

ARTICLE III

PROBATE OF WILLS AND ADMINISTRATION

GENERAL COMMENT

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

The following are essential characteristics of the Flexible System:

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

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

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

(4) A seven day waiting period from death preventing informal probate or informal appointment of a personal representative is required.

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

(6) One judicial, in rem, proceeding encompassing formal probate of any wills (or a determination after notice that the decedent left no will), appointment of a personal representative and complete settlement of an estate under continuing supervision of the Court (supervised administration) is provided for testators and persons interested in a decedent's estate, whether testate or intestate, who desire to use it.

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

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

(9) Personal representatives appointed informally or after notice, and whether supervised or not, have statutory powers enabling them to collect, protect, distribute and otherwise handle all steps in administration without further order of the Court, except that, unless authorized by the will, a Personal Representative must obtain a license to sell real estate and supervised personal representatives may be subjected to special restrictions on power as endorsed on their letters.

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

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

(12) Statutes of limitation bar creditors of the decedent who fail to present claims within one year from the decedent's death.

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

MASSACHUSETTS COMMENT

The provisions of the Uniform Probate Code dealing with succession without administration, also known as universal succession (Sections 3-312 to 3-322) are not recommended for adoption in Massachusetts. These sections would permit heirs and devisees to accept estate assets and assume liabilities without formal or even informal filings with the Magistrate or the Court.

PART 1

GENERAL PROVISIONS

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

The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to property are subject to the restrictions and limitations contained in this chapter to facilitate the prompt settlement of estates. Upon the death of a person, the decedent's real and personal property devolves to the persons to whom it is devised by the decedent's 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 the decedent's heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to allowances and exempt property, to rights of creditors, elective share of the surviving spouse, and to administration.

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

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

COMMENT

The exception referring to Section 3-1201 relates to affidavit procedures which are authorized for collection of estates worth less than \$25,000.

Section 3-107 and various sections in Parts 3 and 4 of this Article make it clear that a will may be probated without appointment of a personal representative, including any nominated by the will.

The requirement of probate stated here and the limitations on probate provided in 3-108 mean that questions as to testacy may be eliminated simply by the running of time. Under these sections, an informally probated will cannot be questioned after the later of three years from the decedent's death or one year from the probate whether or not an executor was appointed, or, if an executor was appointed, without regard to whether the estate has been distributed. If the decedent is believed to have died without a will, the running of three years from death bars probate of a late-discovered will and so makes the assumption of intestacy conclusive. These limitations do not apply to proceedings to construe probated wills or determine heirs of any intestate. See Section 3-108.

The exceptions to the section (other than the exception relevant to small estates) are not intended to accommodate cases of late-discovered wills. Rather, they are designed to make the probate requirement inapplicable where circumstances led survivors of a decedent to believe that there was no point to probating a will of which they may have had knowledge. If any will was probated within three years of death, or if letters of administration were issued in this period, the exceptions to the section are

inapplicable. If there has been no proceeding in probate, persons seeking to establish title by an unprobated will must show, with reference to the estate they claim, either that it has been possessed by those to whom it was devised or that it has been unknown to the decedent's heirs or devisees and not possessed by any.

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

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

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

COMMENT

This section makes it clear that appointment by a public official is required before one can acquire the status of personal representative. "Qualification" is dealt with in Section 3-601. "Letters" are the subject of Section 1-305. Section 3-701 is also related, since it deals with the time of accrual of duties and powers of personal representatives.

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

In Article IV, Sections 4-204 and 4-205 permit a personal representative from another state to obtain the powers of one appointed locally by filing evidence of the personal representative's authority with a local Court.

MASSACHUSETTS COMMENT

Under prior Massachusetts practice a Certificate of Appointment serves the same purpose as Letters. See Section 1-201 (28).

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

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

COMMENT

This and sections of Part 8, Article III, are designed to force creditors of decedents to assert their claims against duly appointed personal representatives. Creditors of a decedent are interested persons who may seek the appointment of a personal representative (Section 3-301). If a personal representative has been appointed and has closed the estate under circumstances which leave a creditor's claim unbarred, the creditor is permitted to enforce the claims against distributees, as well as against the personal representative if any duty owed to creditors under 3-807 or 3-1003 has been breached. The methods for closing estates are outlined in Sections 3-1001 through 3-1003. Termination of appointment under Sections 3-608 et seq. may occur though the estate is not closed and so may be irrelevant to the question of whether creditors may pursue distributees.

MASSACHUSETTS COMMENT

Part 8 of this Article follows substantially the procedure of present G.L. c. 197 as last modified in 1990. However, this Section does broaden creditors rights to recover from distributees. See G.L. c. 197, § 28 et seq.

Section 3-105. [Proceedings Affecting Devolution and Administration]

Persons interested in decedents' estates may petition the magistrate 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.

COMMENT

This and other sections of Article III contemplate a non-judicial or quasi-judicial officer who will act on informal petition and a judge who will hear and decide formal petitions. See Section 1-307 which permits the judge to perform or delegate the functions of the Magistrate.

MASSACHUSETTS COMMENT

See G.L. c. 215, §§ 3 and 6 for jurisdiction of the Court.

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

In proceedings within the exclusive jurisdiction of the court where notice is required by this chapter or by rule, and in proceedings to construe probated wills or determine heirs which concern estates that have not been and cannot now be open 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 commonwealth by notice in conformity with section 1-401. An order is binding as to all who are given notice of the proceeding though less than all interested persons are notified.

COMMENT

The addition after "rule", of the language "and in proceedings to construe probated wills or determine heirs which concern estates that have not been and cannot now be opened for administration." This addition, coupled with the exceptions to the limitations provisions in Section 3-108 that permit proceedings to construe wills and to determine heirs of intestates to be commenced more than three years after death, clarifies the purpose of the draftsmen to offer a probate proceeding to aid the determination of rights of inheritance of estates that were not opened for administration within the time permitted by Section 3-108.

MASSACHUSETTS COMMENT

Notice requirements are presently set out in Probate Court Rules 3, 8 and 29. G.L. 192, § 3 establishes conclusiveness of decrees after one year from issuance.

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

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

COMMENT

This section and others in Article III describe a system of administration of decedents' estates which gives interested persons control of whether matters relating to estates will become occasions for judicial orders. Sections 3-501 through 3-505 describe supervised administration, a judicial proceeding which is continuous throughout administration. It corresponds with the theory of administration of decedents' estates which prevails in many states. If supervised administration is not requested, persons interested in an estate may use combinations of the formal proceedings (order by judge after notice to persons concerned with the relief sought), informal proceedings (request for the limited response that nonjudicial or quasi-judicial personnel of the probate court are authorized to make in response to verified application) and filings provided in the remaining Parts of Article III to secure authority and protection needed to administer the estate. Nothing except self-interest will compel resort to the judge. When resort to the judge is necessary or desirable to resolve a dispute or to gain protection, the scope of the proceeding if not otherwise prescribed by the chapter is framed by the petition. The securing of necessary jurisdiction over interested persons in a formal proceeding is facilitated by Sections 3-106 and 3-602. 3-201 locates venue for all proceedings at the place where the first proceeding occurred.

MASSACHUSETTS COMMENT

This has no counterpart in present procedure.

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

No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than 3 years after the decedent's death, except that: (1) if a previous proceeding was dismissed because of doubt relative to the fact of the decedent's death, then appropriate probate, appointment or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not unduly delayed initiating the subsequent proceeding; (2)

appropriate probate, appointment or testacy proceedings may be maintained relative to the estate of an absent, disappeared or missing person at any time within 3 years after the death of the person can be established; (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 12 months from the informal probate or 3 years from the decedent's death; (4) an informal appointment or a formal testacy or appointment proceeding may be commenced thereafter if no proceedings relative to the succession or estate administration has occurred within the 3 year period after the decedent's death, but the personal representative shall have 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 shall not be presented against the estate; and (5) a formal testacy proceeding may be commenced at any time after 3 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. These limitations shall not apply to proceedings to construe probated wills or to determine heirs of an intestate. In cases under clause (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 chapter which relate to the date of death.

COMMENT

As originally approved and read with 3-102's requirement that wills be probated before being admissible in evidence, this section created a three-year-from-death time period within which proceedings concerning a succession (other than a determination of heirs, or will interpretation or construction) must be commenced. Unless certain limited exceptions were met, an estate became conclusively intestate if no formal or informal estate proceeding was commenced within the three year period, and no administration could be opened in order to generate a deed of distribution for purposes of proving a succession.

Several of the original UPC states rejected the three year bar against late-offered wills and the correlated notion that formal proceedings to determine heirs in previously unadministered estates were necessary to generate title muniments locating inherited land in lawful successors. Critics preferred continued availability of UPC's procedures for appointing p.r.'s whose distributive instruments gave protection to purchasers. The 1987 technical amendment to 3-108 reduced, but failed to eliminate, instances in which original probate and appointment proceedings were barred by the 3 year limitation period.

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

If no will is probated within three years from death, the section has the effect of making the assumption of intestacy final. If a will has been informally probated within the period, the section has the effect of making the informal probate conclusive after three years or within twelve months from informal probate, if later. Heirs or devisees can protect themselves against change within the three years of assumption concerning whether the decedent left a will or died intestate by bringing a formal proceeding shortening the period to that described in Sections 3-412 and 3-413.

A personal representative who has been appointed under an assumption concerning testacy which may be reversed in the three-year period if there has been no formal proceeding, is protected by Section 3-703. It relieves a personal representative of liability for surcharge for certain distributions made pursuant to an informally probated will, or under authority of informally issued letters of administration.

Distributees who receive an estate distributed before the three-year period expires where there has been no formal determination accelerating the time for certainty, remain potentially liable to persons determined to be entitled by formal proceedings instituted within the basic period under Sections 3-909 and 3-1006.

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

MASSACHUSETTS COMMENT

G.L. c. 193, § 4 limited filing of administration to 50 years from death. Subsection (4) is similar to an exception to the 50 year limitation of G.L. c. 193, § 5. Note also additional remedies for fraud under § 1-106 and for vacating formal decrees under § 3-412.

Chapter 140 of the Acts of 2012 adopted a newer version of the Uniform Probate Code § 3-108 which expands the opportunities to begin probate and appointment proceedings after 3 years from death.

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

No statute of limitation running on a cause of action belonging to a decedent which had not been barred as of the date of death, shall apply to bar a cause of action surviving the decedent's death sooner than 4 months after death. A cause of action which, but for this section, would have been barred less than 4 months after death, is barred after 4 months unless tolled.

MASSACHUSETTS COMMENT

Prior Massachusetts procedure does not provide for tolling the statute of limitations for any period after death. See G.L. c. 197, § 9, et seq.

PART 2

VENUE FOR PROBATE AND ADMINISTRATION; PRIORITY TO ADMINISTER

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

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

(1) in the county where the decedent was domiciled at the time of death; or

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

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

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

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

COMMENT

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

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

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

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

(2) An informal probate or appointment petition is filed and granted without notice in A County. If interested persons wish to challenge the Magistrate's determination of venue, they may not simply file a formal proceeding in the county of their choice and thus force the proponent in the prior proceeding to debate the question of venue in their county. 3-201(b) locates the venue of any subsequent proceeding

where the first proceeding occurred. The function of (b) is obvious when one thinks of subsequent proceedings as those which relate to claims, or accounts, or to efforts to control a personal representative. It is less obvious when it seems to locate the forum for squabbles over venue at the place accepting the first informal petition. Still, the applicant seeking an informal order must be careful about statements made in the petition because the applicant may be charged with perjury under Section 1-310 if the applicant is deliberately inaccurate. Moreover, the Magistrate must be satisfied that the allegations in the petition support a finding of venue. 3-201(c) provides a remedy for one who is upset about the venue-locating impact of a prior order in an informal proceeding and who does not wish to engage in full litigation about venue in the forum chosen by the other interested person unless forced to do so. Using it, one may succeed in getting the A County Court to transfer the proceedings to the county of choice. The applicant would be well advised to initiate formal proceedings if given the chance, for if the applicant relies on informal proceedings, the applicant, too, may be "bumped" if the judge in B County agrees with some movant that venue was not in B County.

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

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

MASSACHUSETTS COMMENT

Venue of the estate of a domiciliary is presently governed by Chapter 215, Section 3 where reference is to "inhabitants" or "residents," not "domicile" as in this section. Venue for non-domiciliary estates are governed by Chapter 192, Section 9 and Chapter 199, Section 5.

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

If conflicting claims as to the domicile of a decedent are made in a formal testacy or appointment proceeding commenced in this commonwealth, and in a testacy or appointment proceeding after notice pending at the same time in another state, the court of this commonwealth 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 commonwealth.

COMMENT

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

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

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

Where a court learns that parties before it are also parties to previously initiated litigation involving a common question, traditional judicial reluctance to deciding unnecessary questions, as well as considerations of comity, are likely to lead it to delay the local proceedings to await the result in the other court. A somewhat more troublesome question is involved when one of the parties before the local court manifests a determination not to appear personally in the prior initiated proceedings so that one can preserve one's ability to litigate contested points in a more friendly, or convenient, forum. But, the need to preserve all possible advantages available to particular litigants should be subordinated to the decedent's probable wish that the estate not be wasted in unnecessary litigation. Thus, the section requires that the local claimant either initiate litigation in the forum of choice before litigation is started somewhere else, or accept the necessity of contesting unwanted views concerning the decedent's domicile offered in litigation pending elsewhere.

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

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

(a) Whether the proceedings are formal or informal, persons have priority for appointment in the following order:

- (1) the person with priority as determined by a probated will including a person nominated by a power conferred in a will;
- (2) the surviving spouse of the decedent who is a devisee of the decedent;
- (3) other devisees of the decedent;
- (4) the surviving spouse of the decedent;
- (5) other heirs of the decedent;
- (6) if there is no known spouse or next of kin, a public administrator appointed pursuant to chapter one hundred ninety-four.

(b) An objection to an appointment can be made only in formal proceedings. In

case of objection the priorities stated in (a) apply except that

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

(2) in case of objection to appointment of a person other than one whose priority is determined by will by an heir or devisee appearing to have a substantial interest in the estate, the court may appoint a person who is acceptable to the heirs and devisees or, in default of agreement any suitable person.

(c) A person entitled to letters under (2) through (5) of (a) above, may nominate a qualified person to act as personal representative. Any person may renounce the 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 a person with priority, a person who is nominated under subsection (c), or a person whose entitlement to appointment results from renunciation by another person with priority may be made in either formal or informal proceedings. Before formal appointment of one without priority, the court shall determine that those having priority, although provided notice of the proceedings, 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:

(1) who is under the age of 18;

(2) whose appointment the court finds in formal proceedings to be contrary to the best interests of the estate.

(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 commonwealth 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 personal representative.

COMMENT

The priorities applicable to informal proceedings are applicable to formal proceedings. However, if the proceedings are formal, a person with a substantial interest may object to the selection of one

having priority other than because of will provisions. The provision for majority approval which is triggered by such a protest can be handled in a formal proceeding since all interested persons will be before the court, and a judge capable of handling discretionary matters, will be involved.

In considering this section as it relates to a devise to a trustee for various beneficiaries, it is to be noted that "interested persons" is defined by 1-201(24) to include fiduciaries. Also, 1-403(2) and 3-912 show a purpose to make trustees serve as representatives of all beneficiaries. The provision in (d) is consistent.

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

The meaning of "spouse" is determined by Section 2-802.

MASSACHUSETTS COMMENT

This section substantially follows the provisions of G.L. c. 192, §§ 4, 5 and 6 and c. 193, §§ 1 and 2. Subsection (a)(6) and (a)(7) are modified to follow G.L. c. 193, § 1 and Subsection (f)(1) follows G.L. c. 192, §6 and c. 193, § 8. A creditor might not qualify for appointment as personal representative because of conflict of interest, but may petition for appointment of another under § 3-203(b).

Chapter 140 of the Acts of 2012 amended subsection (e) to make it clear that informal appointment is available when priority is established by nomination and renunciation.

Section 3-204. [Reserved.]

MASSACHUSETTS COMMENT

The UPC demand for notice is not adopted for Massachusetts. It would establish a recordkeeping burden on the Courts. The advantages are ameliorated by the Massachusetts requirement of advance notice to all interested parties for all matters, including informal probate.

