between amounts bid and offered at the close of that day. Assets consisting of sums owed the decedent or the estate by solvent debtors as to which there is no known dispute or defense are valued at the sum due with accrued interest or discounted to the date of distribution. For assets which do not have readily ascertainable values, a valuation as of a date not more than 30 days prior to the date of distribution, if otherwise reasonable, controls. For purposes of facilitating distribution, the personal representative may ascertain the value of the assets as of the time of the proposed distribution in any reasonable way, including the employment of qualified appraisers, even if the assets may have been previously appraised.

(4) The residuary estate ~~shall be distributed in any equitable manner.~~ may be distributed by the personal representative in cash or in kind, in accordance with the best interests of the residuary devisees. Residuary assets may be distributed, at the personal representative's discretion, in pro rata or non pro rata shares; except that residuary assets not distributed pro rata must be valued as of the date on which they are distributed.

(b) After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset he is to receive, if not waived earlier in writing, terminates if he fails to object in writing received by the personal representative within 30 days after mailing or delivery of the proposal.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-907
DISTRIBUTION IN KIND; EVIDENCE
If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring or releasing the assets to the distributee as evidence of the distributee's title to the property.
Maine Probate Code Proposed Comments The language does not constitute substantive change Maine law

§ 3-908
DISTRIBUTION; RIGHT OR TITLE OF DISTRIBUTE
Proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative, is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-909
IMPROPER DISTRIBUTION; LIABILITY OF DISTRIBUTE
Unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a distributee of property improperly distributed or paid, or a claimant who was improperly paid, is liable to return the property improperly received and its income since distribution if he has the property. If he does not have the property, then he is liable to return the value as of the date of disposition of the property improperly received and its income and gain received by him.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-910
Purchasers From Distributees Protected
If property distributed in kind or a security interest therein is acquired for value by a purchaser from or lender to a distributee who has received an instrument or deed of distribution from the personal representative, or is so acquired by a purchaser from or lender to a transferee from such distributee, the purchaser or lender takes title free of rights of any interested person in the estate and incurs no personal liability to the estate, or to any interested person, whether or not the distribution was proper or supported by court order or the authority of the personal representative was terminated before execution of the instrument or deed. This section protects a purchaser from or lender to a

distributee who, as personal representative, has executed a deed of distribution to himself, as well as a purchaser from or lender to any other distributee or his transferee. To be protected under this provision, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind, even if the personal representative and the distributee are the same person, or whether the authority of the personal representative had terminated before the distribution. Any recorded instrument described in this section on which a state documentary fee is noted pursuant to stamp "Maine Real Estate Transfer Tax Paid" shall be prima facie evidence that such transfer was made for value.

Maine Probate Code Proposed Comments The language does not constitute substantive change to Maine law.

§ 3-911

PARTITION FOR PURPOSE OF DISTRIBUTION

When two or more heirs or devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one or more of the heirs or devisees may petition the Court prior to the formal or informal closing of the estate, to make partition. After notice to the interested heirs or devisees, the Court shall partition the property in the same manner as provided by the law for civil actions of partition. The Court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party.

Maine Probate Code Proposed Comments The language does not constitute substantive change to Maine law.

§ 3-912

PRIVATE AGREEMENTS AMONG SUCCESSORS TO DECEDENT BINDING ON PERSONAL REPRESENTATIVE

Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing herein relieves trustees of any duties owed to beneficiaries of trusts.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

§ 3-913

DISTRIBUTIONS TO TRUSTEE

- (a) ~~Before distributing to a trustee, the personal representative may require that the trust be registered if the state in which it is to be administered provides for registration and that the trustee inform the beneficiaries as provided in Section 7-303.~~
- (b) If the trust instrument does not excuse the trustee from giving bond, the personal representative may petition the appropriate Court to require that the trustee post bond if he apprehends that distribution might jeopardize the interests of persons who are not able to protect themselves, and he may withhold distribution until the Court has acted.
- (c) No inference of negligence on the part of the personal representative shall be drawn from his failure to exercise the authority conferred by subsections (a) and (b).

Maine Probate Code Proposed Comments The language does not constitute substantive change to Maine law.

§ 3-914

DISPOSITION OF UNCLAIMED ASSETS

- (a) If an heir, devisee or claimant cannot be found, the personal representative shall distribute the share of the missing person to his conservator, if any, otherwise ~~to the [state treasurer], to become a part of the [state escheat fund].~~ it must be disposed of according to Title 33, chapter 41.
- (b) ~~The money received by [state treasurer] shall be paid to the person entitled on proof of his right thereto or, if the [state treasurer] refuses or fails to pay, the person may petition the Court which appointed the personal representative, whereupon the Court upon notice to the [state treasurer] may determine the person entitled to the money and order the [treasurer] to pay it to him. No interest is allowed thereon and the heir, devisee or claimant shall pay all costs and expenses incident to the proceeding. If no petition is made to the [court] within 8 years after payment to the [state treasurer], the right of recovery is barred.~~

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law..

§ 3-915

DISTRIBUTION TO PERSON UNDER DISABILITY

- (a) A personal representative may discharge his obligation to distribute to any person under legal disability by

distributing in a manner expressly provided in the will.

(b) Unless contrary to an express provision in the will, the personal representative may discharge his obligation to distribute to a minor or person under other disability as authorized by Section 5-104 or any other statute. If the personal representative knows that a conservator has been appointed or that a proceeding for appointment of a conservator is pending, the personal representative is authorized to distribute only to the conservator.

(c) If the heir or devisee is under disability other than minority, the personal representative is authorized to distribute to:

(1) an attorney in fact who has authority under a power of attorney to receive property for that person; or

(2) the spouse, parent or other close relative with whom the person under disability resides if the distribution is of amounts not exceeding \$10,000 a year, or property not exceeding \$10,000 in value, unless the court authorizes a larger amount or greater value.

Persons receiving money or property for the disabled person are obligated to apply the money or property to the support of that person, but may not pay themselves except by way of reimbursement for out-of-pocket expenses for goods and services necessary for the support of the disabled person. Excess sums must be preserved for future support of the disabled person. The personal representative is not responsible for the proper application of money or property distributed pursuant to this subsection.

Maine Probate Code Proposed Comments This section adds options and guidance to former Maine section 3-915 when making a distribution to a person under disability.

3-916 [referenced as “UPC Part 9A” in UPC]

UNIFORM ESTATE TAX APPORTIONMENT ACT (2003)

SECTION 3-9A-101. Short Title. This part may be cited as the Uniform Estate Tax Apportionment Act.

SECTION 3-9A-102. Definitions. In this part:

(1) “Apportionable estate” means the value of the gross estate as finally determined for purposes of the estate tax to be apportioned reduced by:

(A) any claim or expense allowable as a deduction for purposes of the tax;

(B) the value of any interest in property that, for purposes of the tax, qualifies for a marital or charitable deduction or otherwise is deductible or is exempt; and

(C) any amount added to the decedent’s gross estate because of a gift tax on transfers made before death.

(2) “Estate tax” means a federal, state, or foreign tax imposed because of the death of an individual and interest and penalties associated with the tax. The term does not include an inheritance tax, income tax, or generation-skipping transfer tax other than a generation-skipping transfer tax incurred on a direct skip taking effect at death.

(3) “Gross estate” means, with respect to an estate tax, all interests in property subject to the tax.

(4) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company,

association, joint venture, public corporation, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(5) "Ratable" means apportioned or allocated pro rata according to the relative values of interests to which the term is to be applied. "Ratably" has a corresponding meaning.

(6) "Time-limited interest" means an interest in property which terminates on a lapse of time or on the occurrence or nonoccurrence of an event or which is subject to the exercise of discretion that could transfer a beneficial interest to another person. The term does not include a cotenancy unless the cotenancy itself is a time-limited interest

(7) "Value" means, with respect to an interest in property, fair market value as finally determined for purposes of the estate tax that is to be apportioned, reduced by any outstanding debt secured by the interest without reduction for taxes paid or required to be paid or for any special valuation adjustment.

SECTION 3-9A-103. Apportionment by Will or Other Dispositive Instrument.

(a) Except as otherwise provided in subsection (c), the following rules apply:

(1) To the extent that a provision of a decedent's will expressly and unambiguously directs the apportionment of an estate tax, the tax must be apportioned accordingly.

(2) Any portion of an estate tax not apportioned pursuant to paragraph (1) must be apportioned in accordance with any provision of a revocable trust of which the decedent was the settlor which expressly and unambiguously directs the apportionment of an estate tax. If conflicting apportionment provisions appear in two or more revocable trust instruments, the provision in the most recently dated instrument prevails. For purposes of this paragraph:

(A) a trust is revocable if it was revocable immediately after the trust instrument was executed, even if the trust subsequently becomes irrevocable; and

(B) the date of an amendment to a revocable trust instrument is the date of the amended instrument only if the amendment contains an apportionment provision.

(3) If any portion of an estate tax is not apportioned pursuant to paragraph (1) or (2), and a provision in any other dispositive instrument expressly and unambiguously directs that any interest in the property disposed of by the instrument is or is not to be applied to the payment of the estate tax attributable to the interest disposed of by the instrument, the provision controls the apportionment of the tax to that interest.

(b) Subject to subsection (c), and unless the decedent expressly and unambiguously directs the contrary, the following rules apply:

(1) If an apportionment provision directs that a person receiving an interest in property under an instrument is to be exonerated from the responsibility to pay an estate tax that would otherwise be apportioned to the interest,

(A) the tax attributable to the exonerated interest must be apportioned among the other persons receiving interests passing under the instrument, or

(B) if the values of the other interests are less than the tax attributable to the exonerated interest, the deficiency must be apportioned ratably among the other persons receiving interests in the apportionable estate that are not exonerated from apportionment of the tax.

(2) If an apportionment provision directs that an estate tax is to be apportioned to an interest in property a portion of which qualifies for a marital or charitable deduction, the estate tax must first be apportioned ratably among the holders

of the portion that does not qualify for a marital or charitable deduction and then apportioned ratably among the holders of the deductible portion to the extent that the value of the nondeductible portion is insufficient.

(3) Except as otherwise provided in paragraph (4), if an apportionment provision directs that an estate tax be apportioned to property in which one or more time-limited interests exist, other than interests in specified property under Section 3-9A-107, the tax must be apportioned to the principal of that property, regardless of the deductibility of some of the interests in that property.

(4) If an apportionment provision directs that an estate tax is to be apportioned to the holders of interests in property in which one or more time-limited interests exist and a charity has an interest that otherwise qualifies for an estate tax charitable deduction, the tax must first be apportioned, to the extent feasible, to interests in property that have not been distributed to the persons entitled to receive the interests.

(c) A provision that apportions an estate tax is ineffective to the extent that it increases the tax apportioned to a person having an interest in the gross estate over which the decedent had no power to transfer immediately before the decedent executed the instrument in which the apportionment direction was made. For purposes of this subsection, a testamentary power of appointment is a power to transfer the property that is subject to the power.

SECTION 3-9A-104. Statutory Apportionment of Estate Taxes. To the extent that apportionment of an estate tax is not controlled by an instrument described in Section 3-9A-103 and except as otherwise provided in Sections 3-9A-106 and 3-9A-107, the following rules apply:

(1) Subject to paragraphs (2), (3), and (4), the estate tax is apportioned ratably to each person that has an interest in the apportionable estate.

(2) A generation-skipping transfer tax incurred on a direct skip taking effect at death is charged to the person to which the interest in property is transferred.

(3) If property is included in the decedent's gross estate because of Section 2044 of the Internal Revenue Code of 1986 or any similar estate tax provision, the difference between the total estate tax for which the decedent's estate is liable and the amount of estate tax for which the decedent's estate would have been liable if the property had not been included in the decedent's gross estate is apportioned ratably among the holders of interests in the property. The balance of the tax, if any, is apportioned ratably to each other person having an interest in the apportionable estate.

(4) Except as otherwise provided in Section 3-9A-103(b)(4) and except as to property to which Section 3-9A-107 applies, an estate tax apportioned to persons holding interests in property subject to a time-limited interest must be apportioned, without further apportionment, to the principal of that property.

SECTION 3-9A-105. Credits and Deferrals. Except as otherwise provided in Sections 3-9A-106 and 3-9A-107, the following rules apply to credits and deferrals of estate taxes:

(1) A credit resulting from the payment of gift taxes or from estate taxes paid on property previously taxed inures ratably to the benefit of all persons to which the estate tax is apportioned.

(2) A credit for state or foreign estate taxes inures ratably to the benefit of all persons to which the estate tax is apportioned, except that the amount of a credit for a state or foreign tax paid by a beneficiary of the property on which the state or foreign tax was imposed, directly or by a charge against the property, inures to the benefit of the beneficiary.

(3) If payment of a portion of an estate tax is deferred because of the inclusion in the gross estate of a particular interest in property, the benefit of the deferral inures ratably to the persons to which the estate tax attributable to the interest is apportioned. The burden of any interest charges incurred on a deferral of taxes and the benefit of any tax deduction associated with the accrual or payment of the interest charge is allocated ratably among the persons receiving an interest in the property.

SECTION 3-9A-106. Insulated Property: Advancement of Tax.

(a) In this section:

(1) “Advanced fraction” means a fraction that has as its numerator the amount of the advanced tax and as its denominator the value of the interests in insulated property to which that tax is attributable.

(2) “Advanced tax” means the aggregate amount of estate tax attributable to interests in insulated property which is required to be advanced by uninsulated holders under subsection (c).

(3) “Insulated property” means property subject to a time-limited interest which is included in the apportionable estate but is unavailable for payment of an estate tax because of impossibility or impracticability.

(4) “Uninsulated holder” means a person who has an interest in uninsulated property.

(5) “Uninsulated property” means property included in the apportionable estate other than insulated property.

(b) If an estate tax is to be advanced pursuant to subsection (c) by persons holding interests in uninsulated property subject to a time-limited interest other than property to which Section 3-9A-107 applies, the tax must be advanced, without further apportionment, from the principal of the uninsulated property.

(c) Subject to Section 3-9A-109(b) and (d), an estate tax attributable to interests in insulated property must be advanced ratably by uninsulated holders. If the value of an interest in uninsulated property is less than the amount of estate taxes otherwise required to be advanced by the holder of that interest, the deficiency must be advanced ratably by the persons holding interests in properties that are excluded from the apportionable estate under Section 3-9A-102(1)(B) as if those interests were in uninsulated property.

(d) A court having jurisdiction to determine the apportionment of an estate tax may require a beneficiary of an interest in insulated property to pay all or part of the estate tax otherwise apportioned to the interest if the court finds that it would be substantively more equitable for that beneficiary to bear the tax liability personally than for that part of the tax to be advanced by uninsulated holders.

(e) When a distribution of insulated property is made, each uninsulated holder may recover from the distributee a ratable portion of the advanced fraction of the property distributed. To the extent that undistributed insulated property ceases to be insulated, each uninsulated holder may recover from the property a ratable portion of the advanced fraction of the total undistributed property.

(f) Upon a distribution of insulated property for which, pursuant to subsection (d), the distributee becomes obligated to make a payment to uninsulated holders, a court may award an uninsulated holder a recordable lien on the distributee’s property to secure the distributee’s obligation to that uninsulated holder.

SECTION 3-9A-107. Apportionment and Recapture of Special Elective Benefits.

(a) In this section:

(1) “Special elective benefit” means a reduction in an estate tax obtained by an election for:

- (A) a reduced valuation of specified property that is included in the gross estate;
- (B) a deduction from the gross estate, other than a marital or charitable deduction, allowed for specified property; or
- (C) an exclusion from the gross estate of specified property.

(2) “Specified property” means property for which an election has been made for a special elective benefit.

(b) If an election is made for one or more special elective benefits, an initial apportionment of a hypothetical estate tax must be computed as if no election for any of those benefits had been made. The aggregate reduction in estate tax resulting from all elections made must be allocated among holders of interests in the specified property in the proportion that the amount of deduction, reduced valuation, or exclusion attributable to each holder’s interest bears to the aggregate amount of deductions, reduced valuations, and exclusions obtained by the decedent’s estate from the elections. If the estate tax initially apportioned to the holder of an interest in specified property is reduced to zero, any excess amount of reduction reduces ratably the estate tax apportioned to other persons that receive interests in the apportionable estate.

(c) An additional estate tax imposed to recapture all or part of a special elective benefit must be charged to the persons that are liable for the additional tax under the law providing for the recapture.

SECTION 3-9A-108. Securing Payment of Estate Tax from Property in Possession of Fiduciary.

(a) A fiduciary may defer a distribution of property until the fiduciary is satisfied that adequate provision for payment of the estate tax has been made.

(b) A fiduciary may withhold from a distributee an amount equal to the amount of estate tax apportioned to an interest of the distributee.

(c) As a condition to a distribution, a fiduciary may require the distributee to provide a bond or other security for the portion of the estate tax apportioned to the distributee.

SECTION 3-9A-109. Collection of Estate Tax by Fiduciary.

(a) A fiduciary responsible for payment of an estate tax may collect from any person the tax apportioned to and the tax required to be advanced by the person.

(b) Except as otherwise provided in Section 3-9A-106, any estate tax due from a person that cannot be collected from the person may be collected by the fiduciary from other persons in the following order of priority:

(1) any person having an interest in the apportionable estate which is not exonerated from the tax;

(2) any other person having an interest in the apportionable estate;

(3) any person having an interest in the gross estate.

(c) A domiciliary fiduciary may recover from an ancillary personal representative the estate tax apportioned to the property controlled by the ancillary personal representative.

(d) The total tax collected from a person pursuant to this part may not exceed the value of the person’s interest.

SECTION 3-9A-110. Right of Reimbursement.

(a) A person required under Section 3-9A-109 to pay an estate tax greater than the amount due from the person under Section 3-9A-103 or 3-9A-104 has a right to reimbursement from another person to the extent that the other person has not paid the tax required by Section 3-9A-103 or 3-9A-104 and a right to reimbursement ratably from other persons to the extent that each has not contributed a portion of the amount collected under Section 3-9A-109(b).

(b) A fiduciary may enforce the right of reimbursement under subsection (a) on behalf of the person that is entitled to the reimbursement and shall take reasonable steps to do so if requested by the person.

SECTION 3-9A-111. Action to Determine or Enforce Part. A fiduciary, transferee, or beneficiary of the gross estate may maintain an action for declaratory judgment to have a court determine and enforce this part.

SECTION 3-9A-112. Reserved.

SECTION 3-9A-113. Reserved.

SECTION 3-9A-114. Delayed Application.

(a) Sections 3-9A-103 through 3-9A-107 do not apply to the estate of a decedent who dies on or within three years after the effective date of this part, nor to the estate of a decedent who dies more than three years after the effective date of this part if the decedent continuously lacked testamentary capacity from the expiration of the three-year period until the date of death.

(b) For the estate of a decedent who dies on or after the effective date of this part to which Sections 3-9A-103 through 3-9A-107 do not apply, estate taxes must be apportioned pursuant to the law in effect immediately before the effective date of this part.

SECTION 3-9A-115. Effective Date. This part takes effect _____.

Maine Probate Code Proposed Comments This section adds UETAA amendments to former Maine section 3-916.
Note to Revisor: Sub-sections may need to be re-initialed and/or re-numbered. Also, date that section is effective needs to be added in the blank space at the very end of the section.

§ 3-1001

FORMAL PROCEEDINGS TERMINATING ADMINISTRATION; TESTATE OR INTESTATE; ORDER OF GENERAL PROTECTION

(a) A personal representative or any interested person may petition for an order of complete settlement of the estate. The personal representative may petition at any time, and any other interested person may petition after one year from the appointment of the original personal representative except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the court to determine testacy, if not previously determined, to consider the final or compel or approve an accounting and distribution, to construe any will or determine heirs and adjudicate the final settlement and distribution of the estate. After notice to all interested persons and hearing the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any interested person.

(b) If one or more heirs or devisees were omitted as parties in, or were not given notice of, a previous formal testacy proceeding, the court, on proper petition for an order of complete settlement of the estate under this section, and after

notice to the omitted or unnotified persons and other interested parties determined to be interested on the assumption that the previous order concerning testacy is conclusive as to those given notice of the earlier proceeding, may determine testacy as it affects the omitted persons and confirm or alter the previous order of testacy as it affects all interested persons as appropriate in the light of the new proofs. In the absence of objection by an omitted or unnotified person, evidence received in the original testacy proceeding shall constitute prima facie proof of due execution of any will previously admitted to probate, or of the fact that the decedent left no valid will if the prior proceedings determined this fact.

