FIRST REPORT

of the

COMMISSION TO STUDY AND REVISE THE TESTAMENTARY LAWS OF MARYLAND

December 26, 1966

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LETTER OF TRANSMITTAL

To: *The Governor and the General Assembly of Maryland:*

This Report of the Commission to Study and Revise the Testamentary Laws of Maryland sets forth the recommendations of the Commission concerning death taxes in this State.

The Commission was appointed by Governor Tawes in 1965, and began its work in July of that year. The appointment was made pursuant to Joint Resolution No. 23, adopted at the 1965 Session of the General Assembly of Maryland, which requested the Commission to submit a proposal for recodifying and revising the Maryland laws concerning testamentary matters and death taxes.

The Commission has concluded its work on Maryland's death tax structure. Revisions of the death tax structure can be accomplished without significant changes in the non-tax aspects of testamentary law. Moreover, it is anticipated that major fiscal reforms will be submitted to the General Assembly at its 1967 Session.

Maryland death taxes have always been regarded as something of a specialty. The *Interim Report of the Commission on State and County Finance* (January, 1965, p. 77), which provided the base for the subsequent "Cooper- Hughes" Reports, expressly omitted, therefore, any consideration of death taxes. A reform of the death tax structure, however, requires a consideration of the death tax problem coordinated with the larger picture of state revenues. It is, therefore, fortunate that this Commission's deliberations on death taxes occur at a time when the entire State tax structure is being subjected to critical review which is likely to produce significant reform. The time has never been more ripe for ridding Maryland at long last of its complex, often unworkable, and frequently irrational system of death taxation.

For these reasons, the Commission has decided to submit now a First Report, devoted to death taxes. The Commission's final report, which will consist of recommendations on those portions of Article 93 of the Maryland Code unrelated to

taxation, will, it is hoped, be submitted to the 1968 General Assembly.

The Commission is composed of a cross-section of persons experienced in testamentary law, including a former Chief Judge of the Court of Appeals of Maryland, a Judge of the Orphans' Court of Baltimore City, two members of the Association of Registers of Wills, a member of the General Assembly, a lecturer on estate taxes at the University of Maryland Law School, and four members of the Probate and Estate Council of the Maryland State Bar Association. Four commissioners were assistants to the Attorney General of Maryland, responsible for interpreting the Maryland death tax laws. In addition, the Commission has received the invaluable assistance of Melvin J. Sykes, Esquire, a recognized authority on testamentary law, who participated as consultant in virtually all of the Commission's meetings.

Respectfully submitted,

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SUMMARY OF RECOMMENDATIONS

1. The present system of Maryland death taxation should be repealed.
2. The single death tax in Maryland should be an estate tax.
3. Estates should be required to pay income taxes like any other non-charitable entity which earns income.
4. The amount of the Maryland estate tax should be equal to the maximum federal estate tax credit, and other taxes should be adjusted to assure no net loss in revenue by reason of the change.
5. The commissions of executors and administrators should be reduced in the amount of the tax on commissions which would be repealed.

INTRODUCTION

The Commission is unanimous in its conclusion that the present system of death taxation in Maryland is without rational justification. Our system is archaic, unjust, and incredibly complex. It is unique in its shortcomings among all the states. Its relatively insignificant revenue yield (between one and two percent of the State's total receipts) may be more simply and easily derived by the substitution of more rational and flexible revenue sources. There is simply no excuse for the unfair and unnecessary burden and inconvenience which the present patchwork of death taxes has imposed upon the public and those who must administer the system.

Maryland imposes three death taxes: (1) an inheritance tax on legacies under a will or on distributive shares of the next of kin of a decedent, where there is no will; (2) an estate tax, designed to take advantage of certain credits which the federal government allows against federal estate taxes where the amount of such credits is paid to a state; and (3) a tax on commissions of executors and administrators.

The Maryland Estate Tax is necessary for this state to obtain revenue that would have to be paid to the federal government in any event if Maryland did not have the tax. However, every responsible study of Maryland death taxes has stressed the unsoundness, inequity and inconvenience of the inheritance tax and the tax on commissions, and has called for a "thorough overhauling" of the present system.[1]

The following discussion is divided into three parts. The first highlights some of the more significant shortcomings of the present inheritance tax and the tax on commissions. The second sets forth and analyzes this Commission's recommendations for the abolition of these taxes in favor of a rational system of death taxation. The third contains a section-by-section analysis of the legislation prepared by the Commission to implement the recommendations herein contained. The proposed bills, and other relevant information, including an analysis of the economic effect of the Commission's recommendations, are set forth in appendices to this report.

I. THE SHORTCOMINGS OF THE PRESENT SYSTEM

A. The Inheritance Tax.

The inheritance tax was originally enacted in 1844. The difficulties with the tax stem essentially from the fact that inheritance taxation is a primitive instrument for taxing present day transfers of property. It fails to take sufficient account of the passage of property at death other than through the probate estate, and of the new and highly sophisticated modes of disposition of property by way of trusts and powers of appointment, which have become increasingly widespread due to federal tax considerations.

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[1] See Report of the Maryland Tax Revision Commission of 1939 p. 33; Eney, Death and Taxes — Maryland Style, 17 Md. L. Rev. 101 (1957); Page, Maryland Death Taxes, 25 Md. L. Rev. 89 (1965). Walter W. Heller, Former Chairman of the President's Council of Economic Advisers, in his article, The Administration of State Death Taxes, 26 Iowa L. Rev. 628 (1941), called Maryland's death tax system "an example of extreme structural rigidity." The exposition of the existing law in Sykes, Maryland Probate Law and Practice (1956) §§ 781-847 is a conclusive demonstration of the incredible and pointless complexity of the present system, particularly the inheritance tax. See also, Sykes, M.L.E., Probate Forms, Chapter 23.

1. *The inheritance tax is unsound in theory and concept and discriminates unfairly against small estates.*

The tax is an ungraduated capital levy which taxes beneficiaries of small amounts at the same rates as distributees of vast fortunes. Only five of the fifty states have such a non-progressive death tax structure. As such, the tax discriminates against persons of little or moderate means. The Comptroller's office has estimated that approximately half of the revenue produced by the inheritance tax is derived from estates of less than $100,000.

Although the inheritance tax is theoretically imposed on the value of the property received by the beneficiary, the actual tax is based on the appraised value of the assets distributed as of the date of decedent's death, and the law expressly prohibits any reappraisal by a personal representative after 15 months from date of death.[2] The amount of the tax may thus be based on values having little relation to the economic benefit actually passing to legatees or distributees. The theory of the tax, which was designed for a time when estates were settled promptly and property values were stable, simply does not work out today.

2. *The tax does not apply to all kinds of property equally and may be avoided on the basis of purely formal considerations which have no relation to substance.*

First, for example, life insurance, which is a popular method of transferring property at death, is not subject to the Maryland inheritance tax where the beneficiary is someone other than the estate.[3] Thus, if one of two decedents, each of whose chief asset is insurance, surrenders his policies for their cash value before his death, the cash would be subject to inheritance taxes, whereas the proceeds of the policies of the other decedent, which differ solely in the form of the asset, would escape inheritance taxation completely.

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[2] Code, Article 81, Sections 153–154.
[3] 21 Op. Atty. Gen. 701 (1936).

Second, although the holder of a general power of appointment has in fact complete control over the disposition of the property subject to the power, that property escapes inheritance tax when the holder dies.[4]

Third, property passing to a surviving spouse is exempt if it is held in joint tenancy or tenancy by the entireties,[5] but not if it is bequeathed by will.[6] Thus, if a decedent's estate consists of $100,000 in stock held with his wife as tenants by the entireties, the wife takes the entire $100,000 without paying any inheritance tax, whereas if the decedent owned only $50,000 in stock in his own name and bequeathed it outright to his wife, the $50,000 would be subject to inheritance taxes.

Fourth, the tax is payable on the death of a joint tenant of a bank account merely because of the form of the tenancy, regardless of the fact that the decedent may have made no contribution to the account, may have had no control over it at all, and may not have even known about it during his lifetime.[7]

3. *The administration of the Maryland death tax system is irrational and inequitable.*

The Maryland Tax Revision Commission of 1939 had the following comments which are still valid today:

> "The Attorney General is the legal advisor of each Register of Wills and to a certain extent the opinions rendered by him furnish a guide. However, the present system places a wholly unnecessary burden on the Attorney General's office. Many of the questions presented involve no new principle of law but merely the application of general principles to involved questions of fact. * * * Under the present system, inheritance tax questions alone occupy almost the full time of one Assistant Attorney General.

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[4] Connor v. O'Hara, 188 Md. 527, 53 A.2d 33 (1947); 38 Op. Atty. Gen. 301 (1953).
[5] Code, Article 81, Section 151.
[6] Ibid.
[7] *Mitchell v. Register of Wills for Baltimore City*, 227 Md. 305, 176 A.2d 763 (1961).

"Of course, not all of these questions are presented to the Attorney General. It frequently happens that taxable transfers are picked up by the State Auditor, in going over the accounts of the Registers of Wills and the records of the Orphans' Courts, in some cases long after the particular estate has been settled and the property distributed. The Commission believes that many taxable transfers have escaped taxation in the past, which means that the State has lost revenue and that the law has not been uniformly applied and enforced.

"It may be that a Register of Wills would be liable for any inheritance tax which he failed to collect, even though he acted in good faith and under a misapprehension as to the law. In some instances the State Auditor has attempted to surcharge Registers with inheritance taxes which they failed to collect. That imposes an unreasonable burden on the Registers of Wills.

"This statement does not imply any criticism of the Registers of Wills but merely a criticism of the system. The Registers are elected officials holding for four year terms, so that their tenure is subject to political vicissitudes, and their selection is not based on their knowledge of tax law."[8]

The following additional comments should be made:

a. Payment of inheritance taxes and taxes on commissions is made to the Registers of Wills, whereas payment of Maryland estate taxes is made to the Comptroller. There is little justification for the dual system of administration.

b. The lack of uniformity in interpretation and application of the inheritance tax has become even more serious in the last 30 years. Attorney General's opinions are more difficult to reconcile in this field than in perhaps any other, and there have been serious divergencies of interpretation between Registers of Wills.

c. Where the tax on a remainder interest in a trust is not prepaid at the decedent's death, there is no procedure for enforcing the payment of the additional inheritance taxes

[8] Report of the Maryland Tax Revision Commission of 1939, pp. 24–25.

when discretionary distributions of principal are made or when the trust terminates. Indeed, there is not even a penalty for failure to pay the additional taxes. Particularly where professional trustees are not involved, the payment of additional inheritance taxes when distributions of principal are made is undoubtedly the exception rather than the rule. Whether the omissions are purposeful or inadvertent is not the issue — the problem is that the system is so awkward that compliance is not encouraged and honesty is penalized.

d. The process of collecting and enforcing payments of taxes on property which does not pass through the probate estate is still ineffective. As the Maryland Tax Survey Commission of 1939 pointed out, there is "wide-spread evasion of the tax through inadequate means of discovery of withdrawal of funds by a surviving joint owner without knowledge of the bank . . . on the death of one joint owner." The present lien structure for inheritance taxes is also inadequate.

4. *The tax presents extremely difficult problems of valuation, interpretation and application.*

The inheritance tax law is a particularly inadequate instrument for dealing with the newer and more sophisticated types of trusts. The following examples are typical:

a. There is often no rational basis for making the required valuation of the interest of a beneficiary in a trust under which the trustee has the sole discretion to pay income to the beneficiary or to accumulate it. The value of the beneficiary's interest, and hence the amount of the tax, depends upon a prediction of how much the trustee will actually pay to the beneficiary over the beneficiary's lifetime. In many instances the prediction must be grasped out of thin air, and the ultimate result depends on horse trading without rational basis on either side. Respect for law is not promoted when the law requires an essentially irrational process.

b. Likewise, it often cannot be determined, when the tax is payable, whether distribution will be made to col-

laterals to to lineal descendants, or to both, and if to both, in what amounts to each. The resulting tax therefore depends on guesswork and will in fact be at a higher or lower rate than would have been payable on the ultimate distribution. Thus, where a trustee is directed to pay income to the decedent's children and their spouses in such proportions as the trustee deems advisable, there is often no rational basis for predicting in advance how much should be taxed at 7½% as going to the spouses and how much at 1% as going to the children.