Section 3-205. [Judge or Register as Personal Representative.]

If a Judge or Register desires to be appointed personal representative of the estate of his or her spouse, child or parent who at the time of their decease was domiciled in his or her county, such appointment may be made and all subsequent proceedings relative to the estate may be had in the court of any adjoining county, and the register thereof shall forthwith transmit to the register of the county where the decedent was domiciled, a true and attested copy of all papers relating thereto filed and entered on the docket, which shall be recorded by the register to whom they are transmitted.

COMMENT

This section is added to incorporate the provisions of G.L. c. 192, § 7.

PART 3

INFORMAL PROBATE AND APPOINTMENT PROCEEDINGS

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

(a) Petitions for informal probate or informal appointment shall be directed to the court, and verified by the petitioner to be accurate and complete to the best of the petitioner's knowledge and belief as to the following information:

(1) Every petition 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:

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

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

(iii) a statement identifying any heir or surviving spouse who may be an incapacitated person;

(iv) if the decedent was not domiciled in the commonwealth at the time of death, a statement showing venue;

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

(vi) a statement that a copy of the petition and the death certificate have been sent to the division of medical assistance by certified mail; and

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

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

(i) that the original of the decedent's last will is in the possession of the court, or accompanies the petition, or that an authenticated copy of a will

probated in another jurisdiction accompanies the petition;

(ii) that the petitioner, to the best of the petitioner's knowledge, believes the will to have been validly executed;

(iii) that after the exercise of reasonable diligence, the petitioner is unaware of any instrument revoking the will, and that the petitioner believes that the instrument which is the subject of the petition is the decedent's last will.

(iv) a statement that a death certificate issued by a public officer is in the possession of the court, or accompanies the petition.

(3) A petition 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 petition for probate. The petition for appointment shall adopt the statements in the petition for probate and state the name, address and priority for appointment of the person whose appointment is sought.

(4) A petition for informal appointment of a personal representative in intestacy shall state in addition to the statements required by (1):

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

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

(iii) a statement that a death certificate issued by a public officer is in the possession of the court, or accompanies the petition.

(5) A petition 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 petition is granted, and describe the priority of the petitioner.

(6) A petition for appointment of a personal representative to succeed a personal representative who has tendered a resignation as provided in section 3-610, or whose appointment has been terminated by death or removal, shall adopt the statements in the 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, describe the priority of the nominee.

(b) By verifying a petition for informal probate, or informal appointment, the petitioner submits personally to the jurisdiction of the court in any proceeding for relief from fraud relating to the petition, or for perjury, that may be instituted against the petitioner.

COMMENT

Forcing one who seeks informal probate or informal appointment to make oath before a public official concerning the details required of petitions should deter persons who might otherwise misuse the shortened feature of informal proceedings. The petition is available as a part of the public record. If deliberately false representation is made, remedies for fraud will be available to injured persons without specified time limit (see Article I). The section is believed to provide important safeguards that may extend well beyond those presently available under supervised administration for persons damaged by deliberate wrongdoing.

Section 1-310 deals with verification.

Subsection (b) is a form of long-arm provision that affects everyone who acts as a petitioner in informal proceedings, in conjunction with Section 1-106 provides a remedy in the court of probate against anyone who might make known misstatements in a petition.

MASSACHUSETTS COMMENT

This section requires the filing of a death certificate in informal proceedings as in G.L. c. 192, §1. But see Sections 3-402(b) and 3-412(5) relating to more flexibility in formal administration.

Section 3-301(a)(1)(iii) is added to incorporate the protection of G.L. c. 192, §1B. Section 1-404 authorizes the Court to appoint a guardian ad litem for a minor or incapacitated person.

Chapter 140 of the Acts of 2012 changed the reference in subsection (a)(6) from section 3-610(c) to section 3-610 and changed the words "and describe the priority of the petitioner" to "describe the priority of the nominee".

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

Upon receipt of a petition requesting informal probate of a will, the court or a magistrate, upon making the findings required by section 3-303 shall issue a written statement of informal probate if at least 7 days 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 petition or procedure relating thereto which leads to informal probate of a will renders the probate void.

COMMENT

This "umbrella" section and the sections it refers to describe a procedure called "informal probate". It is a statement of probate by a Magistrate. A succeeding section describes cases in which informal probate is to be denied. "Informal probate" is subjected to safeguards which seem appropriate to a transaction which has the effect of making a will operative and which may be the only official reaction concerning its validity. "Informal probate", it is hoped, will serve to keep the simple will which generates no controversy from becoming involved in truly judicial proceedings. The procedure is very much like "probate in common form" as it is known in England and some states.

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

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

(1) the petition is complete;

(2) the petitioner has made oath or affirmation that the statements contained in the petition are true to the best of the petitioner's knowledge and belief;

(3) the petitioner appears from the petition to be an interested person as defined in section 1-201(24);

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

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

(6) on the basis of the statements in the petition any notice required by Section 3-306 has been given and that the petition is not within section 3-304;

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

(8) on the basis of statements in the petition, the spouse and heirs are not incapacitated persons or minors; or if they are incapacitated persons or minors they are represented by guardians or conservators; and

(9) a death certificate issued by a public officer is in the court's possession.

(b) The petition shall be denied if it indicates that a personal representative has been appointed in another county of this commonwealth 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 have been met shall be probated without further proof. In other cases, a magistrate may assume execution if the will appears to have been properly executed.

(d) Informal probate of a will which has been previously probated in another state or country may be granted at any time upon written petition 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 commonwealth upon receipt by the court of a duly authenticated copy of the will and a duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has become operative under the law of the other place.

COMMENT

The purpose of this section is to permit informal probate of a will which, from a simple attestation clause, appears to have been executed properly. It is not necessary that the will be notarized as is the case with "pre-proved" wills. If a will is "pre-proved" as provided in Article II, it will, of course, "appear" to be well executed and include the recital necessary for easy probate here.

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

MASSACHUSETTS COMMENT

The Magistrate is not required to determine if an instrument is signed in accordance with the requirements of jurisdictions other than Massachusetts. Proponents of foreign wills have recourse to formal proceedings. That is not to say that instruments signed in other Uniform Probate Code states will not also meet the requirements of Massachusetts, and thus be eligible for informal proceedings.

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

Petitions 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.

COMMENT

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

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

(a) If the magistrate 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, the magistrate may decline the petition. A declination of informal probate is not an adjudication and does not preclude formal probate proceedings.

COMMENT

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

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

(a) The petitioner must give written notice 7 days prior to petitioning for informal probate or appointment by delivery or by mail: (1) to all heirs and devisees; (2) to any person having a prior or equal right to appointment not waived in writing and filed with the court; and (3) to any personal representative of the decedent whose appointment has not been terminated. The notice shall be delivered or sent by ordinary mail to each

of the heirs and devisees. A certificate that such notice has been given, setting forth the names and addresses of those to whom notice has been given shall be prima facie evidence thereof. No other prior notice of an informal probate or appointment proceeding is required.

(b) The petitioner must publish a notice once in a newspaper designated by the Register of Probate having general circulation in the county where the proceeding is pending, the publication of which is to be not more than thirty days after informal probate or appointment. The court or a magistrate for good cause shown may provide for a different method or time of giving notice.

(c) The notice shall include the name and address of the petitioner and personal representative, indicate that it is provided to persons who have or may have some interest in the estate being administered, indicate whether bond with or without surety will be filed, and describe the court where papers relating to the estate are on file. The notice shall state that the estate is being administered under informal procedure by the personal representative under the Massachusetts Uniform Probate Code without supervision by the court, that inventory and accounts are not required to be filed with the court, but that interested parties are entitled to notice 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 notice shall state that interested parties are entitled to petition the court to institute formal proceedings and to obtain orders terminating or restricting the powers of personal representatives appointed under informal procedure.

(d) If it appears from the petition that there is no spouse or heir of the decedent or that any devisee is a charity, the petitioner shall give notice to the attorney general of the commonwealth.

(e) If it appears from the petition that a spouse, heir or devisee is a minor or an incapacitated person, the petitioner shall give notice to that person and that person's guardian or conservator.

(f) The duty does not extend to require notice to persons who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate. The petitioner's failure to give this notice is a breach of duty to the persons concerned but does not affect the validity of the probate, appointment, powers or other duties. A petitioner may inform other persons of the petition by delivery or ordinary first class mail.

COMMENT

The informal probate of a will that is not accompanied or followed by appointment of a personal representative only serves to shift the burden of making the next move to disinterested heirs who, inter alia, may initiate a Section 3-401 formal testacy proceeding to contest the will at any time within the limitations prescribed by Section 3-108.

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

(a) Upon receipt of a petition for informal appointment of a personal

representative other than a special personal representative as provided in Section 3-614, if at least seven days have elapsed since the decedent's death, the court or a magistrate, after making the findings required by section 3-308, shall appoint the petitioner subject to qualification and acceptance; provided, that if the decedent was a non-resident, the court or a magistrate 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 petitioner, or unless the decedent's will directs that the decedent's estate be subject to the laws of this commonwealth.

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

COMMENT

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

Section 3-601 requires a written acceptance and bond to be filed before letters are issued.

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

(a) In informal appointment proceedings, the court or a magistrate must determine whether:

- (1) the petition for informal appointment of a personal representative is complete;
- (2) the petitioner has made oath or affirmation that the statements contained in the petition are true to the best of the petitioner's knowledge and belief;
- (3) the petitioner appears from the petition to be an interested person as defined in Section 1-201(24);
- (4) on the basis of the statements in the petition, 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 personal representative;
- (6) any notice required by section 3-306 has been given; and
- (7) from the statements in the petition, the person whose appointment is sought has priority entitling that person to the appointment;
- (8) on the basis of the statements in the petition, the spouse and heirs are not incapacitated persons or minors; or if any are incapacitated persons or minors

they are represented by guardians or conservators; and

(9) a death certificate issued by a public officer is in the court's possession.

(b) Unless section 3-612 controls, the petition 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 commonwealth, that (unless the petitioner is the domiciliary personal representative or the domiciliary representative's nominee) the decedent was not domiciled in this commonwealth and that a personal representative whose appointment has not been terminated has been appointed by a court in the state of domicile, or that other requirements of this section have not been met.

COMMENT

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

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

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

If the magistrate 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, the magistrate may decline the petition. A declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings.

COMMENT

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

Section 3-310. [Reserved.]

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

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

PART 4

FORMAL TESTACY AND APPOINTMENT PROCEEDINGS

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

A formal testacy proceeding is litigation to determine whether a decedent left a valid will. A formal testacy proceeding may be commenced by an interested person filing a petition as described in section 3-402(a) in which that person requests that the court 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 petition, 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 magistrate shall not act upon any petition for informal probate of any will of the decedent or any petition 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 the 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 office and requesting the appointment of a special personal representative. In the absence of a request, or if the request is denied, the commencement of a formal proceeding has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution.

COMMENT

The word "testacy" is used to refer to the general status of a decedent in regard to wills. Thus, it embraces the possibility that the decedent left no will, any question of which of several instruments is the valid will, and the possibility that the person died intestate as to a part of the estate, and testate as to the balance. See Section 1-201(51).

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

If a personal representative has been appointed prior to the commencement of a formal testacy proceeding, the petitioner must request confirmation of the appointment to indicate that the petitioner does not want the testacy proceeding to have any effect on the duties of the personal representative, or refrain from seeking confirmation, in which case, the proceeding suspends the distributive power of the previously appointed representative. If nothing else is requested or decided in respect to the personal representative, the distributive powers are restored at the completion of the proceeding, with Section 3-703 directing the petitioner to abide by the will. "Distribute" and "distribution" do not include payment of claims. See 1-201(13), 3-807 and 3-902.

MASSACHUSETTS COMMENT

See 3-614 for appointment of a special personal representative after initiation of a proceeding.

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

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

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

(2) contains the statements required for informal petitions as stated in section 3-301(a)(1), the statements required by subparagraphs (ii) and (iii) 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) If a death certificate issued by a public officer is not filed with the petition, the court may 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.

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

COMMENT

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

Unless an order of supervised administration is sought, there will be little occasion for a formal order concerning appointment of a personal representative which does not also adjudicate the testacy status of the decedent. If a formal order of appointment is sought because of disagreement over who should serve, Section 3-414 describes the appropriate procedure.

The words "otherwise unavailable" in the last paragraph of subsection (a) are not intended to be read restrictively.

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

MASSACHUSETTS COMMENT

Subsection (b) is modified to adopt the death certificate requirements of G.L. c. 192, § 1 while retaining the flexibility of the UPC.

Section 3-403. [Formal Testacy Proceedings; Notice.]

(a) Upon commencement of a formal testacy proceeding, notice shall be given in the manner prescribed by section 1-401 by the petitioner to the persons herein enumerated.

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

(c) The notice shall include the name and address of the petitioner and 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 with or without surety will be filed, and describe the court where papers relating to the estate are on file. The notice shall state that the estate is being administered under formal procedure by the personal representative under the Massachusetts Uniform Probate Code without supervision by the court, that inventory and accounts are not required to be filed with the court, but that recipients are entitled to notice 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.

(d) If it appears from the petition that there is no spouse or heir of the decedent or that any devisee is a charity, the petitioner shall give notice to the attorney general of the commonwealth.

(e) If it appears from the petition that a spouse, heir or devisee is a minor or an incapacitated person, the petitioner shall give notice to that person and that person's guardian or conservator.

(f) The duty does not extend to require notice to persons who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate. The petitioner's failure to give this notice is a breach of duty to the persons concerned but does not affect the validity of the probate, appointment, powers or other duties. A petitioner may inform other persons of the petition by delivery or ordinary first class mail.

COMMENT

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

Testacy proceedings include adjudications that no will exists. Unknown wills as well as any which are brought to the attention of the Court are affected. Persons with potential interests under unknown wills have the notice afforded by death and by publication.

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

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

MASSACHUSETTS COMMENT

The Code provision has been modified to accommodate the practice in Massachusetts of assigning a return date by which objections must be filed. See Probate Rule 6. This avoids the necessity of a hearing where no objections are filed.

Section 3-404. [Reserved.]

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

If evidence concerning execution of the will is necessary, the affidavit or testimony of one of any attesting witnesses to the instrument is sufficient. If the affidavit or testimony of an attesting witness is not available, execution of the will may be proved by other evidence or affidavit.

COMMENT

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

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

MASSACHUSETTS COMMENT

Orders may be entered in uncontested matters without hearing by the Court or Magistrate. See Section 1-401.

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

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

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

COMMENT

The self-proved will is described in Article II. See Section 2-504. It would not preclude proof of undue influence, lack of testamentary capacity, revocation or any relevant proof that the testator was unaware of the contents of the document.

MASSACHUSETTS COMMENT

G.L. c. 192, § 2 provides for proof of a will in uncontested proceedings by testimony, self-proving affidavit or assent of heirs.

Section 3-407. [Reserved.]

MASSACHUSETTS COMMENT

This section of the UPC version is removed to preserve case law regarding duty of going forward with proof. See Section 1-109 for the standard of proof.

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

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

COMMENT

This section is designed to extend the effect of final orders of another jurisdiction of the United States. It should not be read to restrict the obligation of the local court to respect the judgment of another court when parties who were personally before the other court also are personally before the local court. Proof of an order of a Court of another state may be made by authenticated copy under the full faith and credit statute. If conflicting claims of domicile are made in proceedings which are commenced in different

jurisdictions, Section 3-202 applies. This section is framed to apply where a formal proceeding elsewhere has been previously concluded. Hence, if a local proceeding is concluded before formal proceedings at domicile are concluded, local law will control.

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

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

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

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

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

After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, if the court finds that the testator is dead, venue is proper and that the proceeding was commenced within the limitation prescribed by section 3-108, it shall determine the decedent's domicile at death, the heirs and the status 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 commonwealth by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become effective under the law of the other place.

COMMENT

If the court is not satisfied that the alleged decedent is dead, it may permit amendment of the proceeding so that it would become a proceeding to protect the estate of a missing and therefore "disabled" person. See Article V of this Code.

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

If two or more instruments are offered for probate before a final order is entered in a formal testacy proceeding, more than one instrument may be probated if neither expressly revokes the other or contains provisions which work a total revocation by implication. If more than one instrument is probated, the order shall indicate what provisions control in respect to the nomination of an executor, if any. The order may, but need not, indicate how any provisions of a particular instrument are affected by the other instrument. After a final order in a formal 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 a previous probate order and subject to the time

limits of section 3-412.