Maine Probate Code Proposed Comments The language does not constitute substantive change to Maine law.

3-1002

FORMAL PROCEEDINGS TERMINATING TESTATE ADMINISTRATION; ORDER CONSTRUING WILL WITHOUT ADJUDICATING TESTACY.

A personal representative administering an estate under an informally probated will or any devisee under an informally probated will may petition for an order of settlement of the estate which will not adjudicate the testacy status of the decedent. The personal representative may petition at any time, and a devisee may petition after one year, from the appointment of the original personal representative, except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the court to consider the final account or compel or approve an accounting and distribution, to construe the will and adjudicate final settlement and distribution of the estate. After notice to all devisees and the personal representative and hearing, the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate under the will, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any devisee who is a party to the proceeding and those he represents. If it appears that a part of the estate is intestate, the proceedings shall be dismissed or amendments made to meet the provisions of Section 3-1001.

Maine Probate Code Proposed Comments The language does not constitute substantive change to Maine law.

3-1003

CLOSING ESTATES; BY SWORN STATEMENT OF PERSONAL REPRESENTATIVE.

(a) Unless prohibited by order of the court and except for estates being administered in supervised administration proceedings, a personal representative may close an estate by filing with the court no earlier than six months after the date of original appointment of a general personal representative for the estate, a verified statement stating that the personal representative, or a previous personal representative, has:

(1) determined that the time limited for presentation of creditors' claims has expired;

(2) fully administered the estate of the decedent by making payment, settlement, or other disposition of all claims that were presented, expenses of administration and estate, inheritance and other death taxes, except as specified in the statement, and that the assets of the estate have been distributed to the persons entitled. If any claims remain undischarged, the statement must state whether the personal representative has distributed the estate subject to possible liability with the agreement of the distributees, or state in detail other arrangements that have been made to accommodate outstanding liabilities; and

(3) sent a copy of the statement to all distributees of the estate ~~to all persons who would have a claim to succession under the testacy status upon which the personal representative is authorized to proceed~~ and to all creditors or other claimants of whom the personal representative is aware whose claims are neither paid nor barred and has furnished a full account in writing of the personal representative's administration to the distributees whose interests are affected thereby.

(b) If no proceedings involving the personal representative are pending in the court one year after the closing statement is filed the appointment of the personal representative terminates.

Maine Probate Code Proposed Comments This section removes the requirement that the personal representative also provide a closing statement to “all persons who would have a claim under the testacy status,” meaning persons who, for various reasons, were affected by ademption, abatement, mistake, or fraud.

3-1004

LIABILITY OF DISTRIBUTEES TO CLAIMANTS

After assets of an estate have been distributed and subject to Section 3-1006, an undischarged claim not barred may be prosecuted in a proceeding against one or more distributees. No distributee shall be liable to claimants for amounts received as exempt property, homestead or family allowances, or for amounts in excess of the value of his distribution as of the time of distribution. As between distributees, each shall bear the cost of satisfaction of unbarred claims as if the claim had been satisfied in the course of administration. Any distributee who shall have failed to notify other distributees of the demand made upon him by the claimant in sufficient time to permit them to join in any proceeding in which the claim was asserted against him loses his right of contribution against other distributees.

Maine Probate Code Proposed Comments The language does not constitute substantive change to Maine law.

3-1005

LIMITATIONS ON PROCEEDINGS AGAINST PERSONAL REPRESENTATIVE

Unless previously barred by adjudication and except as provided in the closing statement, the rights of successors and of creditors whose claims have not otherwise been barred against the personal representative for breach of fiduciary

duty are barred unless a proceeding to assert the same is commenced within six months after the filing of the closing statement. The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's estate.

Maine Probate Code Proposed Comments The language does not constitute a substantive change Maine law.

3-1006

LIMITATIONS ON ACTIONS AND PROCEEDINGS AGAINST DISTRIBUTEES

Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of a claimant to recover from a distributee who is liable to pay the claim, and the right of an heir or devisee, or of a successor personal representative acting in the heirs' or devisee's behalf, to recover property improperly distributed or its value from any distributee is forever barred at the later of 3 years after the decedent's death or one year after the time of its distribution thereof, but all claims of creditors of the decedent, are barred ~~one year~~ 9 months after the decedent's death. This section does not bar an action to recover property or value received as a result of fraud.

3-1007

CERTIFICATE DISCHARGING LIENS SECURING FIDUCIARY PERFORMANCE

After his appointment has terminated, the personal representative, his sureties, or any successor of either, upon the filing of a verified application showing so far as is known by the applicant, that no action concerning the estate is pending in any court, is entitled to receive a certificate from the Registrar that the personal representative appears to have fully administered the estate in question. The certificate evidences discharge of any lien on any property given to secure the obligation of the personal representative in lieu of bond or any surety, but does not preclude action against the personal representative or the surety.

Maine Probate Code Proposed Comments The language does not constitute a substantive change Maine law.

3-1008

SUBSEQUENT ADMINISTRATION

If other property of the estate is discovered after an estate has been settled and the personal representative discharged or after one year after a closing statement has been filed, the court upon petition of any interested person and upon notice as it directs may appoint the same or a successor personal representative to administer the subsequently

discovered estate. If a new appointment is made, unless the court orders otherwise, the provisions of this Code apply as appropriate; but no claim previously barred may be asserted in the subsequent administration.

Maine Probate Code Proposed Comments The language does not constitute a substantive change Maine law.

3-1101

EFFECT OF APPROVAL OF AGREEMENTS INVOLVING TRUSTS, INALIENABLE INTERESTS, OR INTERESTS OF THIRD PERSONS

A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of any governing instrument, the rights or interests in the estate of the decedent, of any successor, or the administration of the estate, if approved in a formal proceeding in the court for that purpose, is binding on all the parties thereto including those unborn, unascertained or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it.

Maine Probate Code Proposed Comments This section expands its reference under former Maine section 3-1101 from “any probated will” to “any governing instrument.”

3-1102

PROCEDURE FOR SECURING COURT APPROVAL OF COMPROMISE

The procedure for securing court approval of a compromise is as follows:

- (1) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents or legal guardians who have both actual custody and legal responsibility for a minor child acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise. Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.
- (2) Any interested person, including the personal representative, if any, or a trustee, then may submit the agreement to the court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives.
- (3) After notice to all interested persons or their representatives, including the personal representative of any estate and all affected trustees of trusts, the court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement. Minor children represented only by their parents may be bound only if their parents join with

other competent persons in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

3-1201

COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT

(a) Thirty days after the death of a decedent, any person indebted to the decedent or having possession of ~~tangible~~ personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the ~~tangible~~ personal property or an instrument evidencing a debt, obligation, stock or chose in action to a person claiming to be the successor of the decedent upon being presented an affidavit made by or on behalf of the successor stating that:

- (1) the value of the entire estate, wherever located, less liens and encumbrances, does not exceed \$~~50~~25,000; and
- (2) 30 days have elapsed since the death of the decedent; and
- (3) no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction; and
- (4) the claiming successor is entitled to payment or delivery of the property.

(b) A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subsection (a).

Maine Probate Code Proposed Comments Former Maine section 3-1201 set affidavit amount at \$20,000 and included “tangibles,” thereby including all accounts of financial institutions.

3-1202

EFFECT OF AFFIDAVIT

The person paying, delivering, transferring, or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer, or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer, or issuance compelled upon proof of their right in a proceeding brought for the purpose by or on behalf of the persons entitled thereto. Any person to whom payment, delivery, transfer or issuance is made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

3-1203
SMALL ESTATES; SUMMARY ADMINISTRATIVE PROCEDURE
If it appears from the inventory and appraisal that the value of the entire estate, less liens and encumbrances, does not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, the personal representative, without giving notice to creditors, may immediately disburse and distribute the estate to the persons entitled thereto and file a closing statement as provided in Section 3-1204.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

3-1204
SMALL ESTATES; CLOSING BY SWORN STATEMENT OF PERSONAL REPRESENTATIVE
(a) Unless prohibited by order of the court and except for estates being administered by supervised personal representatives, a personal representative may close an estate administered under the summary procedures of Section 3-1203 by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that: (1) to the best knowledge of the personal representative, the value of the entire estate, less liens and encumbrances, did not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable, necessary medical and hospital expenses of the last illness of the decedent; (2) the personal representative has fully administered the estate by disbursing and distributing it to the persons entitled thereto; and (3) the personal representative has sent a copy of the closing statement to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred, and has furnished a full account in writing of his administration to the distributees whose interests are affected. (b) If no actions or proceedings involving the personal representative are pending in the court one year after the closing statement is filed, the appointment of the personal representative terminates. (c) A closing statement filed under this section has the same effect as one filed under Section 3-1003.
Maine Probate Code Proposed Comments The language does not constitute substantive change to Maine law.

None
SOCIAL SECURITY PAYMENTS

If, (1) not less than 30 days after the death of a Maine resident entitled, at the time of his death, to a monthly benefit or benefits under Title II of the Social Security Act, all or part of the amount of such benefit or benefits not in excess of \$1,000 is paid by the United States to the surviving spouse, one or more of the deceased's children, or descendants of his deceased children, the deceased's father or mother, or the deceased's brother or sister, preference being given in the order named if more than one request for payment shall have been made by or for such individuals, upon an affidavit made and filed with the Department of Health and Human Services by the surviving spouse or other relative by whom or on whose behalf request for payment is made, and (2) the affidavit shows the date of death of the deceased, the relationship of the affiant to the deceased, that no personal representative for the deceased has been appointed and qualified, and that, to the affiant's knowledge, there exists at the time of filing of the affidavit, no relative of a closer degree of kindred to the deceased than the affiant, then such payment pursuant to the affidavit shall be deemed to be a payment to the legal representative of the decedent and, regardless of the truth or falsity of the statements made therein, shall constitute a full discharge and release of the United States from any further claim for such payment to the same extent as if such payment had been made to the personal representative of the decedent's estate.

Maine Probate Code Proposed Comments

4-101

DEFINITIONS

- (1) “local administration” means administration by a personal representative appointed in this state pursuant to appointment proceedings described in [Article] III.
- (2) “local personal representative” includes any personal representative appointed in this state pursuant to appointment proceedings described in [Article] III and excludes foreign personal representatives who acquire the power of a local personal representative pursuant to Section 4-205.
- (3) “resident creditor” means a person domiciled in, or doing business in this state, who is, or could be, a claimant against an estate of a non-resident decedent.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

4-201

PAYMENT OF DEBT AND DELIVERY OF PROPERTY TO DOMICILIARY FOREIGN PERSONAL REPRESENTATIVE WITHOUT LOCAL ADMINISTRATION

At any time after the expiration of 60 days from the death of a nonresident decedent, any person indebted to the estate of the nonresident decedent or having possession or control of personal property, or of an instrument evidencing a

debt, obligation, stock or chose in action belonging to the estate of the non-resident decedent may pay the debt, deliver the personal property, or the instrument evidencing the debt, obligation, stock or chose in action, to the domiciliary foreign personal representative of the nonresident decedent upon being presented with proof of his appointment and an affidavit made by or on behalf of the representative stating:

- (1) the date of the death of the nonresident decedent,
- (2) that no local administration, or application or petition therefor, is pending in this state,
- (3) that the domiciliary foreign personal representative is entitled to payment or delivery.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

4-202

PAYMENT OR DELIVERY DISCHARGES

Payment or delivery made in good faith on the basis of the proof of authority and affidavit releases the debtor or person having possession of the personal property to the same extent as if payment or delivery had been made to a local personal representative.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

4-203

RESIDENT CREDITOR NOTICE

Payment or delivery under Section 4-201 may not be made if a resident creditor of the nonresident decedent has notified the debtor of the nonresident decedent or the person having possession of the personal property belonging to the nonresident decedent that the debt should not be paid nor the property delivered to the domiciliary foreign personal representative.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

4-204

PROOF OF AUTHORITY; BOND

If no local administration or application or petition therefor is pending in this state, a domiciliary foreign personal representative may file with a court in this state in a [county] in which property belonging to the decedent is located, authenticated copies of his appointment and of any official bond he has given.

Maine Probate Code Proposed Comments This section removes the requirement under former Maine section 4-204 that the foreign personal representative also must file proof of current authority.

4-205

POWERS

A domiciliary foreign personal representative who has complied with Section 4-204 may exercise as to assets in this state all powers of a local personal representative, and may maintain actions and proceedings in this state subject to any conditions imposed upon nonresident parties generally.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

4-206

POWER OF REPRESENTATIVES IN TRANSITION

The power of a domiciliary foreign personal representative under Section 4-201 or 4-205 shall be exercised only if there is no administration or application therefor pending in this state. An application or petition for local administration of the estate terminates the power of the foreign personal representative to act under Section 4-205, but the local court may allow the foreign personal representative to exercise limited powers to preserve the estate. No person who before receiving actual notice of a pending local administration has changed his position in reliance upon the powers of a foreign personal representative shall be prejudiced by reason of the application or petition for, or grant of, local administration. The local personal representative is subject to all duties and obligations which have accrued by virtue of the exercise of the powers by the foreign personal representative and may be substituted for him in any action or proceedings in this state.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

4-207

ANCILLARY AND OTHER LOCAL ADMINISTRATIONS; PROVISIONS GOVERNING

In respect to a nonresident decedent, the provisions of [Article] III of this [code] govern: (1) proceedings, if any, in a court of this state for probate of the will, appointment, removal, supervision, and discharge of the local personal representative, and any other order concerning the estate; and (2) the status, powers, duties and liabilities of any local personal representative and the rights of claimants, purchasers, distributees and others in regard to a local administration.

Maine Probate Code Proposed Comments The language does not constitute a substantive change Maine law.

4-301

JURISDICTION BY ACT OF FOREIGN PERSONAL REPRESENTATIVE

A foreign personal representative, submits personally to the jurisdiction of the courts of this state in any proceeding relating to the estate by (i) filing authenticated copies of his appointment as provided in Section 4-204, (ii) receiving payment of money or taking delivery of personal property under Section 4-201, or (iii) doing any act as a personal representative in this state which would have given the state jurisdiction over him as an individual. Jurisdiction under clause (ii) is limited to the money or value of personal property collected.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

4-302

JURISDICTION BY ACT OF DECEDENT

In addition to jurisdiction conferred by Section 4-301, a foreign personal representative is subject to the jurisdiction of the courts of this state to the same extent that his decedent was subject to jurisdiction immediately prior to death.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

4-303

SERVICE ON FOREIGN PERSONAL REPRESENTATIVE

~~(a) Service of process may be made upon the foreign personal representative by registered or certified mail, addressed to his last reasonably ascertainable address, requesting a return receipt signed by addressee only. Notice by ordinary first class mail is sufficient if registered or certified mail service to the addressee is unavailable. Service may be made upon a foreign personal representative in the manner in which service could have been made under other laws of this state on either the foreign personal representative or his decedent immediately prior to death.~~

~~(b) If service is made upon a foreign personal representative as provided in subsection (a), he shall be allowed at least [30] days within which to appear or respond.~~

Service of process may be made upon the foreign personal representative in such manner as the Supreme Judicial Court shall by rule provide.

4-401
EFFECT OF ADJUDICATION FOR OR AGAINST PERSONAL REPRESENTATIVE
An adjudication rendered in any jurisdiction in favor of or against any personal representative of the estate is as binding on the local personal representative as if he were a party to the adjudication.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

5-101
SHORT TITLE.
This {article} may be cited as the Uniform Guardianship and Protective Proceedings Act.

5-102
DEFINITIONS.
<p>In this {article}:</p> <p>(1) “Conservator” means a person who is appointed by a court to manage the estate of a protected person. The term includes a limited conservator.</p> <p>(1-A). <u>The "best interest of the minor" is as determined in Title 19-A, section 1653, subsection 3.</u></p> <p>(2) “Court” means the {designate appropriate court} <u>any one of the several courts of probate of this State established as provided in Title 4, sections 201 and 202.</u></p> <p>(3) “Guardian” means a person who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent or spouse, or by the court. The term includes a limited, emergency, and temporary substitute guardian but not a guardian ad litem.</p> <p>(4) “Incapacitated person” means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate <u>informed</u> decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with <u>reasonably available</u> appropriate technological assistance.</p> <p>(5) “Legal representative” includes the lawyer for the respondent, a representative payee, a guardian or conservator acting for a respondent in this state or elsewhere, a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary, and an agent designated under a power of attorney, whether for health care or property, in which the respondent is identified as the principal.</p> <p>(6) “Minor” means an unemancipated individual who has not attained {18} years of age.</p> <p>(7) “Parent” means a parent whose parental rights have not been terminated.</p> <p>(8) “Protected person” means a minor or other individual for whom a conservator has been appointed or other</p>

protective order has been made.

(9) “Respondent” means an individual for whom the appointment of a guardian or conservator or other protective order is sought.

(10) “Ward” means an individual for whom a guardian has been appointed.

Maine Probate Code Proposed Comments In the UPC definition of “incapacitated person,” Maine has inserted “informed” before “decisions.” Lack of capacity to make an “informed” decision is a statutory condition for involuntary treatment in a psychiatric hospital. “Informed” consent to treatment is a term used in other healthcare contexts. This change to the uniform language promotes consistency across Maine statutes related to capacity to decide or consent.

Also in that definition, the Maine has inserted “reasonably available” before “technological assistance.” There is an argument to be made that if technological assistance exists to address functional deficits, a guardianship or conservatorship is not “least restrictive.” However, under the UPC language, if the respondent cannot afford technological assistance and if the assistance is not otherwise available, the respondent is precluded from getting either technological assistance or the protection that guardianship or conservatorship would provide.

“Best interest of the minor” is undefined in the UPC. Maine retains a definition of best interest of the minor, using currently existing criteria in Title 19-A to promote uniformity across Maine statutes.

The UPC does not include definitions of “de facto guardian” and “demonstrated lack of consistent participation,” both added to the former Maine Probate Code as part of P.L. 2005 ch. 371, § 2, which law provided rights to adults who were caring for minors, but not under court appointment. The UPC treatment of persons “other than a parent or guardian having care or custody of a minor” provides those individuals notice of guardianship proceedings, opportunity to object, and potential guardianship appointment.

5-103

[RESERVED.]

5-104

FACILITY OF TRANSFER.

(a) Unless a person required to transfer money or personal property to a minor knows that a conservator has been appointed or that a proceeding for appointment of a conservator of the estate of the minor is pending, the person may do so, as to an amount or value not exceeding ~~[\$10,000]~~ a year, by transferring it to:

- (1) a person who has the care and custody of the minor and with whom the minor resides;
- (2) a guardian of the minor;
- (3) a custodian under the Uniform Transfers To Minors Act or custodial trustee under the Uniform

Custodial Trust Act; ~~or~~

(4) a financial institution as a deposit in an interest-bearing account or certificate in the sole name of the minor and giving notice of the deposit to the minor; or

(5) the minor, if married.

(b) A person who transfers money or property in compliance with this section is not responsible for its proper application.

(c) A guardian or other person who receives money or property for a minor under subsection (a)(1) or (2) may only apply it to the support, care, education, health, and welfare of the minor, and may not derive a personal financial benefit except for reimbursement for necessary expenses. Any excess must be preserved for the future support, care, education, health, and welfare of the minor, and any balance must be transferred to the minor upon emancipation or attaining majority.

Maine Probate Code Proposed Comments Maine adopts the Uniform Probate Code, with a single change to allow transfer of funds under this provision to a married minor. This is consistent with other statutes treating married minors as adults, such as 22 M.R.S.A. § 1503, which gives married minors authority to give consent for healthcare services. With the exception of an increase of the permitted transfer amount from \$5000 to \$10,000, this does not constitute a substantive change to Maine law.

5-105

DELEGATION OF POWER BY PARENT OR GUARDIAN.

(a) A parent or a guardian of a minor or incapacitated person, by a power of attorney, may delegate to another person, for a period not exceeding ~~six~~ twelve months, any power regarding care, custody or property of the minor or ward, except the power to consent to marriage or adoption.

(b). Notwithstanding subsection (a), unless otherwise stated in the power of attorney, if the parent or guardian is a member of the National Guard or Reserves of the United States Armed Forces under an order to active duty for a period of more than 30 days, a power of attorney that would otherwise expire is automatically extended until 30 days after the parent or guardian is no longer under those active duty orders or until an order of the court so provides.