5. *The existence of the inheritance tax along with the estate tax causes great difficulty of computation, and consequent public inconvenience.*

The credit for state death taxes allowable against the Federal Estate Tax is made up in part of the amount paid to the state in inheritance taxes; only to the extent that inheritance and similar death taxes do not use up the maximum federal credit, does the Maryland estate tax take up the slack.[9] A serious problem arises because of the general practice of prudent executors, who retain a part of the estate for future distribution until after the federal estate tax obligation has been finally determined.

The Maryland estate tax is payable at the same time as the federal estate tax, i.e., when the return is filed. The federal tax obligation is not finally determined, however, until after audit and possibly further administrative and even judicial proceedings. When the retained assets are finally distributed, additional inheritance taxes are payable on that distribution. The executor must pay these taxes and file a claim for refund of so much of the Maryland estate tax as amounts to the additional inheritance tax payable on the distribution of the retained assets.[10] The refund itself, however, thereupon becomes distributable to the beneficiaries and is in turn subject to an additional inheritance tax, which

[9] Code, Article 62A.
[10] 39 Op. Atty. Gen. 284 (1954).

again triggers the right to further refund of Maryland estate taxes. The question of just when the dog catches his own tail can be solved only by the use of algebraic equations.

A similar problem arises because inheritance taxes on interests in trusts are more and more becoming payable when the trust terminates — frequently many years after the estate is closed. The payment of these taxes at that time likewise gives rise to a right of refund of Maryland estate taxes, which will set in motion a similar chain of further inheritance tax and estate tax refunds. The postponement of inheritance taxes to the end of the trust may also involve the further practical difficulty that the executor or administrator may have died in the meantime, and a new personal representative, who is often totally unfamiliar with the estate at the time of his appointment, must bear the burden of obtaining the figures and setting up and solving the equations.

B. The Tax On Commissions

The tax on commissions is a charge which in general works out to 10% of the amount of the commissions of an executor or administrator.[11] The tax, which is as ancient in Maryland as the inheritance tax, is unique in the United States. It has no sound basis. It is payable even where commissions are waived; and since the tax is taken into account in fixing the rate of commissions, its ultimate impact is on the estate rather than the personal representative. The tax further burdens the cost of administration because bond is required to cover liability for this tax as well as the inheritance tax even where excused by the testator.

In any case where the commissions are in fact reasonable, or are waived, the tax is clearly unjust. Moreover, commissions are subject to income taxes, and there is no justification for imposing on earned income two kinds of taxes merely because it is earned in the administration of an estate.

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[11] Code, Article 81, Sections 144–148.

II. RECOMMENDATIONS

A. The Present System of Maryland Death Taxation Should Be Repealed.

This Commission concurs with the following comment of the Maryland Tax Revision Commission of 1939:

> ". . . There should be a thorough overhauling of the structure of our death taxes . . . There seems no sound reason for having three separate taxes applicable to transfers upon death and unnecessary complications and confusions could be eliminated by a change in this regard."[12]

B. The Single Death Tax in Maryland Should Be An Estate Tax.

As pointed out in Eney, Death and Taxes — Maryland Style, 17 Md. L. Rev. 101, 120 (1957):

> "The basic difficulties with the present system of death duties in Maryland are the inordinate expense of administering the law, the loose administration of the law, and the inequalities of the burden of the tax. I believe these difficulties could be removed by the repeal of the present laws and the enactment of an estate tax law, and it seems to me that rather than try any more to patch up the present law or adopt it to present conditions, a new approach is worthwhile."[13]

The advantages for Maryland of a single estate tax such as recommended by this Commission are many and compelling.

a. Such a tax would provide necessary relief from the inconvenience and economic burden of death taxation in the small and moderate-size estates which now bear the brunt of Maryland death taxation. In the larger estates, taxation would be graduated and the present inordinate red tape would be eliminated. The inequities and troublesome administrative problems involving the taxation of newer forms of essen-

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[12] Report of the Maryland Tax Revision Commission of 1939, p. 33.

[13] See also Report of the Maryland Tax Revision Commission of 1939 and Page, Maryland Death Taxes, 25 Md. L. Rev. 89 (1965).

tially testamentary disposition would disappear. The federal estate tax return would suffice for both the federal government and Maryland, and the Maryland tax could be easily computed from the federal return.[14]

b. Such a tax would provide the State with automatic federal auditing and policing assistance. The cost of collection and enforcement would be substantially reduced. Evasion would be curtailed. Honesty would no longer be penalized and respect for government would be promoted.

c. The General Assembly would be freed of the burden of passing each year on many technical bills to amend the inheritance tax laws. These laws, because of their generally unsatisfactory character, have been subject to frequent tinkering which has added to the general confusion in this field.

d. The rights and obligations of persons dealing with or interested in decedents' estates would be much more certain, knowable and predictable. It would no longer be necessary to refer to two separate and often conflicting bodies of law. The entire tax obligation of an estate would be determinable from the relatively stable and complete body of federal tax interpretation. The State Attorney General's office would be relieved of the pointless and frustrating responsibility of developing a reasonable body of interpretation of laws that are so fundamentally defective that reasonable and consistent interpretation is impossible.

e. The job of the Registers of Wills would be simplified without adversely affecting the Registers' offices in any way. As in the case of inheritance taxes and taxes on commissions today, the Commission recommends that payment of the Maryland estate tax should be made to the Register of Wills in the appropriate county. A copy of the federal estate tax return should be filed with the Comptroller and documents changing or discharging the federal tax obligation would be

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[14] A table of the amount of tax credit allowable under the federal estate tax law is set forth as Appendix A to this report.

similarly filed. When the tax is paid to the Register, the executor would certify to the Register that he had filed the return with the Comptroller. The Register would account for payments to the Comptroller, who would have the sole responsibility for verification and audit of amounts due in payment of the Maryland estate tax. This arrangement would place all the auditing and verification functions in a single office, namely, the Comptroller, while preserving to the Register the advantages he presently enjoys as collecting officer. The centralization of audit, coupled with the relative simplicity of the tax, would promote uniformity, economy and public convenience.

C. Estates Should Be Required To Pay Income Taxes Like Any Other Non-charitable Entity Which Earns Income.

Under present law, estates are exempt from the state income tax. The theory of the exemption is that since the income of an estate is liable to inheritance taxation to the same extent as corpus, it would be unfair to impose any additional tax on the income. With the repeal of the inheritance tax, there would be no reason to exempt estates from the payment of income taxes. The proposed exemption of $800 would assure that the income tax would not be an undue burden on relatively small estates.

D. The Amount of the Maryland Estate Tax Should Be Equal to the Maximum Federal Estate Tax Credit, and Other Taxes Should Be Adjusted to Assure No Net Loss in Revenue by Reason of the Change.

An analysis of the fiscal effect of the adoption of this proposal is set forth in Appendix B to this report. As that analysis demonstrates, it is impossible to predict with certainty the extent, if any, to which the adoption of the Commission's proposals would reduce the state's revenues from decedent's estates. It is indeed possible, for reasons hereinafter discussed, that adoption of the proposals would actually increase such revenues. The one thing that is abundantly clear is that if there is any reduction in revenue, it will be in

an amount which represents an insignificant part of the total state budget. The Commission feels deeply that the advantages to be gained from adopting its recommendations are so overwhelming that the possibility of the loss of a minimal amount of revenue from decedents' estates should not stand in the way.

The Commission has considered and unanimously rejected the alternative of amending the Maryland estate tax structure and rates to impose a tax beyond the maximum federal death tax credit, in order to be sure that no revenue loss could possibly occur. The Commission's conclusion is based on the following considerations:

a. Only if the Maryland estate tax is in the amount of the maximum federal death tax credit will the advantages discussed under Recommendation No. 2 accrue. If the Maryland Estate Tax went any further, additional inconvenience and red tape would be necessary. Most of the proposals for an increased estate tax would require a complicated Federal Estate Tax-type form which would be necessarily different in detail from the federal forms in estates where federal forms are now required and would have to be required in smaller estates where the federal estate tax return need not now be filed.[15]

If, on the other hand, a Maryland estate tax exempted all estates in which no federal tax is payable, the additional tax falling solely on estates subject to the federal estate tax would not only be unfair, but would tend to drive out wealthy citizens to states with a more favorable death tax system. The Commission is aware of actual instances in which wealthy persons have left Maryland, at least in part for this reason, to make their home in states such as Florida, which have a death tax system such as that proposed by the Commission.

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[15] For example, Maryland may not constitutionally impose an estate tax on real property or tangible personal property located outside of Maryland. The credit for gift taxes or estate taxes paid to other states or countries would not apply in Maryland. The exemptions and rate structure would be different, and there would undoubtedly be differences in detail in regard to certain deductions such as interspousal transfers.

b. The proposals of this Commission are essentially those embodied in the Uniform Death Tax Credit Act sponsored by the National Conference of Commissioners on Uniform State Laws and adopted in substance in a number of states, one of which is Florida.

The adoption of the philosophy of the Uniform Act, which provides for no tax beyond the amount of the credit which would have to be paid to the federal government in any event if Maryland did not impose a tax in that amount, would substantially encourage wealthy people to make their homes in this State, or to retire here, and would thereby enhance not only the total revenues from death taxes but the general economic well being of the state.

c. The truth of the matter is that the Federal government has preempted the estate tax field. The real remedy is for the states to persuade Congress to extend its credit downward to the bracket between $60,000,000 and $100,000,000. It would be manifestly unfair to impose an additional tax on persons in the $60,000-$100,000 bracket, when persons in the top bracket obtain a full credit. It seems unfair to impose an estate tax on persons in the lowest bracket, who are not even reached by the federal government at all.

d. The maximum revenue loss, if any, which can reasonably be anticipated from the adoption of the Commission's proposals is extremely small. It may be made up relatively easily from other more productive, more flexible and less cumbersome means of taxation, *e.g.*, a slight adjustment in the income tax, which is likely to have to be graduated in any event. The Commission believes its proposals come at a particularly opportune time in view of the impending general overhaul of tax structure and rates in this State, in which the necessary revisions can take account of the recommendations here made.

E. The Commissions of Executors and Administrators Should Be Reduced in the Amount of the Tax on Commissions which would be repealed.

III. AN ANALYSIS OF THE LEGISLATION PROPOSED BY THE COMMISSION

The Commission has prepared three bills embodying the proposals contained in this report. The full text of these bills is set forth in Appendices C, D, and E. A section by section analysis of each of these bills is as follows:

A. The Maryland Death Tax Act.

The first and basic bill recommended by the Commission would repeal the present estate and inheritance taxes and the tax on commissions and would impose a single death tax upon decedents' estates in the amount of the maximum state death tax credit allowable for federal estate tax purposes. The bill is set forth in Appendix C. The Death Tax Act is the same in theory as the Uniform Death Tax Credit Act recommended by the National Conference of Commissioners of Uniform State Laws.

Section 1 of the Bill repeals the present inheritance tax, estate tax, and tax on commissions.

Section 2 of the Bill enacts the Maryland Death Tax, Sections 144-156 inclusive of Article 81 of the Code and makes a necessary adjustment in the Uniform Estate Tax Apportionment Act, formerly Section 162 of Article 81, which would become Section 157. An analysis of each of these proposed sections of Article 81 is as follows:

Section 144 contains 10 definitions which simplify the balance of the Statute.

Section 145 levies a death tax on the estate of every decedent domiciled in this state in the amount of the federal estate tax credit for state death taxes.

Section 146 provides for a reduction of the death tax by the lessor of: (a) state death taxes imposed by any other state in respect of any property included in the decedent's estate; or (b) a fraction of the federal death tax credit represented by the value of the decedent's non-Maryland estate divided

by the value of the entire gross estate. This reduction is necessitated by the federal prohibition against Maryland's taking any part of the federal tax credit allocable to real or tangible personal property outside this state, which is subject to taxation by the state or states in which it is located.