COMMENT

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

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

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

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

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

Subject to appeal and subject to vacation as provided herein and in section 3-413, a formal testacy order under sections 3-409 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 vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding or were unaware of the earlier proceeding and were given no notice thereof, except by publication.

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

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

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

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

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

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

(5) If the alleged decedent is not dead, the alleged decedent may recover estate assets in the hands of the personal representative. In addition to any remedies available to the alleged decedent by reason of any fraud or intentional wrongdoing, the alleged decedent may recover any estate or its proceeds from distributees that is in their hands, or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all of the circumstances.

COMMENT

The provisions permitting vacation of an order determining heirs on certain conditions reflect the effort to offer parallel possibilities for adjudications in testate and intestate estates. See Section 3-401. An objective is to make it possible to handle an intestate estate exactly as a testate estate may be handled. If this is achieved, some of the pressure on persons to make wills may be relieved.

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

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

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

COMMENT

See Sections 1-304 and 1-308.

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

(a) A formal proceeding for adjudication regarding the priority or qualification of one who is a petitioner 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(a)(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 as prescribed in section 3-403 to interested persons, including all persons interested in the administration of the estate as successors under the applicable assumption concerning testacy, any previously appointed personal representative and any person having or claiming priority for appointment as personal representative, the court shall determine who is entitled to appointment under section 3-203, make a proper appointment and, if appropriate, terminate any prior appointment found to have been improper as provided in cases of removal under section 3-611.

COMMENT

It is not necessary to petition formally for the appointment of a personal representative as a part of a formal testacy proceeding. A personal representative may be appointed on informal petition either before or after formal proceedings which establish whether the decedent died testate or intestate or no appointment may be desired. See Sections 3-107, 3-301(a)(3), (4) and 3-307. Furthermore, procedures for securing the appointment of a new personal representative after a previous assumption as to testacy has been changed are provided by Section 3-612. These may be informal, or related to pending formal proceedings concerning testacy. A formal order relating to appointment may be desired when there is a dispute concerning priority or qualification to serve but no dispute concerning testacy. It is important to distinguish formal proceedings concerning appointment from "supervised administration" as described in Part V. The former includes any proceeding after notice involving a request for an appointment. The latter originates in a "formal proceeding" and may be requested in addition to a ruling concerning testacy or priority or qualifications of a personal representative, but is descriptive of a special proceeding with a different scope and purpose than those concerned merely with establishing the bases for an administration. In other words, a personal representative appointed in a "formal" proceeding may or may not be "supervised".

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

PART 5

SUPERVISED ADMINISTRATION

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

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

COMMENT

This and the following sections of this Part describe an optional procedure for settling an estate in one continuous proceeding in the Court. The proceeding is characterized as "in rem". In cases where supervised administration is not requested or ordered, no compulsion other than self-interest exists to compel use of a formal testacy proceeding to secure an adjudication of a will or no will, because informal probate or appointment of an administrator in intestacy may be used. Similarly, unless administration is supervised, there is no compulsion other than self-interest to use a formal closing proceeding. Thus, even though an estate administration may be begun by use of a formal testacy proceeding which may involve an order concerning who is to be appointed personal representative, the proceeding is over when the order concerning testacy and appointment is entered. See Section 3-107. Supervised administration, therefore, is appropriate when an interested person desires assurance that the essential steps regarding opening and closing of an estate will be adjudicated. See the Comment following the next section.

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

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

if the decedent's will directs unsupervised administration, supervised administration shall be ordered only upon a finding that it is necessary for protection of persons interested in the estate; or (3) in other cases if the court finds that supervised administration is necessary under the circumstances.

COMMENT

This section is designed to achieve a fair balance between the wishes of the decedent, and the interests of successors in regard to supervised administration.

Since supervised administration normally will result in an adjudicated distribution of the estate, the issue of will or no will must be adjudicated. This section achieves this by forcing a petition for supervised administration to include matters necessary to put the issue of testacy before the Court. It is possible, however, that supervised administration will be requested because administrative complexities warranting it develop after the issue of will or no will has been resolved in a previously concluded formal testacy proceeding.

It should be noted that supervised administration, though it compels a judicial settlement of an estate, is not the only route to obtaining judicial review and settlement at the close of an administration. The procedures described in Section 3-1101 are available for use by or against personal representatives who are not supervised. Also efficient remedies for breach of duty by a personal representative who is not supervised are available under Part 6 of this Article. Finally, each personal representative consents to jurisdiction of the Court as invoked by mailed notice of any proceeding relating to the estate which may be initiated by an interested person. Also, persons interested in the estate may be subjected to orders of the Court following mailed notices made in proceedings initiated by the personal representative. In combination, these possibilities mean that supervised administration will be valuable principally to persons who see some advantage in a single judicial proceeding which will produce adjudications on all major points involved in an estate settlement.

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

(a) The pendency of a proceeding for supervised administration of a decedent's estate stays action on any informal petition 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 receiving notice of the filing of a petition for supervised administration, a personal representative who has been appointed previously shall not exercise the power to distribute any estate. The filing of the petition does not affect other powers and duties unless the court restricts the exercise of any of them pending full hearing on the petition.

COMMENT

The duties and powers of personal representative are described in Part 7 of this Article. The ability of a personal representative to create a good title in a purchaser of estate assets is not hampered by the fact that the personal representative may breach a duty created by statute, court order or other circumstances in making the sale. See Section 3-715. However, formal proceedings against a personal representative may involve requests for qualification of the power normally possessed by personal representatives which, if granted, would subject the personal representative to the penalties for contempt of Court if the personal representative disregarded the restriction. See Section 3-607. If a proceeding also involved a demand that particular real estate be kept in the estate pending determination of a petitioner's claim thereto, notice of the pendency of the proceeding could be recorded as is usual under

the lis pendens concept.

The word "restricts" in the last sentence is intended to negate the idea that a judicial order specially qualifying the powers and duties of a personal representative is a restraining order in the usual sense. The section means simply that some supervised personal representatives may receive the same powers and duties as ordinary personal representatives, except that they must obtain a Court order before paying claimants or distributing, while others may receive a more restricted set of powers. Section 3-607 governs petitions which seek to limit the power of a personal representative.

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

Unless restricted by the court, a supervised personal representative has, without interim orders approving exercise of a power, all powers of personal representatives under this code, but the personal representative shall not exercise 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 the personal representative's letters of appointment and, unless so endorsed, is ineffective as to persons dealing in good faith with the personal representative.

COMMENT

This section provides authority to issue letters showing restrictions of power of supervised administrators. In general, persons dealing with personal representatives are not bound to inquire concerning the authority of a personal representative, and are not affected by provisions in a will or judicial order unless they know of it. But, it is expected that persons dealing with personal representatives will want to see the personal representative's letters, and this section has the practical effect of requiring them to do so. No provision is made for noting restrictions in letters except in the case of supervised representatives. See Section 3-715.

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

Unless otherwise ordered by the court, supervised administration is terminated by order in accordance with time restrictions, notices and contents of orders prescribed for proceedings under section 3-1001. Interim orders approving or directing partial distributions or granting other relief may be issued by the court at any time during the pendency of a supervised administration on the petition of the personal representative or any interested person. Unless otherwise required by order, notice of interim orders in supervised administration need be given only to interested persons who request notice of all orders entered in the proceeding.

COMMENT

Since supervised administration is a single proceeding, the notice requirement contained in 3-106 relates to the notice of institution of the proceedings which is described with particularity by Section 3-502. The above section makes it clear that an additional notice is required for a closing order. 1-402 permits any person to waive notice by a writing filed in the proceeding.

PART 6

PERSONAL REPRESENTATIVE; APPOINTMENT, CONTROL AND TERMINATION OF AUTHORITY

Section 3-601. [Qualification.]

Prior to receiving letters, a personal representative shall accept appointment and qualify by filing a bond with the appointing court.

COMMENT

This and related sections of this Part describe details and conditions of appointment which apply to all personal representatives without regard to whether the appointment proceeding involved is formal or informal, or whether the personal representative is supervised. Section 1-305 authorizes issuance of copies of letters and prescribes their content. The section should be read with Section 3-504 which directs endorsement on letters of any restrictions of power of a supervised administrator.

MASSACHUSETTS COMMENT

G.L. c. 205 sets forth current requirement of a bond in all cases and sureties in some cases.

Section 3-602. [Acceptance of Appointment; Consent to Jurisdiction.]

By accepting appointment, a personal representative submits personally to the jurisdiction of any court of the commonwealth in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding in the probate and family court shall be delivered to the personal representative, or mailed by ordinary first class mail at the address listed in the petition for appointment or as thereafter reported to the court and to the address as then known to the petitioner. Service in a proceeding in any other court shall be delivered in accordance with the rules of that Court.

COMMENT

Except for personal representatives appointed pursuant to Section 3-502, appointees are not deemed to be "officers" of the appointing court or to be parties in one continuous judicial proceeding that extends until final settlement. See Section 3-107. Yet, it is desirable to follow patterns which prevent personal representatives who might make themselves unavailable to service within the commonwealth from affecting the power of the appointing court to enter valid orders affecting him. See *Michigan Trust Co. v. Ferry*, 33 S.Ct. 550, 228 U.S. 346, 57 L.Ed. 867 (1912). The concept employed to accomplish this is that of requiring each appointee to consent in advance to the personal jurisdiction of the Court in any proceeding relating to the estate that may be instituted against that appointee. The section requires that the appointee be given notice of any such proceeding, which, when considered in the light of the responsibility being undertaken, should make the procedure sufficient to meet the requirements of due process.

MASSACHUSETTS COMMENT

Submission to personal jurisdiction of the Court eliminates the need of appointing an agent for service of process. This section replaces G.L. c. 195, §§ 8 to 10.

Section 3-603. [Bond without Sureties.]

(a) Sureties shall be required on the bond of a personal representative unless: (i) the will directs that there be no bond or waives the requirement of surety thereon; (ii) all of the heirs, if no will has been probated, or all of the devisees named in a will file a written waiver of sureties; (iii) the personal representative is a bank or trust company qualified to do trust business or exercise trust powers in this state; or (iv) the court concludes that sureties are not in the best interest of the estate. In any formal proceeding the court, on its own motion, may require sureties or additional sureties.

(b) No surety shall be required upon bonds filed by national banks or trust companies located in the commonwealth and duly permitted to act in a fiduciary capacity as personal representative or trustee, except that the court appointing such bank or trust company as a personal representative, other than as trustee, may upon application of any interested person require the bank or trust company so appointed to give such security, in addition to any lien or security provided by the laws of the United States, as the court may consider proper, and upon failure of such bank or trust company to give the security required may revoke such appointment and remove such bank or trust company.

MASSACHUSETTS COMMENT

Absence of sureties does not diminish the personal representative's obligations or liability to the estate. See G.L. c. 195, § 17 which is based on Section 3-808. See also Section 3-703. The UPC version has been modified to preserve Massachusetts practice of requiring a bond in all cases. Trust companies are added as fiduciaries who are not generally required to supply sureties on the bond. See G.L. c. 205, § 6A. State chartered banks are relieved of the requirement by G.L. c. 167G, §6. Unlike many states where a bond, if required, is always with sureties; in Massachusetts a bond is always required, but sureties may, in certain circumstances, be waived.

Section 3-604. [Bond with Sureties; Procedure; Reduction.]

(a) If a bond is required and the provisions of the will or order do not specify the amount, unless stated in the petition, the person qualifying shall file a statement under oath with the court indicating the best estimate of the value of the personal estate of the decedent and shall file a bond with the court in an amount equal to the estimate. The court may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic financial institution in a manner that prevents their unauthorized disposition. On petition of the personal representative or another interested person the court may increase or reduce the amount of the bond, release surety, or permit the substitution of another bond with the same or different surety.

(b) In this Section "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, credit union and any corporation authorized to do business as a banking company under chapter 172A.

MASSACHUSETTS COMMENT

See G.L. c. 205 for additional remedies.

Section 3-605. [Demand for Sureties by Interested Person.]

Any person apparently having an interest in the estate worth in excess of \$5000 or any creditor having a claim in excess of \$5000, may make a written demand that a personal representative give sureties on the bond. The demand shall be filed with the court and a copy mailed to the personal representative if appointment and qualification have occurred. Thereupon, sureties shall be required but such requirement shall cease if the person demanding sureties ceases to be interested in the estate or if sureties are excused under section 3-604. After receiving notice and until the provision of sureties or cessation of the requirement of sureties, the personal representative shall refrain from exercising any powers of office except as necessary to preserve the estate. Failure of the personal representative to meet a requirement of sureties by providing suitable sureties within 30 days after receipt of notice shall be cause for removal and appointment of a successor personal representative.

COMMENT

The demand for sureties described in this section may be made in a petition or application for appointment of a personal representative, or may be made after a personal representative has been appointed. The mechanism for compelling sureties is designed to function without unnecessary judicial involvement. If demand for sureties is made in a formal proceeding, the judge can determine the amount of the bond to be required with due consideration for all circumstances. If demand is not made in formal proceedings, methods for computing the amount of bond are provided by statute so that the demand can be complied with without resort to judicial proceedings. The information which a personal representative is required by Section 3-705 to give each beneficiary includes a statement concerning whether sureties have been required.

MASSACHUSETTS COMMENT

Chapter 140 of the Acts of 2012 amended this section to reflect that in Massachusetts bonds are always required of Personal Representatives, but sureties may, in certain circumstances, be waived.

Section 3-606. [Terms and Conditions of Bonds.]

(a) The following requirements and provisions apply to any bond required by this Part:

(1) Bonds shall name the first judge of the court making the appointment and his successors 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 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 the surety by registered or certified mail at the address as listed with the court where the bond is filed and to the 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.

(6) If a new bond is required, the sureties on the prior bond shall be liable for all breaches of the conditions thereof committed before the new bond is approved and filed.

(7) In no event shall any surety be liable for any claim or cause of action arising out of or in any way connected with acts or omissions of the personal representative occurring prior to the appointment of such person as personal representative. As provided in section 702 of chapter 203E, this section shall also apply to bonds of trustees.

(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.

MASSACHUSETTS COMMENT

Compare G.L. c. 205, § 1 et seq. under which suit is required on the bond. But see c. 195, § 17 and Section 3-808 which make the personal representative directly liable. Subsection (a)(6) was added to preserve c. 205, § 17. Permission of the Court is no longer needed prior to suit on the bond, if judgment is made fixing damages. G.L. c. 206, § 23 enables the Court to permit suit if damages have not been determined.

Chapter 140 of the Acts of 2012 changed the reference in subsection (a)(7) to reflect enactment of the Massachusetts Uniform Trust Code.

Section 3-607. [Order Restraining Personal Representative.]

(a) On complaint in equity 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 or her office, or make any other order to secure proper performance of his or her duty, if it appears to the court that the personal representative otherwise may take some action which would jeopardize unreasonably the interest of the petitioner 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 the attorney of record, if any, and to any other parties named defendant in the petition.

COMMENT

Cf. Section 3-401 which provides for a restraining order against a previously appointed personal representative incident to a formal testacy proceeding. The above section describes a remedy which is available for any cause against a previously appointed personal representative, whether appointed formally or informally.

This remedy, in combination with the safeguards relating to the process for appointment of a personal representative, permit "control" of a personal representative that is believed to be equal, if not superior to that available with respect to "supervised" personal representatives. The request for a restraining order may mark the beginning of a new proceeding but the personal representative, by the consent provided in Section 3-602, is practically in the position of one who, on motion, may be cited to appear before a judge.

MASSACHUSETTS COMMENT

This remedy is supplementary to proceedings under Mass. Rule of Civil Procedure 65. See also 3-401 permitting a request for restraining order as part of a filing for a formal proceeding.

Section 3-608. [Termination of Appointment; General.]

Termination of appointment of a personal representative occurs as indicated in sections 3-609 to 3-612, inclusive. Termination ends the right and power pertaining to the office of personal representative as conferred by this code or any will, except that a personal representative, at any time prior to distribution or until restrained or enjoined by court order, may perform acts necessary to protect the estate and may deliver the assets to a successor representative. Termination does not discharge a personal representative from liability for transactions or omissions occurring before termination, or relieve the personal representative of the duty to preserve assets subject to the personal representative's control, to account therefor and to deliver the assets. Termination does not affect the jurisdiction of the court over the personal representative, but terminates the authority to represent the estate in any pending or future proceeding.