This subsection applies only if the parent or guardian's service is in support of:

(1). An operational mission for which members of the reserve components have been ordered to active duty without their consent; or

(2). Forces activated during a period of war declared by Congress or a period of national emergency declared by the President or Congress.

Maine Probate Code Proposed Comments Maine adopts the UPC, with two exceptions. First, Maine uses a 12-month effective period for a power of attorney rather than the 6-month period in the UPC. Second, Maine provides

for an automotive extension for parents on active military duty. Adoption of the UPC removes the requirement under former Maine law that a delegation by a court-appointed guardian through a power of attorney be filed with the court.

5-106

SUBJECT-MATTER JURISDICTION.

(a) Except to the extent the guardianship is subject to the ~~insert citation to~~ Uniform Child Custody Jurisdiction and Enforcement Act], the court of this state has jurisdiction over guardianship for minors domiciled or present in this state. The court of this state has jurisdiction over protective proceedings for minors domiciled in or having property located in this state.

(b) The court of this state has jurisdiction over guardianship and protective proceedings for an adult individual as provided in the ~~insert citation to~~ Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.]

Maine Probate Code Proposed Comments Maine adopts the UPC language concerning jurisdiction. This does not change the Probate Court's role as the exclusive court in the State of Maine with jurisdiction over guardianship and protective proceedings for minors and adults, except as that jurisdiction may be reserved specifically to another court.

NOTE: Provisions of 4 M.R.S. §253 will have to be amended.

5-107

TRANSFER OF JURISDICTION.

(a) Except as otherwise provided in subsection (b), the following rules apply:

(1) After the appointment of a guardian or conservator or entry of another protective order, the court making the appointment or entering the order may transfer the proceeding to a court in another {county} in this state or to another state if the court is satisfied that a transfer will serve the best interest of the ward or protected person.

(2) If a guardianship or protective proceeding is pending in another state or a foreign country and a petition for guardianship or protective proceeding is filed in a court in this state, the court in this state shall notify the original court and, after consultation with the original court, assume or decline jurisdiction, whichever is in the best interest of the ward or protected person.

(3) A guardian, conservator, or like fiduciary appointed in another state may petition the court for appointment as a guardian or conservator in this state if venue in this state is or will be established. The appointment may be made upon proof of appointment in the other state and presentation of a certified copy of the portion of the court record in the other state specified by the court in this state. Notice of hearing on the petition, together with a copy of the petition, must be given to the ward or protected person, if the ward or protected person has attained 14 years of age, and to the persons who would be entitled to notice if the regular procedures for appointment of a guardian or conservator under this {article} were applicable. The court shall make the appointment in this state unless

it concludes that the appointment would not be in the best interest of the ward or protected person. On the filing of an acceptance of ~~office~~ appointment and any required bond, the court shall issue appropriate letters of guardianship or conservatorship. Not later than 14 days after an appointment, the guardian or conservator shall send or deliver a copy of the order of appointment to the ward or protected person, if the ward or protected person has attained 14 years of age, and to all persons given notice of the hearing on the petition.

(b) This section does not apply to a guardianship or protective proceeding for an adult individual that is subject to the transfer provisions of ~~{insert citation to Article 3 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007)}~~ sections 5-531 and 5-532.

5-108

VENUE.

(a) Venue for a guardianship proceeding for a minor is in the {county} of this state in which the minor resides or is present at the time the proceeding is commenced.

(b) Venue for a guardianship proceeding for an incapacitated person is in the {county} of this state in which the respondent resides and, if the respondent has been admitted to an institution by order of a court of competent jurisdiction, in the {county} in which the court is located. Venue for the appointment of an emergency or a temporary substitute guardian of an incapacitated person is also in the {county} in which the respondent is present.

(c) Venue for a protective proceeding is in the {county} of this state in which the respondent resides, whether or not a guardian has been appointed in another place or, if the respondent does not reside in this state, in any {county} of this state in which property of the respondent is located.

(d) If a proceeding under this {article} is brought in more than one {county} in this state, the court of the {county} in which the proceeding is first brought has the exclusive right to proceed unless that court determines that venue is properly in another court or that the interests of justice otherwise require that the proceeding be transferred.

5-109

[RESERVED.]

5-110

LETTERS OF ~~OFFICE~~ APPOINTMENT.

Upon the guardian's filing of an acceptance of ~~office~~ appointment, the court shall issue appropriate letters of

guardianship. Upon the conservator's filing of an acceptance of ~~office~~ appointment and any required bond, the court shall issue appropriate letters of conservatorship. Letters of guardianship must indicate whether the guardian was appointed by the court, a parent, or the spouse. Any limitation on the powers of a guardian or conservator or of the assets subject to a conservatorship must be endorsed on the guardian's or conservator's letters.

Maine Probate Code Proposed Comments This section expands previous Maine law by stating content requirements for letters of appointment.

5-111

EFFECT OF ACCEPTANCE OF APPOINTMENT.

By accepting appointment, a guardian or conservator submits personally to the jurisdiction of the court in any proceeding relating to the guardianship or conservatorship. The petitioner shall send or deliver notice of any proceeding to the guardian or conservator at the guardian's or conservator's address shown in the court records and at any other address then known to the petitioner.

Maine Probate Code Proposed Comments Language does not constitute a substantive change to Maine law.

5-112

TERMINATION OF OR CHANGE IN GUARDIAN'S OR CONSERVATOR'S APPOINTMENT.

(a) The appointment of a guardian or conservator terminates upon the death, resignation, or removal of the guardian or conservator or upon termination of the guardianship or conservatorship. A resignation of a guardian or conservator is effective when approved by the court. ~~†~~A parental or spousal appointment as guardian under an informally probated will terminates if the will is later denied probate in a formal proceeding.~~†~~ Termination of the appointment of a guardian or conservator does not affect the liability of either for previous acts or the obligation to account for money and other assets of the ward or protected person.

(b) A ward, protected person, or person interested in the welfare of a ward or protected person may petition for removal of a guardian or conservator on the ground that removal would be in the best interest of the ward or protected person or for other good cause. A guardian or conservator may petition for permission to resign. A petition for removal or permission to resign may include a request for appointment of a successor guardian or conservator.

(c) The court may appoint an additional guardian or conservator at any time, to serve immediately or upon some other designated event, and may appoint a successor guardian or conservator in the event of a vacancy or make the appointment in contemplation of a vacancy, to serve if a vacancy occurs. An additional or successor guardian or conservator may file an acceptance of appointment at any time after the appointment, but not later than 30 days after the occurrence of the vacancy or other designated event. The additional or successor guardian or conservator becomes

eligible to act on the occurrence of the vacancy or designated event, or the filing of the acceptance of appointment, whichever last occurs. A successor guardian or conservator succeeds to the predecessor's powers, and a successor conservator succeeds to the predecessor's title to the protected person's assets.

Maine Probate Code Propose Comments This section adds to Maine law explicit authority to appoint contingent co-guardians or successor guardians or conservators.

5-113

NOTICE.

(a) Except as otherwise ordered by the court for good cause, if notice of a hearing on a petition is required, other than a notice for which specific requirements are otherwise provided, the petitioner shall give notice of the time and place of the hearing to the person to be notified. Notice must be given in ~~compliance with [insert the applicable rule of civil procedure]~~ such manner as the Supreme Judicial Court shall by rule provide at least 14 days before the hearing.

(b) Proof of notice must be made before or at the hearing and filed in the proceeding.

(c) A notice under this {article} must be given in plain language.

Maine Probate Code Propose Comments This section adds a plain language requirement to Maine law, and specifies that the petitioner must give the required notices.

5-114

WAIVER OF NOTICE.

A person may waive notice by a writing signed by the person or the person's attorney and filed in the proceeding. However, a respondent, ward, or protected person may not waive notice.

Maine Probate Code Propose Comments This section removes the authority under former Maine law, §5-309(b) and §5-405(a), for a ward or protected person to waive notice if he or she attended the hearing, or if the waiver was confirmed by his or her counsel, the guardian ad litem, or the visitor.

5-115

GUARDIAN AD LITEM.

At any stage of a proceeding, a court may appoint a guardian ad litem if the court determines that representation of the interest otherwise would be inadequate. If not precluded by a conflict of interest, a guardian ad litem may be

appointed to represent several individuals or interests. The court shall state on the record the duties of the guardian ad litem and its reasons for the appointment.

Maine Probate Code Propose Comments This section removes the specific requirements of former sections §1-112, §5-303, and § 5-407 addressing appointment and duties of guardians ad litem in guardianship and conservatorship proceedings. This section consolidates the appointment sections, and gives the court discretion and a duty to tailor the role of the guardian ad litem to the circumstances.

5-116

REQUEST FOR NOTICE; INTERESTED PERSONS.

An interested person not otherwise entitled to notice who desires to be notified before any order is made in a guardianship proceeding, including a proceeding after the appointment of a guardian, or in a protective proceeding, may file a request for notice with the clerk of the court in which the proceeding is pending. The clerk shall send or deliver a copy of the request to the guardian and to the conservator if one has been appointed. A request is not effective unless it contains a statement showing the interest of the person making it and the address of that person or a lawyer to whom notice is to be given. The request is effective only as to proceedings conducted after its filing. A governmental agency paying or planning to pay benefits to the respondent or protected person is an interested person in a protective proceeding.

Maine Probate Code Propose Comments This section expands previous Maine law by allowing an individual not otherwise entitled to notice to receive notice in a guardianship or a conservatorship proceeding, provided that the individual has provide a statement showing the individual's interest and an address to which notice should be sent.

5-117

MULTIPLE APPOINTMENTS OR NOMINATIONS.

If a respondent or other person makes more than one written appointment or nomination of a guardian or a conservator, the most recent controls.

5-201

APPOINTMENT AND STATUS OF GUARDIAN.

A person becomes a guardian of a minor by parental appointment or upon appointment by the court. The guardianship status continues until terminated, without regard to the location of the guardian or minor ward. This

section does not apply to permanency guardians appointed in District Court child protective proceedings. If a minor has a permanency guardian, the court may not appoint another guardian without leave of the District Court in which the child protective proceeding is pending.

Maine Probate Code Propose Comments Maine law (22 M.R.S. § 4038-C) permits District Courts in child protective proceedings to appoint a permanency guardian. The Maine Probate Code departs from the Uniform Probate Code to recognize that authority and to assure that the Probate Court does not appoint a guardian without leave of the District Court if the District Court has appointed a permanency guardian.

5-202

PARENTAL APPOINTMENT OF GUARDIAN.

(a) A guardian may be appointed by will or other signed writing by a parent for any minor child the parent has or may have in the future. The appointment may specify the desired limitations on the powers to be given to the guardian. The appointing parent may revoke or amend the appointment before confirmation by the court.

(b) Upon petition of an appointing parent and a finding that the appointing parent will likely become unable to care for the child within {two} years, and after notice as provided in Section 5-205(a), the court, before the appointment becomes effective, may confirm the parent's selection of a guardian and terminate the rights of others to object.

(c) Subject to Section 5-203, the appointment of a guardian becomes effective upon the appointing parent's death, an adjudication that the parent is an incapacitated person, or a written determination by a physician who has examined the parent that the parent is no longer able to care for the child, whichever first occurs.

(d) The guardian becomes eligible to act upon the filing of an acceptance of appointment, which must be filed within 30 days after the guardian's appointment becomes effective. The guardian shall:

(1) file the acceptance of appointment and a copy of the will with the court of the {county} in which the will was or could be probated or, in the case of another appointing instrument, file the acceptance of appointment and the appointing instrument with the court of the {county} in which the minor resides or is present; and

(2) give written notice of the acceptance of appointment to the appointing parent, if living, the minor, if the minor has attained 14 years of age, and a person other than the parent having care and custody of the minor.

(e) Unless the appointment was previously confirmed by the court, the notice given under subsection (d)(2) must include a statement of the right of those notified to terminate the appointment by filing a written objection in the court as provided in Section 5-203.

(f) Unless the appointment was previously confirmed by the court, within 30 days after filing the notice and the appointing instrument, a guardian shall petition the court for confirmation of the appointment, giving notice in the manner provided in Section 5-205(a).

(g) The appointment of a guardian by a parent does not supersede the parental rights of either parent. If both

parents are dead or have been adjudged incapacitated persons, an appointment by the last parent who died or was adjudged incapacitated has priority. An appointment by a parent which is effected by filing the guardian's acceptance under a will probated in the state of the testator's domicile is effective in this state.

(h) The powers of a guardian who timely complies with the requirements of subsections (d) and (f) relate back to give acts by the guardian which are of benefit to the minor and occurred on or after the date the appointment became effective the same effect as those that occurred after the filing of the acceptance of the appointment.

(i) The authority of a guardian appointed under this section terminates upon the first to occur of the appointment of a guardian by the court or the giving of written notice to the guardian of the filing of an objection pursuant to Section 5-203.

Maine Probate Code Propose Comments The UPC provisions permitting parental appointment of a so-called stand-by guardian are new to Maine law.

5-203

OBJECTION BY MINOR OR OTHERS TO PARENTAL APPOINTMENT.

Until the court has confirmed an appointee under Section 5-202, a minor who is the subject of an appointment by a parent and who has attained 14 years of age, the other parent, or a person other than a parent or guardian having care or custody of the minor may prevent or terminate the appointment at any time by filing a written objection in the court in which the appointing instrument is filed and giving notice of the objection to the guardian and any other persons entitled to notice of the acceptance of the appointment. An objection may be withdrawn, and if withdrawn is of no effect. The objection does not preclude judicial appointment of the person selected by the parent. The court may treat the filing of an objection as a petition for the appointment of an emergency or a temporary guardian under Section 5-204, and proceed accordingly.

5-204

JUDICIAL APPOINTMENT OF GUARDIAN: CONDITIONS FOR APPOINTMENT.

- (a) A minor or a person interested in the welfare of a minor may petition for appointment of a guardian.
- (b) The court may appoint a guardian for a minor if the court finds the appointment is in the minor's best interest, and:
 - (1) the parents consent;
 - (2) all parental rights have been terminated; or
 - (3) the parents are unwilling or unable to exercise their parental rights.
- (c) If a guardian is appointed by a parent pursuant to Section 5-202 and the appointment has not been

prevented or terminated under Section 5-203, that appointee has priority for appointment. However, the court may proceed with another appointment upon a finding that the appointee under Section 5-202 has failed to accept the appointment within 30 days after notice of the guardianship proceeding.

~~(d) If necessary and on petition or motion and whether or not the conditions of subsection (b) have been established, the court may appoint a temporary guardian for a minor upon a showing that an immediate need exists and that the appointment would be in the best interest of the minor. Notice in the manner provided in Section 5-113 must be given to the parents and to a minor who has attained 14 years of age. Except as otherwise ordered by the court, the temporary guardian has the authority of an unlimited guardian, but the duration of the temporary guardianship may not exceed six months. Within five days after the appointment, the temporary guardian shall send or deliver a copy of the order to all individuals who would be entitled to notice of hearing under Section 5-205.~~

~~(e) If the court finds that following the procedures of this [part] will likely result in substantial harm to a minor's health or safety and that no other person appears to have authority to act in the circumstances, the court, on appropriate petition, may appoint an emergency guardian for the minor. The duration of the guardian's authority may not exceed [30] days and the guardian may exercise only the powers specified in the order. Reasonable notice of the time and place of a hearing on the petition for appointment of an emergency guardian must be given to the minor, if the minor has attained 14 years of age, to each living parent of the minor, and a person having care or custody of the minor, if other than a parent. The court may dispense with the notice if it finds from affidavit or testimony that the minor will be substantially harmed before a hearing can be held on the petition. If the guardian is appointed without notice, notice of the appointment must be given within 48 hours after the appointment and a hearing on the appropriateness of the appointment held within [five] days after the appointment.~~

~~(d) If necessary, the court may appoint a temporary guardian, with the status of an ordinary guardian of a minor, but the authority of a temporary guardian may not last longer than 6 months, except as provided in subsection (e).~~

Notice of hearing on the petition for the appointment of a temporary guardian must be served as provided under section 5-113 and section 5-205, except that the notice must be given at least 5 days before the hearing, and notice need not be given to any person whose address and present whereabouts are unknown and cannot be ascertained by due diligence. Upon a showing of good cause, the court may waive service of the notice of hearing on any person, other than the minor, if the minor is at least 14 years of age.

(e) If one of the parents of a minor is a member of the National Guard or the Reserves of the United States Armed Forces under an order to active duty for a period of more than 30 days, a temporary guardianship that would otherwise expire is automatically extended until 30 days after the parent is no longer under those active duty orders or until an order of the court so provides. This subsection applies only if the parent's service is in support of:

(1). An operational mission for which members of the reserve components have been ordered to active duty without their consent; or

(2). Forces activated during a period of war declared by Congress or a period of national emergency declared by the President or Congress.

(f) A nonconsenting parent whose parental rights have not been terminated is entitled to court-appointed legal

counsel if indigent. In a contested action, the court may also appoint counsel for any indigent guardian or petitioner when a parent or legal custodian has counsel.

(g) In a proceeding on a petition for judicial appointment of a guardian, the court may order a parent to pay child support in accordance with Title 19-A, Part 3. When the Department of Health and Human Services provides child support enforcement services, the Commissioner of Health and Human Services may designate employees of the department who are not attorneys to represent the department in court if a hearing is held. The commissioner shall ensure that appropriate training is provided to all employees who are designated to represent the department under this paragraph.

(h) If the court appoints a limited guardian, the court shall specify the duties and powers of the guardian, as required in section 5-110 and section 5-206, and any parental rights and responsibilities retained by the parent of the minor.

Maine Probate Code Propose Comments Maine does not adopt the temporary and emergency guardianship language of the UPC. The existing process in Maine, including authority to issue orders for transitional arrangements, accommodates prompt disposition and appropriate protections for participants in the context of Maine's part-time Probate Courts. Maine also retains additional protections, previously codified in the last three paragraphs of 18-A M.R.S. § 5-204(d), in 5-204(f), (g) and (h), concerning legal representation for indigent parents, cost-effective participation of child support enforcement agents in guardianship proceedings, and specifying any parental rights retained if a limited guardian is appointed.

5-205

JUDICIAL APPOINTMENT OF GUARDIAN: PROCEDURE.

(a) After a petition for appointment of a guardian is filed, the court shall schedule a hearing, and the petitioner shall give notice of the time and place of the hearing, together with a copy of the petition, to:

- (1) the minor, if the minor has attained 14 years of age and is not the petitioner;
- (2) any person alleged to have had the primary care and custody of the minor during the 60 days before the filing of the petition;
- (3) each living parent of the minor or, if there is none, the adult nearest in kinship that can be found;
- (4) any person nominated as guardian by the minor if the minor has attained 14 years of age;
- (5) any appointee of a parent whose appointment has not been prevented or terminated under Section 5-203; and
- (6) any guardian or conservator currently acting for the minor in this state or elsewhere.

(b) The court, upon hearing, shall make the appointment if it finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the conditions of Section 5-204(b) have been met, and the best interest of the minor will be served by the appointment. In other cases, the court may dismiss the proceeding or make

any other disposition of the matter that will serve the best interest of the minor.

(c) If the court determines at any stage of the proceeding, before or after appointment, that the interests of the minor are or may be inadequately represented, it may appoint a lawyer to represent the minor, giving consideration to the choice of the minor if the minor has attained 14 years of age.

Maine Probate Code Propose Comments This section adds to the people entitled to notice of a guardianship petition, but otherwise does not constitute a substantive change to Maine law.

5-206

JUDICIAL APPOINTMENT OF GUARDIAN: PRIORITY OF MINOR’S NOMINEE; LIMITED GUARDIANSHIP.

(a) The court shall appoint as guardian or co-guardians a person or persons whose appointment will be in the best interest of the minor. The court shall appoint a person or persons nominated by the minor, if the minor has attained 14 years of age, unless the court finds the appointment will be contrary to the best interest of the minor.

(b) In the interest of developing self-reliance of a ward or for other good cause, the court, at the time of appointment or later, on its own motion or on motion of the minor or other interested person, may limit the powers of a guardian or co-guardians otherwise granted by this {part} and thereby create a limited guardianship. Following the same procedure, the court may grant additional powers or withdraw powers previously granted.

Maine Probate Code Propose Comments This section adds a specific criterion for limiting the power of guardian in the interest of developing self-reliance of a ward, consistent with adult guardianship statute. This section removes the prohibition under previous Maine law against appointing a guardian who intends to remove the minor from the state for purposes of adoption, leaving the decision as to the minor’s best interest in the sound discretion of the court.