Section 147 levies a death tax upon the estate of every decedent not domiciled in this state. The tax is that fraction of the total federal death tax credit represented by the value of the decedent's Maryland estate to the value of the entire gross estate. This tax is the converse of the reduction provided in the previous section and makes certain that Maryland receives the full portion of the federal death tax credit to which it is entitled in the case of both resident and nonresident decedents.

Section 148 provides a procedure for collecting the tax.

Sub-Section (a) imposes the duty of filing upon the person who is required to file a federal estate tax return. Such person must file with the Comptroller a verified copy of the federal estate tax return within 15 months after the death of the decedent and must certify to the Register of Wills that the return has been filed. Payment of the tax must be made to the Register when the return is filed. The Register certifies the fact of payment to the Comptroller. The sub-section provides for a simple and automatic procedure for extension of the time for filing if the federal government extends the time for filing the federal estate tax return.

Sub-section (b) provides for the obligation to pay additional Maryland death taxes in the event of an increase in the federal tax beyond the amount shown by the federal estate tax return. The person responsible for the federal return must file with the Comptroller a copy of the appropriate federal document (i.e., assessment, closing agreement, or final judgment) within 30 days after the receipt thereof and must pay the additional Maryland death tax.

Sub-section (c) vests in the Comptroller the exclusive responsibility for determining the proper amount of the tax.

Section 149 provides for interest at the rate of 6% from the time due on the unpaid tax or any part thereof if the tax is not paid as provided by the Act.

Section 150 provides for refunds and integrates the Maryland death tax into the general refund provisions of the Maryland Tax Laws, Code, Article 81, Sections 215-219.

Section 151 provides that upon failure of the person responsible to file the return or any other required documents within the time prescribed by law or permitted by extension, the Comptroller may impose a penalty of not more than 10% of the tax finally determined.

Section 152 provides for a clear and simple lien to enforce the collection of the tax.

Sub-section (a) provides that the tax shall be a lien for 10 years upon property includable in the Maryland estate of the decedent except to the extent that such property is used for payment of charges against the estate and expense of administration and is allowed as such by any court having jurisdiction of the administration.

Sub-section (b) provides that the lien may be released upon receipt by the Comptroller of the executor's discharge by the federal government from liability for federal estate taxes or by a statement by the executor under penalty of perjury that no Maryland death tax is due.

Sub-section (c) provides that the tax lien shall not be valid against a purchase, lease, security interest or lien acquired for value unless the interest or lien was acquired in bad faith. The terms value and bad faith are specifically defined. The object of this sub-section is to strike a fair balance between the interest of the State Treasury and those engaged in bona fide commercial dealings who have fully and innocently paid for the property subject to the lien.

Sub-section (d) provides for a procedure for discharging part of the property subject to the lien under circumstances where part of the tax is paid or the balance of the property is more than sufficient to cover the lien.

Section 153 provides that a discharge from personal liability from payment of the federal estate tax automatically operates as a discharge for personal liability of the Maryland death tax.

Section 154 in effect incorporates for Maryland the federal estate tax provisions for liability on the part of a transferee.

Section 155 provides that reference in other Maryland laws to the inheritance tax or tax on commissions shall not be deemed to apply to the Maryland death tax except where in the context of the reference such applicability would be reasonable.

Section 156 is a standard severability clause.

Section 157 changes to the "Maryland Death Tax" the reference to the Maryland Estate Tax contained in the Maryland Uniform Estate Tax Apportionment Act.

Section 3 of the Bill provides that the new Act shall take effect and shall be applicable to estates of persons dying on and after June 1, 1967.

B. Amendment of the Income Tax Law.

The second Bill of the Commission, set forth in Appendix D, provides for the taxation of the income of decedents' estates not subject to the inheritance tax. The new death tax and the repeal of the inheritance tax apply to estates of persons dying on and after June 1, 1967. Consequently, the law applicable to estates of persons dying before that time will be the same as in the past. The Bill would amend Section 279 (f) to include a personal representative among the fiduciaries subject to state income taxation. Section 282 (i) would limit the exemption of estates from income taxation only to the estates of decedents dying before June 1, 1967. Section 286 (d) would provide an exemption of $800 for the fiduciary income tax liability of the personal representative of a decedent's estate. Section 294 (b) would relieve a fiduciary whose net income is less than $800 from the obligation of filing.

C. Reduction of Commissions.

The third Bill recommended by the Commission set forth in Appendix E provides for the reduction of allowable commissions in the amount of the tax on commissions which would be repealed by the enactment of the Maryland Death Tax Act.

Section 6 of Article 93 would be amended to make the range of allowable commissions not less than 1.8% and not more than 9% on the first $20,000 of the estate and not more than 3.6% on the balance. Section 72 of Article 93 would amend the commissions allowable to a collector so that they could not exceed 2.7% on the property and debts collected or 1.8% on the whole inventory. Section 316 of Article 93 would be amended to provide for a minimum commission of 1.8% instead of 2% and a maximum commission of 9% instead of 10% on the sale of realty. In each case, the net amount received by the personal representative would be the same as its present figure.

APPENDIX A

TABLE OF DEATH TAX CREDITS

Section 2011 of the Internal Revenue Code permits a credit for State death taxes against the Federal estate tax. The Internal Revenue Code puts a ceiling on the credit, as set forth in the following table. As used in this table "taxable estate" is computed *after* taking into account the $60,000 exemption to which every estate is entitled under the Federal law.

If the taxable estate is:	The maximum tax credit shall be:
Not over $90,000	$^{8}/_{10}$ths of 1% of the amount by which the taxable estate exceeds $40,000.
Over $90,000 but not over $140,000	$400 plus 1.6% of the excess over $90,000.
Over $140,000 but not over $240,000	$1,200 plus 2.4% of the excess over $140,000.
Over $240,000 but not over $440,000	$3,600 plus 3.2% of the excess over $240,000.
Over $440,000 but not over $640,000	$10,000 plus 4% of the excess over $440,000.
Over $640,000 but not over $840,000	$18,000 plus 4.8% of the excess over $640,000.
Over $840,000 but not over $1,040,000	$27,600 plus 5.6% of the excess over $840,000.
Over $1,040,000 but not over $1,540,000	$38,800 plus 6.4% of the excess over $1,040,000.
Over $1,540,000 but not over $2,040,000	$70,800 plus 7.2% of the excess over $1,540,000.
Over $2,040,000 but not over $2,540,000	$106,800 plus 8% of the excess over $2,040,000.

If the taxable estate is:	The maximum tax credit shall be:
Over $2,540,000 but not over $3,040,000	$146,800 plus 8.8% of the excess over $2,540,000.
Over $3,040,000 but not over $3,540,000	$190,800 plus 9.6% of the excess over $3,040,000.
Over $3,540,000 but not over $4,040,000	$238,800 plus 10.4% of the excess over $3,540,000.
Over $4,040,000 but not over $5,040,000	$290,800 plus 11.2% of the excess over $4,040,000.
Over $5,040,000 but not over $6,040,000	$402,800 plus 12% of the excess over $5,040,000.
Over $6,040,000 but not over $7,040,000	$522,800 plus 12.8% of the excess over $6,040,000.
Over $7,040,000 but not over $8,040,000	$650,800 plus 13.6% of the excess over $7,040,000.
Over $8,040,000 but not over $9,040,000	$786,800 plus 14.4% of the excess over $8,040,000.
Over $9,040,000 but not over $10,040,000	$930,800 plus 15.2% of the excess over $9,040,000.
Over $10,040,000	$1,082,800 plus 16% of the excess over $10,040,000.

APPENDIX B

Analysis of Fiscal Effect of Recommended Revision of Maryland Death Tax

The Comptroller estimates that the maximum revenue loss based on 1966 experience if the proposed recommended revisions of Maryland death taxes is adopted is $7,880,231.58, out of a total budget of approximately a billion dollars. There are certain factors, however, which the Comptroller has not considered in his calculations; when those factors are considered, the actual loss, if any, will probably be much less than his calculations would indicate and in the long run the recommendations may even produce a gain.

The Comptroller's calculations are as follows:

"Study of Maryland Death Tax Structure for Fiscal Year 1966, Showing Death Tax Collections, Federal Estate Tax Credit, and Loss of Revenue to State if Inheritance Taxes Had Been Eliminated.

Death Tax Collections — Fiscal Year 1966

	Tax Remitted To State	*25% Commissions Retained*	*Total Collections*
Collateral	$ 4,912,278.69	$1,637,426.23	$ 6,549,704.92
Direct	1,415,740.44	471,913.48	1,887,653.92
Commissions of E&A	948,561.59	316,187.19	1,264,748.78
Interest on Inheritance	35,339.96	----	35,339.96
Estate	2,751,522.83	----	2,751,522.83
Totals	$10,063,443.51	$2,425,526.90	$12,488,970.41

SURVEY OF TOTAL FEDERAL ESTATE TAX CREDIT AS COMPARED TO PORTION OF CREDIT ACTUALLY PAID TO MARYLAND FOR FISCAL YEAR 1966. (rounded to nearest dollar)

	Total Credit Allowed	*Portion Paid to Maryland as Estate Tax*
Federal Credit	$4,541,265.00	$2,702,844.00
Interest	67,474.00	48,679.00
Total	$4,608,739.00	$2,751,523.00
Less Amount Actually Received	2,751,523.00	
Additional amount if Inheritance Tax were eliminated	$1,857,216.00	

CONCLUSIONS: 59½% of the Federal Credit was collected in the form of Maryland Estate Tax, or for every dollar we collect under the present system we could expect $1.67½ if the inheritance tax is discontinued.

COMPUTATION OF LOSS TO STATE IF INHERITANCE TAX HAD BEEN ELIMINATED.

Tax actually remitted to State	$10,063,443.51
Less Maryland Estate Tax actually received	2,751,522.83
	7,311,920.68
Add Excess Fees of Office received from Registers of Wills	1,816,551.29
	9,128,471.97
Additional amount required to operate Registers of Wills' offices if no commission received on Inheritance Taxes	608,975.61
	9,737,447.58
Less additional amount of Federal Credit	1,857,216.00
Net loss of Revenue to State	$ 7,880,231.58"

The foregoing calculation takes no account of the following factors:

a. The yield from the income tax on estates which would be imposed when the inheritance tax is repealed.

b. The estate tax credit which would be paid in estates where the Maryland estate tax is not now payable because inheritance taxes exceed the federal estate tax credit and the executor or administrator simply does not file any Maryland estate tax return at all. Although there is no legal sanction for such a practice, it is generally conceded to be widespread.

c. The savings in the cost of administration and general public convenience resulting from rationalization of the death tax structure.

d. The increased revenues which would result from the repeal of a death tax system which discourages wealthy citizens from making their homes in this state.

APPENDIX C

A BILL ENTITLED

AN ACT to repeal in its entirety Article 62A of the Annotated Code of Maryland (1964 Replacement Volume and 1966 Cumulative Supplement), title "Maryland Estate Tax", to repeal Sections 144 to 148, inclusive, of Article 81 of the Annotated Code of Maryland (1955 Replacement Volume and 1966 Cumulative Supplement), title "Revenue and Taxes", subtitle "Tax on Commissions of Executors and Administrators", to repeal Sections 149 to 161, inclusive, and Sections 163 to 176, inclusive, of said Article 81, subtitle "Inheritance Tax", subheading "In General", and to enact in lieu of the tax provisions so repealed new Sections 144 to 156 of said Article 81, under the new sub-title "Maryland Death Tax", and to renumber as Section 157 and repeal and re-enact, with amendments, Section 162(1) of said Article 81, being the "Uniform Estate Tax Apportionment Act", providing generally for repeal of the existing Maryland estate and inheritance taxes and tax on commissions and for the imposition of a single death tax upon decedents' estates in the amount only of the maximum state death tax credit allowable for federal estate tax purposes.