COMMENT

"Termination", as defined by this and succeeding provisions, provides definiteness respecting when the powers of a personal representative (who may or may not be discharged by court order) terminate.

It is to be noted that this section does not relate to jurisdiction over the estate in proceedings which may have been commenced against the personal representative prior to termination. In such cases, a substitution of successor or special personal representative should occur if the plaintiff desires to maintain an action against the estate.

It is important to note that "termination" is not "discharge". However, an order of the Court entered under 3-1001 or 3-1002 both terminates the appointment of, and discharges, a personal representative.

Section 3-609. [Termination of Appointment; Death or Disability.]

The death of a personal representative or the appointment of a guardian or

conservator for the estate of a personal representative, terminates his or her appointment. Until appointment and qualification of a successor or special personal 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 the decedent or ward at the time the 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 appointment and qualification.

COMMENT

See Section 3-718, which establishes the rule that a surviving co-executor may exercise all powers incident to the office unless the will provides otherwise. Read together, this section and Section 3-718 mean that the representative of a deceased co-representative would not have any duty or authority in relation to the office held by the decedent.

MASSACHUSETTS COMMENT

See G.L. c. 195, §§ 11 and 12. For the procedure for appointment of a successor personal representative see §§ 3-301(a)(5) and (6) and 3-613.

Section 3-610. [Resignation by personal representative]

A personal representative may resign the personal representative's position by filing a written statement of resignation with the court after having provided 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 shall be ineffective as a termination of appointment and shall be effective only upon the appointment and qualification of a successor representative and delivery of the assets to such successor representative.

COMMENT

This section provides a procedure for resignation by a personal representative which may occur without judicial assistance.

MASSACHUSETTS COMMENT

See also Rule 90 of the Supplemental Rules of the Probate and Family Court.

Chapter 140 of the Acts of 2012 amended this section to adopt the UPC process for a Personal Representative to resign. See 3-301(a)(5) and (6) for informal appointment of a successor personal representative.

Section 3-611. [Termination of Appointment by Removal; Cause; Procedure.]

(a) A person interested in the estate may petition for removal of a personal representative for cause at any time. Notice shall be given in the manner prescribed by section 1-401 by the petitioner to the personal representative, and to other persons as the court may order. The court may suspend the personal representative's authority in any manner during the pendency of the proceeding. 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 if it is shown that a personal representative or the person seeking appointment intentionally misrepresented material facts in the proceedings leading to appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of the 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 his or her appointment or his or her nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this commonwealth to administer local assets.

COMMENT

Thought was given to qualifying (a) above so that no formal removal proceedings could be commenced until after a set period from entry of any previous order reflecting judicial consideration of the qualifications of the personal representative. It was decided, however, that the matter should be left to the judgment of interested persons and the Court.

Section 3-612. [Termination of Appointment; Change of Testacy Status.]

Except as otherwise ordered in formal proceedings, the probate of a will subsequent to the appointment of a personal representative in intestacy or under a will which is superseded by formal probate of another will, or the vacation of an informal probate of a will subsequent to the appointment of the personal representative thereunder, does not terminate the appointment of the personal representative although the personal representative's 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.

COMMENT

This section and Section 3-401 describe the relationship between formal or informal proceedings which change a previous assumption concerning the testacy of the decedent, and a previously appointed personal representative. The basic assumption of both sections is that an appointment, with attendant powers of management, is separable from the basis of appointment; i.e., intestate or testate?; what will is the last will? Hence, a previously appointed personal representative continues to serve in spite of formal or informal proceedings that may give another a prior right to serve as personal representative. But, if the testacy status is changed in formal proceedings, the petitioner also may request appointment of the person who would be entitled to serve if his assumption concerning the decedent's will prevails. Provision is made for a situation where all interested persons are content to allow a previously appointed personal representative to continue to serve even though another has a prior right because of a change relating to the decedent's will. It is not necessary for the continuing representative to seek reappointment under the new assumption for Section 3-703 is broad enough to require the personal representative to administer the estate as intestate, or under a later probated will, if either status is established after the personal representative was appointed. Under Section 3-403, notice of a formal testacy proceeding is required to be given to any previously appointed personal representative. Hence, the testacy status cannot be changed without notice to a previously appointed personal representative.

Section 3-613. [Successor Personal Representative.]

Parts 3 and 4 of this article govern proceedings for appointment of a personal representative to succeed one whose appointment has been terminated. After appointment and qualification, a successor personal representative may be substituted in all actions and proceedings to which the former personal representative was a party, and no notice, process or claim which was given or served upon the former personal representative need be given to or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative. Except as otherwise ordered by the court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if the appointment had not been terminated.

MASSACHUSETTS COMMENT

See also 3-301(a)(5) and (6) for informal appointment of a successor personal representative.

Section 3-614. [Special Personal Representative; Appointment.]

A special personal representative may be appointed in a 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. A special personal representative shall continue to act during appeal of his or her appointment unless the court orders otherwise.

COMMENT

The appointment of a special personal representative must be handled by the Court. Appointment of a special personal representative would enable the estate to participate in a transaction which the general personal representative could not, or should not, handle because of conflict of interest. If a need arises because of temporary absence or anticipated incapacity for delegation of the authority of a personal representative, the problem may be handled without judicial intervention by use of the delegation powers granted to personal representatives by Section 3-715(21).

MASSACHUSETTS COMMENT

This is akin to a special administrator appointed pursuant to G.L. c. 193, § 10. This and the provisions for informal probate eliminate the need for temporary executors and temporary administrators under G.L. c. 192, § 13 and c. 193, § 7A. See Section 3-402(b) for the necessity of filing a death certificate. Section 3-401 permits a request for appointment of a special personal representative at the initiation of formal proceedings.

Section 3-615. [Special Personal Representative; Who May Be Appointed.]

Any suitable person may be appointed special personal representative.

COMMENT

The provisions of this Code concerning informal probate should reduce the number of cases in which a fiduciary will need to be appointed pending probate of a will. Nonetheless, there will be instances where contests begin before probate and where it may be necessary to appoint a special personal representative. The objective of this section is to reduce the likelihood that contestants will be encouraged to file contests as early as possible simply to gain some advantage via having a person who is sympathetic to their cause appointed special personal representative. Most will contests are not successful. Hence, it seems reasonable to prefer the named executor as special personal representative where he is otherwise qualified.

MASSACHUSETTS COMMENT

But see *Matter of Lovejoy*, 26 Mass. App. Ct. 385 (1988) limiting Court's discretion where all interested parties agree on person to be appointed personal representative.

Section 3-616. [Reserved.]

Section 3-617. [Special Personal Representative; Formal Proceedings; Power and Duties.]

(a) A special personal representative appointed by order of the court in any formal proceeding has the power of a general personal representative except as limited by section 3-715(b) and in the appointment and duties as prescribed in the order. The appointment may be for a period of up to 90 days except in extraordinary circumstances, in which case the court may order an appointment for a longer period. The court may, for good cause shown, extend the appointment for additional period, of up to 90 days.

(b) A special personal representative has authority to distribute only pursuant to part 7, of article III, and pursuant to specific orders of the court.

(c) Unless otherwise ordered by the court, the authority of any personal representative previously appointed by the court or magistrate shall be suspended for as long as a special personal representative has authority.

MASSACHUSETTS COMMENT

See Sections 3-703(b) and 3-715 for limitations on a special personal representative's powers. The duration of the appointment has been modified to reflect prior Massachusetts practice.

Chapter 140 of the Acts of 2012 added subsection (c).

Section 3-618. [Termination of Appointment; Special Personal Representative.]

The appointment of a special representative 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 personal representative is subject to termination as provided in sections 3-608 through 3-611.

PART 7

DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

Section 3-701. [Time of Accrual of Duties and Powers.]

The duties and powers of a personal representative commence upon 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 the decedent's body, funeral and burial arrangements. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.

COMMENT

This section codifies the doctrine that the authority of a personal representative relates back to death from the moment it arises. It also makes it clear that authority of a personal representative stems from the personal representative's appointment. The sentence concerning ratification is designed to eliminate technical questions that might arise concerning the validity of acts done by others prior to appointment. Section 3-715(21) relates to delegation of authority after appointment. The third sentence accepts an idea found in the Illinois Probate Act, § 79 [S.H.A. ch. 3, § 79].

MASSACHUSETTS COMMENT

Under prior Massachusetts law, the personal representative has no authority over the disposition of the decedent's body. See Newhall, Settlement of Estates §1:10. If there is no spouse, the next of kin control, Riley, Estate Administration § 1.

Nothing in this Part is intended to supersede the provisions of Part 6 relating to special personal representatives.

Section 3-702. [Priority Among Different Letters.]

A person to whom general letters are issued first has exclusive authority under the letters until the appointment is terminated or modified. If, through error, general letters are afterwards issued to another, the first appointed representative may recover any property of the estate in the hands of the representative subsequently appointed, but the acts of the latter done in good faith before notice of the first letters are not void for want of validity of appointment.

COMMENT

The qualification relating to "modification" of an appointment is intended to refer to the change that may occur in respect to the exclusive authority of one with letters upon later appointment of a co-representative or of a special personal representative. The sentence concerning erroneous dual appointment is derived from recent New York legislation. See Section 704, Surrogate's Court Procedure Act [McKinney's SCPA 704].

Erroneous appointment of a second personal representative is possible if formal proceedings after notice are employed. The problem can arise even though notice to known interested persons and

by publication is involved.

Section 3-703. [General Duties; Relation and Liability to Persons Interested in Estate; Standing to Sue.]

(a) A personal representative is a fiduciary who shall observe the standards of care applicable to trustees as described by chapter 203C. 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. The personal representative shall use the authority conferred by this code, by the terms of the will, if any, and by any order in proceedings to which the personal representative is party for the best interests of successors to the estate.

(b) 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 appointment or fitness to continue, or a supervised administration proceeding. Nothing in this section affects the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants, the surviving spouse, any minor and dependent children and any pretermitted child of the decedent as described elsewhere in this code.

(c) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this commonwealth at death has the same standing to sue and be sued in the courts of this commonwealth and the courts of any other jurisdiction as the decedent had immediately prior to death.

COMMENT

This and the next section are especially important sections for they state the basic theory underlying the duties and powers of personal representatives. Whether or not a personal representative is supervised, this section applies to describe the relationship the personal representative bears to interested parties. If a supervised representative is appointed, or if supervision of a previously appointed personal representative is ordered, an additional obligation to the court is created. See Section 3-501.

The fundamental responsibility is that of a trustee. See Section 7-302 and the Prudent Investor Rule, National Conference of Commissioners on Uniform State Laws, November 27, 1992 Draft. Unlike many trustees, a personal representative's authority is derived from appointment by the public agency known as the Court. But, the Code also makes it clear that the personal representative, in spite of the source of authority, is to proceed with the administration, settlement and distribution of the estate by use of statutory powers and in accordance with statutory directions. See Sections 3-107 and 3-704. Subsection (b) is particularly important, for it ties the question of personal liability for administrative or distributive acts to the question of whether the act was "authorized at the time". Thus, a personal representative may rely upon and be protected by a will which has been probated without adjudication or an order appointing the personal representative to administer which is issued in no-notice proceedings even though proceedings occurring later may change the assumption as to whether the decedent died testate or intestate. See Section 3-302 concerning the status of a will probated without notice and Section 3-102 concerning the ineffectiveness of an unprobated will. However, it does not follow from the fact that the personal representative distributed under authority that the distributees may not be liable to

restore the property or values received if the assumption concerning testacy is later changed. See Sections 3-909 and 3-1004. Thus, a distribution may be "authorized at the time" within the meaning of this section, but be "improper" under the latter section.

Paragraph (c) is designed to reduce or eliminate differences in the amenability to suit of personal representatives appointed under this Code and under traditional assumptions. Also, the subsection states that so far as the law of the appointing forum is concerned, personal representatives are subject to suit in other jurisdictions. It, together with various provisions of Article IV, are designed to eliminate many of the present reasons for ancillary administrations.

MASSACHUSETTS COMMENT

The Prudent Investor Rule was developed in Massachusetts. See G.L. c. 195, § 5A and Harvard College v. Armory, 26 Mass. 446 (1830) as well as the new Massachusetts Prudent Investor Act, c. 203C.

Section 3-704. [Personal Representative to Proceed Without Court Order; Exception.]

A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified or ordered in regard to a supervised personal representative, do so without adjudication, order, or direction of the court, but the personal representative may invoke the jurisdiction of the court, in proceedings authorized by this code, to resolve questions concerning the estate or its administration.

COMMENT

This section is intended to confer authority on the personal representative to initiate a proceeding at any time when it is necessary to resolve a question relating to administration. Section 3-105 grants broad subject matter jurisdiction to the probate court which covers a proceeding initiated for any purpose other than those covered by more explicit provisions dealing with testacy proceedings, proceedings for supervised administration, proceedings concerning disputed claims and proceedings to close estates.

MASSACHUSETTS COMMENT

G.L. c. 195, § 5A also authorizes an executor or administrator to seek specific authority to exercise powers. The UPC authorization of sales of real estate is not adopted, § 3-715. G.L. c. 202 is retained as the procedure for securing a license to sell. Absent a power granted in a will, personal representatives will have no authority to sell or mortgage real estate without a license.

Section 3-705. [Reserved.]

MASSACHUSETTS COMMENT

The UPC provisions for notice within 30 days after appointment have been combined with the pre-appointment notice under §§ 3-306 and 3-403. As a result a more informative notice will be given to interested parties, but only once.

Section 3-706. [Duty of Personal Representative; Inventory and Appraisal.]

(a) Within 3 months after appointment, a personal representative, who is not a successor to another representative, shall prepare an inventory of the property owned by the decedent at the time of death, listing it with reasonable detail and indicating the

fair market value of each listed item as of the date of death, and the type and amount of any encumbrance that may exist with reference to any item.

(b) Within 3 months after appointment, a successor personal representative shall prepare an inventory of the property of the estate, listing it with reasonable detail and indicating the fair market value of each listed item as of the date of the successor personal representative's appointment, and the type and amount of any encumbrance that may exist with reference to any item.

(c) The personal representative shall file with the court, or mail to all interested persons whose addresses are reasonably available, a copy of the inventory. The personal representative may also file the original of the inventory with the court.

COMMENT

If the personal representative breaches duty concerning the inventory, the personal representative may be removed. Section 3-611. Or, an interested person seeking to surcharge a personal representative for losses incurred as a result of the personal representative's administration might be able to take advantage of any breach of duty concerning inventory. The section provides two ways in which a personal representative may handle an inventory. If the personal representative elects to send copies to all interested persons, information concerning the assets of the estate need not become a part of the records of the probate court. The alternative procedure is to file the inventory with the court. This procedure would be indicated in estates with large numbers of interested persons, where the burden of sending copies to all would be substantial. The Court's role in respect to the second alternative is simply to receive and file the inventory with the file relating to the estate.

MASSACHUSETTS COMMENT

This follows Massachusetts procedure of G.L. c. 195, § 5 except that filing with the court is not required by the Code. This section clarifies the issue of whether appraisal shall be as of the date of death or date of appointment. See Section 3-908 for deed of distribution to establish title in a distributee.

Chapter 140 of the Acts of 2012 amended this section to require a new inventory from a successor personal representative.

Section 3-707. [Employment of Appraisers.]

The personal representative may employ one or more qualified and disinterested appraisers to assist in ascertaining the fair market value as of the date of the decedent's death of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate.

MASSACHUSETTS COMMENT

See G.L. c. 195, § 6 for the Court's option to appoint appraisers.

Section 3-708. [Reserved]

Section 3-709. [Duty of Personal Representative; Possession of Estate.]

(a) 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 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 the personal representative's possession. The personal representative may maintain an action to recover possession of property or to determine the title thereto.

(b) Whoever injuriously intermeddles with any personal property of a deceased person, without being thereto authorized by law, shall be liable as a personal representative in his or her own wrong to the person aggrieved.