5-207

DUTIES OF GUARDIAN.

(a) Except as otherwise limited by the court, a guardian of a minor ward has the duties and responsibilities of a parent regarding the ward’s support, care, education, health, and welfare. A guardian shall act at all times in the ward’s best interest and exercise reasonable care, diligence, and prudence.

(b) A guardian shall:

(1) become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward’s capacities, limitations, needs, opportunities, and physical and mental health;

(2) take reasonable care of the ward’s personal effects and bring a protective proceeding if necessary to protect other property of the ward;

(3) expend money of the ward which has been received by the guardian for the ward's current needs for support, care education, health, and welfare;

(4) conserve any excess money of the ward for the ward's future needs, but if a conservator has been appointed for the estate of the ward, the guardian shall pay the money at least quarterly to the conservator to be conserved for the ward's future needs;

(5) report the condition of the ward and account for money and other assets in the guardian's possession or subject to the guardian's control, as ordered by the court on application of any person interested in the ward's welfare or as required by court rule; and

(6) inform the court of any change in the ward's custodial dwelling or address.

Maine Probate Code Propose Comments This section expands the statutory duties of a guardian under previous Maine law, requiring the guardian to become and remain acquainted with a ward, and to inform the court of a change in the ward's address, but this section does not otherwise constitute a substantive change to Maine law.

5-208

POWERS OF GUARDIAN.

(a) Except as otherwise limited by the court, a guardian of a minor ward has the powers of a parent regarding the ward's support, care, education, health, and welfare.

(b) A guardian may:

(1) apply for and receive money for the support of the ward otherwise payable to the ward's parent, guardian, or custodian under the terms of any statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship;

(2) if otherwise consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the ward and establish the ward's place of custodial dwelling, but may only establish or move the ward's custodial dwelling outside the state upon express authorization of the court;

(3) if a conservator for the estate of a ward has not been appointed with existing authority, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the ward or to pay money for the benefit of the ward;

(4) except as limited by section 8-506, consent to medical or other care, treatment, or service for the ward;

(5) consent to the marriage of the ward; and

(6) if reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

(c) The court may specifically authorize the guardian to consent to the adoption of the ward.

(d) If co-guardians are appointed, the powers of the guardians are joint and several, unless limited by the appointing document.

Maine Probate Code Propose Comments The Maine amendments to the UPC reconcile it with section 5-806 of the Uniform Healthcare Decisions Act (18-A M.R.S. §§ 5-801 – 5-818), which section limits certain health care decision-making by the guardian.

The Maine amendments also assure that people who rely on a co-guardian’s authority to act may rely on the consent or action of either co-guardian separately.

5-209

RIGHTS AND IMMUNITIES OF GUARDIAN.

(a) A guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room, board, and clothing provided by the guardian to the ward, but only as approved by the court. If a conservator, other than the guardian or a person who is affiliated with the guardian, has been appointed for the estate of the ward, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court.

(b) A guardian need not use the guardian’s personal funds for the ward’s expenses. A guardian is not liable to a third person for acts of the ward solely by reason of the guardianship. A guardian is not liable for injury to the ward resulting from the negligence or act of a third person providing medical or other care, treatment, or service for the ward except to the extent that a parent would be liable under the circumstances.

5-210

TERMINATION OF GUARDIANSHIP; OTHER PROCEEDINGS AFTER APPOINTMENT.

(a) A guardianship of a minor terminates upon the minor’s death, adoption, emancipation, marriage, or attainment of majority or as ordered by the court.

(b) A ward or a person interested in the welfare of a ward may petition for any order that is in the best interest of the ward. The petitioner shall give notice of the hearing on the petition to the ward, if the ward has attained 14 years of age and is not the petitioner, the guardian, and any other person as ordered by the court.

Maine Probate Code Propose Comments Maine adopts the UPC, but retains a provision traditional in Maine that the marriage of a minor ward terminates a guardianship.

5-211
TRANSITIONAL ARRANGEMENT FOR MINORS
<u>In issuing, modifying or terminating an order of guardianship for a minor, the court may enter an order providing for transitional arrangements for the minor if the court determines that such arrangements will assist the minor with a transition of custody and are in the best interest of the minor. Orders providing for transitional arrangements may include, but are not limited to, rights of contact, housing, counseling or rehabilitation.</u>
Maine Probate Code Propose Comments The UPC has no provision concerning transitional arrangements for minors. This section carries forward the former 18-A M.R.S. § 5-213, enacted in 2011, to support transition arrangements in the best interest of the minor. See comment for § 5-204.

5-301
Appointment and Status of Guardian.
A person becomes a guardian of an incapacitated person by a parental, or spousal, <u>or domestic partner</u> appointment, or upon appointment by the court. The guardianship continues until terminated, without regard to the location of the guardian or ward.
Maine Probate Code Propose Comments This section modifies the UPC to treat domestic partners in a manner comparable to their treatment in other sections of the MPC.

5-302
Appointment of Guardian By Will or Other Writing.
(a) A parent, by will or other signed writing, may appoint a guardian for an unmarried child who the parent believes is an incapacitated person, specify desired limitations on the powers to be given to the guardian, and revoke or amend the appointment before confirmation by the court.
(b) An individual, by will or other signed writing, may appoint a guardian for the individual's spouse <u>or domestic partner</u> who the appointing spouse <u>or domestic partner</u> believes is an incapacitated person, specify desired limitations on the powers to be given to the guardian, and revoke or amend the appointment before confirmation by the court.
(c) The incapacitated person, the person having care or custody of the incapacitated person if other than the appointing parent, <u>domestic partner</u> or spouse, or the adult nearest in kinship to the incapacitated person may file a written objection to an appointment, unless the court has confirmed the appointment under subsection (d). The filing of the written objection terminates the appointment. An objection may be withdrawn and, if withdrawn, is of no effect. The objection does not preclude judicial appointment of the person selected by the parent, <u>domestic partner</u> or

spouse. Notice of the objection must be given to the guardian and any other person entitled to notice of the acceptance of the appointment. The court may treat the filing of an objection as a petition for the appointment of an emergency guardian under Section 5-312 or for the appointment of a limited or unlimited guardian under Section 5-304 and proceed accordingly.

(d) Upon petition of the appointing parent, domestic partner or spouse, and a finding that the appointing parent, domestic partner or spouse will likely become unable to care for the incapacitated person within {two} years, and after notice as provided in this section, the court, before the appointment becomes effective, may confirm the appointing parent's, domestic partner or spouse's selection of a guardian and terminate the rights of others to object.

Maine Probate Code Propose Comments This section modifies the UPC to treat domestic partners in a manner comparable to their treatment in other sections of the MPC. The UPC provisions permitting parental or spousal appointment of a so-called stand-by guardian are new to Maine law.

5-303

Appointment of Guardian By Will or Other Writing: Effectiveness; Acceptance; Confirmation.

(a) The appointment of a guardian under Section 5-302 becomes effective upon the death of the appointing parent, domestic partner or spouse, the adjudication of incapacity of the appointing parent, domestic partner or spouse, or a written determination by a physician who has examined the appointing parent, domestic partner or spouse that the appointing parent, domestic partner or spouse is no longer able to care for the incapacitated person, whichever first occurs.

(b) A guardian appointed under Section 5-302 becomes eligible to act upon the filing of an acceptance of appointment, which must be filed within 30 days after the guardian's appointment becomes effective. The guardian shall:

(1) file the notice of acceptance of appointment and a copy of the will with the court of the {county} in which the will was or could be probated or, in the case of another appointing instrument, file the acceptance of appointment and the appointing instrument with the court in the {county} in which the incapacitated person resides or is present; and

(2) give written notice of the acceptance of appointment to the appointing parent, domestic partner or spouse if living, the incapacitated person, a person having care or custody of the incapacitated person other than the appointing parent, domestic partner or spouse, and the adult nearest in kinship.

(c) Unless the appointment was previously confirmed by the court, the notice given under subsection (b)(2) must include a statement of the right of those notified to terminate the appointment by filing a written objection as provided in Section 5-302.

(d) An appointment effected by filing the guardian's acceptance under a will probated in the state of the testator's domicile is effective in this state.

(e) Unless the appointment was previously confirmed by the court, within 30 days after filing the notice and the appointing instrument, a guardian appointed under Section 5-302 shall file a petition in the court for confirmation of the appointment. Notice of the filing must be given in the manner provided in Section 5-309.

(f) The authority of a guardian appointed under Section 5-302 terminates upon the appointment of a guardian by the court or the giving of written notice to the guardian of the filing of an objection pursuant to Section 5-302, whichever first occurs.

(g) The appointment of a guardian under this section is not a determination of incapacity.

(h) The powers of a guardian who timely complies with the requirements of subsections (b) and (e) relate back to give acts by the guardian which are of benefit to the incapacitated person and occurred on or after the date the appointment became effective the same effect as those that occurred after the filing of the acceptance of appointment.

Maine Probate Code Propose Comments The section modifies the UPC to treat domestic partners in a manner comparable to their treatment in other sections of the MPC.

5-304

Judicial Appointment of Guardian: Petition.

(a) An individual or a person interested in the individual's welfare may petition for a determination of incapacity, in whole or in part, and for the appointment of a limited or unlimited guardian, for the individual.

(b) The petition must set forth the petitioner's name, residence, current address if different, relationship to the respondent, and interest in the appointment and, to the extent known, state or contain the following with respect to the respondent and the relief requested:

(1) the respondent's name, age, principal residence, current street address, and, if different, the address of the dwelling in which it is proposed that the respondent will reside if the appointment is made;

(2) the name and address of the respondent's:

(A) spouse, or if the respondent has none, an adult with whom the respondent has resided for more than six months before the filing of the petition; and

(B) adult children or, if the respondent has none, the respondent's parents and adult brothers and sisters, or if the respondent has none, at least one of the adults nearest in kinship to the respondent who can be found, or, if none, an adult friend if any can be found;

(3) the name and address of any person responsible for care or custody of the respondent;

(4) the name and address of any legal representative of the respondent;

(5) the name and address of any person nominated as guardian by the respondent;

(6) the name and address of any proposed guardian and the reason why the proposed guardian should be selected;

(7) the reason why guardianship is necessary, including a brief description of the nature and extent of

the respondent's alleged incapacity;

(8) if an unlimited guardianship is requested, the reason why limited guardianship is inappropriate and, if a limited guardianship is requested, the powers to be granted to the limited guardian; and

(9) a general statement of the respondent's property with an estimate of its value, including any insurance or pension, and the source and amount of any other anticipated income or receipts.

(c) The person nominated to serve as guardian shall file a plan which, where relevant, shall include, but not be limited to, the type of proposed living arrangement for the respondent, how the respondent's financial needs will be met, how the respondent's medical and other remedial needs will be met, how the respondent's social needs will be met and a plan for the respondent's continuing contact with relatives and friends.

(d) The respondent must be examined by a physician, a psychologist, or other individual who is qualified to evaluate the respondent's alleged impairment. The person who examines the respondent shall submit a report in writing to the court, providing diagnoses, a description of the respondent's actual mental and functional limitations, and prognoses.

Maine Probate Code Propose Comments This section modifies the UPC to add subsections (c) and (d), requiring a guardianship plan and a certification from a health care provider, consistent with former 18-A M.R.S. § 5-303(a) and (b).

5-305

Judicial Appointment of Guardian: Preliminaries to Hearing.

(a) Upon receipt of a petition to establish a guardianship, the court shall set a date and time for hearing the petition and appoint a {visitor}. The duties and reporting requirements of the {visitor} are limited to the relief requested in the petition. The {visitor} must be an individual having training or experience in the type of incapacity alleged.

Alternative A

(b) The court shall appoint a lawyer to represent the respondent in the proceeding if:

- (1) requested by the respondent;
- (2) recommended by the {visitor}; or
- (3) the court determines that the respondent needs representation.

Alternative B

~~(b) Unless the respondent is represented by a lawyer, the court shall appoint a lawyer to represent the respondent in the proceeding, regardless of the respondent's ability to pay.~~

End of Alternatives

(c) The {visitor} shall interview the respondent in person and, to the extent that the respondent is able to understand:

- (1) explain to the respondent the substance of the petition, the nature, purpose, and effect of the proceeding, the respondent's rights at the hearing, and the general powers and duties of a guardian;
 - (2) determine the respondent's views about the proposed guardian, the proposed guardian's powers and duties, and the scope and duration of the proposed guardianship;
 - (3) inform the respondent of the right to employ and consult with a lawyer at the respondent's own expense and the right to request a court-appointed lawyer; and
 - (4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, will be paid from the respondent's estate.
- (d) In addition to the duties imposed by subsection (c), the {visitor} shall:
- (1) interview the petitioner and the proposed guardian;
 - (2) visit the respondent's present dwelling and any dwelling in which the respondent will live if the appointment is made;
 - (3) obtain information from any physician or other person who is known to have treated, advised, or assessed the respondent's relevant physical or mental condition; and
 - (4) make any other investigation the court directs.
- (e) The {visitor} shall promptly file a report in writing with the court, which must include:
- (1) a recommendation as to whether a lawyer should be appointed to represent the respondent;
 - (2) a summary of daily functions the respondent can manage without assistance, could manage with the assistance of supportive services or benefits, including use of appropriate technological assistance, and cannot manage;
 - (3) recommendations regarding the appropriateness of guardianship, including as to whether less restrictive means of intervention are available, the type of guardianship, and, if a limited guardianship, the powers to be granted to the limited guardian;
 - (4) a statement of the qualifications of the proposed guardian, together with a statement as to whether the respondent approves or disapproves of the proposed guardian, and the powers and duties proposed or the scope of the guardianship;
 - (5) a statement as to whether the proposed dwelling meets the respondent's individual needs;
 - (6) a recommendation as to whether a professional evaluation or further evaluation is necessary; and
 - (7) any other matters the court directs.

Legislative Note: ~~Those states that enact Alternative B of subsection (b) which requires appointment of counsel for the respondent in all proceedings for appointment of a guardian should not enact subsection (e)(1).~~

Maine Probate Code Propose Comments Maine adopts UPC Alternative A, permitting the court to retain discretion existing under former Maine law not to appoint a lawyer in uncontested proceedings.

Judicial Appointment of Guardian: Professional Evaluation.

At or before a hearing under this {part}, the court may order a professional evaluation of the respondent and shall order the evaluation if the respondent so demands demands or if necessary to satisfy the requirements of section 5-304(d). The cost of the evaluation must be paid from the estate of the allegedly incapacitated person if the court is satisfied sufficient funds are available. If the court orders the evaluation, the respondent must be examined by a physician, psychologist, or other individual appointed by the court who is qualified to evaluate the respondent’s alleged impairment. The examiner shall promptly file a written report with the court. Unless otherwise directed by the court, the report must contain:

- (1) a description of the nature, type, and extent of the respondent’s specific cognitive and functional limitations;
 - (2) an evaluation of the respondent’s mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;
 - (3) a prognosis for improvement and a recommendation as to the appropriate treatment or habilitation plan;
- and
- (4) the date of any assessment or examination upon which the report is based.

Maine Probate Code Propose Comments This section modifies the UPC to grant the court specific authority to order the examination required under § 5-304(d), and so that the costs of evaluation are treated as the costs of a visitor, a guardian ad litem, or a court-appointed attorney were treated under former 18-A M.R.S. § 5-303(b).

5-307

Confidentiality of Records.

The written report of a {visitor} and any professional evaluation are confidential and must be sealed upon filing. ~~but~~ The person who files the visitor’s report or a professional evaluation must provide notice of filing and a copy of the report or evaluation to the respondent at the time of filing. Copies of the report or evaluation are available to:

- (1) the court;
 - (2) the respondent without limitation as to use;
- And, unless the respondent files an objection with the court within 10 days of receiving a copy of the report or evaluation, with a showing of good cause, copies of the report are available to:
- (3) the petitioner, the {visitor}, and the petitioner’s and respondent’s lawyers, for purposes of the proceeding;
- and
- (4) other persons for such purposes as the court may order for good cause.

Maine Probate Code Propose Comments This section is new, with no previous counterpart in the MPC. This

section modifies the UPC to provide the respondent with an opportunity to object to an interested party's access to reports or evaluations that would otherwise be made available to that party.

5-308

Judicial Appointment of Guardian: Presence and Rights at Hearing.

(a) Unless excused by the court for good cause, the proposed guardian shall attend the hearing. ~~The In~~
~~contested proceedings, the~~ respondent shall attend ~~and participate in~~ the hearing, unless excused by the court for good cause. The respondent may present evidence and subpoena witnesses and documents; examine witnesses, including any court-appointed physician, psychologist, or other individual qualified to evaluate the alleged impairment, and the {visitor}; and otherwise participate in the hearing. The hearing may be held in a location convenient to the respondent, or may be held by telephonic or other electronic conferencing, and may be closed upon the request of the respondent and a showing of good cause. The court may allow any interested person to attend a hearing by telephonic or other electronic conferencing.

(b) Any person may request permission to participate in the proceeding. The court may grant the request, with or without hearing, upon determining that the best interest of the respondent will be served. The court may attach appropriate conditions to the participation.

Maine Probate Code Propose Comments This section modifies the UPC to require the respondent's attendance only in contested proceedings, to eliminate the requirement that the respondent "participate" in the hearing, and to allow telephonic or other electronic participation in hearings, in keeping with the practice in most of Maine's probate courts.

5-309

Notice.

(a) A copy of a petition for guardianship and notice of the hearing on the petition must be served personally on the respondent. The notice must (i) include a statement that the respondent must be physically present unless excused by the court informing the respondent of the respondent's right to attend the hearing in uncontested proceedings, and of the respondent's obligation to be present at the hearing in contested proceedings unless excused by the court, (ii) inform the respondent of the respondent's rights at the hearing, and (iii) include a description of the nature, purpose, and consequences of an appointment. A failure to serve the respondent with a notice substantially complying with this subsection precludes the court from granting the petition.

(b) In a proceeding to establish a guardianship, notice of the hearing must be given to the persons listed in the petition. Failure to give notice under this subsection does not preclude the appointment of a guardian or the making of a protective order.

(c) Notice of the hearing on a petition for an order after appointment of a guardian, together with a copy of the petition, must be given to the ward, the guardian, and any other person the court directs.

(d) A guardian shall give notice of the filing of the guardian's report, together with a copy of the report, to the ward and any other person the court directs. The notice must be delivered or sent within 14 days after the filing of the report.

Maine Probate Code Propose Comments This section modifies the UPC for consistency with the Maine modifications to UPC § 5-308.

5-310

Who May Be Guardian: Priorities.

(a) Subject to subsection (c), the court in appointing a guardian shall consider persons otherwise qualified in the following order of priority:

(1) a guardian, other than a temporary or emergency guardian, currently acting for the respondent in this state or elsewhere;

(2) a person nominated as guardian by the respondent, including the respondent's most recent nomination made in a durable power of attorney, if at the time of the nomination the respondent had sufficient capacity to express a preference;

(3) an agent appointed by the respondent under ~~{a durable power of attorney for health care}~~ ~~{the Uniform Health-Care Decisions Act(1993)}~~;

(4) the spouse or domestic partner of the respondent or an individual nominated by will or other signed writing of a deceased spouse or deceased domestic partner;

(5) an adult child of the respondent;

(6) a parent of the respondent, or an individual nominated by will or other signed writing of a deceased parent; ~~and~~

(7) an adult with whom the respondent has resided for more than six months before the filing of the petition; and

(8) a person nominated by the person who is caring for the respondent or paying benefits to the respondent.

(b) With respect to persons having equal priority, the court shall select the one it considers best qualified. The court, acting in the best interest of the respondent, may decline to appoint a person having priority and appoint a person having a lower priority or no priority.

(c) An owner, operator, or employee of ~~{a long-term-care institution}~~ at which the respondent is receiving care may not be appointed as guardian unless related to the respondent by blood, marriage, or adoption, or unless a domestic partner of the respondent.

Maine Probate Code Propose Comments This section modifies the UPC to treat domestic partners in a manner comparable to their treatment elsewhere in the MPC.

The former MPC § 5-311(b)(5) gave priority to a “relative” with whom the respondent has resided. Adoption of the UPC gives priority to an “adult” with whom the respondent has resided. This section carries forward from the former MPC § 5-311(b)(6) consideration, as a last priority for guardianship, of a person nominated by someone who is caring for the respondent or is paying benefits to the respondent.