WHEREAS, pursuant to recommendations made by the Commission to Study a Revision of the Testamentary Laws of the State of Maryland, appointed pursuant to Joint Resolution No. 23 of the Laws of Maryland of 1965, the General Assembly of Maryland is desirous of repealing all taxes presently applicable to the administration of estates, namely, the collateral inheritance tax, the direct inheritance tax, the tax on commissions of executors and administrators and the Maryland estate tax, and of enacting a single Maryland death tax equal to the maximum federal credit for state death taxes; now, therefore

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That Article 62A of the Annotated Code of Maryland (1964 Replacement Volume and 1966 Cumulative Supplement), title "Maryland Estate Tax", be and it is hereby repealed; that Sections 144 to 148, inclusive, of Article 81 of the Annotated Code of Maryland (1965 Replacement Volume and 1966 Cumulative Supplement), title "Revenue and Taxes", subtitle "Tax on Commissions of Executors and Administrators", be and they are hereby repealed; that Sections 149 to 161, inclusive, and Sections 163 to 176, inclusive, of Article 81 of the Annotated Code of Maryland (1965 Replacement Volume and 1966 Cumulative Supplement), title "Revenue and Taxes", subtitle "Inheritance Tax", subheading "In General", be and they are hereby repealed.

SECTION 2. *And be it further enacted,* That Section 162(1) of Article 81 of the Annotated Code of Maryland (1965 Replacement Volume and 1966 Cumulative Supplement), title "Revenue and Taxes", subtitle, "Inheritance Tax", subheading "In General", be and it is hereby renumbered and repealed and re-enacted, with amendments; and that new Sections 144 to 156, inclusive, be added to said Article 81 under the new subtitle "Maryland Death Tax", subheading "In General", all to read as follows:

MARYLAND DEATH TAX

In General

144. Definitions.

As used in this Subtitle:

(1) "death tax credit" means the credit against the federal estate tax for state death taxes;

(2) "decedent" means the decedent in relation to whose estate a tax is imposed by this subtitle;

(3) "executor" means the person required to file a return;

(4) "federal tax" means the tax imposed on the transfer of the taxable estate of decedents by the Internal Revenue Code;

(5) "gross estate" means the gross estate as finally determined and valued for federal estate tax purposes;

(6) "Internal Revenue Code" means the Internal Revenue Code of 1954, Public Law 591—Chapter 736, 2nd Session of the Eighty-third Congress of the United States, approved August 16, 1954, as the same is in force as of the effective date of this Act;

(7) "return" means the estate tax return required to be filed by the Internal Revenue Code;

(8) "state" means any state, the District of Columbia, the Commonwealth of Puerto Rico, and any possession of the United States;

(9) "state death taxes" means any estate, inheritance, legacy, or succession taxes actually paid to any state for which credit against the federal tax is allowable under the Internal Revenue Code;

(10) "Maryland estate" means that part of the gross estate the transfer of which Maryland has the power to tax.

145.

Imposition of Tax in Relation to the Estate of a Domiciled Decedent.

A tax is levied against the estate of every decedent domiciled in this State upon the transfer of the estate in an amount which equals the amount of the death tax credit.

146.

Credit Against the Tax.

The tax levied by Section 145 shall be reduced by the lesser of (a) any state death taxes imposed by any other state in respect of any property included in the decedent's gross estate, or (b) an amount which bears the same ratio to the death tax credit as the value of the decedent's non-Maryland estate bears to the value of the decedent's entire gross estate.

147.

Imposition of Tax in Relation to Property of Nondomiciled Decedent.

A tax is levied against the estate of every decedent not domiciled in this State upon the transfer of the decedent's Maryland estate in an amount which bears the same ratio to the death tax credit as the value of the decedent's Maryland estate bears to the value of decedent's entire gross estate.

148.

Filing Copies of Return and Payment of Tax.

(a) Every executor of a decedent dying domiciled in this State or of a non-domiciled decedent who died owning property in respect of which the tax is imposed by this State, shall file with the Comptroller within fifteen (15) months after the death of the decedent a copy of the return, duly verified. If the time for filing of the return is extended without penalty by the Internal Revenue Service, and a copy of the document of extension, duly certified by the person filing it, is filed with the Comptroller, the time for filing a copy of the return is extended for a period ending thirty days after the period of extension granted by the Internal Revenue Service. At the time the executor files the return, he shall certify to the Register of Wills that he has filed the return and he shall pay the tax to the Register of Wills. The Register of Wills shall certify the fact of such payment to the Comptroller.

(b) Within thirty (30) days after the receipt of a final judgment of any court of competent jurisdiction, a closing agreement made under section 7121 of the Internal Revenue Code, or an assessment made by the Internal Revenue Service pursuant to a waiver of restrictions on assessment. the executor shall file with the Comptroller a copy of the appropriate document and shall pay to the Register of Wills any additional Maryland death tax thereby caused to be due.

(c) The exclusive responsibility for determination of the proper amount of tax shall be in the Comptroller.

149.

Interest.

If the tax or any part thereof is not paid as provided in this subtitle, the unpaid tax or part thereof shall bear interest at the rate of six per centum (6%) per annum from the due date.

150.

Refunds.

(a) Claims for refund, or interest or penalties thereon, shall be governed by the provisions of sections 215 to 219, inclusive, of this Article.

(b) Any refund finally determined to be due shall bear interest at the rate of six per centum (6%) per annum from the date the tax was paid.

151.

Penalties.

If the return or any other document is not filed within the time prescribed by law or permitted by extension, the Comptroller may impose a penalty of not more than 10% of the tax finally determined, to be collected as part of the tax.

152.

Lien.

(a) Unless the estate tax imposed by this subtitle is sooner paid in full, or sooner becomes non-assessable or uncollectible by reason of lapse of time, it shall (except as otherwise hereinafter provided) be a lien for 10 years upon the property includible in the Maryland estate of the decedent, except that such part of the Maryland estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

(b) The death tax lien shall be divested upon receipt by the Comptroller of a copy of the executor's discharge from personal liability for federal estate tax. A copy of such discharge may be filed with the Register of Wills for the jurisdiction in Maryland in which the estate is being administered, and if there be no such jurisdiction, with the Register of Wills for any jurisdiction in Maryland in which is located any property includible in the decedent's gross estate. If no Maryland death tax is due, the executor's statement to that effect signed under the penalties of perjury and of sections 220 and 221 of this Article, shall be filed with such Register of Wills and shall operate as a divestiture of any Maryland death tax lien.

(c) The death tax lien shall not be valid against any purchase, lease, security interest or lien, acquired for value, unless such interest or lien was acquired in bad faith. "Value" means an adequate and full consideration in money or

money's worth, given or to be given and shall include an antecedent consideration unless the acquiring person had actual notice or knowledge of the existence of the Maryland death tax lien at the time of acquisition. An act shall be deemed to have been done in "bad faith" if a purpose of the act is to hinder, evade or defeat the collection of the Maryland death tax and such purpose, at the time of the act, was held by or known to the person charged with bad faith; but an act shall not be deemed to have been in bad faith merely because the existence of the Maryland death tax lien was known to such person.

(d) The Comptroller may issue a certificate of discharge of any property subject to the lien if he finds that (i) the fair market value of that part of the property remaining subject to the lien is at least double the amount of the unsatisfied tax liability secured by such lien and all prior liens or (ii) there is paid to the Comptroller in partial satisfaction of the liability secured by the lien an amount determined to be not less than the state's tax interest in part to be discharged.

153.

Discharge of Executor from Personal Liability.

Discharge from personal liability for payment of federal estate tax shall automatically discharge the executor from personal liability of payment of Maryland death tax.

154.

Liability of Transferees and Others.

If the Maryland death tax is not paid when due, then the spouse, transferee, trustee (except the trustee of an employer's trust which meets the requirements of section 401 (a) of the Internal Revenue Code, as from time to time amended), surviving tenant, person in possession of the property by reason of the exercise, non-exercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate, shall be personally liable for such tax to the extent of the value, at the time of the decedent's death, of such property.

155.

Effect of References to Repealed Taxes.

On and after the effective date of this subtitle, any provision of law relating to the Maryland estate tax, inheritance

tax or tax on commissions of executors and administrators shall not be applicable with respect to Maryland death tax, except where in the context of the reference such applicability would be reasonable.

156.

Severability.

If any portion, part or provision of this subtitle, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect the remainder or any other application of this subtitle which can be given effect without the portion, part or provision or application so held to be invalid, and, to this end, the parts, portions, provisions and applications of this subtitle are severable.

[162] *157.*

Uniform Estate Tax Apportionment Act.

(1) Definitions.—When used in this section *only.*

(a) "Estate" means the gross estate of a decedent as determined for the purpose of the federal estate tax and the Maryland [estate] *death* tax.

(b) "Fiduciary" means executor, administrator of any description, and trustee.

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

(d) "Person interested in the estate" means any person, including a personal representative, guardian, or trustee, entitled to receive, or who has received, from a decedent while alive or by reason of the death of a decedent, any property or interest therein included in the decedent's taxable estate.

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

(f) "Tax" means the federal estate tax and the Maryland [estate] *death* tax and interest and penalties imposed in addition to the tax.

Section 3. *And be it further enacted,* That this Act shall take effect, and shall be applicable to estates of persons dying, on or after June 1, 1967.

APPENDIX D

A BILL
ENTITLED

AN ACT to repeal and re-enact, with amendments, Sections 279 (f), 280 (i), 286 (d), 294 (b) of Article 81 of the Annotated Code of Maryland (1965 Replacement Volume), title "Revenue and Taxes," subtitle "Income Tax," to provide for the taxation of income of decedents' estates not subject to inheritance tax.

SECTION: 1. *Be it enacted by the General Assembly of Maryland,* That Sections 279 (f), 280 (i), 286 (d) and 294 (b) of Article 81 of the Annotated Code of Maryland (1965 Replacement Volume), title "Revenue and Taxes," subtitle "Income Tax," be and they are hereby repealed and re-enacted, with amendments, to read as follows:

279.

(f)

"Fiduciary" means any person by whom the legal title to real or personal property is held for the use and benefit of another, and shall include a trustee *and a personal representative,* but shall not include an agent holding custody or possession of property owned by his principal, a guardian, a committee or trustee for an incompetent, a receiver or trustee liquidating the business of an individual, partnership or corporation, [or an executor or administrator of the estate of a decedent when the estate is subject to the inheritance or succession tax laws of this State,] or an individual, firm or corporation acting individually or collectively as manager or trustees of an employees pension trust exempt hereunder.

280.

(i) Income received during administration of estate.—Income received by an executor, administrator or personal representative of a deceased person during the period of administration of the deceased person's estate, which is subject to [estate,] inheritance [or succession] taxes payable to the State of Maryland. *This exemption shall not be applicable to any estate as to which the provisions of the Maryland Death Tax are applicable.*

286.

(d) Fiduciary.—In the case of a fiduciary *who is the personal representative of a decedent's estate, eight hundred*

dollars ($800), and in the case of any other fiduciary, two hundred dollars ($200).

294.

(b) Fiduciaries.—Every fiduciary receiving income taxable under this subtitle shall file with the Comptroller a return stating specifically the items of his gross income and the items which he claims as deductions, exemptions and credits under this subtitle when his net income for the taxable year 1944 and any year thereafter exceeds $200 *(or $800 in the case of a personal representative of a decedent's estate),* or his gross income for the taxable year exceeds $5,000.

SEC. 2. *And be it further enacted,* That this Act shall take effect, and be applicable with respect to persons dying on or after, June 1, 1967.

APPENDIX E

A BILL
ENTITLED

AN ACT to repeal and re-enact, with amendments, Sections 6, 72 and 316 of Article 93 of the Annotated Code of Maryland (1964 Replacement Volume and 1966 Supplement), title "Testamentary Law", subtitles, respectively, "Account," "Administration by Collector," and "Sales," providing, as a companion measure to the enactment of Maryland Death Tax, for the reduction of allowable commissions in the amount of the tax on commissions repealed by the enactment of such Maryland Death Tax.

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That Sections 6, 72, and 316 of Article 93 of the Annotated Code of Maryland (1964 Replacement Volume and 1966 Supplement), title "Testamentary Law", subtitles, respectively, "Account", "Administration by Collector", and "Sales" be and they are hereby repealed and re-enacted with amendments to read as follows:

6.

Statement of disbursements in account; when assets insufficient to discharge.