(c) A personal representative in his own wrong shall be liable to the rightful personal representative for the full value of the personal property of the deceased taken by him or her and for all damages caused to the estate by his or her acts; and he or she shall not be allowed to retain or deduct any part of such estate, except for funeral expenses or debts of the deceased or other charges actually paid by him or her and which the rightful personal representative might have been compelled to pay.

COMMENT

Section 3-101 provides for the devolution of title on death. This section deals with the personal representative's duty and right to possess assets. It proceeds from the assumption that it is desirable whenever possible to avoid disruption of possession of the decedent's assets by devisees or heirs. But, if the personal representative decides that possession of an asset is necessary or desirable for purposes of administration, the personal representative's judgment is made conclusive in any action for possession that may be needed against an heir or devisee. It may be possible for an heir or devisee to question the judgment of the personal representative in later action for surcharge for breach of fiduciary duty, but this possibility should not interfere with the personal representative's administrative authority as it relates to possession of the estate.

Section 3-710. [Power to Avoid Transfers.]

The property liable for the payment of unsecured debts of a decedent includes all property transferred by the decedent by any means which is in law void or voidable as against creditors, and subject to prior liens, the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative.

COMMENT

See, also, Section 6-201, which saves creditors' rights in regard to non-testamentary transfers effective at death.

MASSACHUSETTS COMMENT

See G.L. c. 230, § 5 whereby an heir, legatee or creditor may bring an action in the personal representative's name if necessary.

Section 3-711. [Reserved.]

Section 3-712. [Improper Exercise of Power; Breach of Fiduciary Duty.]

If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of fiduciary duty to the same extent as a trustee of an express trust. The rights of purchasers and others dealing with a personal representative shall be determined as provided in sections 3-713 and 3-714.

COMMENT

An interested person has two principal remedies to forestall a personal representative from committing a breach of fiduciary duty. (1) Under Section 3-607 the interested person may apply to the Court for an order restraining the personal representative from performing any specified act or from exercising any power in the course of administration. (2) Under Section 3-611 the interested person may petition the Court for an order removing the personal representative.

Evidence of a proceeding, or order, restraining a personal representative from selling, leasing, encumbering or otherwise affecting title to real property subject to administration, if properly recorded under the laws of this commonwealth, would be effective to prevent a purchaser from acquiring a marketable title under the usual rules relating to recordation of real property titles.

In addition Sections 1-302 and 3-105 authorize joinder of third persons who may be involved in contemplated transactions with a personal representative in proceedings to restrain a personal representative under Section 3-607.

Section 3-713. [Sale, Encumbrance or Transaction Involving Conflict of Interest; Voidable; Exceptions.]

Any sale or encumbrance to the personal representative, the personal representative's spouse, agent or attorney, or any corporation or trust in which the personal representative has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one who has consented after fair disclosure, unless

(1) the will or a contract entered into by the decedent expressly authorized the transaction or transactions in general; or

(2) the transaction is approved by the court after notice to interested persons.

COMMENT

If a personal representative violates the duty against self-dealing described by this section, a voidable title to assets sold results. Other breaches of duty relating to sales of assets will not cloud titles except as to purchasers with actual knowledge of the breach. See Section 3-714. The principles of bona fide purchase would protect a purchaser for value without notice of defect in the seller's title arising from conflict of interest.

Section 3-714. [Persons Dealing with Personal Representative; Protection.]

A person who in good faith either assists a personal representative or deals with a personal representative for value is protected as if the personal representative properly exercised 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.

COMMENT

This section qualifies the effect of a provision in a will which purports to prohibit sale of property by a personal representative. The provisions of a will may prescribe the duties of a personal representative and subject the personal representative to surcharge or other remedies of interested persons if the personal representative disregards them. See Section 3-703. But, the will's prohibition is not relevant to the rights of a purchaser unless the purchaser had actual knowledge of its terms. Interested persons who want to prevent a personal representative from having the power described here must use the procedures described in Sections 3-501 to 3-505. The section cannot control whether a purchaser takes free of the lien of unpaid state or federal estate taxes. Hence, purchasers from personal representatives appointed pursuant to this Code will have to satisfy themselves concerning whether estate taxes are paid, and if not paid, whether the tax lien follows the property they are acquiring. See Section 6234, Internal Revenue Code [26 U.S.C.A. § 6234] and G.L. c. 65C, § 14.

The purpose of the Code is to make the deed or instrument of distribution the usual muniment of title. See Section 3-907, 3-908, 3-910. However, this is not available when no administration has occurred and in that event reliance upon general recording statutes must be had.

Section 3-715. [Transactions Authorized for Personal Representatives; Exceptions.]

(a) 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 other than a special personal representative, acting reasonably for the benefit of the interested persons, may properly:

- (1) retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment;
- (2) receive assets from fiduciaries, or other sources;
- (3) perform, compromise or refuse performance of the decedent's contracts that

continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:

(i) execute and deliver a deed of conveyance for cash payment of all sums remaining due on the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or

(ii) deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement;

(4) satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances;

(5) if funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit or invest liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements or other prudent investments which would be reasonable for use by trustees generally;

(6) acquire or dispose of tangible and intangible personal property for cash or on credit, at public or private sale; and manage, develop, improve, exchange, change the character of, or abandon an estate asset;

(7) make repairs or alterations in buildings or other structures, demolish any improvements, structures, raze existing or erect new party walls or buildings;

(8) subdivide, develop or dedicate land to public use; adjust boundaries; or adjust differences in valuation 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 the personal representative 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, the personal representative 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 a personal representative other than a special 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 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) defend and prosecute claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of duties;

(23) sell, or lease any 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;

(23 ½) sell, lease or encumber to an arm's length third party any real estate of the estate, or an interest in that real estate, for cash, credit, or for part cash and part credit, with or without security for unpaid balances and whether the personal representative has been appointed formally or informally; the sale, lease or encumbrance shall be conclusive notwithstanding section 3-302 or any contest of the

informal probate proceeding, provided that: (i) if the decedent died without a will, a license has been issued under chapter 202; or (ii) if the decedent died with a will, either: (a) the will, probated formally or informally, empowered the personal representative to sell, lease or encumber that real estate or an interest in that real estate, or (b) a license has been issued under chapter 202.

(24) continue any unincorporated business or venture in which the decedent was engaged at the time of 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 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.

(b) 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 special personal representative acting reasonably for the benefit of the interested persons, may properly exercise only those powers set forth in subsections (1), (2), (3), (5), (7), (12), (15), (18), (19), (20), (21), (22), (24) and (26) of paragraph (a).

COMMENT

This section accepts the assumption of the Uniform Trustee's Powers Act that it is desirable to equip fiduciaries with the authority required for the prudent handling of assets and extends it to personal representatives. The section requires that a personal representative act reasonably and for the benefit of the interested person. Subject to this and to the other qualifications described by the preliminary statement, the enumerated transactions are made authorized transactions for personal representatives. Sub-paragraphs (27) and (18) support the other provisions of the Code, particularly Section 3-704, which contemplates that personal representatives will proceed with all of the business of administration without court orders.

In part, sub-paragraph (4) involves a substantive question of whether noncontractual charitable pledges of a decedent can be honored by a personal representative. It is believed, however, that it is not desirable from a practical standpoint to make much turn on whether a charitable pledge is, or is not, contractual. Pledges are rarely made the subject of claims. The effect of subparagraph (4) is to permit the personal representative to discharge pledges where the personal representative believes the decedent would have wanted it done without exposing the personal representative to surcharge. The holder of a contractual pledge may, of course, pursue the remedies of a creditor. If a pledge provides that the obligation ceases on the death of the pledgor, no personal representative would be safe in assuming that the decedent would want the pledge completed under the circumstances.

Subsection (3) is not intended to affect the right to performance or to damages of any person who contracted with the decedent. To do so would constitute an unreasonable interference with private rights.

The intention of the subsection is simply to give a personal representative who is obligated to carry out a decedent's contracts the same alternatives in regard to the contractual duties which the decedent had prior to death.

MASSACHUSETTS COMMENT

See G.L. c. 195, § 5A for less comprehensive list of powers of executors and administrators. The UPC authority for sale of real estate without a license is not adopted. A personal representative may proceed under G.L. c. 202 for a license to sell or mortgage real estate.

Chapter 140 of the Acts of 2012 added subsection 23 ½ to clarify that a personal representative appointed formally or informally may sell real estate pursuant to a power contained in a will or by license to sell.

Section 3-716. [Powers and Duties of Successor Personal Representative.]

A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate, as expeditiously as possible, but shall not exercise any power expressly made personal to the executor named in the will.

Section 3-717. [Co-representatives; When Joint Action Required.]

If two or more persons are appointed co-representatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate. This restriction does not apply when any co-representative receives and receipts for property due the estate, when the concurrence of all cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate, or when a co-representative has been delegated to act for the others. Persons dealing with a co-representative if actually unaware that another has been appointed to serve or if advised by the personal representative with whom they deal that the personal representative has authority to act alone for any of the reasons mentioned herein, are as fully protected as if the person with whom they dealt had been the sole personal representative.

COMMENT

With certain qualifications, this section is designed to compel co-representatives to agree on all matters relating to administration when circumstances permit. Delegation by one to another representative is a form of concurrence in acts that may result from the delegation. A co-representative who abdicates responsibility to co-administer the estate by a blanket delegation breaches a duty to interested persons as described by Section 3-703. Section 3-715 (21) authorizes some limited delegations, which are reasonable and for the benefit of interested persons.

Section 3-718. [Powers of Surviving Personal Representative.]

Unless the terms of the will otherwise provide, every power exercisable by personal co-representatives may be exercised by the one or more remaining after the appointment of one or more is terminated, and if one of 2 or more nominated as co-representatives is not appointed, those appointed may exercise all the powers incident to the office.

COMMENT

This section applies where one of two or more co-representatives dies, becomes disabled or is removed. In regard to co-executors, it is based on the assumption that the decedent would not consider the powers of fiduciaries to be personal, or to be suspended if one or more could not function. In regard to co-administrators in intestacy, it is based on the idea that the reason for appointing more than one ceases on the death or disability of either of them.

MASSACHUSETTS COMMENT

See G.L. c. 195, § 11 to the same effect.

Section 3-719. [Compensation of Personal Representative.]

A personal representative is entitled to reasonable compensation for services. If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, the personal representative may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative also may renounce the right to all or any part of the compensation. A written renunciation of fee may be filed with the court.

COMMENT

This section has no bearing on the question of whether a personal representative who also serves as attorney for the estate may receive compensation in both capacities. If a will provision concerning a fee is framed as a condition on the nomination as personal representative, it could not be renounced.

Section 3-720. [Expenses in Estate Litigation.]

If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not that personal representative or person is entitled to receive from the estate necessary expenses and disbursements including reasonable attorneys' fees incurred.

COMMENT

Litigation prosecuted by a personal representative for the primary purpose of enhancing the prospects for compensation would not be in good faith.

A personal representative is a fiduciary for successors of the estate (Section 3-703). Though the will naming the personal representative may not yet be probated, the priority for appointment conferred by Section 3-203 on one named executor in a probated will means that the person named has an interest, as a fiduciary, in seeking the probate of the will. Hence, the personal representative is an interested person within the meaning of Sections 3-301 and 3-401. Section 3-912 gives the successors of an estate control over the executor, provided all are competent adults. So, if all persons possibly interested in the probate of a will, including trustees of any trusts created thereby, concur in directing the named executor to refrain from efforts to probate the instrument, the personal representative would lose standing to proceed. All of these observations apply with equal force to the case where the named executor of one instrument seeks to contest the probate of another instrument. Thus, the Code changes the idea followed in some jurisdictions that an executor lacks standing to contest other wills which, if valid, would supersede the will naming the personal representative, and standing to oppose other contests that may be mounted against the instrument nominating the personal representative.

Section 3-721. [Reserved]

MASSACHUSETTS COMMENT

Current provisions for determining fees of personal representatives, attorney and agents are retained. See G.L. c. 215, §§ 39, 39A, 39B and 45.

PART 8

CREDITORS' CLAIMS

Section 3-801. [Reserved]

Section 3-802. [Statutes of Limitations.]

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.

Only those successors who would be affected thereby, must agree to a waiver of a defense of limitations available to an estate.

Section 3-803. [Limitations on Presentation of Claims.]

(a) Except as provided in this chapter, a personal representative shall not be held to answer to an action by a creditor of the deceased unless such action is commenced within one year after the date of death of the deceased and unless, before the expiration of such period, the process in such action has been served by delivery in hand upon such personal representative or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed with the register.

(b) A trustee of a trust, the assets of which are subject as a matter of substantive law to being reached by creditors of the deceased shall not be held to answer to an action by a creditor of the deceased unless such action is commenced against such trustee or against the personal representative of the deceased within the time and in the manner provided in subsection (a). Such trustee shall have immunity from personal liability to a creditor or the deceased in the same manner as a personal representative has, pursuant to section 3-807.

(c) A claim described in subsections (a) or (b) which is barred by statute of the decedent's domicile before the limitation in this commonwealth is barred in this commonwealth.

(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) an action for personal injuries or death, if commenced more than one year after the date of death of the deceased, brought against the personal

representative, provided that such action is commenced within three years next after the cause of action accrues, and provided further that any judgment recovered in any action so brought may be satisfied only from the proceeds of a policy of insurance or bond, if any, and not from the general assets of the estate.

(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.

(e) If the supreme judicial court, upon a complaint in equity filed by a creditor whose claim has not been prosecuted within the time limited by subsections (a) or (b), deems that justice and equity require it and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time so limited, it may give him judgment for the amount of his claim against the estate of the deceased person, provided forthwith upon the filing of the complaint a notice such as provided in subsection (a) has been filed in the proper registry of probate; but such judgment shall not affect any payment or distribution made before the filing of such complaint and notice.

(f) If a deceased received medical assistance under chapter 118E when such deceased was 55 years of age or older or while an inpatient in a nursing facility or other medical institution, section 32 of chapter 118E shall govern the notice to be given to the division of medical assistance and such division's claim for recovery under section 31 of said chapter 118E if the division so chooses.

COMMENT

Under Section 3-808 a personal representative is not liable on transactions entered into on behalf of the estate unless he agrees to be personally liable or unless he breaches a duty by making the contract. Tort claims normally will involve casualty insurance of the decedent or of the personal representative, and so will fall within the exception of subparagraph (d). If a personal representative is personally at fault in respect to a tort claim arising after the decedent's death, his personal liability would not be affected by the running of the special short period provided here.

The one-year from death limitation (which applies without regard to whether or when an estate is opened for administration) is designed to prevent concerns stemming from the possible applicability to this Code of *Tulsa Professional Collection Services v. Pope*, 108 S.Ct. 1340, 485 U.S. 478 (1988) from unduly prolonging estate settlements and closings.

Successors who are willing to delay receipt and enjoyment of inheritances may consider waiting out the limitation period running from death simply to avoid any public record of an administration that might alert known and unknown creditors to pursue their claims. The scenario was deemed to be unlikely, however, for unpaid creditors of a decedent are interested persons (Section 1-201(24)) who are qualified to force the opening of an estate for purposes of presenting and enforcing claims. Further, successors who delay opening an administration will suffer from lack of proof of title to estate assets and attendant inability to enjoy their inheritances. Finally, the odds that holders of important claims against the decedent will need help in learning of the death and proper place of administration is rather small. Any benefit to such claimants of additional procedures designed to compel administrations and to locate and warn claimants of an impending bar, is quite likely to be heavily outweighed by the costs such procedures would impose on all estates, the vast majority of which are routinely applied to quick payment of the decedents' bills and distributed without any creditor controversy.

MASSACHUSETTS COMMENT

This section preserves the claim procedure of G.L. c. 197, §§ 9 and 9A.

Section 3-804. [Manner of Commencement of Claims.]

(1) A personal representative shall not be held to answer to an action by a creditor of the deceased which is commenced within any other or additional period of limitation for bringing such action provided by or under this chapter unless before the expiration of such period the process in such action has been served by delivery in hand upon the personal representative or service thereof accepted by the personal representative or a notice as aforesaid has been filed with the register.

(2) Claims against a decedent's estate shall be commenced by 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) A special personal representative shall be liable to an action by a creditor of the deceased brought within the period of limitation provided in section 3-803; provided, however, that any such action shall be stayed by the court in which it is brought until such time as a general personal representative has been appointed and said general personal representative has been substituted for said special personal representative as the party defendant.