5-311

FINDINGS; ORDER OF APPOINTMENT.

(a) The court may:

(1) appoint a limited or unlimited guardian or co-guardians for a respondent only if it finds by clear and convincing evidence that:

(A) the respondent is an incapacitated person; and

(B) the respondent’s identified needs cannot be met by less restrictive means, including use of appropriate reasonably available technological assistance; or

(2) with appropriate findings, treat the petition as one for a protective order under Section 5-401, enter any other appropriate order, or dismiss the proceeding.

(b) The court, whenever feasible, shall grant to a guardian only those powers necessitated by the ward’s limitations and demonstrated needs and make appointive and other orders that will encourage the development of the ward’s maximum self-reliance and independence.

(c) Within 14 days after an appointment, a guardian shall send or deliver to the ward and to all other persons given notice of the hearing on the petition a copy of the order of appointment, together with a notice of the right to request termination or modification.

Maine Probate Code Propose Comments See Maine comment to § 5-102.

5-312

EMERGENCY GUARDIAN.

(a) If the court finds that compliance with the procedures of this {part} will likely result in substantial harm to the respondent’s health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances, the court, on petition by a person interested in the respondent’s welfare, may appoint an emergency guardian whose authority may not exceed ~~{60} days~~ 6 months and who may exercise only the powers specified in the order. A petition for emergency guardianship must be accompanied by an affidavit that sets forth the factual basis for

the emergency and the specific powers requested by the proposed guardian. Immediately upon receipt of the petition for an emergency guardianship, the court shall appoint a lawyer to represent the respondent in the proceeding. Except as otherwise provided in subsection (b), reasonable notice of the time and place of a hearing on the petition must be given to the respondent and the respondent's spouse, parents, adult children, any domestic partner known to the court, and any other persons as the court directs.

(b) An emergency guardian may be appointed without notice to the respondent and the respondent's lawyer and others described in subsection (a) only if the court finds from affidavit or testimony that the respondent will suffer serious, immediate and irreparable harm be substantially harmed before a hearing on the appointment can be held. If the court appoints an emergency guardian without notice to the respondent, the respondent must be given notice of the appointment within 48 hours after the appointment. The court shall hold a hearing on the appropriateness of the appointment within [five] days after the appointment.

(b-1) If the court takes action to appoint an emergency guardian, then the court, within 2 days, excluding Saturdays, Sundays and legal holidays, of taking the action, shall appoint a visitor or guardian ad litem to visit the respondent and make a report to the court within 10 days of the appointment of the visitor or guardian ad litem. The visitor or guardian ad litem shall serve the respondent with a copy of the order appointing the emergency guardian and shall explain the meaning and consequences of the appointment. The visitor or guardian ad litem shall inquire of the respondent whether that person wishes to contest any aspect of the emergency guardianship or seek any limitation of the emergency guardian's powers. The visitor or guardian ad litem shall advise the respondent of that person's right to be represented in the proceeding by counsel of that person's own choice or by counsel appointed by the court. The visitor or guardian ad litem shall also interview the emergency guardian, except in cases where the court itself has taken action to exercise the powers of an emergency guardian. In the report to the court, the visitor or guardian ad litem shall inform the court that the respondent has received a copy of the order appointing the emergency guardian. The visitor or guardian ad litem shall advise the court if circumstances indicate the respondent wishes to contest any aspect of the emergency guardianship or seek a limitation of the emergency guardian's powers and whether the respondent is already represented by counsel. The visitor or guardian ad litem shall also advise the court whether any issue exists with respect to whether the appointment of the emergency guardian is in the respondent's best interest.

(b-2) If it comes to the court's attention, through the report of the visitor or guardian ad litem or otherwise, that the respondent wishes to contest any aspect of the emergency guardianship or seek a limitation of the emergency guardian's powers, or that an issue exists with respect to whether the emergency guardianship is in the respondent's best interest, the court shall hold an expedited hearing on the appropriateness of the appointment within forty (40) days after the appointment. The court may continue the expedited hearing if the petitioner and the attorney for the respondent, or, if none, the visitor or the guardian ad litem, agree to such a continuance. The court may continue the hearing on its own motion due to circumstances beyond the control of the court and the parties, provided the hearing is held within 60 days of the signing of the order. If the appointment of a guardian is contested by the respondent and the person is not already represented by an attorney, the court shall appoint counsel to represent the respondent in the proceeding. The cost of the appointment of the visitor, guardian ad litem or attorney must be paid from the estate of the respondent if the court is satisfied that sufficient funds are available. At the hearing, the petitioner has the burden

of showing by clear and convincing evidence that emergency guardianship continues to be necessary to provide the person with continuing care, protection or support pending a final hearing.

(b-3) Notice of the expedited hearing must be served as provided in section 5-309, except that the notice must be given at least 5 days before the expedited hearing, and notice need not be served on any person whose address or present whereabouts is unknown and cannot be ascertained by due diligence. The court may waive service of the expedited hearing on any person, other than the respondent, upon a showing of good cause.

(c) Appointment of an emergency guardian, with or without notice, is not a determination of the respondent's incapacity.

(d) The court may remove an emergency guardian at any time. An emergency guardian shall make any report the court requires. In other respects, the provisions of this {article} concerning guardians apply to an emergency guardian.

Maine Probate Code Propose Comments This section adopts the UPC in part, but retains the role under former MPC § 5-310-A of the visitor and guardian ad litem in cases of emergency guardianships. Given the nature of the probate courts in the State of Maine, it is not practical to require the assignment of a lawyer immediately upon the receipt of a petition for an emergency guardian, or to adopt the shortened time limits contained in the UPC. Partly for that reason, Maine continues to require the filing of an affidavit with the petition for emergency appointment, setting forth the factual basis for the emergency and the powers requested, as in former MPC § 5-310-A. The role of the guardian ad litem and visitor will continue to ensure that the respondent's interests are represented, without limiting the court's authority to appoint a lawyer for the respondent at a later time on a case-by-case basis.

This section carries forward from the former MPC § 5-310-A a heightened standard of harm as the basis for an ex parte appointment.

Instead of adopting the shorter time limits contained in the UPC, this section integrates provisions of the former MPC § 5-310-A providing for emergency appointment to be followed by a visit with a guardian ad litem or visitor.

5-313

TEMPORARY SUBSTITUTE GUARDIAN.

(a) If the court finds that a guardian is not effectively performing the guardian's duties and that the welfare of the ward requires immediate action, it may appoint a temporary substitute guardian for the ward for a specified period not exceeding six months. Except as otherwise ordered by the court, a temporary substitute guardian so appointed has the powers set forth in the previous order of appointment. The authority of any unlimited or limited guardian previously appointed by the court is suspended as long as a temporary substitute guardian has authority. If an appointment is made without previous notice to the ward or the affected guardian, the court, within five days after the appointment, shall inform the ward or guardian of the appointment.

(b) The court may remove a temporary substitute guardian at any time. A temporary substitute guardian shall make any report the court requires. In other respects, the provisions of this ~~article~~ concerning guardians apply to a temporary substitute guardian.

Maine Probate Code Propose Comments This section removes the statutory prohibition under previous Maine law against a temporary guardian seeking involuntary hospitalization of a ward outside the State. However, the court retains discretion to impose limits on the authority of a temporary substitute guardian.

5-314

DUTIES OF GUARDIAN.

(a) Except as otherwise limited by the court, a guardian shall make decisions regarding the ward's support, care, education, health, and welfare. A guardian shall exercise authority only as necessitated by the ward's limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian. A guardian at all times shall act in the ward's best interest and exercise reasonable care, diligence, and prudence.

(b) A guardian shall:

- (1) become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;
- (2) take reasonable care of the ward's personal effects and bring protective proceedings if necessary to protect the property of the ward;
- (3) expend money of the ward that has been received by the guardian for the ward's current needs for support, care, education, health, and welfare;
- (4) conserve any excess money of the ward for the ward's future needs, but if a conservator has been appointed for the estate of the ward, the guardian shall pay the money to the conservator, at least quarterly, to be conserved for the ward's future needs;
- (5) immediately notify the court if the ward's condition has changed so that the ward is capable of exercising rights previously removed; and
- (6) inform the court of any change in the ward's custodial dwelling or address.

5-315

POWERS OF GUARDIAN.

(a) Except as otherwise limited by the court, a guardian may:

(1) apply for and receive money payable to the ward or the ward's guardian or custodian for the support of the ward under the terms of any statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship;

(2) if otherwise consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the ward and establish the ward's place of custodial dwelling, but may only establish or move the ward's place of dwelling outside this state upon express authorization of the court;

(3) if a conservator for the estate of the ward has not been appointed with existing authority, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the ward or to pay money for the benefit of the ward;

(4) except as limited by 18-A M.R.S. § 5-806, consent to medical or other care, treatment, or service for the ward;

(5) consent to the marriage or [divorce] of the ward; and

(6) if reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

(b) The court may specifically authorize the guardian to consent to the adoption of the ward.

(c) If co-guardians are appointed, the powers of the guardians are joint and several, unless limited by the appointing document.

Maine Probate Code Propose Comments The Maine amendments to the UPC reconcile it with section 5-806 of the Uniform Healthcare Decisions Act (18-A M.R.S. §§ 5-801 – 5-818), which section limits certain health care decisions by the guardian. The Maine amendments also assure that people who rely on a co-guardian's authority to act may rely on the consent or action of either co-guardian separately.

5-316

RIGHTS AND IMMUNITIES OF GUARDIAN; LIMITATIONS.

(a) A guardian is entitled to reasonable compensation for services as guardian based on the factors set forth in section 3-721(b) and to reimbursement for room, board, and clothing provided to the ward, but only as approved by order of the court. If a conservator, other than the guardian or one who is affiliated with the guardian, has been appointed for the estate of the ward, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court.

(b) A guardian need not use the guardian's personal funds for the ward's expenses. A guardian is not liable to a third person for acts of the ward solely by reason of the relationship. A guardian who exercises reasonable care in choosing a third person providing medical or other care, treatment, or service for the ward is not liable for injury to the ward resulting from the wrongful conduct of the third party.

(c) A guardian, without authorization of the court, may not revoke a power of attorney for health care {made pursuant to the Uniform Health-care Decisions Act (1993)} of which the ward is the principal. If a power of attorney for health care {pursuant to the Uniform Health-care Decisions Act (1993)} is in effect, absent an order of the court to the contrary, a health-care decision of the agent takes precedence over that of a guardian.

(d) A guardian may not initiate the commitment of a ward to a ~~mental health-care institution~~ psychiatric hospital except in accordance with the state's procedure for involuntary civil commitment.

Maine Probate Code Propose Comments Maine has amended subsection (d) to refer to a “psychiatric hospital” as opposed to a “mental health-care institution”, to conform to Title 34-B, Section 3863, which addresses involuntary civil commitment.

5-317

REPORTS; MONITORING OF GUARDIANSHIP.

(a) Within 30 days after appointment, a guardian shall report to the court in writing on the condition of the ward and account for money and other assets in the guardian's possession or subject to the guardian's control.

A guardian shall report at least annually thereafter ~~and whenever ordered by the court~~, or as otherwise specified by the court or provided by court rule. A report must state or contain:

- (1) the current mental, physical, and social condition of the ward;
- (2) the living arrangements for all addresses of the ward during the reporting period;
- (3) the medical, educational, vocational, and other services provided to the ward and the guardian's opinion as to the adequacy of the ward's care;

(4) a summary of the guardian's visits with the ward and activities on the ward's behalf and the extent to which the ward has participated in decision-making;

(5) if the ward is institutionalized, whether the guardian considers the current plan for care, treatment, or habilitation to be in the ward's best interest;

(6) plans for future care; and

(7) a recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship.

(b) The court may appoint a {visitor} or guardian ad litem to review a report, interview the ward or guardian, and make any other investigation the court directs.

~~(c) The court shall establish a system for monitoring guardianships, including the filing and review of annual reports. Reserved.~~

(d) Notwithstanding the requirements of paragraph (a), a guardian appointed before the effective date of this Act shall be required to report only as directed by the court.

Maine Probate Code Propose Comments This section allows the court discretion to direct the timing of reporting by guardians, and allows reporting requirements for guardianships existing on the effective date of the Act to remain in place unless altered by the court. It also allows courts to retain systems currently in place for monitoring.

5-318

TERMINATION OR MODIFICATION OF GUARDIANSHIP.

(a) A guardianship terminates upon the death of the ward or upon order of the court.

(b) On petition of a ward, a guardian, or another person interested in the ward's welfare, the court may terminate a guardianship if the ward no longer needs the assistance or protection of a guardian. The court may modify the type of appointment or powers granted to the guardian if the extent of protection or assistance previously granted is currently excessive or insufficient or the ward's capacity to provide for support, care, education, health, and welfare has so changed as to warrant that action.

(b-1) On petition of the guardian, the court may accept the guardian's resignation and make any other order that may be appropriate.

(b-2) On petition of the ward or any person interested in the ward's welfare, the court may remove a guardian and appoint a successor if in the best interest of the ward.

(c) Except as otherwise ordered by the court for good cause, the court, before terminating a guardianship or accepting the resignation of a guardian, shall follow the same procedures to safeguard the rights of the ward as apply to a petition for guardianship. Upon presentation by the petitioner of evidence establishing a prima facie case for termination, the court shall order the termination unless it is proven by clear and convincing evidence that continuation of the guardianship is in the best interest of the ward.

Maine Probate Code Proposed Comments The Maine amendments to the UPC include specific resignation provisions for the guardian; a provision to allow the ward or others to petition for removal of a guardian; and a requirement of clear and convincing evidence to show that continuing guardianship is in the best interest of the ward, once a prima facie case for termination has been made.

5-401

Protective Proceeding

Upon petition and after notice and hearing, the court may appoint a limited or unlimited conservator or make any other protective order provided in this {part} in relation to the estate and affairs of:

(1) a minor, if the court determines that the minor owns money or property requiring management or protection that cannot otherwise be provided or has or may have business affairs that may be put at risk or prevented because of the minor's age, or that money is needed for support and education and that protection is necessary or desirable to obtain or provide money; or

(2) any individual, including a minor, if the court determines that, for reasons other than age:

(A) by clear and convincing evidence, the individual is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make or communicate informed decisions, even with the use of appropriate reasonably available technological assistance, or because the individual is missing, detained, or unable to return to the United States; and

(B) by a preponderance of the evidence, the individual has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, education, health, and welfare of the individual or of individuals who are entitled to the individual's support and that protection is necessary or desirable to obtain or provide money.

(C) If an allegedly incapacitated adult files voluntary written consent to the appointment of a conservator with the court or appears in court and consents to the appointment, unless the court finds the consent suspect, the court may appoint a conservator as requested upon a finding by a preponderance of the evidence that the individual is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make or communicate informed decisions, even with the use of appropriate reasonably available technological assistance. For the purposes of this subsection, voluntary written consent is valid only if the consent was obtained by a visitor, a guardian ad litem or an attorney representing the allegedly incapacitated person and the allegedly incapacitated person gave the consent outside the presence of the person or persons seeking conservatorship.

Maine Probate Code Proposed Comments This section adds language about communicating informed consent and reasonably available technological assistance consistent with the additions to § 5-102 and the accompanying Maine comments.

This section adds subsection (C) to Section 2 of the UPC provision in order to retain the exception to the clear and convincing standard under former Maine law, 18-A M.R.S. § 5-401(2), for a conservatorship to which an allegedly incapacitated adult has consented.

5-402

Jurisdiction Over Business Affairs of Protected Person

After the service of notice in a proceeding seeking a conservatorship or other protective order and until termination of the proceeding, the court in which the petition is filed has:

- (1) exclusive jurisdiction to determine the need for a conservatorship or other protective order;
- (2) exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this state must be managed, expended, or distributed to or for the use of the protected person, individuals who are in fact dependent upon the protected person, or other claimants; and
- (3) concurrent jurisdiction to determine the validity of claims against the person or estate of the protected person and questions of title concerning assets of the estate.

5-403

Original Petition for Appointment or Protective Order

(a) The following may petition for the appointment of a conservator or for any other appropriate protective order:

- (1) the person to be protected;
- (2) an individual interested in the estate, affairs, or welfare of the person to be protected, including a parent, guardian, or custodian; or
- (3) a person who would be adversely affected by lack of effective management of the property and business affairs of the person to be protected.

(b) A petition under subsection (a) must set forth the petitioner's name, residence, current address if different, relationship to the respondent, and interest in the appointment or other protective order, and, to the extent known state or contain the following with respect to the respondent and the relief requested:

- (1) the respondent's name, age, principal residence, current street address, and, if different, the address of the dwelling where it is proposed that the respondent will reside if the appointment is made;
- (2) if the petition alleges impairment in the respondent's ability to receive and evaluate information, a brief description of the nature and extent of the respondent's alleged impairment;
- (3) if the petition alleges that the respondent is missing, detained, or unable to return to the United States, a statement of the relevant circumstances, including the time and nature of the disappearance or detention and a description of any search or inquiry concerning the respondent's whereabouts;
- (4) the name and address of the respondent's:
 - (A) spouse or, if the respondent has none, an adult with whom the respondent has resided for more than six months before the filing of the petition; and
 - (B) adult children or, if the respondent has none, the respondent's parents and adult brothers and sisters or, if the respondent has none, at least one of the adults nearest in kinship to the respondent who can be found, or, if none, an adult friend if any can be found;
- (5) the name and address of the person responsible for care or custody of the respondent;
- (6) the name and address of any legal representative of the respondent;
- (7) a general statement of the respondent's property with an estimate of its value, including any insurance or pension, and the source and amount of other anticipated income or receipts; and
- (8) the reason why a conservatorship or other protective order is in the best interest of the respondent.

(c) If a conservatorship is requested, the petition must also set forth to the extent known:

- (1) the name and address of any proposed conservator and the reason why the proposed conservator

should be selected;

(2) the name and address of any person nominated as conservator by the respondent if the respondent has attained 14 years of age; and

(3) the type of conservatorship requested and, if an unlimited conservatorship, the reason why limited conservatorship is inappropriate or, if a limited conservatorship, the property to be placed under the conservator's control and any limitation on the conservator's powers and duties.

Maine Probate Code Proposed Comments In conjunction with proposed 18-A M.R.S. § 5-404, this requires that notice of a protective proceeding be given to an adult friend if any can be found and if no family can be found. This is similar to the requirement of former 18-A M.R.S. § 5-405(a-1).

5-404

Notice

(a) A copy of the petition and the notice of hearing on a petition for conservatorship or other protective order must be served personally on the respondent, but if the respondent's whereabouts is unknown or personal service cannot be made, service on the respondent must be made by ~~substituted service~~ ~~or~~ ~~publication~~. The notice must include a statement that the respondent must be physically present unless excused by the court, inform the respondent of the respondent's rights at the hearing, and, if the appointment of a conservator is requested, include a description of the nature, purpose, and consequences of an appointment. A failure to serve the respondent with a notice substantially complying with this subsection precludes the court from granting the petition.

(b) In a proceeding to establish a conservatorship or for another protective order, notice of the hearing must be given to the persons listed in the petition. Failure to give notice under this subsection does not preclude the appointment of a conservator or the making of another protective order.

(c) Notice of the hearing on a petition for an order after appointment of a conservator or making of another protective order, together with a copy of the petition, must be given to the protected person, if the protected person has attained 14 years of age and is not missing, detained, or unable to return to the United States, any conservator of the protected person's estate, and any other person as ordered by the court.

(d) A conservator shall give notice of the filing of the conservator's inventory, report, or plan of conservatorship, together with a copy of the inventory, report, or plan of conservatorship to the protected person if the person can be located, has attained 14 years of age, and has sufficient mental capacity to understand these matters, and to any other person the court directs. The notice must be delivered or sent within 14 days after the filing of the inventory, report, or plan of conservatorship.

Maine Probate Code Proposed Comments This section adds language from the former 18-A M.R.S. § 5-418 limiting obligations to provide notice of filing of inventories, reports or plans to people who can be located, are at least

14 years of age, and are able to understand the filings.

5-405

Original Petition: Minors; Preliminaries to Hearing

(a) Upon the filing of a petition to establish a conservatorship or for another protective order for the reason that the respondent is a minor, the court shall set a date for hearing. If the court determines at any stage of the proceeding that the interests of the minor are or may be inadequately represented, it may appoint a lawyer to represent the minor, giving consideration to the choice of the minor if the minor has attained 14 years of age.