On the other side shall be stated the disbursements by him made, and which are to be made in the following order

and priority: First, such fees as may be due under § 24 of Article 36 of this Code; second, funeral expenses, to be allowed at the discretion of the court according to the condition and circumstances of the deceased, not to exceed five hundred dollars ($500.00) except by special order of the court, and provided the estate of the decedent be solvent; third, his allowance for costs and extraordinary expenses (not personal) which the court may think proper to allow, laid out in the administration or distribution of the estate or in the recovery or security of any part thereof, costs to include reasonable fees for legal services rendered upon any matter in connection with the administration or distribution of the estate in respect to which the court may believe legal services proper, and in addition to include commissions, which shall be at the discretion of the court not under [two percent] *one and eight-tenths percent (1.8%)* nor exceeding [ten percent] *nine percent (9%)* on the first twenty thousand dollars ($20,000.00) of the estate, and on the balance of the estate not more than [four percent] *three and six-tenths percent (3.6%)*; fourth the widow's allowance as in this article directed to be paid; fifth, all taxes due by his decedent; sixth, charges for medical attendance, including nursing attendance in last illness, to be allowed at the discretion of the court according to the conditions and circumstances of the deceased, not to exceed one hundred dollars ($100.00), not more than fifty dollars ($50.00) of which shall be paid to the physician or physicians furnishing said medical attendance and not more than fifty dollars ($50.00) of which shall be paid to the nurse or nurses furnishing said nursing attendance; seventh, the allowance for things lost or which have perished without the party's fault, which allowance shall be according to the appraisement; eighth, debts of the deceased proved or passed in the following order, (a) claims for rent in arrears against deceased persons, for which a distress might be levied by law, but not for a period of more than three months; (b) claims for wages, salaries or commissions to clerks, servants, salesmen or employees contracted not more than three months prior to decedent's death, and claims founded on judgments and decrees, (c) all other just claims. If there be not sufficient to discharge all such judgments and decrees, a proportionate dividend shall be made between the judgment and decree creditors.

72.
Commission of Collector.

The orphans' court may allow a collector a commission on the property and debts actually collected and afterwards delivered to the executor or administrator, not exceeding [three per cent.,] *two and seven-tenths percent (2.7%),* or on the whole inventory not exceeding [two per cent] *one and eight-tenths percent (1.8%).*

316.
Sale of real estate by executor authorized to sell—In general.

In all cases where an executor may be authorized and directed to sell the real estate of a testator, such executor may sell and convey the same, and shall account therefor to the orphans' court of the county where he obtained letters, in the same manner that an executor is bound to account for the sales of personal estate; and the orphans' court may allow such executor a commission on the proceeds of such sale, not less than [two percent] *one and eight-tenths percent (1.8%),* nor more than [ten per cent] *nine percent (9%);* but such sale shall not be valid or effectual unless ratified and confirmed by the orphans' court, after notice by publication given in the same manner as practiced in cases of sales of lands under decrees in equity; and the bond of such executor shall be answerable for the proceeds of sales of the real estate which may come into his possession, to the same extent as if it were personal estate in his hands; in case the purchaser of any such real estate has transferred, or shall transfer his said purchase to another person, it shall be lawful for the orphans' court, upon petition in writing by the original purchaser and such assignee and upon being satisfied that such substitution or transfer may be made without injury to the estate, to pass an order substituting such assignee as purchaser of the said real estate, upon such terms as may be deemed expedient, regard being had to the interests of the estate, and directing the executor to convey the said real estate to the said assignee, his heirs and assigns; provided, however, that it shall not be necessary to the validity of the sale of any such real estate by the executor that the same be ratified by the orphans' court, as aforesaid, in any case where a court of equity of competent jurisdiction has assumed jurisdiction in relation to the sale of any such real estate. Provided, that an executor having full power to sell under the will may transfer and convey all redeemable rents

reserved by leases or subleases of land, otherwise known as redeemable ground rents, after due notice from the tenant of an intention to redeem the same, without complying with the requirements of this section as to reporting such conveyance to the orphans' court and securing its ratification thereof.

SEC. 2. *And be it further enacted,* That this Act shall take effect, and be applicable with respect to estates of persons dying on or after, June 1, 1967.

Second Report

of

GOVERNOR'S COMMISSION

TO REVIEW AND REVISE THE TESTAMENTARY LAW

OF MARYLAND

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Article 93

Decedents' Estates

•

December 5, 1968

Second Report

of

GOVERNOR'S COMMISSION TO REVIEW AND REVISE THE TESTAMENTARY LAW OF MARYLAND

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Article 93

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THE COMMISSION:

HON. WILLIAM L. HENDERSON, *Chairman.*

HON. THOMAS M. ANDERSON, JR.
ROBERT L. KARWACKI, ESQ.
HON. THOMAS HUNTER LOWE
JOSHUA W. MILES, ESQ.
ROGER D. REDDEN, ESQ.
HON. JAMES M. ROBY
JOHN G. ROUSE, JR., ESQ.
HON. RUTH R. STARTT
SHALE D. STILLER, ESQ.
G. VAN VELSOR WOLF, ESQ.
HON. GERTRUDE C. WRIGHT
C. M. ZACHARSKI, JR., ESQ.

Letter of Transmittal

TO: THE GOVERNOR AND THE GENERAL ASSEMBLY OF MARYLAND

This is the Second Report of the Governor's Commission to Study and Revise the Testamentary Laws of Maryland.

The Commission's First Report, dated December 26, 1966, dealt exclusively with the subject of death taxes in Maryland. As the subject of death taxes is readily separable from the main body of testamentary law in Maryland, this Report does not duplicate anything contained in the First Report.

The present Report is essentially a comprehensive restatement of the testamentary laws of Maryland and represents the major effort of the Commission.

The Commission was appointed by Governor Tawes in 1965 and began its work in July of that year. Its appointment was made pursuant to Joint Resolution No. 23, adopted at the 1965 Session of the General Assembly of Maryland, which requested the Commission to submit a proposal for recodifying and revising the Maryland laws concerning testamentary matters and death taxes.

This Second Report makes no proposals for changing the basic procedures for the administration of the law through the constitutional offices of the Orphans' Courts and Registers of Wills. The Commission takes no position on such questions as the desirability of continuing the use of lay judges, the various and varied compensations paid judges in the different counties and Baltimore City, the operation of the Registers' offices on a fee basis, the fixing of their salaries by the Board of Public Works, the provision for the mandatory approval by the Comptroller of the employment and compensation of all employees in the offices of the Registers, and the utilization of the Registers as tax collectors. The Commission's failure to call for changes in these traditional procedures is not to be taken as an expression of approval, but simply that these subjects seem to fall outside the scope of study of the law called for in the Joint Resolution to which we owe our existence as a commission.

The Commission has reserved for a later, Third Report the question of what changes should be made in the existing pattern for compensating executors and administrators. It feels that a further study of this important and sensitive subject is clearly indicated but has concluded that it is not yet prepared to make any final recommendations thereon.

The basic thrust of the Second Report is the restatement and recodification of the testamentary law. There is no field of Maryland

law whose statutory framework is more archaic, disorganized, cumbersome and illogical. The Joint Resolution passed by the General Assembly recognized this situation in the following language:

> "These laws urgently need revision and recodification in order to remove confusion concerning the location and intent of many sections of these laws as well as duplications and conflicts in the laws relating to testamentary business and tax laws pertaining thereto.
>
> "Testamentary law is an involved and technical part of the Maryland Code and for the benefit of all concerned should be as clear, concise, and orderly as possible. A revision of the laws would be of much assistance both to the Registers of Wills and to the Orphans' Courts in the prompt and proper administration of these laws."

The testamentary law is archaic: the framework is patterned on Chapter 101 of the Acts of 1798, legislation which, while coherent and viable in an essentially agricultural and less dynamic economy, has little relevance to 1968. It is disorganized: changes seem to have been tossed into the Code at random. As the Report demonstrates, the testamentary law of Maryland, although it is supposed to be contained in the Article of the Maryland Code titled "Testamentary Law", is scattered through at least 15 different Articles. Even Article 93 itself is devoid of any coherent order. It is cumbersome: it requires a maximum of red tape in the administration of an estate; yet, in some instances, its procedures may well be unconstitutional because of the availability of so many ex parte actions which can be taken without notice to those primarily interested in the proper administration of the estate. It is illogical: the artificial distinction between real property and personal property, for example, so important at common law, can no longer be justified in administering an estate. It is sometimes unintelligible: provisions such as Sections 48–51 of Article 93 have not only become atrophied from disuse but cannot even be explained in rational terms.

The Bench, the Bar, and the general public should no longer tolerate the condition which 170 years of patchwork amendments have created out of the relatively simple Act of 1798. The Commission's basic job, therefore, has been to attempt to create reasonable order in the law of decedents' estates.

A cursory glance at the table of contents will disclose the Commission's approach to this problem. The proposed new Article 93 is divided into twelve subtitles:

Subtitle I contains general definitions and rules of construction applicable throughout the entire Article.

Subtitle II sets forth the powers, duties, and procedures of the public bodies charged with administering the law — the Orphans' Courts and the Registers of Wills.

Subtitle III relates to the statutory shares of various persons, both in intestacy and testacy. Included within the latter category are the statutory shares of a surviving spouse and a pretermitted child.

Subtitle IV deals primarily with the execution of wills and miscellaneous rules relating to the interpretation of wills.

Subtitle V discusses in logical sequence the procedures to be followed in opening an estate.

Subtitle VI includes the rules relating to the appointment of personal representatives (a generic term used to describe both executors and administrators) and the termination of their powers.

Subtitle VII relates to the manner of administering the estate: the powers and duties of the personal representatives, the requirements of inventories and accounts.

Subtitle VIII prescribes the procedures to be followed in handling creditors' claims.

Subtitle IX provides special rules relating to distribution of the estate.

Subtitle X creates a new procedure for closing estates.

Subtitle XI contains miscellaneous rules.

Subtitle XII contains effective date provisions.

Most of the Sections of the statute are followed by "Comments" which describe the relationship between the present Maryland law and the recommendations of the Commission. This format is derived from the Uniform Commercial Code, adopted by the General Assembly in 1963, where the Comments have proved to be invaluable to the Courts, the Legislature, and the Bar in understanding the statutory language.

Although present Article 93 contains many provisions relating to guardianship, the Commission's jurisdiction did not extend to that subject. However, the Commission understands that the Section on Estates and Trusts of the Maryland State Bar Association will be submitting to the 1969 Session of the General Assembly a comprehensive statutory revision of the Maryland law of guardians, committees, and conservators.

The number of substantive changes in Maryland testamentary law recommended by this Report is not extensive. Most of the changes of substance are motivated by one salient thought — the handling of estates should be accomplished with efficiency, expedition, and as little

red tape and expense as possible. The major changes recommended by the Commission are:

1. Inclusion within the probate estate of all interests in real estate. Section 1–301.
2. Elimination of the need for ancillary administration. Section 5–501.
3. Consolidation of the variegated forms of special administrators, such as administrators ad colligendum, administrators d.b.n., etc. Section 6–401.
4. Abolition of the rights and complications of dower. Section 3–202.
5. Provision for the probate of most wills, and the appointment of a personal representative, by the Register of Wills, whether or not the Orphans' Court is in session, unless some interested person asks for a judicial determination. Section 5–302.
6. Elimination of the need for Court appointed appraisers, and the need for any appraiser at all where the assets to be appraised are cash or securities listed on a national exchange. Section 7–202.
7. Reduction of the period for filing creditors' claims to the four months period following the date of the first published notice to creditors, and the imposition of a statute of limitations of the same four months for claims not filed. Section 8–103.
8. Requirement that a first account be filed within six months. Section 7–305.
9. Requirement that the estate be distributed within six months unless extended by Court order for good cause shown. Section 7–101(b).
10. Relatively broad and specifically authorized powers given to every personal representative, unless limited by the will or an order of Court. Section 7–401.
11. A procedure for the waiver, under certain limited circumstances, of public filing of inventories and accounts. Sections 7–201(b) and 7–301.
12. Establishment of conditions under which a personal representative may, between his appointment and discharge, conduct the administration of the estate in the manner commonly associated with the administration of trusts,

i.e., without constantly obtaining perfunctory orders of Court. Section 7–402.