COMMENT

The filing of a claim with the probate court under (2) of this section does not serve to initiate a proceeding concerning the claim. Rather, it serves merely to protect the claimant who may anticipate some need for evidence to show that his claim is not barred. The probate court acts simply as a depository of the statement of claim, as is true of its responsibility for an inventory filed with it under Section 3-706.

MASSACHUSETTS COMMENT

Subsection (1) follows G.L. c. 197, § 9(b) and Subsection (3) restates G.L. c. 193, § 15.

Section 3-805. [Classification of Claims.]

(a) If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

- (1) costs and expenses of administration;
- (2) reasonable funeral expenses;
- (3) debts and taxes with preference under federal law;
- (4) reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending the decedent;

(5) debts and taxes with preference under other laws of this commonwealth;

(6) debts due to the division of medical assistance;

(7) 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.

COMMENT

Under federal law, funeral expenses, but not debts incurred by the decedent can be given priority over claims of the United States.

MASSACHUSETTS COMMENT

See G.L. c. 198, § 1 which assigns a similar priority except that it groups together expenses of last sickness, funeral and administration.

Section 3-806. [Allowance of Claims.]

(a) 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.

(b) 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 with the date of judgment unless based on a contract making a provision for interest, in which case they bear interest in accordance with that provision.

MASSACHUSETTS COMMENT

See G.L. c. 197, § 20 for interest due on legacies.

Section 3-807. [Payment of Claims.]

(a) Upon the expiration of the time limitation 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 family 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) If a personal representative finds that the estate of the deceased will probably be insufficient for the payment of his debts the personal representative shall represent the estate to be insolvent to the court, and shall, pursuant to court order, after notice to

all persons interested, divide and pay over what remains in the personal representative's hands among the creditors who prove their debts. No action shall be maintained against a personal representative after an estate has been represented insolvent, unless for a claim entitled to a preference which would not be affected by the insolvency of the estate or unless the assets prove more than sufficient to pay all the debts allowed. If the estate is represented insolvent while an action is pending for a claim which is not entitled to such preference, the action may be stayed without costs until it appears whether the estate is insolvent, and if it is not insolvent, the plaintiff may prosecute the action as if no such representation had been made.

(c) If a personal representative shall not within six months after the date of death of the deceased have had notice of demands against the estate of the deceased sufficient to warrant him to represent such estate to be insolvent, he or she may, after the expiration of said six months, pay the debts due from the estate and shall not be personally liable to any creditor in consequence for such payments made before notice of such creditor's demand; and if such a personal representative shall be in doubt as to the validity of any debt which, if valid, the personal representative would have a right to pay under this section, the personal representative may, with the approval of the court, after notice to all persons interested, pay such debt or so much thereof as the court may authorize.

(d) If a personal representative pays under subsection (c), before notice of the demand of any other creditor, the whole of the estate and effects of the deceased, the personal representative shall not be required in consequence of such notice to represent the estate insolvent, but in an action against the personal representative shall be discharged upon proving such payments.

(e) If a personal representative pays, under subsection (c), so much of the estate and effects of the deceased that the remainder is insufficient to satisfy a demand of which the personal representative afterward has notice, the personal representative shall be liable on such last mentioned demand for only so much as may then remain. If two or more such demands are exhibited, which together exceed the amount of assets remaining in his hands, the personal representative may represent the estate insolvent, and shall, pursuant to court order, after notice to all persons interested, divide and pay over what remains in the personal representative's hands among the creditors who prove their debts; but the creditors of the deceased who have been previously paid shall not be liable to repay any part of the amount received by them.

(f) If it appears, upon the settlement of the account of a personal representative, that the whole estate and effects which have come to the personal representative's hands have been exhausted in paying the charges of administration and debts or claims entitled by law to a preference over the common creditors of the deceased, such settlement shall be a bar to an action brought against the personal representative by a creditor who is not entitled to such preference, although the estate has not been represented insolvent.

(g) The personal representative at any time may pay any just claim that has not been barred, with or without formal presentation, but, except as provided in subsections (c), (d), (e) and (f), 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.

MASSACHUSETTS COMMENT

This adopts the Massachusetts procedure set forth in G.L. c. 197, §§ 2 to 5. Subsections (a) and (g) follow the U.P.C. The cumbersome procedure of settling insolvent estates under c. 198 is abandoned in favor of resort by those seeking protection to the broad powers of the Court, see Section 3-107. C. 198, §§ 1 and 31 are combined in subsection (b).

Section 3-808. [Individual Liability of Personal Representative.]

(a) Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.

(b) A personal representative is individually liable only if he or she is personally at fault for (1) obligations arising from ownership or control of the estate or (2) for torts committed in the course of administration of the estate.

(c) Claims based on contracts entered into by a personal representative in his fiduciary capacity, on obligations arising from ownership or control of the estate or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor.

(d) Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding.

COMMENT

In the absence of statute an executor, administrator or a trustee is personally liable on contracts entered into in his fiduciary capacity unless he expressly excludes personal liability in the contract. He is commonly personally liable for obligations stemming from ownership or possession of the property (e.g., taxes) and for torts committed by servants employed in the management of the property. The claimant ordinarily can reach the estate only after exhausting his remedies against the fiduciary as an individual and then only to the extent that the fiduciary is entitled to indemnity from the property. This and the following sections are designed to make the estate a quasi-corporation for purposes of such liabilities. The personal representative would be personally liable only if an agent for a corporation would be under the same circumstances, and the claimant has a direct remedy against the quasi-corporate property.

MASSACHUSETTS COMMENT

In 1976, G.L. c. 195, § 17 was revised based on the same language of the U.P.C. See also *Apahouser Lock & Security Corp. v. Carvelli*, 26 Mass. App. Ct. 385 (1988).

Section 3-809. [Secured Claims.]

Payment of a secured claim is upon the basis of the amount allowed if the creditor surrenders his security; otherwise payment is upon the basis of one of the following:

- (1) if the creditor exhausts his security before receiving payment, unless precluded by other law, upon the amount of the claim allowed less the fair value of the security; or
- (2) if the creditor does not have the right to exhaust his security or has not done so, upon the amount of the claim allowed less the value of the security determined by converting it into money according to the terms of the agreement pursuant to which the security was delivered to the creditor, or by the creditor and personal representative by agreement, arbitration, compromise or litigation.

Section 3-810. [Claims Not Due and Contingent or Unliquidated Claims.]

(a) If a claim which will become due at a future time or a contingent or unliquidated claim becomes due or certain before the distribution of the estate, and if the claim has been allowed or established by a proceeding, it is paid in the same manner as presently due and absolute claims of the same class.

(b) In other cases the personal representative or, on petition of the personal representative or the claimant in a special proceeding for the purpose, the court may provide for payment as follows:

- (1) if the claimant consents, he may be paid the present or agreed value of the claim, taking any uncertainty into account;
- (2) arrangement for future payment, or possible payment, on the happening of the contingency or on liquidation may be made by creating a trust, giving a mortgage, obtaining a bond or security from a distributee, or otherwise.

MASSACHUSETTS COMMENT

See G.L. c. 197, § 13.

Section 3-811. [Counterclaims.]

In paying 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.

MASSACHUSETTS COMMENT

See G.L. c. 197, § 25.

Section 3-812. [Execution and Levies Prohibited.]

No execution may issue upon nor may any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but this section shall not be construed to prevent the enforcement of mortgages, pledges or liens upon real or personal property in an appropriate proceeding.

Section 3-813. [Compromise of Claims.]

When a claim against the estate has been presented in any manner, the personal representative may, if it appears for the best interest of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated.

MASSACHUSETTS COMMENT

See G.L. c. 195, § 5A(4)

Section 3-814. [Encumbered Assets.]

If any assets of the estate are encumbered by mortgage, pledge, lien, or other security interest, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance or convey or transfer the assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has 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.

COMMENT

Section 2-609 establishes a rule of construction against exoneration. Thus, unless the will indicates to the contrary, a specific devisee of mortgaged property takes subject to the lien without right to have other assets applied to discharge the secured obligation.

MASSACHUSETTS COMMENT

See G.L. c. 191, § 23.

Section 3-815. [Administration in More Than One State; Duty of Personal Representative.]

(a) All assets of estates being administered in this commonwealth are subject to all claims, allowances and charges existing or established against the personal representative wherever appointed.

(b) If the estate either in this commonwealth 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, each claimant whose claim has been allowed either in this commonwealth or elsewhere in administrations of which the personal representative is aware, is entitled to receive payment of an equal proportion of his claim, after satisfaction of the exemptions, allowances and charges. If a preference or security in regard to a claim is allowed in another jurisdiction but not in this commonwealth, 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 commonwealth is not the state of the decedent's last domicile, the claims allowed in this commonwealth shall be paid their proportionate share of total assets 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 commonwealth the amount to which they are entitled, local assets shall be marshaled so that each claim allowed in this commonwealth is paid its proportion as far as possible, after taking into account all dividends on claims allowed in this commonwealth from assets in other jurisdictions.

COMMENT

Under Section 3-803(a)(1), if a local (property only) administration is commenced, claimants may prove claims in the local administration at any time before the local claim period expires. Section 3-815 has the effect of subjecting all assets of the decedent, wherever they may be located and administered, to claims properly presented in any local administration. It is necessary, however, that the personal representative of any portion of the estate be aware of other administrations in order for him to become responsible for claims and charges established against other administrations.

Section 3-816. [Final Distribution to Domiciliary Representative.]

The estate of a non-resident decedent being administered by a personal representative appointed in this commonwealth shall, if there is a personal representative of the decedent's domicile willing to receive it, be distributed to the domiciliary personal representative for the benefit of the successors of the decedent unless (1) by virtue of the decedent's will, if any, and applicable choice of law rules, the successors are identified pursuant to the local law of this commonwealth without reference to the local law of the decedent's domicile; (2) the personal representative of this commonwealth, after reasonable inquiry, is unaware of the existence or identity of a domiciliary personal representative; or (3) the court orders otherwise in a proceeding for a closing order under section 3-1001 or incident to the closing of a supervised administration. In other cases, distribution of the estate of a decedent shall be made in accordance with the other parts of this article.

PART 9

SPECIAL PROVISIONS RELATING TO DISTRIBUTION

Section 3-901. [Successors' Rights if No Administration.]

In the absence of administration, the heirs and devisees are entitled to the estate in accordance with the terms of a probated will or the laws of intestate succession. Devisees may establish title by the probated will to devised property. Persons entitled to property by family allowance, exemption or intestacy may establish title thereto by proof of the decedent's ownership, his death, and their relationship to the decedent. Successors take subject to all charges incident to administration, including the claims of creditors and allowances of surviving spouse and dependent children, and subject to the rights of others resulting from abatement, retainer, advancement, and ademption.

COMMENT

Title to a decedent's property passes to his heirs and devisees at the time of his death. See Section 3-101. This section adds little to Section 3-101 except to indicate how successors may establish record title in the absence of administration.

MASSACHUSETTS COMMENT

For a discussion of the principle that title passes to the heirs without the requirement of the heirs to be determined by a probate proceeding and that the 3 year statute of limitations does not apply to a probate determination of heirs, see *In the Matter of the Petition of Beachside I Homeowners Association*, No. A11-180, Court of Appeals of Minnesota, July 18, 2011.

Section 3-902. [Distribution; Order in Which Assets Appropriated; Abatement.]

(a) Except as provided in subsection (b) and except as provided in connection with the share of the surviving spouse who elects to take an elective share, shares of distributees abate, without any preference or priority as between real and personal property, in the following order: (1) property passing by intestacy; (2) residuary devises; (3) general devises; (4) specific devises. For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

(b) If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(c) If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other

interests in the remaining assets.

COMMENT

A testator may determine the order in which the assets of his estate are applied to the payment of his debts. If he does not, then the provisions of this section express rules which may be regarded as approximating what testators generally want. The statutory order of abatement is designed to aid in resolving doubts concerning the intention of a particular testator, rather than to defeat his purpose. Hence, subsection (b) directs that consideration be given to the purpose of a testator. This may be revealed in many ways. Thus, it is commonly held that, even in the absence of statute, general legacies to a wife, or to persons with respect to which the testator is in loco parentis, are to be preferred to other legacies in the same class because this accords with the probable purpose of the legacies.

MASSACHUSETTS COMMENT

Compare G.L. c. 191, §§26 and 27, G.L. c. 202, §§ 1 to 4A. This section would eliminate the priority of real property over personality.

Section 3-903. [Right of Retainer.]

The amount of a non-contingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest; but the successor has the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt.

MASSACHUSETTS COMMENT

This section is similar to G.L. c. 197, § 25.

Section 3-904. [Interest on General Pecuniary Devise.]

The rate of interest upon general pecuniary devises or pecuniary distribution under a trust instrument, unless otherwise provided in the will or trust instrument, shall be such as the supreme judicial court may by general rules establish, and in absence of any such rules the rate shall be four percent per annum. Unless otherwise provided in the will or trust instrument, interest shall be payable from the date of the expiration of the period within which creditors may bring actions against a personal representative as provided in section 3-803.

MASSACHUSETTS COMMENT

This section adopts G.L. c. 197, § 20 as it is applicable to estates. S.J.C. Rule 1:14 establishes the rate of interest at 8%. This section does not limit the personal representative's liability of remaindermen for lost income on uninvested or mismanaged assets, see *Sullivan v. Sullivan*, 335 Mass. 268 (1957).

Section 3-905. [Reserved]

MASSACHUSETTS COMMENT

The U.P.C. section would reverse the rule that forfeiture clauses are valid in Massachusetts. See *Newhall, The Settlement of Estates*, § 348. It is not recommended for adoption in Massachusetts. See

Section 3-906. [Distribution in Kind; Valuation; Method.]

(a) Except as restricted or otherwise provided for by will or order of the court, a personal representative may distribute assets of the estate in kind or partly in cash and partly in kind and pro rata or not pro rata at then current values as between distributees.

(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.

MASSACHUSETTS COMMENT

The option to distribute in cash or kind of G.L. c. 195, § 5A (3) is preserved in place of the UPC preference for in kind distributions.

Section 3-907. [Distribution in Kind; Evidence.]

If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring or releasing the assets to the distributee as evidence of the distributee's title to the property.

COMMENT

This and sections following should be read with Section 3-709 which permits the personal representative to leave certain assets of a decedent's estate in the possession of the person presumptively entitled thereto. The "release" contemplated by this section would be used as evidence that the personal representative had determined that he would not need to disturb the possession of an heir or devisee for purposes of administration.

A personal representative may acquire a full title to estate assets, as in the case where particular items are conveyed to the personal representative by sellers, transfer agents or others. The language of Section 3-907 is designed to cover instances where the instrument of distribution operates as a transfer, as well as those in which its operation is more like a release.

Section 3-908. [Distribution; Right or Title of Distributee.]

Proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative, is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper.

COMMENT

The purpose of this section is to channel controversies which may arise among successors of a

decendent because of improper distributions through the personal representative who made the distribution, or a successor personal representative. Section 3-108 does not bar appointment proceedings initiated to secure appointment of a personal representative to correct an erroneous distribution made by a prior representative. But see Section 3-1006.

Section 3-909. [Improper Distribution; Liability of Distributee.]

Unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a distributee of property improperly distributed or paid, or a claimant who was improperly paid, is liable to return the property improperly received and its income since distribution if he has the property. If he does not have the property, then he is liable to return the value as of the date of disposition of the property improperly received and its income and gain received by him.

COMMENT

The term "improperly" as used in this section must be read in light of Section 3-703 and the manifest purpose of this and other sections of the Code to shift questions concerning the propriety of various distributions from the fiduciary to the distributees in order to prevent every administration from becoming an adjudicated matter. Thus, a distribution may be "authorized at the time" as contemplated by Section 3-703, and still be "improper" under this section. Section 3-703 is designed to permit a personal representative to distribute without risk in some cases, even though there has been no adjudication. When an unadjudicated distribution has occurred, the rights of persons to show that the basis for the distribution (e.g., an informally probated will, or informally issued letters of administration) is incorrect, or that the basis was improperly applied (erroneous interpretation, for example) is preserved against distributees by this section.