(b) While a petition to establish a conservatorship or for another protective order is pending, after preliminary hearing and without notice to others, the court may make orders to preserve and apply the property of the minor as may be required for the support of the minor or individuals who are in fact dependent upon the minor. The court may appoint a ~~master~~ visitor to assist in that task.

Maine Probate Code Proposed Comments Adoption of this section is not intended to change the existing Maine rule that a lawyer appointed by the court to represent a minor has the powers and duties of a guardian ad litem.

5-406

Original Petition: Preliminaries to Hearing

(a) Upon the filing of a petition for a conservatorship or other protective order for a respondent for reasons other than being a minor, the court shall set a date for hearing. The court shall appoint a {visitor} unless the petition does not request the appointment of a conservator and the respondent is represented by a lawyer. The duties and reporting requirements of the {visitor} are limited to the relief requested in the petition. The {visitor} must be an individual having training or experience in the type of incapacity alleged.

Alternative A

(b) The court shall appoint a lawyer to represent the respondent in the proceeding if:

- (1) requested by the respondent;
- (2) recommended by the {visitor}; or
- (3) the court determines that the respondent needs representation.

Alternative B

~~(b) Unless the respondent is represented by a lawyer, the court shall appoint a lawyer to represent the respondent in the proceeding, regardless of the respondent's ability to pay.~~

End of Alternatives

(c) The {visitor} shall interview the respondent in person and, to the extent that the respondent is able to understand:

- (1) explain to the respondent the substance of the petition and the nature, purpose, and effect of the proceeding;
- (2) if the appointment of a conservator is requested, inform the respondent of the general powers and duties of a conservator and determine the respondent's views regarding the proposed conservator, the proposed conservator's powers and duties, and the scope and duration of the proposed conservatorship;
- (3) inform the respondent of the respondent's rights, including the right to employ and consult with a lawyer at the respondent's own expense, and the right to request a court-appointed lawyer; and
- (4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, will be paid from the respondent's estate.

(d) In addition to the duties imposed by subsection (c), the {visitor} shall:

- (1) interview the petitioner and the proposed conservator, if any; and
- (2) make any other investigation the court directs.

(e) The {visitor} shall promptly file a report with the court, which must include:

- (1) a recommendation as to whether a lawyer should be appointed to represent the respondent;
- (2) recommendations regarding the appropriateness of a conservatorship, including whether less restrictive means of intervention are available, the type of conservatorship, and, if a limited conservatorship, the powers and duties to be granted the limited conservator, and the assets over which the conservator should be granted authority;
- (3) a statement of the qualifications of the proposed conservator, together with a statement as to whether the respondent approves or disapproves of the proposed conservator, and a statement of the powers and duties proposed or the scope of the conservatorship;
- (4) a recommendation as to whether a professional evaluation or further evaluation is necessary; and
- (5) any other matters the court directs.

(f) The court may also appoint a physician, psychologist, or other individual qualified to evaluate the alleged impairment to conduct an examination of the respondent.

(g) While a petition to establish a conservatorship or for another protective order is pending, after preliminary hearing and without notice to others, the court may issue orders to preserve and apply the property of the respondent as may be required for the support of the respondent or individuals who are in fact dependent upon the respondent. The court may appoint a ~~master~~ visitor to assist in that task.

Legislative Note: ~~Those states that enact Alternative B of subsection (b) which requires appointment of counsel for the respondent in all protective proceedings should not enact subsection (e)(1).~~

Maine Probate Code Proposed Comments This section adopts UPC Alternative A, permitting the court to retain discretion existing under former Maine law not to appoint a lawyer in uncontested proceedings.

5-407

Confidentiality of Records

The written report of a {visitor} and any professional evaluation are confidential and must be sealed upon filing. ~~but~~ The person who files the visitor’s report or a professional evaluation must provide notice of filing and a copy of the report or evaluation to the respondent at the time of filing. Copies of the report or evaluation are available to:

- (1) the court;
- (2) the respondent without limitation as to use;

And, unless the respondent files an objection with the court within 10 days of receiving a copy of the report or evaluation, with a showing of good cause, copies of the report are available to:

- (3) the petitioner, the {visitor}, and the petitioner’s and respondent’s lawyers, for purposes of the proceeding; and
- (4) other persons for such purposes as the court may order for good cause.

Maine Probate Code Proposed Comments This section modifies UPC § 5-407 to provide the respondent with an opportunity to object to an interested party’s access to reports or evaluations that would otherwise be made available to that party.

5-408

Original Petition: Procedure at Hearing

(a) Unless excused by the court for good cause, a proposed conservator shall attend the hearing. In a contested hearing, the ~~The~~ respondent shall attend ~~and participate in~~ the hearing, unless excused by the court for good cause. The respondent may present evidence and subpoena witnesses and documents, examine witnesses, including any court-appointed physician, psychologist, or other individual qualified to evaluate the alleged impairment, and the {visitor}, and otherwise participate in the hearing. The hearing may be held in a location convenient to the respondent, or by telephone or other electronic conferencing, and may be closed upon request of the respondent and a showing of good cause.

(b) Any person may request permission to participate in the proceeding. The court may grant the request, with or without hearing, upon determining that the best interest of the respondent will be served. The court may attach appropriate conditions to the participation.

Maine Probate Code Proposed Comments Maine has modified the UPC to require the respondent’s attendance only in contested proceedings, to eliminate the requirement that the respondent “participate” in the hearing, and to allow telephonic or other electronic participation in hearings, in keeping with the practice in most of Maine’s probate courts.

5-409
Original Petition: Orders
<p>(a) If a proceeding is brought for the reason that the respondent is a minor, after a hearing on the petition, upon finding that the appointment of a conservator or other protective order is in the best interest of the minor, the court shall make an appointment or other appropriate protective order.</p> <p>(b) If a proceeding is brought for reasons other than that the respondent is a minor, after a hearing on the petition, upon finding that a basis exists for a conservatorship or other protective order, the court shall make the least restrictive order consistent with its findings. The court shall make orders necessitated by the protected person's limitations and demonstrated needs, including appointive and other orders that will encourage the development of maximum self-reliance and independence of the protected person.</p> <p>(c) Within 14 days after an appointment, the conservator shall deliver or send a copy of the order of appointment, together with a statement of the right to seek termination or modification, to the protected person, if the protected person has attained 14 years of age and is not missing, detained, or unable to return to the United States, and to all other persons given notice of the petition.</p> <p>(d) The appointment of a conservator or the entry of another protective order is not a determination of incapacity of the protected person.</p>

5-410
Powers of Court
<p>(a) After hearing and upon determining that a basis for a conservatorship or other protective order exists, the court has the following powers, which may be exercised directly or through a conservator:</p> <ul style="list-style-type: none">(1) with respect to a minor for reasons of age, all the powers over the estate and business affairs of the minor which may be necessary for the best interest of the minor and members of the minor's immediate family; and(2) with respect to an adult, or to a minor for reasons other than age, for the benefit of the protected person and individuals who are in fact dependent on the protected person for support, all the powers over the estate and business affairs of the protected person which the person could exercise if the person were an adult, present, and not under conservatorship or other protective order. <p>(b) Subject to Section 5-110 requiring endorsement of limitations on the letters of office appointment, the court may limit at any time the powers of a conservator otherwise conferred and may remove or modify any limitation.</p>

5-411

Required Court Approval

- (a) After notice to interested persons and upon express authorization of the court, a conservator may:
- (1) make gifts, ~~except as not otherwise provided~~ authorized in Section 5-427(b);
 - (2) convey, release, or disclaim contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entireties;
 - (3) exercise or release a power of appointment;
 - (4) create a revocable or irrevocable trust of property of the estate, whether or not the trust extends beyond the duration of the conservatorship, or revoke or amend a trust revocable by the protected person;
 - (5) exercise rights to elect options and change beneficiaries under insurance policies and annuities or surrender the policies and annuities for their cash value;
 - (6) exercise any right to an elective share in the estate of the protected person's deceased spouse and to renounce or disclaim any interest by testate or intestate succession or by transfer inter vivos; and
 - (7) make, amend, or revoke the protected person's will.
- (b) A conservator, in making, amending, or revoking the protected person's will, shall comply with ~~the state's statute for executing wills~~ Title 18-A, Section 2-502, on the execution of wills.
- (c) The court, in exercising or in approving a conservator's exercise of the powers listed in subsection (a), shall consider primarily the decision that the protected person would have made, to the extent that the decision can be ascertained. The court shall also consider:
- (1) the financial needs of the protected person and the needs of individuals who are in fact dependent on the protected person for support and the interest of creditors;
 - (2) possible reduction of income, estate, inheritance, or other tax liabilities;
 - (3) eligibility for governmental assistance;
 - (4) the protected person's previous pattern of giving or level of support;
 - (5) the existing estate plan;
 - (6) the protected person's life expectancy and the probability that the conservatorship will terminate before the protected person's death; and
 - (7) any other factors the court considers relevant.
- (d) Without authorization of the court, a conservator may not revoke or amend a durable power of attorney of which the protected person is the principal. If a durable power of attorney is in effect, absent a court order to the contrary, a decision of the agent takes precedence over that of a conservator.

Maine Probate Code Proposed Comments This section amends UPC § 5-411(a)(1) to make it unambiguous. This section also removes the provision under previous Maine law (18-A M.R.S. § 5-408(6)(b), enacted by P.L. 2005, ch. 12, § DDD-4, as amended by P.L. 2011, ch. 155, § 1) prohibiting courts from authorizing gifts that would hasten a protected person's MaineCare eligibility.

5-412**Protective Arrangements and Single Transactions**

(a) If a basis is established for a protective order with respect to an individual, the court, without appointing a conservator, may:

(1) authorize, direct, or ratify any transaction necessary or desirable to achieve any arrangement for security, service, or care meeting the foreseeable needs of the protected person, including:

- (A) payment, delivery, deposit, or retention of funds or property;
- (B) sale, mortgage, lease, or other transfer of property;
- (C) purchase of an annuity;
- (D) making a contract for life care, deposit contract, or contract for training and education; or
- (E) addition to or establishment of a suitable trust ~~[, including a trust created under the Uniform~~

~~Custodial Trust Act (1987)]; and~~

(2) authorize, direct, or ratify any other contract, trust, will, or transaction relating to the protected person's property and business affairs, including a settlement of a claim, upon determining that it is in the best interest of the protected person.

(b) In deciding whether to approve a protective arrangement or other transaction under this section, the court shall consider the factors described in Section 5-411(c).

(c) The court may appoint a ~~[master]~~ visitor to assist in the accomplishment of any protective arrangement or other transaction authorized under this section. The ~~[master]~~-visitor has the authority conferred by the order and shall serve until discharged by order after report to the court.

Maine Probate Code Proposed Comments This section removes the provision under previous Maine law (18-A M.R.S. § 5-409(d), enacted by P.L. 2005, ch. 12, § DDD-6, as amended by P.L. 2011, ch. 155, § 1) prohibiting courts from authorizing gifts that would hasten a protected person's MaineCare eligibility.

5-413**Who May be Conservator: Priorities**

(a) Except as otherwise provided in subsection (d), the court, in appointing a conservator, shall consider persons otherwise qualified in the following order of priority:

- (1) a conservator, guardian of the estate, or other like fiduciary appointed or recognized by an appropriate court of any other jurisdiction in which the protected person resides;
- (2) a person nominated as conservator by the respondent, including the respondent's most recent nomination made in a durable power of attorney, if the respondent has attained 14 years of age and at the time of the nomination had sufficient capacity to express a preference;

(3) an agent appointed by the respondent to manage the respondent's property under a durable power of attorney;

(4) the spouse of the respondent;

(5) an adult child of the respondent;

(6) a parent of the respondent; and

(7) an adult with whom the respondent has resided for more than six months before the filing of the petition.

(b) A person having priority under subsection (a)(1), (4), (5), or (6) may designate in writing a substitute to serve instead and thereby transfer the priority to the substitute.

(c) With respect to persons having equal priority, the court shall select the one it considers best qualified. The court, acting in the best interest of the protected person, may decline to appoint a person having priority and appoint a person having a lower priority or no priority.

(d) An owner, operator, or employee of {a long-term care facility or institution} at which the respondent is receiving care may not be appointed as conservator unless related to the respondent by blood, marriage, or adoption.

Maine Probate Code Proposed Comments This section removes “domestic partner” from the priority list for consideration as conservator. The spousal priority now applies to same sex couples, and a person who has chosen not to marry may be considered later in the priority list as “an adult with whom the respondent has resided for more than six months.”

Although this section does not require it, the court may order the conservator to notify the court of any change of address.

5-414

Petition for Order Subsequent to Appointment

(a) A protected person or a person interested in the welfare of a protected person may file a petition in the appointing court for an order:

(1) requiring bond or collateral or additional bond or collateral, or reducing bond;

(2) requiring an accounting for the administration of the protected person's estate;

(3) directing distribution;

(4) removing the conservator and appointing a temporary or successor conservator;

(5) modifying the type of appointment or powers granted to the conservator if the extent of protection or management previously granted is currently excessive or insufficient or the protected person's ability to manage the estate and business affairs has so changed as to warrant the action; or

(6) granting other appropriate relief.

(b) A conservator may petition the appointing court for instructions concerning fiduciary responsibility.

(c) Upon notice and hearing the petition, the court may give appropriate instructions and make any appropriate order.

5-415

Bond

The court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the conservatorship according to law, with sureties as it may specify. Unless otherwise directed by the court, the bond must be in the amount of the aggregate capital value of the property of the estate in the conservator's control, plus one year's estimated income, and minus the value of assets deposited under arrangements requiring an order of the court for their removal and the value of any real property that the fiduciary, by express limitation, lacks power to sell or convey without court authorization. The court, in place of sureties on a bond, may accept collateral for the performance of the bond, including a pledge of securities or a mortgage of real property.

The following persons wishing to serve as conservators are exempt from furnishing a bond under this section:

- (1) A spouse;
- (2) A financial institution authorized to do business in this State as defined in Title 9-B, section 131, subsection 17-A, or their employees; and
- (3) A person who is already bonded in the course of the person's business if the bond is sufficient to cover the duties of conservator.

Maine Probate Code Proposed Comments This section carries forward statutory exceptions to bonding requirements found in former Maine law at 18-A MRSA § 5-411(c). Although this section does not require it, the court may order the conservator to notify the court if the conservator moves out of state, and the court may reassess the need for a bond at that time.

5-416

Terms and Requirements of Bond

(a) The following rules apply to any bond required:

- (1) Except as otherwise provided by the terms of the bond, sureties and the conservator are jointly and severally liable.
- (2) By executing the bond of a conservator, a surety submits to the jurisdiction of the court that issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the conservator in which the surety is named as a party. Notice of any proceeding must be sent or delivered to the surety at the address shown in the court records at the place where the bond is filed and to any other address then known to the petitioner.

(3) On petition of a successor conservator or any interested person, a proceeding may be brought against a surety for breach of the obligation of the bond of the conservator.

(4) The bond of the conservator may be proceeded against until liability under the bond is exhausted.

(b) A proceeding may not be brought against a surety on any matter as to which an action or proceeding against the primary obligor is barred.

Maine Probate Code Proposed Comments Language does not constitute a substantive change to Maine law.

5-417

Compensation and Expenses

If not otherwise compensated for services rendered, a guardian, conservator, lawyer for the respondent, lawyer whose services resulted in a protective order or in an order beneficial to a protected person's estate, or any other person appointed by the court is entitled to reasonable compensation from the estate. Compensation may be paid and expenses reimbursed without court order. If the court determines that the compensation is excessive or the expenses are inappropriate, the excessive or inappropriate amount must be repaid to the estate.

The factors set forth in section 3-721, subsection (b) should be considered in determining the reasonableness of compensation under this section.

5-418

General Duties of Conservator; Plan

(a) A conservator, in relation to powers conferred by this ~~part~~ or implicit in the title acquired by virtue of the proceeding, is a fiduciary and shall observe the standards of care applicable to a trustee.

(b) A conservator may exercise authority only as necessitated by the limitations of the protected person, and to the extent possible, shall encourage the person to participate in decisions, act in the person's own behalf, and develop or regain the ability to manage the person's estate and business affairs.

(c) Within 60 days after appointment, a conservator shall file with the appointing court a plan for protecting, managing, expending, and distributing the assets of the protected person's estate. The plan must be based on the actual needs of the person and take into consideration the best interest of the person. The conservator shall include in the plan steps to develop or restore the person's ability to manage the person's property, an estimate of the duration of the conservatorship, and projections of expenses and resources.

(d) In investing an estate, selecting assets of the estate for distribution, and invoking powers of revocation or withdrawal available for the use and benefit of the protected person and exercisable by the conservator, a conservator shall take into account any estate plan of the person known to the conservator and may examine the will and any other donative, nominative, or other appointive instrument of the person.

Maine Probate Code Proposed Comments While former Maine Probate Code section 5-418 required that a conservator provide a copy of an inventory to protected persons over 14 who were capable of understanding, by adopting the uniform code, Maine is endorsing a view of conservatorship that more clearly encourages participation by the protected person in management of his or her affairs to the maximum extent of the protected person's ability.

5-419

Inventory; Records

(a) Within 60 days after appointment, a conservator shall prepare and file with the appointing court a detailed inventory of the estate subject to the conservatorship, together with an oath or affirmation that the inventory is believed to be complete and accurate as far as information permits.

(b) A conservator shall keep records of the administration of the estate and make them available for examination on reasonable request of an interested person.

Maine Probate Code Proposed Comments This section removes specific provisions under previous Maine law concerning sanctions for failure to file an inventory. The court retains discretion to impose any appropriate sanctions and take other necessary steps based on breach of fiduciary duty.

5-420

Reports; Appointment of {Visitor}; Monitoring

(a) A conservator shall report to the court for administration of the estate annually unless the court otherwise directs, upon resignation or removal, upon termination of the conservatorship, and at other times as the court directs. An order, after notice and hearing, allowing an intermediate report of a conservator adjudicates liabilities concerning the matters adequately disclosed in the accounting. An order, after notice and hearing, allowing a final report adjudicates all previously unsettled liabilities relating to the conservatorship.

(b) A report must state or contain:

(1) a list of the assets of the estate under the conservator's control and a list of the receipts, disbursements, and distributions during the period for which the report is made;

(2) a list of the services provided to the protected person; and

(3) any recommended changes in the plan for the conservatorship as well as a recommendation as to the continued need for conservatorship and any recommended changes in the scope of the conservatorship.

(c) The court may appoint a {visitor} to review a report or plan, interview the protected person or conservator, and make any other investigation the court directs. In connection with a report, the court may order a conservator to submit the assets of the estate to an appropriate examination to be made in a manner the court directs.

~~(d) The court shall establish a system for monitoring conservatorships, including the filing and review of conservators' reports and plans.~~ Reserved.

(e) Notwithstanding the preceding provisions of this Section, a private conservator appointed before January 2, 2008 shall not be required to submit reports pursuant to subsection (a), but shall only be required to submit such periodic reports as may be directed in the order of appointment.

(f) If the conservator fails without good cause to file the accounting required by the court, the court may require the conservator or the conservator's surety to pay to the protected person's estate a minimum of \$100 and a maximum of the amount the court determines is just to compensate the estate for any damage resulting from the failure to file the accounting. The payments required by this subsection are in addition to any other award or remedy available at law or in equity for fiduciary misconduct of the conservator.

Maine Probate Code Proposed Comments This section allows courts to retain systems currently in place for monitoring, and carries forward from the former 18-A M.R.S. § 5-419(d) penalty provisions related to failure of the conservator to file an accounting.

5-421

Title by Appointment

(a) The appointment of a conservator vests title in the conservator as trustee to all property of the protected person, or to the part thereof specified in the order, held at the time of appointment or thereafter acquired. An order vesting title in the conservator to only a part of the property of the protected person creates a conservatorship limited to assets specified in the order.

(b) Letters of conservatorship are evidence of vesting title of the protected person's assets in the conservator. An order terminating a conservatorship transfers title to assets remaining subject to the conservatorship, including any described in the order, to the formerly protected person, or the person's successors.

(c) Subject to the requirements of other statutes governing the filing or recordation of documents of title to land or other property, letters of conservatorship and orders terminating conservatorships may be filed or recorded to give notice of title as between the conservator and the protected person.

(d) The appointment of a conservator is not a transfer or alienation within the meaning of general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will or trust instrument, imposing restrictions upon or penalties for transfer or alienation by the protected person of his rights or interest, but this section

does not restrict the ability of persons to make specific provision by contract or dispositive instrument relating to a conservator.