The Commission, by virtue of the Resolution which created it, consisted of a broad-based group of persons interested, and knowledgeable, in testamentary law. The Chairman is a former Chief Judge of the Court of Appeals, Maryland's highest court. Two of the members are Registers of Wills, and a third recently retired as a Register of Wills after service for over twenty years as a Register or Deputy Register. Two of the members are in the General Assembly. The remaining members are practicing lawyers with extensive experience in testamentary law.

The Commission also had the invaluable assistance of Melvin J. Sykes, Esquire, the present editor of his father's monumental treatise on Maryland probate law and practice. The Commission also expresses its gratitude to Professor Russell R. Reno, of the University of Maryland Law School, who has remained continuously available for advice and suggestions, and to several of the former Commission members who were, for a variety of reasons, unable to remain as members: Honorable C. Warren Colgan, Associate Judge of the Orphans' Court of Baltimore City, Senator J. Albert Roney, Judge John P. Moore, and Register of Wills Walter Addison. For about a year, John W. Sause, Jr., lent his valuable services as Reporter. The Commission is also appreciative of the cooperation of Governors Tawes and Agnew in providing funds necessary to pay the Commission's expenses.

On every subject the Commission considered the recommendations of the National Conference of Commissioners on Uniform State Laws, embodied in the Boulder Draft of the Uniform Probate Code prepared in August, 1967. Where there were major differences between Maryland practice and the Boulder draft, the Commission, in most instances, followed the existing Maryland practice.

The Commission has met in full session over 25 times. A drafting committee, consisting of G. Van Velsor Wolf, Esquire, as Chairman, and Roger D. Redden, Esquire, Shale D. Stiller, Esquire, and C. M. Zacharski, Jr., Esquire, translated into detailed statutory language the policy decisions of the Commission and did most of the research reflected in the "Comments" to the statute. Each member of the drafting committee devoted hundreds of hours to the task, often meeting 8–12 hours at a time, and sometimes more.

The Herculean job of typing the five successive drafts of the Report was ably and cheerfully performed by Mrs. Mildred R. Doyle, whose patience and unflagging loyalty were indispensable to the Commission's performance of its duties.

The proposed statute represents the only significant attempt to deal comprehensively with the testamentary law of Maryland since

1798, and your Commission has been honored in having had the opportunity to play its part in this recommended improvement in the laws of our State.

Respectfully submitted,

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December 5, 1968.

ARTICLE 93

Decedents' Estates

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SUBTITLE VI THE PERSONAL REPRESENTATIVE

SUBTITLE VII ADMINISTRATION OF THE ESTATE

SUBTITLE I

GENERAL PROVISIONS

Part 1 — Definitions and Use of Terms.

1–101. Definitions.

When used in this Article, unless otherwise apparent from the context:

(a) "Administrative probate" means probate as defined in Section 5–301.

(b) "Child" is defined in Sections 1–205 through 1–208.

(c) "County" includes Baltimore City.

(d) "Court" is defined in Section 2–101.

(e) "Extended powers" refers to those powers set forth in Section 7–402.

(f) "Heir" means a person entitled pursuant to Part 1 of Subtitle III to property of an intestate decedent.

(g) "Interested person" means (1) a person named as executor in a will, and a person serving as personal representative after judicial or administrative probate; (2) a legatee in being, whether his interest is vested or contingent, and (3) an heir even if decedent died testate except that an heir of a testate decedent ceases to be an "interested person" after the completion of administrative or judicial probate (unless judicial probate is requested subsequent to the completion of administrative probate, and then after the completion of the judicial probate). "Interested person" includes a person as above defined who is a minor or other person under disability and also the judicially appointed guardian, committee, conservator or trustee for such person, if any, and if none, then the parent or other person having assumed responsibility for such person.

(h) "Issue" is defined in Section 1–209.

(i) "Judicial probate" means probate as defined in Section 5–401.

(j) "Legacy" means any property disposed of by will, including any property disposed of in a residuary clause and any assets passing by the decedent's exercise of a testamentary power of appointment.

In all Comments throughout this Report, numbers preceded by a § and followed by (Md), such as §76 (Md), signify the present sections of Article 93 of the Annotated Code of Maryland (1966 replacement volume), "Testamentary Law". Numbers followed by "(UPC)" refer to sections as presented in the Boulder Draft of the proposed new Uniform Probate Code, submitted to the National Conference of Commissioners on Uniform State Laws at their meeting in Honolulu, August, 1967. Numbers preceded by the word "Section" refer to sections of the Commission's proposed statute. All references designated "*Sykes* § ___", refer to the specified sections of *Sykes, Probate Law and Practice* (1956 ed.).

(k) "Legatee" means a person who under the terms of a will would receive a legacy. "Legatee" includes a trustee but not a beneficiary of an interest under the trust.

(l) "Letters" includes letters testamentary and letters of administration.

(m) "Maryland Rules" means the Rules promulgated by the Court of Appeals of Maryland under the authority of the Constitution and Laws of Maryland.

(n) "Net estate" means the property of the decedent exclusive of the family allowance and enforceable claims against the estate.

(o) "Personal representative" includes an executor or administrator but not a special administrator.

(p) "Property" includes both real and personal property, and any right or interest therein. Except as used in Section 3–102(b), "property" refers to (1) all real and personal property of a decedent, and (2) any right or interest therein which does not pass, at the time of the decedent's death, to another person by the terms of the instrument under which it is held, or by operation of law.

(q) "Register" is defined in Section 2–201.

(r) "Representation" is defined in Section 1–210.

(s) "Special administrator" means a personal representative appointed as provided in Section 6–401.

(t) "Will" means any written instrument, including a codicil, which is executed in form prescribed by Sections 4–102 through 4–104, and has not been revoked in any manner provided by Section 4–105.

COMMENT.

Section 1–101 contains the basic definitions of certain terms used from time to time throughout this Article, which apply unless otherwise apparent from the context.

The definition of "County" in subsection (c) repeats the rule in §14 of Article 1, but it was felt useful to repeat it in this Article.

The definition of "interested person" in subsection (g) is of considerable importance in many Sections of this Article where provision is made for the personal representative to give notice of various actions to "interested persons." Persons not in being and possible takers under a power of appointment are not "interested persons." Beneficiaries of a trust are not "interested persons" because under subsection (k), "legatee" means only the trustees, and not the beneficiaries of the trust. In the rare instances where there is a legal future interest, the owners will be "interested persons."

The definitions of "legacy" and "legatee" in subsections (j) and (k) also include what are now referred to as a "devise" and a "devisee." Since this Article abolishes for the purposes of testamentary law the distinctions between real property and personal property (Section 1–301), one term, "legacy" or "legatee," is sufficient to do double duty.

"Legatee" would not include someone named in the will to receive a legacy which is void or otherwise inoperative. For example, if a will leaves $100 to X, if A survives the testator, X will not be a legatee if A predeceases the testator.

Subsection (o) is intended to require the use of "personal representative" instead of "executors" or "administrators." The Commission also recommends that §5 of Article 1 and §2(6) of Article 81 be revised to include references to personal representatives.

The definition of "property" in subsection (p) is intended to include, and be limited to, those assets which have traditionally constituted what is sometimes called in Maryland the "probate estate", except that realty owned by the decedent would, under the Commission's recommendations, for the first time, also be included in the probate estate. See Section 1–301. Possibilities of reverter and rights of entry owned by a decedent are also "property." See §346 (Md) and Comment to Section 1–301. On the other hand, "property" is not intended to include such items as insurance proceeds payable to a beneficiary other than the decedent's estate, property held in an inter-vivos trust, property subject to a power of appointment exercisable by the decedent, annuities and pensions not payable to the decedent's estate, death benefits described in Section 11–105(a), and the like. In Section 3–102(b) the term "property" has a broader meaning, as defined in 3–102(c) and the Comment thereunder.

Of course, a will, although valid, is inoperative as such until it is admitted to probate or recorded. See Section 5–102(a).

1–102. Verification.

When a writing is required by this Article to be verified, verification shall be sufficient if the writing is signed by the person required to make the verification and contains the following representation:

> I do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing document are true and correct to the best of my knowledge, information and belief.

COMMENT.

In the last four years the General Assembly has abolished the requirement of affidavits in corporate papers filed with the State Department of Assessments and Taxation and in documents perfecting a security interest in personal property. See §127B of Article 23 and §9–401 of Article 95B. In doing so the General Assembly has recognized that the requirement of one's taking an oath before a Notary Public or other officer is a burdensome anachronism. Cf. §9 of Article 1 stating that under certain circumstances an affirmation may be substituted for the taking of an oath.

The suggested form provides a standard method of verification, which follows substantially the provisions of Rule 21 of the Maryland Rules for swearing witnesses. Nothing in this Section is intended to relax the substantive law of perjury as applied to verification required under this Article, whether in the form of the traditional oath or the less rigorous form permitted by this Section.

1–103. Notice.

Unless personal service or notice by publication is expressly required in this Article or by the Maryland Rules, the first notice required or permitted to be given to any person under this Article shall be sufficient if deposited as registered or certified mail, postage prepaid, return receipt requested, addressed to the addressee at the address last known to the sender, with delivery restricted to the addressee. Any subsequent notice to such person in accordance with this Article shall be sufficient if deposited as ordinary mail, postage prepaid, addressed to the same address at which the first notice was received, as evidenced by return through the post office of the return receipt for such notice, or, after notice in writing from the said addressee of a change of address, to his new address. If no return receipt is received apparently signed by the addressee, and there is no proof of actual notice, no action taken in any proceeding under this Article shall prejudice the rights of the person entitled to notice unless proof is made by verified writing to the satisfaction of the Court or Register that reasonable efforts to locate the addressee and warn him of the pendency of the action have been made.

COMMENT.

The provisions of Maryland Rule 104 b 2 with reference to service of process by registered mail in lieu of personal delivery would seem reasonable with respect to the first notice sent to a particular person under this Article, but too onerous as to subsequent notices of which there are likely to be many. Therefore, all notices subsequent to the first would be sufficient if sent by ordinary mail to the address at which the first notice was received, or to a new address if requested by the addressee in writing.

1–104. Gender; singular or plural number.

Unless otherwise apparent from the context: words of the masculine gender include the feminine and neuter; words in the singular number include the plural; and words in the plural number include the singular.

COMMENT.

Cf. §§7 and 8 of Article 1.

1–105. Construction of Article.

(a) *Purposes.* The purposes of this Article are to simplify the administration of estates, to reduce the expenses of administration, to clarify the law governing decedents' estates, and to eliminate certain provisions of existing law which are archaic, often meaningless under modern procedures and no longer useful. This Article shall be liberally construed and applied to promote its underlying purposes.

(b) *Severability.* If any provision or clause of this Article, or application thereof, to any person or circumstances is held invalid,

such invalidity shall not affect other provisions or application of the Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are declared to be severable.

(c) *Presumption.* Unless otherwise expressly provided, whenever this Article states that a fact shall be presumed, the presumption is rebuttable.

Part 2 — Determining Relationship.

1–201. Application of rules.

In the absence of express language to the contrary, the rules of construction contained in this Part shall be applied in construing all provisions of this Article and the terms of a will.

COMMENT.

As noted in the Comments, the following Sections in Part 2 are very similar to existing statutes dealing with intestate succession. It seemed to the Commission that matters relating to the determination of relationship have more general significance; e.g., the determination of who is a child or issue is not confined to intestacy situations. See *Sykes,* §59.

Consistent with the Commission's view that all aspects of testamentary law should be as uniform as possible, the rules of construction set forth in this Part should, therefore, be applicable both in construing the provisions of this Article and in construing wills.