The definition of "distributee" to include the trustee and beneficiary of a testamentary trust in 1-201(13) is important in allocating liabilities that may arise under Sections 3-909 and 3-910 on improper distribution by the personal representative under an informally probated will. The provisions of 3-909 and 3-910 are based on the theory that liability follows the property and the fiduciary is absolved from liability by reliance upon the informally probated will.

Section 3-910. [Reserved.]

Section 3-911. [Reserved.]

Section 3-912. [Private Agreements Among Successors to Decedent Binding on Personal Representative.]

Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a

testamentary trust are successors for the purposes of this section. Nothing herein relieves trustees of any duties owed to beneficiaries of trusts.

COMMENT

It may be asserted that this section is only a restatement of the obvious and should be omitted. Its purpose, however, is to make it clear that the successors to an estate have residual control over the way it is to be distributed. Hence, they may compel a personal representative to administer and distribute as they may agree and direct. Successors should compare the consequences and possible advantages of careful use of the power to renounce as described by Section 2-801 with the effect of agreement under this section. The most obvious difference is that an agreement among successors under this section would involve transfers by some participants to the extent it changed the pattern of distribution from that otherwise applicable.

Differing from a pattern that is familiar in many states, this Code does not subject testamentary trusts and trustees to special statutory provisions, or supervisory jurisdiction. A testamentary trustee is treated as a devisee with special duties which are of no particular concern to the personal representative. Article VII contains optional procedures extending the safeguards available to personal representatives to trustees of both inter vivos and testamentary trusts.

MASSACHUSETTS COMMENT

Compare G.L. c. 204, § 13 et seq. See also Sections 3-1101 and 3-1102.

Section 3-913. [Distributions to Trustee.]

(a) If a trust instrument does not excuse the trustee from giving bond, before distributing to a trustee a personal representative may petition the appropriate Court to require that the trustee post bond with sureties if the personal representative apprehends that distribution might jeopardize the interests of persons who are not able to protect themselves, and the personal representative may withhold distribution until the court has acted.

(b) No inference of negligence on the part of the personal representative shall be drawn from his or her failure to exercise the authority conferred by subsection (a).

COMMENT

This section is concerned with the fiduciary responsibility of the personal representative to beneficiaries of trusts to which he or she may deliver. Normally, the trustee represents beneficiaries in matters involving third persons, including prior fiduciaries. Yet, the personal representative may apprehend that delivery to the trustee may involve risks for the safety of the fund and for the personal representative. For example, the personal representative may be anxious to see that there is no equivocation about the devisee's willingness to accept the trust, and no problem of preserving evidence of the acceptance. The personal representative may have doubts about the integrity of the trustee, or about the trustee's ability to function satisfactorily. The testator's selection of the trustee may have been based on facts which are still current, or which are of doubtful relevance at the time of distribution. If the risks relate to the question of the trustee's intention to handle the fund without profit for himself or herself, a conflict of interest problem is involved. If the risk relates to the ability of the trustee to manage prudently, a more troublesome question is posed for the personal representative. Is the personal representative not bound to act in the best interests of the beneficiaries?

In many instances involving doubts of this sort, the personal representative probably will want the protection of a Court order. Sections 3-1001 and 3-1002 provide ample authority for an appropriate proceeding in the Court which issued the personal representative's letters.

In other cases, however, the personal representative may believe that he or she may be adequately protected if the acceptance of the trust by the devisee is unequivocal, or if the trustee is bonded. Also, the section complements Section 7-304 by providing that the personal representative may petition an appropriate court to require that the trustee be bonded.

Status of testamentary trustees under the Uniform Probate Code. Under the Uniform Probate Code, the testamentary trustee by construction would be considered a devisee, distributee, and successor to whom title passes at time of the testator's death even though the will must be probated to prove the transfer. The informally probated will is conclusive until set aside and the personal representative may distribute to the trustee under the informally probated will or settlement agreement and the title of the trustee as distributee represented by the instrument or deed of distribution is conclusive until set aside on showing that it is improper. Should the informally probated will be set aside or the distribution to the trustee be shown to be improper, the trustee as distributee would be liable for value received but purchasers for value from the trustee as distributee under an instrument of distribution would be protected. Section 1-201's definition of "distributee" limits the distributee liability of the trustee and substitutes that of the trust beneficiaries to the extent of distributions by the trustee.

As a distributee as defined by 1-201, the testamentary trustee or beneficiary of a testamentary trust is liable to claimants like other distributees, would have the right of contribution from other distributees of the decedent's estate and would be protected by the same time limitations as other distributees (3-1006).

Incident to his or her standing as a distributee of the decedent's estate, the testamentary trustee would be an interested party who could petition for an order of complete settlement by the personal representative or for an order terminating testate administration. The trustee also could appropriately receive the personal representative's account and distribution under a closing statement. As distributee he or she could represent beneficiaries in compromise settlements in the decedent's estate which would be binding upon the trustee and his or her beneficiaries. See Section 3-912.

The general fiduciary responsibilities of the testamentary trustee are not altered by the Uniform Probate Code and the trustee continues to have the duty to collect and reduce to possession within a reasonable time the assets of the trust estate including the enforcement of any claims on behalf of the trust against prior fiduciaries, including the personal representative, and third parties.

Section 3-914. [Disposition of Unclaimed Assets.]

(a) If a personal representative has money which the personal representative considers it advisable to deposit in a savings bank, or in savings accounts in a trust company, or in paid-up shares and accounts of and in a co-operative bank, or with which the personal representative considers it advisable to purchase shares or make deposits in a credit union located in the commonwealth or to purchase share accounts of a federal savings and loan association located in the commonwealth, in the name of the judge of probate, for the benefit of any person, the personal representative may apply to the court by which he or she was appointed for leave so to do, and the court may in its discretion, without notice, direct such money to be so deposited. When the deposit is made the deposit book or certificates of the bank shall be filed in court. When the person entitled to such money satisfies the court of his or her right to receive it, the court shall by decree direct that it be transferred to him or her.

(b)(1) If a personal representative holds property the disposition of which depends upon the death of an absentee whose death has not been determined under paragraph (1), (2) or (3) of section 1-107, on or after the day 5 years after the date of the absentee's disappearance the personal representative, or any person who would be interested in the property were the absentee dead, may

petition the court having jurisdiction of the estate for an order that the property be disposed of to the persons to whom and in the shares or proportions in which it would be distributed if the absentee had died on the day 5 years after the date of the absentee's disappearance.

(2) The court may direct the petitioner to report the results of, or make and report back concerning, a reasonably diligent search for the absentee in any manner that may seem advisable, including any or all of the following methods:

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

(ii) by notifying law enforceable officials, public welfare agencies and registers of deaths in appropriate locations of the disappearance of the absentee;

(iii) by engaging the services of an investigator.

The costs of any search so directed shall be paid from estate property.

(3) After any such report directed by the court under paragraph (2) above has been completed to the satisfaction of the court, notice of the hearing on the petition shall be given as provided in section 1-401.

(4) If after the hearing the court finds that the facts warrant a presumption of death under paragraph (4) of section 1-107, it shall enter an appropriate order of disposition of the trust property and any undistributed net income.

COMMENT

This section applies when it is believed that a claimant, heir or distributee exists but he cannot be located. See 2-105.

MASSACHUSETTS COMMENT

Subsection (a) adopts G.L. c. 206, § 27 and (b) is derived from c. 203, §§ 26 through 39. See Section 7-309 for a similar provision for trusts.

Section 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 an obligation to distribute to a minor or person under other disability as authorized by chapter two hundred one A or any other statute. If the personal representative knows that a guardian of the estate or conservator has been appointed or that a proceeding for appointment of a guardian of the estate or conservator is pending, the personal representative is authorized to distribute only to

the guardian of the estate or 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.

MASSACHUSETTS COMMENT

See G.L. c. 201A, § 6 for distributions to minors.

Section 3-916. [Apportionment of Estate Taxes.]

(a) For purposes of this section:

(1) "Estate", the gross estate of a decedent as determined for the purpose of federal estate tax and the estate tax payable to this commonwealth;

(2) "Fiduciary" means personal representative or trustee;

(3) "Person", any individual, partnership, association, joint stock company, corporation, government, political subdivision, governmental agency, or local governmental agency;

(4) "Person interested in the estate", any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's estate. It includes a personal representative, guardian, conservator, and trustee;

(5) "State", any state, territory, or possession of the United States, the District of Columbia, and the commonwealth of Puerto Rico;

(6) "Tax", the federal and Massachusetts estate tax and the additional inheritance tax imposed by the commonwealth and interest and penalties imposed in addition to the tax;

(b) Except as provided in subsection (i) and, unless the will otherwise provides, the tax shall be apportioned among all persons interested in the estate. The apportionment is to be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax are to be used for that purpose. If the decedent's will directs a method of apportionment of tax different from the method described in this code, the method described in the will controls.

(c)(1) The court in which venue lies for the administration of the estate of a decedent, on petition for the purpose may determine the apportionment of the tax.

(2) If the court finds that it is inequitable to apportion interest and penalties in the manner provided in subsection (b), because of special circumstances, it may direct apportionment thereof in the manner it finds equitable.

(3) If the court finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by the negligence of the fiduciary, the court may charge him with the amount of the assessed penalties and interest.

(4) In any action to recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this code the determination of the court in respect thereto shall be prima facie correct.

(d)(1) The personal representative or other person in possession of the property of the decedent required to pay the tax may withhold from any property distributable to any person interested in the estate, upon its distribution to him, the amount of tax attributable to his interest. If the property in possession of the personal representative or other person required to pay the tax and distributable to any person interested in the estate is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative or other person required to pay the tax may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative or the other person required to pay the tax, the personal representative or the other person required to pay the tax may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this chapter.

(2) If property held by the personal representative is distributed prior to final apportionment of the tax, the distributee shall provide a bond or other security for the apportionment liability in the form and amount prescribed by the personal representative.

(e)(1) In making an apportionment, allowances shall be made for any exemptions granted, any classification made of persons interested in the estate and for any deductions and credits allowed by the law imposing the tax.

(2) Any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purposes of the gift inures to the benefit of the person bearing such relationship or receiving the gift; but if an

interest is subject to a prior present interest which is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal.

(3) Any deduction for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate inures to the proportionate benefit of all persons liable to apportionment.

(4) Any credit for inheritance, succession or estate taxes or taxes in the nature thereof applicable to property or interests includable in the estate, inures to the benefit of the persons or interests chargeable with the payment thereof to the extent proportionately that the credit reduces the tax.

(5) To the extent that property passing to or in trust for a surviving spouse or any charitable, public or similar purpose is not an allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property is not included in the computation provided for in subsection (b) hereof, and to that extent no apportionment is made against the property. The sentence immediately preceding does not apply to any case if the result would be to deprive the estate of a deduction otherwise allowable under section 2053(d) of the Internal Revenue Code of 1986, as amended, or corresponding provisions of any subsequent United States tax law, relating to deduction for state death taxes on transfers for public, charitable, or religious uses.

(f) No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder is chargeable against the corpus of the property or funds subject to the temporary interest and remainder.

(g) Neither the personal representative nor other person required to pay the tax is under any duty to institute any action to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the 3 months next following final determination of the tax. A personal representative or other person required to pay the tax who institutes the action within a reasonable time after the 3 months' period is not subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectible at a time following the death of the decedent but thereafter became uncollectible. If the personal representative or other person required to pay the tax cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be equitably apportioned among the other persons interested in the estate who are subject to apportionment.

(h) A personal representative acting in another state or a person required to pay the tax domiciled in another state may institute an action in the courts of this state and may recover a proportionate amount of the federal estate tax, of an estate tax payable to another state or of a death duty due by a decedent's estate to another state, from a person interested in the estate who is either domiciled in this state or who owns property in this state subject to attachment or execution. For the purposes of the action

the determination of apportionment by the court having jurisdiction of the administration of the decedent's estate in the other state is prima facie correct.

(i) If the liabilities of persons interested in the estate as prescribed by this act differ from those which result under the federal estate tax law, the liabilities imposed by the federal law will control and the balance of this section shall apply as if the resulting liabilities had been prescribed herein.

(j) If any portion of the property with respect to which such tax is levied or assessed is property in which the decedent has a qualifying income interest for life within the meaning of section 3A of chapter 65C or section 2044 of the Internal Revenue Code of 1986, as amended or any statutes of similar import, such portion of the net amount of the tax so levied or assessed, including, in the case of the Massachusetts estate tax, any tax imposed under the provision of subsection (b) of section 2 of said chapter 65C, shall, except as otherwise provided or directed by the decedent's will, be charged to and paid from the corpus of such property as equals the amount by which the total net amount of such tax levied or assessed exceeds the total net amount of such tax as would have been levied or assessed if the value of such property which is included in the measure of such tax had not been so included. The amount so charged shall not be apportioned between temporary and remainder estates.

(k) A direction in a will or instrument of trust to pay taxes caused by, resulting from, or imposed by reason of the death of the testator or donor, as the case may be, out of the decedent's probate estate or trust estate or other property, shall not include, unless the will or instrument of trust or a provision of such tax laws specifically provides otherwise, taxes levied or assessed under the tax laws of the United States or of the commonwealth or of any foreign state or commonwealth (i) on generation-skipping transfers or (ii) on any qualified terminable interest property in which the decedent had a qualifying income interest for life.

COMMENT

Section 3-916 copies the Uniform Estate Tax Apportionment Act.

MASSACHUSETTS COMMENT

See G.L. c. 65A, §§ 5 and 5A for apportionment and recovery of estate taxes. Subsection (j) is taken from c. 65A, § 5(3) and subsection (k) follows c. 191, § 1(6).

Section 3-917. [Partial Distribution]

If the court finds that partial distribution of the property of an estate in process of settlement can, without detriment to such estate, be made to the persons entitled thereto, the court may, subject to the rights of creditors and after notice, order such partial distribution to be made.

MASSACHUSETTS COMMENT

This section is taken from G.L. c. 197, § 22. There is no corresponding Uniform Probate Code provision.

PART 10

CLOSING ESTATES

Section 3-1001. [Formal Proceedings Terminating Administration; Testate or Intestate; Order of General Protection.]

(a) A personal representative or any interested person may petition for an order of complete settlement of the estate. The personal representative may petition at any time, and any other interested person may petition after one year from the appointment of the original personal representative except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the court to determine testacy, if not previously determined, to consider the final account, compel or approve an accounting or distribution or both, to construe any will, determine heirs or adjudicate the final settlement and distribution of the estate. Unless the petition is assented to by all interested parties, notice shall be given in the manner prescribed by section 1-401 by the petitioner to all interested persons.

(b) After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, 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. Such discharge shall forever exonerate the personal representative and his or her sureties from all liability under such decree unless his or her account is impeached for fraud or manifest error.

(c) If one or more heirs or devisees were omitted as parties in, or were not given notice of, a previous formal testacy proceeding, the court, on proper petition for an order of complete settlement of the estate under this section, and after notice to the omitted or unnotified persons and other interested parties determined to be interested on the assumption that the previous order concerning testacy is conclusive as to those given notice of the earlier proceeding, may determine testacy as it affects the omitted persons and confirm or alter the previous order of testacy as it affects all interested persons as appropriate in the light of the new proofs. In the absence of objection by an omitted or unnotified person, evidence received in the original testacy proceeding shall constitute prima facie proof of due execution of any will previously admitted to probate, or of the fact that the decedent left no valid will if the prior proceedings determined this fact.

COMMENT

Section 3-106 specifies that an order is binding as to all who are given notice even though less than all interested persons were notified. This section provides a method of curing an oversight in regard to notice which may come to light before the estate is finally settled. If the person who failed to receive notice of the earlier proceeding succeeds in obtaining entry of a different order from that previously made, others who received notice of the earlier proceeding may be benefited. Still, they are not entitled to notice of the curative proceeding, nor should they be permitted to appear.

MASSACHUSETTS COMMENT

See generally G.L. c. 206 relating to accounts. The last sentence of subsection (c) was added to preserve similar language of c. 206, § 24. For waiver of notice, see §1-402.

Section 3-1002. [Reserved]

Section 3-1003. [Closing Estates; By Sworn Statement of Personal Representative.]