Maine Probate Code Proposed Comments This section does not constitute a substantive change to Maine law.

5-422

Protected Person's Interest Inalienable

(a) Except as otherwise provided in subsections (c) and (d), the interest of a protected person in property vested in a conservator is not transferrable or assignable by the protected person. An attempted transfer or assignment by the protected person, although ineffective to affect property rights, may give rise to a claim against the protected person for restitution or damages which, subject to presentation and allowance, may be satisfied as provided in Section 5-429.

(b) Property vested in a conservator by appointment and the interest of the protected person in that property are not subject to levy, garnishment, or similar process for claims against the protected person unless allowed under Section 5-429.

(c) A person without knowledge of the conservatorship who in good faith and for security or substantially equivalent value receives delivery from a protected person of tangible personal property of a type normally transferred by delivery of possession, is protected as if the protected person or transferee had valid title.

(d) A third party who deals with the protected person with respect to property vested in a conservator is entitled to any protection provided in other law.

5-423

Sale, Encumbrance, or Other Transaction Involving Conflict of Interest

Any transaction involving the conservatorship estate which is affected by a substantial conflict between the conservator's fiduciary and personal interests is voidable unless the transaction is expressly authorized by the court after notice to interested persons. A transaction affected by a substantial conflict between personal and fiduciary interests includes any sale, encumbrance, or other transaction involving the conservatorship estate entered into by the conservator, the spouse, descendant, agent, or lawyer of a conservator, or a corporation or other enterprise in which the conservator has a substantial beneficial interest.

5-424**Protection of Person Dealing With Conservator**

(a) A person who assists or deals with a conservator in good faith and for value in any transaction other than one requiring a court order under Section 5-410 or 5-411 is protected as though the conservator properly exercised the power. That a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, but restrictions on powers of conservators which are endorsed on letters as provided in Section 5-110 are effective as to third persons. A person who pays or delivers assets to a conservator is not responsible for their proper application.

(b) Protection provided by this section extends to any procedural irregularity or jurisdictional defect that occurred in proceedings leading to the issuance of letters and is not a substitute for protection provided to persons assisting or dealing with a conservator by comparable provisions in other law relating to commercial transactions or to simplifying transfers of securities by fiduciaries.

Maine Probate Code Proposed Comments This language does not constitute a substantive change to Maine law.

5-425**Powers of Conservator In Administration**

(a) Except as otherwise qualified or limited by the court in its order of appointment and endorsed on the letters, a conservator has all of the powers granted in this section and any additional powers granted by law to a trustee in this state.

(b) A conservator, acting reasonably and in an effort to accomplish the purpose of the appointment, and without further court authorization or confirmation, may:

- (1) collect, hold, and retain assets of the estate, including assets in which the conservator has a personal interest and real property in another state, until the conservator considers that disposition of an asset should be made;
- (2) receive additions to the estate;
- (3) continue or participate in the operation of any business or other enterprise;
- (4) acquire an undivided interest in an asset of the estate in which the conservator, in any fiduciary capacity, holds an undivided interest;
- (5) invest assets of the estate as though the conservator were a trustee;
- (6) deposit money of the estate in a financial institution, including one operated by the conservator;
- (7) acquire or dispose of an asset of the estate, including real property in another state, for cash or on credit, at public or private sale, and manage, develop, improve, exchange, partition, change the character of, or abandon an asset of the estate;
- (8) make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any

improvements, and raze existing or erect new party walls or buildings;

(9) subdivide, develop, or dedicate land to public use, make or obtain the vacation of plats and adjust boundaries, adjust differences in valuation or exchange or partition by giving or receiving considerations, and dedicate easements to public use without consideration;

(10) enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the term of the conservatorship;

(11) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(12) grant an option involving disposition of an asset of the estate and take an option for the acquisition of any asset;

(13) vote a security, in person or by general or limited proxy;

(14) pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(15) sell or exercise stock-subscription or conversion rights;

(16) consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(17) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery;

(18) insure the assets of the estate against damage or loss and the conservator against liability with respect to a third person;

(19) borrow money, with or without security, to be repaid from the estate or otherwise and advance money for the protection of the estate or the protected person and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any assets, for which the conservator has a lien on the estate as against the protected person for advances so made;

(20) pay or contest any claim, settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise, and release, in whole or in part, any claim belonging to the estate to the extent the claim is uncollectible;

(21) pay taxes, assessments, compensation of the conservator and any guardian, and other expenses incurred in the collection, care, administration, and protection of the estate;

(22) allocate items of income or expense to income or principal of the estate, as provided by other law, including creation of reserves out of income for depreciation, obsolescence, or amortization or for depletion of minerals or other natural resources;

(23) pay any sum distributable to a protected person or individual who is in fact dependent on the protected person by paying the sum to the distributee or by paying the sum for the use of the distributee:

(A) to the guardian of the distributee;

(B) to a distributee's custodian under ~~{the Maine Uniform Transfers to Minors Act (1983/1986)}~~ or custodial trustee under ~~{the Uniform Custodial Trust Act (1987)}~~ the laws of another state; or

(C) if there is no guardian, custodian, or custodial trustee, to a relative or other person having physical

custody of the distributee;

(24) prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of assets of the estate and of the conservator in the performance of fiduciary duties; ~~and~~

(25) execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the conservator; ~~and~~

(26) Exercise any powers described in section 1-111 relating to compliance with environmental laws.

Maine Probate Code Proposed Comments This section eliminates the provision of prior Maine law giving a conservator of the estate of an unmarried minor, as to whom no one has parental rights, the duties and powers of a guardian of the minor, recognizing that a guardian of the minor can be appointed if needed. This section includes language in subparagraph 23(B) similar to language in the Maine Uniform Trust Code, 18-B M.R.S. § 816(21)(B), which recognizes that Maine has not adopted the Uniform Custodial Trust Act, but other states have.

5-426

Delegation

(a) A conservator may not delegate to an agent or another conservator the entire administration of the estate, but a conservator may otherwise delegate the performance of functions that a prudent trustee of comparable skills may delegate under similar circumstances.

(b) The conservator shall exercise reasonable care, skill, and caution in:

(1) selecting an agent;

(2) establishing the scope and terms of a delegation, consistent with the purposes and terms of the conservatorship;

(3) periodically reviewing an agent's overall performance and compliance with the terms of the delegation; and

(4) redressing an action or decision of an agent which would constitute a breach of trust if performed by the conservator.

(c) A conservator who complies with subsections (a) and (b) is not liable to the protected person or to the estate for the decisions or actions of the agent to whom a function was delegated.

(d) In performing a delegated function, an agent shall exercise reasonable care to comply with the terms of the delegation.

(e) By accepting a delegation from a conservator subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

Maine Probate Code Proposed Comments This section is new and had no previous counterpart in the Maine

Probate Code. It is analogous to section 807 of the Maine Uniform Trust Code.

5-427

Principles of Distribution by Conservator

(a) Unless otherwise specified in the order of appointment and endorsed on the letters of appointment or contrary to the plan filed pursuant to Section 5-418, a conservator may expend or distribute income or principal of the estate of the protected person without further court authorization or confirmation for the support, care, education, health, and welfare of the protected person and individuals who are in fact dependent on the protected person, including the payment of child or spousal support, in accordance with the following rules:

(1) A conservator shall consider recommendations relating to the appropriate standard of support, care, education, health, and welfare for the protected person or an individual who is in fact dependent on the protected person made by a guardian, if any, and, if the protected person is a minor, the conservator shall consider recommendations made by a parent.

(2) A conservator may not be surcharged for money paid to persons furnishing support, care, education, or benefit to a protected person, or an individual who is in fact dependent on the protected person, in accordance with the recommendations of a parent or guardian of the protected person unless the conservator knows that the parent or guardian derives personal financial benefit therefrom, including relief from any personal duty of support, or the recommendations are not in the best interest of the protected person.

(3) In making distributions under this subsection, the conservator shall consider:
(A) the size of the estate, the estimated duration of the conservatorship, and the likelihood that the protected person, at some future time, may be fully self-sufficient and able to manage business affairs and the estate;

(B) the accustomed standard of living of the protected person and individuals who are in fact dependent on the protected person; and

(C) other money or sources used for the support of the protected person.

(4) Money expended under this subsection may be paid by the conservator to any person, including the protected person, as reimbursement for expenditures that the conservator might have made, or in advance for services to be rendered to the protected person if it is reasonable to expect the services will be performed and advance payments are customary or reasonably necessary under the circumstances.

(b) If the estate is ample to provide for the distributions authorized by subsection (a), a conservator for a protected person other than a minor may make gifts that the protected person might have been expected to make, in amounts that do not exceed in the aggregate for any calendar year 20 percent of the income of the estate in that year.

Maine Probate Code Proposed Comments The UPC expands distributions permissible under former Maine law to include distributions not only for the health and welfare of the protected person but also for others who are in fact

dependent on the protected person without being dependents.

5-428

Death of Protected Person

{(a)} If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the protected person which may have come into the conservator's possession, inform the personal representative or beneficiary named in the will of the delivery, and retain the estate for delivery to the personal representative of the decedent or to another person entitled to it.

{(b) If a personal representative has not been appointed within 40 days after the death of a protected person and an application or petition for appointment is not before the court, the conservator may apply to exercise the powers and duties of a personal representative in order to administer and distribute the decedent's estate. Upon application for an order conferring upon the conservator the powers of a personal representative, after notice given by the conservator to

- (1) any person nominated as personal representative by any will of which the applicant is aware,
- (2) all of the decedent's heirs, and
- (3) all devisees of the will, if any,

the court may grant the application upon determining that there is no objection and endorse the letters of conservatorship to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative.

(c) The issuance of an order under this section has the effect of an order of appointment of a personal representative {as provided in Section 3-308 and {Parts}-6 through 10 of {Article} III}. However, the estate in the name of the conservator, after administration, may be distributed to the decedent's successors without retransfer to the conservator as personal representative.}

Maine Probate Code Proposed Comments This section includes requirements for notice to individuals likely to be affected by a conservator's request for authority to exercise the powers of a personal representative.

5-429

Presentation and Allowance of Claims

(a) A conservator may pay, or secure by encumbering assets of the estate, claims against the estate or against the protected person arising before or during the conservatorship upon their presentation and allowance in accordance with the priorities stated in subsection (d). A claimant may present a claim by:

(1) sending or delivering to the conservator a written statement of the claim, indicating its basis, the name and address of the claimant, and the amount claimed; or

(2) filing a written statement of the claim, in a form acceptable to the court, with the clerk of court and sending or delivering a copy of the statement to the conservator.

(b) A claim is deemed presented on receipt of the written statement of claim by the conservator or the filing of the claim with the court whichever first occurs. A presented claim is allowed if it is not disallowed by written statement sent or delivered by the conservator to the claimant within 60 days after its presentation. The conservator before payment may change an allowance to a disallowance in whole or in part, but not after allowance under a court order or judgment or an order directing payment of the claim. The presentation of a claim tolls the running of any statute of limitations relating to the claim until 30 days after its disallowance.

(c) A claimant whose claim has not been paid may petition the court for determination of the claim at any time before it is barred by a statute of limitations and, upon due proof, procure an order for its allowance, payment, or security by encumbering assets of the estate. If a proceeding is pending against a protected person at the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party shall give to the conservator notice of any proceeding that could result in creating a claim against the estate.

(d) If it appears that the estate is likely to be exhausted before all existing claims are paid, the conservator shall distribute the estate in money or in kind in payment of claims in the following order:

(1) costs and expenses of administration;

(2) claims of the federal or state government having priority under other law;

(3) claims incurred by the conservator for support, care, education, health, and welfare previously provided to the protected person or individuals who are in fact dependent on the protected person;

(4) claims arising before the conservatorship; and

(5) all other claims.

(e) Preference may not be given in the payment of a claim over any other claim of the same class, and a claim due and payable may not be preferred over a claim not due.

(f) If assets of the conservatorship are adequate to meet all existing claims, the court, acting in the best interest of the protected person, may order the conservator to grant a security interest in the conservatorship estate for payment of any or all claims at a future date.

Maine Probate Code Proposed Comments The UPC allows the conservator to disallow a claim at any time before it has been paid. This is a change from former Maine law.

5-430

Personal Liability of Conservator

(a) Except as otherwise agreed, a conservator is not personally liable on a contract properly entered into in a fiduciary capacity in the course of administration of the estate unless the conservator fails to reveal in the contract the

representative capacity and identify the estate.

(b) A conservator is personally liable for obligations arising from ownership or control of property of the estate or for other acts or omissions occurring in the course of administration of the estate, including liability for violation of environmental law, only if personally at fault.

(c) Claims based on contracts entered into by a conservator in a fiduciary capacity, obligations arising from ownership or control of the estate, and claims based on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in a fiduciary capacity, whether or not the conservator is personally liable therefor.

(d) A question of liability between the estate and the conservator personally may be determined in a proceeding for accounting, surcharge, or indemnification, or in another appropriate proceeding or action.

~~[(e) A conservator is not personally liable for any environmental condition or injury resulting from any environmental condition on land solely by reason of an acquisition of title under Section 5-421.]~~

Maine Probate Code Proposed Comments This section addresses environmental liability in conformity with Title 18-B section 1010, subsection 2.

5-431

Termination of Proceedings

(a) A conservatorship terminates upon the death of the protected person or upon order of the court. Unless created for reasons other than that the protected person is a minor, a conservatorship created for a minor also terminates when the protected person attains majority or is emancipated.

(b) Upon the death of a protected person, the conservator shall conclude the administration of the estate by distribution to the person's successors. The conservator shall file a final report and petition for discharge within ~~{30}~~ days after distribution.

(c) On petition of a protected person, a conservator, or another person interested in a protected person's welfare, the court may terminate the conservatorship if the protected person no longer needs the assistance or protection of a conservator. Termination of the conservatorship does not affect a conservator's liability for previous acts or the obligation to account for funds and assets of the protected person.

(d) Except as otherwise ordered by the court for good cause, before terminating a conservatorship, the court shall follow the same procedures to safeguard the rights of the protected person that apply to a petition for conservatorship. Upon the establishment of a prima facie case for termination, the court shall order termination unless it is proved that continuation of the conservatorship is in the best interest of the protected person.

(e) Upon termination of a conservatorship and whether or not formally distributed by the conservator, title to assets of the estate passes to the formerly protected person or the person's successors. The order of termination must provide for expenses of administration and direct the conservator to execute appropriate instruments to evidence the

transfer of title or confirm a distribution previously made and to file a final report and a petition for discharge upon approval of the final report.

(f) The court shall enter a final order of discharge upon the approval of the final report and satisfaction by the conservator of any other conditions placed by the court on the conservator's discharge.

Maine Probate Code Proposed Comments This section eliminates the list found in previous Maine law of reasons for terminating conservatorship and adds a requirement that the conservator's final report be filed within 30 days after distribution.

5-432

Registration of Guardianship Orders

If a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in this state, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in this state by filing as a foreign judgment in ~~a court~~ the Probate Court; in any appropriate {county} of this state; certified copies of the order and letters of ~~office~~ appointment.

Maine Probate Code Proposed Comments This section, by its relocation from Part 5-A into this Part 5, expands previous Maine law pertaining to registration of guardianship orders so that orders relating to minors as well as to adults may be registered.

5-433

Registration of Protective Orders

If a conservator has been appointed in another state and a petition for a protective order is not pending in this state, the conservator appointed in the other state, after giving notice to the appointing court of an intent to register, may register the protective order in this state by filing as a foreign judgment in the Probate Court ~~a court of this state~~, in any {county} in which property belonging to the protected person is located; certified copies of the order and letters of ~~office~~ appointment and of any bond.

Maine Probate Code Proposed Comments This section, by its relocation from Part 5-A into this Part 5, expands previous Maine law pertaining to registration of conservatorship orders so that orders relating to minors as well as to adults are covered, and provides a single procedure for dealing with foreign conservatorships.

5-434

Effect of Registration

(a) Upon registration of a guardianship or protective order from another state, the guardian or conservator may exercise in this state all powers authorized in the order of appointment except as prohibited under the laws of this state, including maintaining actions and proceedings in this state and, if the guardian or conservator is not a resident of this state, subject to any conditions imposed upon nonresident parties.

(b) A court of this state may grant any relief available under this {article} and other law of this state to enforce a registered order.

Maine Probate Code Proposed Comments This section, by its relocation from Part 5-A into this Part 5, expands previous Maine law pertaining to the effect of conservatorship orders so that orders relating to minors as well as to adults are covered, and clarifies in a single statute the authority of foreign conservators.

None

UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT

None

PUBLIC GUARDIANSHIP AND CONSERVATORSHIP

None

UNIFORM HEALTH-CARE DECISIONS ACT

None

MAINE UNIFORM POWER OF ATTORNEY ACT

6-101

NONPROBATE TRANSFERS ON DEATH

(a) A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary. This subsection includes a written provision that:

(1) Money or other benefits due to, controlled by, or owned by a decedent before death must be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing,

- including a will, executed either before or at the same time as the instrument, or later;
- (2) Money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand; or
- (3) Any property controlled by or owned by the decedent before death which is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(b) Nothing in this section limits the rights of creditors under other laws of this State.

Maine Probate Code Proposed Comments The section does not constitute a substantive change to Maine law. Maine has retained paragraph (b) from section 6-201 of prior Maine law, which was a non-uniform provision.

6-102

LIABILITY OF NONPROBATE TRANSFEREES FOR CREDITOR CLAIMS AND STATUTORY ALLOWANCES

- (a) In this section, “nonprobate transfer” means a valid transfer effective at death, other than a transfer of a survivorship interest in a joint tenancy of real estate, by a transferor whose last domicile was in this State to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor’s probate estate.
- (b) Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against decedent’s probate estate and statutory allowances to the decedent’s spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee.
- (c) Nonprobate transferees are liable for the insufficiency described in subsection (b) in the following order of priority:
- (1) A transferee designated in the decedent’s will or any other governing instrument, as provided in the instrument;
 - (2) The trustee of a trust serving as the principal nonprobate instrument in the decedent’s estate plan as shown by its designation as devisee of the decedent’s residuary estate or by other facts or circumstances, to the extent of the value of the nonprobate transfer received or controlled;
 - (3) Other nonprobate transferees, in proportion to the values received.
- (d) Unless otherwise provided by the trust instrument, interests of beneficiaries in all trusts incurring liabilities under this section abate as necessary to satisfy the liability, as if all of the trust instruments were a single will and the interests were devised under it.

- (e) A provision made in one instrument may direct the apportionment of the liability among the nonprobate transferees taking under that or any other governing instrument. If a provision in one instrument conflicts with a provision in another, the later one prevails.
- (f) Upon due notice to a nonprobate transferee, the liability imposed by this section is enforceable in proceedings in this State, whether or not the transferee is located in this State.
- (g) A proceeding under this section may not be commenced unless the personal representative of the decedent's estate has received a written demand for the proceeding from the surviving spouse or a child, to the extent that statutory allowances are affected, or a creditor. If the personal representative declines or fails to commence a proceeding after demand, a person making demand may commence the proceeding in the name of the decedent's estate, at the expense of the person making the demand and not of the estate. A personal representative who declines in good faith to commence a requested proceeding incurs no personal liability for declining.
- (h) A proceeding under this section must be commenced within one year after the decedent's death, but a proceeding on behalf of a creditor whose claim was allowed after proceedings challenging disallowance of the claim may be commenced within 60 days after final allowance of the claim.
- (i) Unless a written notice asserting that a decedent's probate estate is nonexistent or insufficient to pay allowed claims and statutory allowances has been received from the decedent's personal representative, the following rules apply:
- (1) Payment or delivery of assets by a financial institution, registrar, or other obligor, to a nonprobate transferee in accordance with the terms of the governing instrument controlling the transfer releases the obligor from all claims for amounts paid or assets delivered.
 - (2) A trustee receiving or controlling a nonprobate transfer is released from liability under this section with respect to any assets distributed to the trust's beneficiaries. Each beneficiary to the extent of the distribution received becomes liable for the amount of the trustee's liability attributable to assets received by the beneficiary.

Maine Probate Code Proposed Comments Section 6-102 is a new section but the concepts for the most part were previously included in various sections of Maine law, including the Maine Trust Code. The new section serves a useful function of addressing these issues in a comprehensive way and establishing an order of priority in the procedure for enforcing claims against various non probate assets. One significant change from prior Maine law is to shorten the time period for bringing a claim under this section from two years after the decedent's date of death to one year. This section does not supersede existing law that insulates death benefits in life insurance contracts, retirement plans or IRAs from creditors' claims.