2–803 (UPC) makes elaborate provision for "Effect of Homicide on Intestate Succession, Wills, Joint Assets, Life Insurance and Beneficiary Designations." This problem has arisen in only two appellate Maryland cases. See, *Sykes,* §182, note 95, and *Weiner,* "Felonious Homicide and the Right of Survivorship under Tenancy by the Entireties," 17 Md. L. Rev. 45 (1957). Moreover, the UPC draft would permit the property of the decedent to pass in such a situation "as if the killer had predeceased the decedent." This is contrary to present Maryland law. See *Price v. Hitaffer,* 164 Md. 505 (1933).

The Commission feels that this subject can be handled on the basis of common law principles and public policy as situations arise. It therefore has not included any statute dealing with homicide, although such omission is intended neither to change present law nor to restrict future opinion in the same or similar cases.

1–202. Spouse — termination of relationship.

(a) *Generally.* A person who is validly divorced *a vinculo matrimonii* from the decedent or whose marriage to the decedent has been validly annulled is not a surviving spouse.

(b) *Termination as to one party.* A surviving spouse does not include:

(1) a person who has voluntarily appeared in a proceeding in which an *a vinculo matrimonii* divorce as between the decedent

and the survivor, or an annulment of their marriage, was obtained even though not recognized as valid in this State, unless they have subsequently married each other;

(2) a person who, by participating in a marriage ceremony with a third person, has acknowledged as valid a decree or judgment of divorce or annulment obtained by the decedent;

(3) a person who has entered into a bigamous marriage while married to the decedent;

(4) a person who has deserted the decedent and has lived in adultery with a third person, unless the parties were reconciled at the time of the decedent's death.

COMMENT.

Although the statutes of some States bar the surviving spouse on account of desertion or adultery, this Section requires some definitive act to bar the surviving spouse. Normally this is divorce. Subsection (a) states an obvious proposition, but subsection (b) deals with the difficult problem of invalid divorce or annulment, which is particularly frequent as to foreign divorce decrees, but may arise as to a local decree where there is some defect in jurisdiction; the basic principle underlying these provisions is estoppel against the surviving spouse.

Present Maryland statutes recognize two ways in which *one* spouse may forfeit his rights to benefit from the marital relationship, both of which are restated here in paragraphs (3) and (4) of subsection (b).

Under §18 of Article 27 a person convicted of bigamy forfeits dower rights and a distributive share of the spouse's estate; and, if the convicted person is the husband, the wife is "forthwith" entitled to a share of the husband's real and personal property. The Commission has retained the basic policy of the present statute and makes it applicable to real and personal property as well as other interests of the spouse.

The statute of 13 Edw. I, chapter 34 (1285), provides that a wife forfeits dower if she shall "willingly leave her Husband, and go away, and continue with her Advouterer . . ." unless "her Husband willingly, and without Coertion of the Church, reconcile her, and suffer her to dwell with him." See 1 *Alexander's British Statutes* (Coe ed.), page 186; *Schmeizl v. Schmeizl,* 186 Md. 371, 374 (1946), and 184 Md. 584, 599 (1945). This statute presently applies only to testate estates, but the Commission's recommendation in subsection (b)(4) will also apply to intestate estates.

2–802 (UPC) does not recognize either of these forms of effective termination of the marital relationship but the Commission felt that no change should be made in the Maryland law which would continue to prohibit the anomaly of a spouse deriving benefit from the estate of a spouse with whom he had clearly demonstrated an intent to sever relationship. Cf. *Schmeizl v. Schmeizl,* 186 Md. at p. 374.

The UPC also suggests that if a judgment of partial divorce or separation is rendered "against the surviving spouse", such spouse has no right to an elective share or family allowance. At the present time, Maryland law gives no effect to partial divorces or separations in determining the rights of surviving spouses. See, *Sykes,* §182. The Commission has not included the UPC suggestion which would represent an unnecessarily radical departure from present practice. The Commission also calls attention to the fact that in the usual case, partial divorces or separations are accompanied by agreements governing the rights of the parties. Such would be recognized under this draft. See Section 3–205.

The use of the phrase *"a vinculo matrimonii",* commonly employed in referring to an absolute divorce in Maryland, is intended to apply to a divorce granted in another State having a similar effect.

1–203. Degree of relationship — generally.

Degrees of relationship shall be reckoned according to the method of the civil law, namely, by beginning with either of the persons in question, ascending to the common ancestor, and then descending to the other person, counting one degree for each step both ascending and descending.

COMMENT.

This Section is included in the proposed draft because the computation of degrees of relationship in Maryland is a matter of some confusion. The Commission feels that explicit provisions should be made on the subject in the statute.

Present §§145 and 152 (Md) refer to degrees of relationship, but the statutes do not contain a provision as to the method of computation. Under the case law it has been held that to determine collateral relations in equal degree under the distribution statute, degrees of consanguinity should be counted by the civil law, and not by the common law method. On the other hand, the common law method is used to ascertain whether there are any relations within the fifth degree for the purpose of determining whether property of a decedent escheats to the State for the use of the schools; see *Sykes,* §§160 and 161, which also set forth the method of computation under each of the systems.

In the view of the Commission, the concurrent use of both methods of computation under various circumstances is unnecessarily confusing, and the proposed draft provides for uniform use of the civil law method which is simpler and measures differences more precisely.

1–204. Degree of relationship — relative of half blood.

A relative of the half blood shall be deemed to be, and shall have the same status as a relative of the whole blood of the same degree.

COMMENT.

This follows the present Maryland practice prescribed in §145 (Md); see also 2–107 (UPC).

1–205. Child — generally.

A child includes a legitimate child, an adopted child, and an illegitimate child to the extent provided in the following sections. Child does not include a stepchild, a foster child, or a grandchild or more remote descendant.

1–206. Child — legitimate.

(a) *Born during marriage.* Except as provided in Section 1–207, a child born at any time after his parents have participated in a marriage ceremony with each other and are living together, even if the marriage is invalid, shall be treated as the child of both parents. A child born or conceived during a marriage is presumed to be the legitimate child of both spouses.

(b) *Artificial insemination.* Any child conceived by artificial insemination of a married woman with the consent of her husband shall be treated as the child of both of them for all purposes. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence.

COMMENT.

The first sentence of subsection (a) incorporates the substance of present §151 (Md) with minor improvements in style. The second sentence reflects the present law under which the presumption is rebuttable under the provisions of §§66F(b) of Article 16, see *Shelley v. Smith,* 249 Md. 619 (1968).

Subsection (b) is new. It is derived from 2–111(b) (UPC). The Commission feels that this addition is desirable in view of the increased use of artificial insemination and the lack of any statute or case law on the subject in Maryland.

1–207. Child — adopted.

(a) *General rule.* An adopted child shall be treated as a natural child of his adopting parent or parents. On adoption, a child shall no longer be deemed a child of either natural parent except that upon adoption by the spouse of a natural parent, the child shall still be deemed the child of such natural parent.

(b) *More than one adoption.* A child who has been adopted more than once shall be deemed to be a child of the parent or parents who have most recently adopted him and shall cease to be deemed a child of his previous parents.

COMMENT.

Paragraph (a) restates the existing Maryland law as contained in §78 of Article 16 and §147 (Md). Paragraph (b) is new. The entire section is derived from 2–109 (UPC).

See also Section 1–205 as to the status of an adopted child.

1–208. Child — illegitimate.

A person born to parents who have not participated in a marriage ceremony with each other shall be deemed to be the child of his mother. He shall be deemed to be the child of his father only if his father (1) has been adjudicated to be the father in a proceeding brought for that purpose or has been judicially ordered to support the child, (2) has admitted in open court that he is the father, (3) has acknowledged himself, in writing, to be the father, (4) has openly and notoriously recognized the person to be his child, or (5) has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.

COMMENT.

This Section incorporates the provisions of present §150 (Md) and §§6 and 7 of Article 46. See also Note, "Inheritance by and from Illegitimates and Maryland Intestacy Law," 20 Md. L. Rev. 276 (1960), and *Sykes*, §§162 through 165. The language is derived from 2–111(c) (UPC). The only change in substance made in this Section is the inclusion of a provision permitting an illegitimate child to inherit from a father who has been adjudicated as the father in a proceeding brought for that purpose or who has been judicially ordered to support the child. This Section also spells out more fully the procedure for legitimation by acknowledgment without a subsequent marriage as is now required by the Maryland law. It reflects the modern policy in the direction of mitigating the impact of illegitimacy. For the effect of legal adoption on the status of an illegitimate child who is legally adopted see Section 1–207. See also Section 3–108.

1–209. Issue.

Issue means every living lineal descendant except a lineal descendant of a living lineal descendant. Any person who is treated as a child of any person pursuant to Sections 1–205 to 1–208 shall be deemed for all purposes as (a) a lineal descendant of such person and (b) subject to the exception in the first sentence of this Section, a lineal descendant of all persons of whom such person is a lineal descendant.

COMMENT.

This definition is based upon that contained in 1–103(n) (UPC), reworded and condensed. See Note, "Distribution to 'Issue'," 21 Md. L. Rev. 242 (1961).

1–210. Representation — per stirpes.

(a) *Intestate succession.* When representation is provided in this Article, the property shall be divided into as many equal shares as there are (1) children or brothers and sisters of the decedent, as the case may be, who survive the decedent and (2) children or brothers and sisters of the decedent, as the case may be, who did not survive the decedent but of whom issue did survive the decedent. A child, or brother or sister, as the case may be, who did survive the decedent

shall receive one share, and the share of each deceased child, or brother or sister (leaving issue who did survive the decedent), as the case may be, shall be divided among his issue in the same manner.

(b) *Wills.* Unless a contrary intention expressly appears, when a will provides that upon the occurrence of any event distribution shall be made by representation or *per stirpes,* the estate shall be divided into as many equal shares as there are, with respect to the particular legacy involved, (1) legatees and (2) persons who would have been legatees had they survived until the occurrence of such event and of whom issue did survive the occurrence of such event. Each legatee shall receive one share and the share of each deceased legatee shall be divided among his issue in the same manner.

COMMENT.

This Section broadens the effect of §149 (Md) which spells out the method of taking by representation as applied to the issue of the decedent only. While the present statute refers to representation with respect to collaterals, it does not provide how such representation is to be reckoned. For examples of the application of subsection (a) see Sections 3–103 and 3–104(b) and (c).

The theory of this Section is that the decedent would normally prefer equality among the branches of the family represented by his closest relatives, whether or not any of the generation of his closest relatives does in fact survive him, rather than the branches represented by the more remote generation of which at least one member did survive him. This Section rejects the Uniform Probate Code approach in 2–106 (UPC).

For example, suppose A has two children, B and C, both of whom predecease him. B had had one child, M, who survived A, and C had had two children, N, who survived A, and O, who had died leaving X, Y and Z who survived A (his great grandchildren).

Under the present Maryland law and this Section, A's estate would be divided into two equal parts of which one would be distributed to M. The other would then, in turn, be divided equally so that one share (one-fourth of A's estate) would be paid over to N, with the other share distributed in equal portions to X, Y and Z. Under the new Uniform Probate Code [2–106 (UPC)], however, as A's grandchildren, M and N, are his nearest living heirs that generation would form the determinative stirps and B's son M would receive only one-third of A's estate, as would N, with the great grandchildren X, Y and Z likewise sharing one-third.

The method of taking by representation in all cases, which Section 1–210 would provide, would make the Maryland statutes consistent with the rule laid down in *Ballenger v. McMillan,* 205 Md. 94 (1954), dealing with the meaning of the phrase "per stirpes" where a gift is made to the descendants of A per stirpes. The earlier case of *Patchell v. Groom,* 185 Md. 10 (1945), had adopted as the Maryland law what is now proposed by the UPC. However, the *Ballenger* case reversed this rule, relying upon the reasoning contained in Judge Henderson's separate opinion filed in *Patchell v. Groom,* and concurred in by Judges Collins and Markell, in which he took issue with

the majority in their holding that the stirpes or stocks of descent for the taking by representation among the descendants of a person could begin with a generation more remote than the children of such person. See *Singley,* "Patchell v. Groom Revisited: Distribution Among Descendants Per Stirpes," 15 Md. L. Rev. 1 (1955).

Part 3 — Property Subject to Article — Real and Personal.

1–301. Devolution of property at death.