(a) Unless prohibited by order of the court and except for estates being administered in supervised administration proceedings, a personal representative may close an estate by filing with the court no earlier than 6 months after the date of original appointment of a general personal representative for the estate, a verified statement stating that the personal representatives 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 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 1 year after the closing statement is filed, the personal representative's closing statement may not be challenged, except for fraud or manifest error.

COMMENT

The Code uses "termination" to refer to events which end a personal representative's authority. See Sections 3-608, et seq. The word "closing" refers to circumstances which support the conclusions that the affairs of the estate either are, or have been alleged to have been, wound up. If the affairs of the personal representative are reviewed and adjudicated under either Sections 3-1001 or 3-1002, the judicial conclusion that the estate is wound up serves also to terminate the personal representative's authority. See Section 3-610(b). On the other hand, a "closing" statement under 3-1003 is only an affirmation by the personal representative that he believes the affairs of the estate to be completed. The statement is significant because it reflects that assets have been distributed. Any creditor whose claim has not been barred and who has not been paid is permitted by Section 3-1004 to assert his claim against distributees. The personal representative is also still fully subject to suit under Sections 3-602 and 3-608, for his authority is not "terminated" under Section 3-610(a) until one year after a closing statement is filed. Even

if his authority is "terminated," he remains liable to suit unless protected by limitation or unless an adjudication settling his accounts is the reason for "termination". See Sections 3-1005 and 3-608.

From a slightly different viewpoint, a personal representative may obtain a complete discharge of his fiduciary obligations through a judicial proceeding after notice. Sections 3-1001 and 3-1002 describe two proceedings which enable a personal representative to gain protection from all persons or from devisees only. A personal representative who neither obtains a judicial order of protection nor files a closing statement, is protected by 3-703 in regard to acts or distributions which were authorized when done but which become doubtful thereafter because of a change in testacy status. On the other questions, the personal representative who does not take any of the steps described by the Code to gain more protection, has no protection against later claims of breach of his fiduciary obligation other than any arising from consent or waiver of individual distributees who may have bound themselves by receipts given to the personal representative.

This section increases the prospects of full discharge of a personal representative who uses the closing statement route over those of a personal representative who relies on receipts. Full protection follows from the running of the six months limitations period described in 3-1005. But, 3-1005's protection does not prevent distributees from claiming lack of full disclosure. Hence, it offers little more protection than a receipt. Still, it may be useful to decrease the likelihood of later claim of non-disclosure. Its more significant function, however, is to provide a means for terminating the office of personal representative in a way that will be obvious to third persons.

Section 3-1004. [Liability of Distributees to Claimants.]

After assets of an estate have been distributed and subject to section 3-1006, an undischarged claim not barred may be prosecuted in a proceeding against one or more distributees as an improper distribution in accordance with section 3-909.

Section 3-1005. [Limitations on Proceedings Against Personal Representative.]

Unless previously barred by adjudication and except as provided in the closing statement, the rights of successors and of creditors whose claims have not otherwise been barred against the personal representative for breach of fiduciary duty are barred unless a proceeding to assert the same is commenced within 6 months after the filing of the closing statement. The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's estate.

COMMENT

This and the preceding section make it clear that a claimant whose claim has not been barred may have alternative remedies when an estate has been distributed subject to his claim. Under this section, he has six months to prosecute an action against the personal representative if the latter breached any duty to the claimant. For example, the personal representative may be liable to a creditor if he violated the provisions of Section 3-807. The preceding section describes the fundamental liability of the distributees to unbarred claimants to the extent of the value received. The last sentence emphasizes that a personal representative who fails to disclose matters relevant to his liability in his closing statement and in the account of administration he furnished to distributees, gains no protection from the period described here. A personal representative may, however, use Section 3-1001, or, where appropriate, 3-1002 to secure greater protection.

Section 3-1006. [Limitations on Actions and Proceedings Against Distributees.]

Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of 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 their 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 1 year after the time of its distribution thereof, but all claims of creditors of the decedent are barred 1 year after the decedent's death. This section does not bar an action to recover property or value received as a result of fraud.

COMMENT

This section describes an ultimate time limit for recovery by creditors, heirs and devisees of a decedent from distributees. It is to be noted: (1) Section 3-108 imposes a general limit of three years from death on one who must set aside an informal probate in order to establish his rights, or who must secure probate of a late-discovered will after an estate has been administered as intestate. Hence the time limit of 3-108 may bar one who would claim as an heir or devisee sooner than this section, although it would never cause a bar prior to three years from the decedent's death. (2) This section would not bar recovery by a supposed decedent whose estate has been probated. See Section 3-412. (3) The limitation of this section ends the possibility of appointment of a personal representative to correct an erroneous distribution as mentioned in Sections 3-1005 and 3-1008. If there have been no adjudications under Section 3-409, or possibly 3-1001 or 3-1002, estate of the decedent which is discovered after administration has been closed may be the subject of different distribution than that attending the estate originally administered.

Section 3-1007. [Reserved]

Section 3-1008. [Reserved.]

PART 11

COMPROMISE OF CONTROVERSIES

Section 3-1101. [Effect of Approval of Agreements Involving Trusts, Inalienable Interests, or Interests of Third Persons.]

A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, as to the administration or distribution of an estate, or as to an accounting therefore, or as to any matter relating to said estate, or as to the construction of a will or trust created by a written instrument, or as to the fiduciary's power and authority thereunder, or as to any controversy growing out of said will or instrument that may arise between the fiduciary and any other person or the guardian or conservator of any person interested under said will or instrument or in said estate, or between claimants or the guardians or conservators of claimants to said estate, to which arbitration or compromise, in the form of an agreement in writing, such personal representative, guardian, conservator, receiver, commissioner or other fiduciary officer or trustee, and all other persons in being and of full age and not under guardianship, and the guardian or conservator, if any, of all other persons who claim a vested interest in said estate, whose interests will, in the opinion of the court, be affected by the proposed arbitration or compromise, shall be parties, 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.

MASSACHUSETTS COMMENT

See G.L. c. 204, §§ 13 to 18. This section is revised by adopting language of c. 204, § 14 to broaden its application beyond estates. See also Section 3-912 for private agreements among heirs and devisees.

Section 3-1102. [Procedure for Securing Court Approval of Compromise.]

The procedure for securing court approval of a compromise is as follows:

(1) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents or guardians acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise. Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.

(2) Any interested person, including the personal representative or a trustee, then may submit the agreement to the court for its approval and for execution by the

personal representative, the trustee of every affected trust, and other fiduciaries and representatives.

(3) After notice as prescribed by section 1-401 to all interested persons or their representatives, including the personal representative of the estate and all affected trustees of trusts, the court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement. Minor children represented only by their parents or guardians may be bound only if their parents or guardians join with other competent persons in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

COMMENT

This section and the one preceding it outline a procedure which may be initiated by competent parties having beneficial interests in a decedent's estate as a means of resolving controversy concerning the estate. If all competent persons with beneficial interests or claims which might be affected by the proposal and parents properly representing interests of their children concur, a settlement scheme differing from that otherwise governing the devolution may be substituted. The procedure for securing representation of minors and unknown or missing persons with interests must be followed. See Section 1-403. The ultimate control of the question of whether the substitute proposal shall be accepted is with the court which must find: "that the contest or controversy is in good faith and that the effect of the agreement upon the interests of parties represented by fiduciaries is just and reasonable."

The thrust of the procedure is to put the authority for initiating settlement proposals with the persons who have beneficial interests in the estate, and to prevent executors and testamentary trustees from vetoing any such proposal. The only reason for approving a scheme of devolution which differs from that framed by the testator or the statutes governing intestacy is to prevent dissipation of the estate in wasteful litigation. Because executors and trustees may have an interest in fees and commissions which they might earn through efforts to carry out testator's intention, the judgment of the court is substituted for that of such fiduciaries in appropriate cases. A controversy which the court may find to be in good faith, as well as concurrence of all beneficially interested and competent persons and parent-representatives provide prerequisites which should prevent the procedure from being abused. Thus, the procedure does not threaten the planning of a testator who plans and drafts with sufficient clarity and completeness to eliminate the possibility of good faith controversy concerning the meaning and legality of his plan.

See Section 1-403 for rules governing representatives and appointment of guardians ad litem.

Section 3-1103. [Non-Resident Beneficiaries; Payment of Trust Fund to Foreign Trustee.]

If all living parties interested as beneficiaries in a trust created by a will allowed in the commonwealth reside outside thereof, the court having jurisdiction of the trust may, on petition of parties in interest or of the personal representative or trustee, if it considers it just and expedient, authorize the personal representative or trustee to pay the fund to a trustee appointed by the proper court in any other state or country, if all living beneficiaries and the personal representative or trustee signify their consent, and the court is satisfied that the laws of such other state or country secure the due performance of said trust; and upon such payment, shown to the satisfaction of said court, the personal representative or trustee appointed here may be discharged from

further responsibility by decree of said court.

MASSACHUSETTS COMMENT

This section is added to incorporate G.L. c. 206, § 29.

PART 12

COLLECTION OF PERSONAL PROPERTY BY VOLUNTARY ADMINISTRATION PROCEDURE FOR SMALL ESTATES

GENERAL COMMENT

The four sections which follow include two designed to facilitate transfer of small estates with use of a voluntary personal representative, and two designed to simplify the duties of a personal representative, who is appointed to handle a small estate.

The Flexible System of Administration described by earlier portions of Article III lends itself well to situations involving small estates. Letters may be obtained quickly without notice or judicial involvement. Immediately, the personal representative is in a position to distribute to successors whose deeds or transfers will protect purchasers. This route accommodates the need for quick and inexpensive transfers of land of small value as well as other assets. Consequently, it was unnecessary to frame complex provisions extending the affidavit procedures to land.

Figures gleaned from a recent authoritative report of a major survey of probated estates in Cleveland, Ohio, demonstrate that more than one-half of all estates in probate had a gross value of less than \$15,000. This means that the principal measure of the relevance of any legislation dealing with probate procedures is to be found in its impact on very small and moderate sized estates. Here is the area where probate affects most people.

Section 3-1201. [Voluntary Administration of Small Estates.]

If a person domiciled in the commonwealth dies leaving an estate consisting entirely of personal property the total value of which may include a motor vehicle of which the decedent was the owner, and other personal property not exceeding \$25,000 in value, any interested person may, after the expiration of 30 days from the death of the decedent, provided no petition for appointment of a personal representative has been filed with the court of the county in which the decedent resided, file with said court upon a form prescribed by the court a statement, verified by oath, or affirmation containing: (a) the name and residential address of the petitioner, (b) the name, residence and date of death of the deceased, (c) the relationship of the petitioner to the deceased, (d) a schedule showing every asset of the estate known to the petitioner and the estimated value of each such asset, (e) a statement that the petitioner has undertaken to act as voluntary personal representative of the estate of the deceased and will administer the same according to law, and apply the proceeds thereof in conformity with this section, (f) the names and addresses of surviving joint owners of property with the deceased, known to the petitioner, (g) the names and addresses known to the petitioner of the persons who would take under the provisions of part 1 of article II of this chapter in the case of intestacy, and (h) the names and addresses known to the petitioner of the persons who would take under the provisions of the will, if any. The original of any will shall be filed with the above statement.

Upon presentation of such statement, accompanied by a certificate of the death of the deceased by a public officer and payment of a fee as may be specified in section 40 of chapter 262, the register shall docket these documents as a part of the permanent records of the court. Upon payment of a fee as prescribed in section 40 of chapter 262,

the register shall, if no other probate proceeding for administration of such estate is pending in said court, issue an attested copy of a statement duly filed under this section.

Notwithstanding any provision of law to the contrary, a voluntary personal representative shall certify on the statement that copies of said statement and death certificate have been sent to the division of medical assistance by certified mail. If the decedent received medical assistance under chapter 118E (1) when age 65 or older or (2) at any time on or after March 22, 1991, regardless of age, while an inpatient in a nursing facility or other medical institution, the provisions of section 32 of chapter 118E shall apply except (1) the period for the department to present a claim under subsection (b)(1) of said section 32 shall be within 4 months of the date the register docketed the statement and (2) interest on allowed claims under subsection (c) of said section 32 shall commence 4 months plus 60 days after said date. This paragraph shall apply to estates of decedents dying on or after September 1, 1992.

Upon the presentation of a copy of such a statement duly attested by the register, the tender of a proper receipt in writing and the surrender of any policy, passbook, note, certificate or other evidentiary instrument, a voluntary personal representative may, as the legal representative of the deceased and his estate, receive payment of any debt or obligation in the nature of a debt, or delivery of any chattel or asset, scheduled in such statement. Payments and deliveries made under this section shall discharge liability of the debtor, obligor or deliverer to all persons with respect to such debt, chattel, obligation or other asset unless, at the time of such payment or delivery, a written demand has been made upon said debtor, obligor or deliverer by a duly appointed personal representative.

A voluntary personal representative may sell any chattel so received and negotiate or assign any chose in action to convert the same to cash in a reasonable amount.

A voluntary personal representative shall, as far as possible out of the assets which come into his hands, first discharge the necessary expenses of the funeral and last sickness of the deceased and the necessary expenses of administration without fee for his services, and then pay the debts of the deceased in the order specified in section 3-805 and any other debts of the estate, and then distribute the balance, if any, in accordance with part 1 of article II of this chapter.

A voluntary personal representative shall be liable as a personal representative in his own wrong to all persons aggrieved by his administration of the estate, and, if letters testamentary or letters of administration are at any time granted, shall be liable as such a personal representative to the rightful personal representative.

For the purpose of paragraph (6) of section 113 chapter 175 and section 2 of chapter 90, a voluntary personal representative shall be deemed to be the personal representative of the estate of the decedent until a personal representative is appointed.

Upon payment of the proper fee, the register may issue a certificate of appointment to said voluntary personal representative, with a copy of the statement annexed thereto.

MASSACHUSETTS COMMENT

Rather than utilizing the UPC method of collection of assets by affidavit without Court involvement, this section adopts G.L. c. 195 §§ 16 and 16A which provide for informal voluntary administration of estates valued at \$15,000 or less and raises the limit to \$25,000.

G.L. c. 90D, § 15A authorizes the Register of Motor Vehicles to transfer an automobile to a surviving spouse. G.L. c. 35, § 19B; c. 41, § 1111; c. 149, §§ 178A and 178C authorize employers to pay sums owed a deceased employee to designated persons. G.L. c. 167D § 33 permits bank accounts of \$10,000 or less to be paid to a surviving spouse or next of kin. G.L. c. 176A, § 32; c. 176B, § 19 and c. 176E, § 15A enable health care providers to pay up to \$2,000 to a surviving spouse or next of kin. G.L. c. 196A, § 1 allows securities of a value not exceeding \$750 per issue and \$2,100 total to be re-registered in the name of a surviving spouse, child or parent.

Chapter 140 of the Acts of 2012 amended this section changing the phrase "If an inhabitant of the commonwealth" in the first paragraph to read, "If a person domiciled in the commonwealth".

Section 3-1202. [Effect of Statement.]

The person paying, delivering, transferring, or issuing personal property or the evidence thereof pursuant to section 3-1201 is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He or she 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 a statement 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.

Section 3-1203. [Small Estates; Summary Administration Procedure.]

If it appears that the value of the entire estate, less liens and encumbrances, does not exceed family allowances, exempt property, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, the personal representative, without giving notice to creditors, may immediately disburse and distribute the estate to the persons entitled thereto and file a closing statement as provided in section 3-1204.

COMMENT

This section makes it possible for the personal representative to make a summary distribution of a small estate without the necessity of giving notice to creditors. Since the probate estate of many decedents will not exceed the amount calculated in the statute, this section will prove useful in many estates. See Sections 2-401 et seq. for allowances and exempt property.

MASSACHUSETTS COMMENT

Compare G.L. c. 195 §§ 16 and 16A which provide for informal voluntary administration of estates valued at \$15,000 or less.

Section 3-1204. [Small Estates; Closing by Sworn Statement of Personal Representative.]

(a) Unless prohibited by order of the court and except for estates being administered by supervised personal representatives, a personal representative may close an estate administered under the summary procedures of section 3-1203 by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that:

(1) to the best knowledge of the personal representative, the value of the entire estate, less liens and encumbrances, did not exceed family allowances, exempt property, 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 1 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.

COMMENT

The remedies for fraudulent statement provided in Section 1-106 of course would apply to any intentional misstatements by a personal representative.

7/2012