6-201

DEFINITIONS

- (1) "Account" means a contract of deposit between a depositor and a financial institution, and includes a checking

account, savings account, certificate of deposit, and share account.

(2) “Agent” means a person authorized to make account transactions for a party.

(3) “Beneficiary” means a person named as one to whom sums on deposit in an account are payable on request after death of all parties or for whom a party is named as trustee.

(4) “Financial institution” means an organization authorized to do business under state or federal laws relating to financial institutions, and includes a bank, trust company, savings bank, building and loan association, savings and loan company or association, and credit union.

(5) “Multiple-party account” means an account payable on request to one or more of two or more parties, whether or not a right of survivorship is mentioned.

(6) “Party” means a person who, by the terms of an account, has a present right, subject to request, to payment from the account other than as a beneficiary or agent.

(7) “Payment” of sums on deposit includes withdrawal, payment to a party or third person pursuant to a check or other request, and a pledge of sums on deposit by a party, or a set-off, reduction, or other disposition of all or part of an account pursuant to a pledge.

(8) “P.O.D. designation” means the designation of (i) a beneficiary in an account payable on request to one party during the party’s lifetime and on the party’s death to one or more beneficiaries, or to one or more parties during their lifetimes and on death of all of them to one or more beneficiaries, or (ii) a beneficiary in an account in the name of one or more parties as trustee for one or more beneficiaries if the relationship is established by the terms of the account and there is no subject of the trust other than the sums on deposit in the account, whether or not payment to the beneficiary is mentioned.

(9) “Receive,” as it relates to notice to a financial institution, means receipt in the office or branch office of the financial institution in which the account is established, but if the terms of the account require notice at a particular place, in the place required.

(10) “Request” means a request for payment complying with all terms of the account, including special requirements concerning necessary signatures and regulations of the financial institution; but, for purposes of this [part], if terms of the account condition payment on advance notice, a request for payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for payment;

(11) “Sums on deposit” means the balance payable on an account, including interest and dividends earned, whether or not included in the current balance, and any deposit life insurance proceeds added to the account by reason of death of a party;

(12) “Terms of the account” includes the deposit agreement and other terms and conditions, including the form, of the contract of deposit.

Maine Probate Code Proposed Comments Maine adopts the UPC wording to coordinate definitions and consolidate the application of POD accounts and so called “Totten Trusts” into the comprehensive framework of POD accounts through appropriate definitions of “Beneficiary”, “Party”, “POD designation”. The term “joint account” used throughout this section under Maine law is replaced with “multiple party” account and other accounts previously

designated under Maine law as multiple party accounts are addressed through definitions of “POD Designation” and “Beneficiary” as well as other provisions of the UPC.

6-202

LIMITATION ON SCOPE OF PART

This [part] does not apply to:

- (1) an account established for a partnership, joint venture, or other organization for a business purpose,
- (2) an account controlled by one or more persons as an agent or trustee for a corporation, unincorporated association, or charitable or civic organization, or
- (3) a fiduciary or trust account in which the relationship is established other than by the terms of the account.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

6-203

TYPES OF ACCOUNT; EXISTING ACCOUNTS

(a) An account may be for a single party or multiple parties. A multiple-party account may be with or without a right of survivorship between the parties. Subject to Section 6-212(c), either a single-party account or a multiple-party account may have a POD designation, an agency designation, or both.

(b) An account established before, on, or after the effective date of this [part], whether in the form prescribed in Section 6-204 or in any other form, is either a single-party account or a multiple-party account, with or without right of survivorship, and with or without a POD designation or an agency designation, within the meaning of this [part], and is governed by this [part].

Maine Probate Code Proposed Comments This section is new and had no previous counterpart in the MPC. It coordinates with the adoption of forms under UPC §6-204 and sets out clearly the options when an account is established.

6-204

FORMS

(a) A contract of deposit that contains provisions in substantially the following form establishes the type of account provided, and the account is governed by the provisions of this [part] applicable to an account of that type:

UNIFORM SINGLE-OR MULTIPLE-PARTY ACCOUNT FORM

PARTIES [Name One or More Parties]:

OWNERSHIP [Select One And Initial]:

SINGLE-PARTY ACCOUNT

MULTIPLE-PARTY ACCOUNT

Parties own account in proportion to net contributions unless there is clear and convincing evidence of a different intent.

RIGHTS AT DEATH [Select One And Initial]:

SINGLE-PARTY ACCOUNT

At death of party, ownership passes as part of party's estate.

SINGLE-PARTY ACCOUNT WITH POD (PAY ON DEATH) DESIGNATION

[Name One Or More Beneficiaries]:

At death of party, ownership passes to POD beneficiaries and is not part of party's estate.

MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP

At death of party, ownership passes to surviving parties.

MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP AND POD (PAY ON DEATH)

DESIGNATION

[Name One Or More Beneficiaries]:

At death of last surviving party, ownership passes to POD beneficiaries and is not part of last surviving party's estate.

MULTIPLE-PARTY ACCOUNT WITHOUT RIGHT OF SURVIVORSHIP

At death of party, deceased party's ownership passes as part of deceased party's estate.

AGENCY (POWER OF ATTORNEY) DESIGNATION [Optional]

Agents may make account transactions for parties but have no ownership or rights at death unless named as POD beneficiaries.

[To Add Agency Designation To Account, Name One Or More Agents]:

[Select One And Initial]:

AGENCY DESIGNATION SURVIVES DISABILITY OR INCAPACITY OF PARTIES

AGENCY DESIGNATION TERMINATES ON DISABILITY OR INCAPACITY OF PARTIES

(b) A contract of deposit that does not contain provisions in substantially the form provided in subsection (a) is governed by the provisions of this [part] applicable to the type of account that most nearly conforms to the depositor's intent.

Maine Probate Code Proposed Comments This section is new and had no previous counterpart in the MPC. The mechanics of this form should encourage the depositor and financial institution to consider the rights of a party to the

account during lifetime and the distribution of the account after a party's death. Since the form is not required to make the terms of the multiple-party account effective, it offers flexibility and a helpful alternative for depositors.

6-205

DESIGNATION OF AGENT

- (a) By a writing signed by all parties, the parties may designate as agent of all parties on an account a person other than a party.
- (b) Unless the terms of an agency designation provide that the authority of the agent terminates on disability or incapacity of a party, the agent's authority survives disability and incapacity. The agent may act for a disabled or incapacitated party until the authority of the agent is terminated.
- (c) Death of the sole party or last surviving party terminates the authority of an agent.

Maine Probate Code Proposed Comments This section is new and had no previous counterpart in the MPC. This section allows financial institutions to offer an option to depositors who seek the convenience of an agency relationship but intend the proceeds of account to pass according to the depositor's will or to the depositor's heirs after death. While not supplanting the comprehensive Maine Uniform Power of Attorney Law, 18-A M.R.S.A. §5-901 et seq., this section offers a limited agency role for specific financial accounts.

6-206

APPLICABILITY OF PART

The provisions of [Subpart] 2 concerning beneficial ownership as between parties or as between parties and beneficiaries apply only to controversies between those persons and their creditors and other successors, and do not apply to the right of those persons to payment as determined by the terms of the account. [Subpart] 3 governs the liability and set-off rights of financial institutions that make payments pursuant to it.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

6-211

OWNERSHIP DURING LIFETIME

- (a) In this section, "net contribution" of a party means the sum of all deposits to an account made by or for the party, less all payments from the account made to or for the party which have not been paid to or applied to the use of another party and a proportionate share of any charges deducted from the account, plus a proportionate share of any

interest or dividends earned, whether or not included in the current balance. The term includes deposit life insurance proceeds added to the account by reason of death of the party whose net contribution is in question.

(b) During the lifetime of all parties, sums deposited into an account belong to the parties in proportion to the net contribution of each, unless there is clear and convincing evidence of a different intent. As between parties married to each other, in the absence of proof otherwise, the net contribution of each is presumed to be an equal amount.

(c) A beneficiary in an account having a POD designation has no right to sums on deposit during the lifetime of any party.

(d) An agent in an account with an agency designation has no beneficial right to sums on deposit.

Maine Probate Code Proposed Comments In the absence of proof otherwise, subparagraph (b) creates a presumption, as between parties married to each other, that the net contribution of each is presumed to be an equal amount.

6-212

RIGHTS AT DEATH

(a) Except as otherwise provided in this [part], on death of a party sums on deposit in a multiple-party account belong to the surviving party or parties. If two or more parties survive and one is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 6-211 belongs to the surviving spouse. If two or more parties survive and none is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 6-211 belongs to the surviving parties in equal shares, and augments the proportion to which each survivor, immediately before the decedent's death, was beneficially entitled under Section 6-211, and the right of survivorship continues between the surviving parties.

(b) In an account with a POD designation:

(1) On death of one of two or more parties, the rights in sums on deposit are governed by subsection (a).

(2) On death of the sole party or the last survivor of two or more parties, sums on deposit belong to the surviving beneficiary or beneficiaries. If two or more beneficiaries survive, sums on deposit belong to them in equal and undivided shares, and there is no right of survivorship in the event of death of a beneficiary thereafter. If no beneficiary survives, sums on deposit belong to the estate of the last surviving party.

(c) Sums on deposit in a single-party account without a POD designation, or in a multiple-party account that, by the terms of the account, is without right of survivorship, are not affected by death of a party, but the amount to which the decedent, immediately before death, was beneficially entitled under Section 6-211 is transferred as part of the decedent's estate. A POD designation in a multiple-party account without right of survivorship is ineffective. For purposes of this section, designation of an account as a tenancy in common establishes that the account is without right of survivorship.

(d) The ownership right of a surviving party or beneficiary, or of the decedent's estate, in sums on deposit is subject

to requests for payment made by a party before the party's death, whether paid by the financial institution before or after death, or unpaid. The surviving party or beneficiary, or the decedent's estate, is liable to the payee of an unpaid request for payment. The liability is limited to a proportionate share of the amount transferred under this section, to the extent necessary to discharge the request for payment.

Maine Probate Code Proposed Comments Maine law is revised to delete the right to rebut the presumption that amounts held in a joint account pass to the surviving joint tenant. Prior Maine law permitted the personal representative of an estate to claim proceeds passed to the estate if there were "clear and convincing evidence of a different intention at the time the account [was] created."

The section includes the presumption that the deceased spouse's interest in a multiparty account passes to surviving spouse. In most cases, any other party to a multiparty account with spouses is a child of the spouses and the intent is to pass the interest after death to that child but not to increase a child's lifetime interest.

Subsection (d) is new to Maine law and clarifies a surviving party's interest in a multiple-party account can be reduced by outstanding checks or other withdrawals by the deceased party which were made prior to death. Such reductions might also include repayment of any automatic deposit, such as Social Security payment, or automatic withdrawals for bills of a decedent.

6-213

ALTERATION OF RIGHTS

(a) Rights at death of a party under Section 6-212 are determined by the terms of the account at the death of the party. A party may alter the terms of the account by a notice signed by the party and given to the financial institution to change the terms of the account or to stop or vary payment under the terms of the account. To be effective, the notice must be received by the financial institution during the party's lifetime.

(b) A right of survivorship arising from the express terms of the account, Section 6-212, or a POD designation, may not be altered by will.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

6-214

ACCOUNTS AND TRANSFERS NONTESTAMENTARY

Except as provided in [Part] 2 of [Article] II (elective share of surviving spouse) or as a consequence of, and to the extent directed by, Section 6-215, a transfer resulting from the application of Section 6-212 is effective by reason

of the terms of the account involved and this [part] and is not testamentary or subject to [Articles] I through IV (estate administration).

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law. T

6-215
RESERVED

6-216
COMMUNITY PROPERTY AND TENANCY BY THE ENTIRETIES
(a) A deposit of community property in an account does not alter the community character of the property or community rights in the property, but a right of survivorship between parties married to each other arising from the express terms of the account or Section 6-212 may not be altered by will.
(b) This [part] does not affect the law governing tenancy by the entireties.
Maine Probate Code Proposed Comments Maine has chosen not to adopt UPC §6-216 because Maine does not recognize either community property or tenancies by the entireties.

6-221
AUTHORITY OF FINANCIAL INSTITUTION
A financial institution may enter into a contract of deposit for a multiple-party account to the same extent it may enter into a contract of deposit for a single-party account, and may provide for a POD designation and an agency designation in either a single-party account or a multiple-party account. A financial institution need not inquire as to the source of a deposit to an account or as to the proposed application of a payment from an account.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law other than incorporating the agency designation adopted in Sections 6-205 and related sections.

6-222

PAYMENT ON MULTIPLE-PARTY ACCOUNT
A financial institution, on request, may pay sums on deposit in a multiple-party account to: <ul style="list-style-type: none"> (1) one or more of the parties, whether or not another party is disabled, incapacitated, or deceased when payment is requested and whether or not the party making the request survives another party; or (2) the personal representative, if any, or, if there is none, the heirs or devisees of a deceased party if proof of death is presented to the financial institution showing that the deceased party was the survivor of all other persons named on the account either as a party or beneficiary, unless the account is without right of survivorship under Section 6-212.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

6-223
PAYMENT ON POD DESIGNATION
A financial institution, on request, may pay sums on deposit in an account with a POD designation to: <ul style="list-style-type: none"> (1) one or more of the parties, whether or not another party is disabled, incapacitated, or deceased when the payment is requested and whether or not a party survives another party; (2) the beneficiary or beneficiaries, if proof of death is presented to the financial institution showing that the beneficiary or beneficiaries survived all persons named as parties; or (3) the personal representative, if any, or, if there is none, the heirs or devisees of a deceased party, if proof of death is presented to the financial institution showing that the deceased party was the survivor of all other persons named on the account either as a party or beneficiary.
Maine Probate Code Proposed Comments The second clause in subsection (1) serves as additional protection to financial institutions.

6-224
PAYMENT TO DESIGNATED AGENT
A financial institution, on request of an agent under an agency designation for an account, may pay to the agent sums on deposit in the account, whether or not a party is disabled, incapacitated, or deceased when the request is made or received, and whether or not the authority of the agent terminates on the disability or incapacity of a party.
Maine Probate Code Proposed Comments This section is new and had no previous counterpart in the MPC. It coordinates with the adoption by Maine of Uniform Probate Code UPC §6-205.

6-225**PAYMENT TO MINOR**

If a financial institution is required or permitted to make payment pursuant to this [part] to a minor designated as a beneficiary, payment may be made pursuant to the Uniform Transfers to Minors Act (1983/1986).

Maine Probate Code Proposed Comments This section is new and had no previous counterpart in the MPC. The section provides for the efficient and economical transfer of funds to a minor. The cost and delay associated with probate court proceedings to appoint a guardian or conservator can be substantial, compared with the need to provide for the efficient and economical transfer of an account and the protections under Uniform Transfers to Minors Act are sufficient.

6-226**DISCHARGE**

(a) Payment made pursuant to this [part] in accordance with the terms of the account discharges the financial institution from all claims for amounts so paid, whether or not the payment is consistent with the beneficial ownership of the account as between parties, beneficiaries, or their successors. Payment may be made whether or not a party, beneficiary, or agent is disabled, incapacitated, or deceased when payment is requested, received, or made.

(b) Protection under this section does not extend to payments made after a financial institution has received written notice from a party, or from the personal representative, surviving spouse or heir or devisee of a deceased party, to the effect that payments in accordance with the terms of the account, including one having an agency designation, should not be permitted, and the financial institution has had a reasonable opportunity to act on it when the payment is made. Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in a request for payment if the financial institution is to be protected under this section. Unless a financial institution has been served with process in an action or proceeding, no other notice or other information shown to have been available to the financial institution affects its right to protection under this section.

(c) A financial institution that receives written notice pursuant to this section ~~or otherwise has reason to believe~~ that a dispute exists as to the rights of the parties may refuse, without liability, to make payments in accordance with the terms of the account.

(d) Protection of a financial institution under this section does not affect the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of sums on deposit in accounts or payments made from accounts.

Maine Probate Code Proposed Comments Maine has chosen not to adopt the clause in UPC §6-226(c) which permits a financial institution to refuse payment if it receives any non-written notice giving the financial institution “reason to believe that a dispute exists” as to payment rights. Maine determined this clause was vague and created

unnecessary uncertainty with respect to a financial institution’s right to withhold payment to a party and should not be adopted.

6-227

SET-OFF

Without qualifying any other statutory right to set-off or lien and subject to any contractual provision, if a party is indebted to a financial institution, the financial institution has a right to set-off against the account. The amount of the account subject to set-off is the proportion to which the party is, or immediately before death was, beneficially entitled under Section 6-211 or, in the absence of proof of that proportion, an equal share with all parties.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

6-301

Definitions

- (1) “Beneficiary form” means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.
- (2) “Register,” including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.
- (3) “Registering entity” means a person who originates or transfers a security title by registration, and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.
- (4) “Security” means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, and a security account.
- (5) “Security account” means (i) a reinvestment account associates with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner’s death, or (ii) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner’s death.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

6-302
REGISTRATION IN BENEFICIARY FORM; SOLE OR MULTIPLE OWNER
Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship as tenants by the entireties, or as owners of community property held in survivorship form , and not as tenants in common.
Maine Probate Code Proposed Comments The ownership forms of tenancy by the entirety and community property have been deleted from the Uniform Transfer on Death Security Registration Act because they cannot be created under Maine law.

6-303
REGISTRATION IN BENEFICIARY FORM; APPLICABLE LAW
A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity’s principal office, the office of its transfer agent or its office making the registration, or by this or a similar statute of the law of the state listed as the owner’s address at the time of registration. A registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

6-304
ORIGINATION OF REGISTRATION IN BENEFICIARY FORM
A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners.
Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

6-305
FORM OF REGISTRATION IN BENEFICIARY FORM
Registration in beneficiary form may be shown by the words “transfer on death” or the abbreviation “TOD,” or by the

words “pay on death” or the abbreviation “POD,” after the name of the registered owner and before the name of a beneficiary.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

6-306

EFFECT OF REGISTRATION IN BENEFICIARY FORM

The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner’s death. A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary.

Maine Probate Code Proposed Comments This section replaces MPC Section 6-312 which previously permitted changes of beneficiary of a security by will.

6-307

OWNERSHIP ON DEATH OF OWNER

On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survive the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

6-308

PROTECTION OF REGISTERING ENTITY

(a) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this part.

(b) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this part.

(c) A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of the security in accordance with Section 6-307 and does so in good faith reliance (i) on the registration, (ii) on this part, (iii) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this part do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this part.

(d) The protection provided by this part to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

6-309

NON TESTAMENTARY TRANSFER ON DEATH.

A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this Act and is not testamentary.

Maine Probate Code Proposed Comments The language does not constitute a substantive change to Maine law.

6-310

TERMS, CONDITIONS, AND FORMS FOR REGISTRATION

(a) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form, and (ii) for implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions so established may provide for proving death, avoiding or resolving any problems concerning fractional shares, designating primary and contingent beneficiaries, and substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death. Substitution may be indicated by appending to the name of the primary beneficiary the letters LDPS, standing or "lineal descendants per stirpes." This designation substitutes a deceased beneficiary's descendants who survive the owner for a beneficiary who fails to so survive, the descendants to be identified and to share in accordance with the law of the beneficiary's domicile at the owner's death governing inheritance by descendants of an intestate. Other forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering

entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

(b) The following are illustrations of registrations in beneficiary form which a registering entity may authorize:

- (1) Sole owner-sole beneficiary: John S. Brown TOD (or POD) John S. Brown Jr.
- (2) Multiple owners-sole beneficiary: John S. Brown, Mary B. Brown JT TEN TOD John S. Brown Jr.
- (3) Multiple owners-primary and secondary (substituted) beneficiaries: John S. Brown Mary B. Brown JT TEN TOD John S. Brown Jr. SUB BENE Peter Q. Brown or John S. Brown Mary B. Brown JT TEN TOD John S. Brown Jr. LDPS.

Maine Probate Code Proposed Comments UPC renumbering adopted. The language does not constitute a substantive change to Maine law.

6-311

APPLICATION OF PART

This part applies to registrations of securities in beneficiary form made before or after [effective date], by decedents dying on or after [effective date].

None

TRUST ADMINISTRATION

None

MISCELLANEOUS PROVISIONS

None

ADOPTION