All property of a decedent shall be subject to this Article, and upon his death shall pass directly to the personal representative for administration and distribution, without any distinction, preference, or priority as between real and personal property.

COMMENT.

The Commission has recommended the abolition of the distinction between real and personal property as it applies to testamentary law.

In 1879, Maitland, the noted legal historian, wrote:

> "The distinction between real and personal property might be done away with, without any disturbance of substantial rights or interests. There would be a savings of money, of time, of temper, of trouble; a saving of vexatious law suits and of those worst of quarrels — family quarrels; vast masses of antique and unintelligible law might be forever forgotten; but beyond this, there would be little change, certainly no change which the veriest Tory could call revolutionary."

What Maitland said then of English law is true of Maryland law today.

The distinction between real and personal property in the administration of estates developed in early English law. It originated at a time when landed estates were the basic feature of a feudal economy. In those days, land descended by primogeniture to the eldest son, while the less important personalty went to all the children.

With the general adoption of English law by the American States, and Maryland in particular, the distinction became imbedded in our own law. However, in our modern economy, assets other than land are now the prime source of wealth. As a result, there is little, if any, reason for continuing to exclude a decedent's real estate from the assets comprising his probate estate. In fact, such exclusion causes serious problems which often defeat the intention of the testator, and work against the best interests of the decedent's family and creditors as well.

For example, under the rule that personal property must be consumed completely before real property can be used to pay debts, *Safe Deposit & Trust Company v. Tait,* 54 F. 2d 387 (D. Md.—1931), income producing personal property, such as the stock in a family business, must be sold to pay debts and expenses before a vacant lot can be used to raise cash for that purpose. All too often such a priority turns upon circumstances utterly unrelated to the needs of the family. Inclusion of real estate in the probate estate would remove this priority

and give the personal representative added flexibility so that, in an estate with extraordinary expenditures, maximum value might be salvaged for the family. In addition, the cumbersome and expensive creditor's bill in equity to subject real estate of a decedent to liability for his debts will no longer be necessary.

Moreover, during the early stages of administration, the heirs or legatees of real estate are frequently not ready to assume the responsibility of managing their property, and as a practical matter, the personal representative is often required to collect the rents, pay taxes and expenses, make repairs, prevent waste and provide insurance coverage for the property. Yet, the personal representative has no ownership interest and may not have even an insurable interest. Furthermore, where the personal representative must take active control of real estate which will pass to heirs or legatees, how are these items to be handled in probate accounting? In the counties of Maryland the practice differs. In some jurisdictions, income and expenses are reported by the personal representative in his accounting. In others, no accounting is made, and the personal representative is simply acting as an agent for the ultimate takers.

Another set of problems arises where real estate must be allocated by the personal representative among various outright and trust gifts created under a will. Until the personal representative makes the allocation, the title to real estate really stands in limbo, and there is no way of determining responsibility for its management. Moreover, even after allocation, in some counties, the fact that real estate has been allocated is noted only in the account and no further indication of ownership ever appears on the county's land records. Indeed, in some few jurisdictions, executors neither execute deeds nor note allocation in the administration account, and a title searcher apparently must guess from reading the will where real estate was allocated.

In 1925, England solved the problem it had created by making real estate an asset of the probate estate (Administration of Estates Act, 15–16 Geo. V, Chap. 23, Section 1). The Commission feels that the time has come to adopt the same approach in Maryland. Accordingly, Section 1–101(p) of this draft provides that throughout the statute, the term "property" includes both real and personal property. Sections 7–401 and 7–402 grant the personal representative extensive powers over all the decedent's assets, both real and personal property. Section 1–301 specifically reflects the fact that the personal representative has title to and complete power over all of the "property" of the estate, and that there shall be no distinction between real property and personal property.

All the distinctions in Article 93 between real property and personal property have been eliminated. Thus, for example, the special provisions of §88 (Md) requiring recordation of the will in any jurisdiction where the decedent owned real estate have been repealed because in every instance a personal representative will now be required to execute and record a deed to pass title to the distributees of an estate. Likewise, §2 (Md) [filing certificate of supervisors of assessments], §124 (Md) [administration where an intestate dies owning realty and no personalty], §§316 through 321 (Md) [sales of real estate by a personal representative], §364 (Md), §1 of Article 46

and §8 of Article 57 need no longer be retained. As to §2 (Md), see Comment to Section 7–302. As to §364 (Md), see Comment to Section 9–103.

If Section 1–301 is adopted, the provisions of §§106, 157 and 158 of Article 16, which presuppose a distinction between real property and personal property, and of §21 of Article 66, which specifically provides that the interest of a mortgagee in a mortgage passes to his personal representative on death, can be repealed.

The Commission has also recommended the deletion of the provisions of §346 (Md), which provided that all real and personal property could be disposed of by will, since it contemplates that under Section 1–301 *all* property (both personal and real) will automatically pass to the personal representative. The elimination of §346 (Md) would also clearly abolish estates tail; cf., §22 of Article 21 and §1 of Article 46 which, in effect, probably abolish the concept of estates tail, but which are not entirely clear.

§346 (Md) now specifically authorizes the testamentary disposition of possibilities of reverter and rights of entry. In eliminating §346 (Md), the Commission does not intend to imply that possibilities of reverter and rights of entry may no longer be disposed of by will. The definition of "property" in Section 1–101(p) includes possibilities of reverter and rights of entry.

Indeed, the Commission does not intend to change any of the rules with respect to the transmissibility of future interests. For discussions of this problem, see Professor Reno's two articles on "Alienability and Transmissibility of Future Interests in Maryland," 2 Md. L. Rev. 89 (1938) and 15 Md. L. Rev. 193 (1955). See also *Carter,* "Recent Developments Relating to Devolution and Descent of Future Interests in Maryland," 11 Md. L. Rev. 187 (1950); *Jones,* "Vested and Contingent Remainders," 8 Md. L. Rev. 1 (1943); Notes, 28 Md. L. Rev. 156 (1968) and 9 Md. L. Rev. 367 (1948); and *Sykes,* §2.

See also Sections 4–402 and 4–408 dealing with related subjects.

The Commission also notes that Article 23, §164 provides that burial lots and crypts may be devised by will and shall descend as real estate to the heirs. This statute should be amended to provide that burial lots and crypts shall pass to the personal representative, like other property.

The Commission has rejected the concept of the new Uniform Probate Code that title to all property passes directly to the heirs or legatees, subject to the power or control over the property by the personal representative. The Commission felt that this dichotomy between title, on the one hand, and power, on the other, is unworkably vague and unnecessarily inconvenient. On the contrary, the Commission recommends the suggested wording of Section 1–301 in order to make it clear that the title to all property, both real and personal, and as to both testate and intestate estates, shall pass directly to the personal representative.

SUBTITLE II

THE COURT

COMMENT.

Early in its deliberations the Commission concluded that the responsibility delegated to it by the Joint Resolution under the authority of which it was created did not include the consideration of recommendations for major changes in the present traditional basic procedures for the administration of the testamentary law through the Constitutional offices of the Judges of the Orphans' Courts and the Registers of Wills.

Thus, the Article continues the system of utilizing the three judge Court (the members of which need not be and, with the exception of Baltimore City, usually are not even members of the Bar), the varied methods of compensating the Judges in different Counties, the operation of the offices of the Registers of Wills on a fee basis, the fixing of the salaries of the Registers of Wills by the Board of Public Works, the provision for the mandatory approval by the Comptroller of the employment and compensation of all employees in the offices of the Registers of Wills, and the like. This fact is not to be construed as representing either approval or disapproval of such provisions by the Commission or by any of its members.

On the other hand, the Commission has recommended provisions which would, by raising the importance and dignity of the office of Register of Wills to a quasi-judicial status, expedite and simplify the administration of estates. In the opinion of the Commission, the Register of Wills through experience and personal contact with the administration process is well able to discharge the additional responsibilities contemplated for his office, such as administrative probate (see Part 3 of Subtitle V) and the exclusive authority to appoint standing, as well as general, appraisers (see Part 3 of this Subtitle).

This proposal is consistent with the more responsible, quasi-judicial position granted in some other States to the officer who performs the function of the Register in Maryland. The Boulder Draft of the new Uniform Probate Code also recognizes this quasi-judicial function of the Register (see Part 2 of this Subtitle II).

Part 1 — The Probate Court.

2–101. Generally.

As used in this Article, the word Court means the Orphans' Court in any County, or the court exercising the jurisdiction of the Orphans' Court in any county.

COMMENT.

The Commission does not intend to change or deal with the jurisdiction of the equity courts, except to the extent necessary in consequence of making real estate a part of the probate estate. The contours of the powers of equity courts in this area are set forth in

Sykes, §271. The word Court will also include the Circuit Court for Montgomery County, where that Court is constitutionally directed to sit as the Orphans' Court of Montgomery County.

2–102. Powers; right of interested person.

The Court shall have full power to conduct judicial probate, to direct the conduct of personal representatives, and to pass such orders as in its discretion may be required in the course of the administration of a decedent's estate, including the power to summon witnesses. An interested person may at any time petition the Court to resolve questions concerning the estate or its administration. The Court shall not, under pretext of incidental power or constructive authority, exercise any jurisdiction not expressly conferred by law.

COMMENT.

This Section is derived from §§259 and 287 (Md). The Commission does not intend to change the existing powers of the Court except in two instances.

First, under the provisions of Section 5–301, dealing with administrative probate, the Register may conduct the initial probate proceeding under certain circumstances, whether or not the Court is in recess. This avoids the problem of determining whether the Register may take the probate of wills while the Court is in session. See §297 (Md). Therefore, Section 2–102, gives the Court power to conduct only judicial probate. Even in judicial probate the Register shall examine the witnesses to the will unless the Court otherwise directs, Section 5–404(b). The power to conduct administrative probate is vested solely in the Register and is to be exercised whether or not the Court is in session. For a discussion of administrative and judicial probate see Sections 5–301 to 5–304 and 5–401 to 5–407, inclusive.

Second, because the personal representative will now have title to real estate [see Section 1–301] the Court's jurisdiction over real estate will be the same as its jurisdiction over personal property.

The Commission did not feel that it was necessary to describe in detail all of the rules which the Court of Appeals of Maryland has developed in setting forth those areas in which the Court does not have jurisdiction. These rules, for example, prohibit the Court from exercising jurisdiction over questions of title, administration of trusts, or disinterments. The Commission does, however, intend that all of the rules which have been developed by the Court of Appeals for determining whether the Court has jurisdiction over any particular matter will continue to be the law. See *Sykes,* §§203, 208–210 and 212–213 for a discussion of the rules which have developed in this area. These rules shall not, however, affect the Court's general jurisdiction if the Court is a court which has general equity jurisdiction. See *Sykes,* §271.

The Commission felt that the general statement of power, to wit, that the Court may "pass such orders as in its discretion may be required in the course of the administration of a decedent's estate"

is sufficiently broad so that it is not necessary to itemize separate powers, such as to authorize the personal representative to retain assets during an extended period of administration required by the testator's direction that the personal representative act, in effect, as a continuing trustee [see §15 (Md)], to examine, hear and decree upon accounts, claims and demands [see §263 (Md)], to order the delivery of any concealed assets to the personal representative [see §270 (Md)], to order, on the petition of an interested party, a personal representative to inventory property claimed to have been concealed by him [see §271 (Md)], to authorize the compromise of any claim [see §286 (Md)], and the like. The special power to summon witnesses is derived from §265 (Md). For possible additional relief see §4 of Article 31A.

2–103. Enforcement.

The Court has the same legal and equitable powers to effectuate its jurisdiction, punish contempts, and carry out its orders, judgments and decrees as a court of record with general jurisdiction in equity.

COMMENT.

Although this Section adopts a portion of 1–201 (UPC), the provisions of the Boulder Draft of the Uniform Probate Code relating to the Court are, in general, inapplicable to the system of estate administration in Maryland since the UPC assumes a court of equivalent status to a court of general jurisdiction in law and equity in all matters, whereas the Orphans' Courts in Maryland have always been courts of very limited jurisdiction.

The powers of enforcement set out in §§265 through 269 (Md) have been omitted.

As for §265 (Md), the procedure for the issuance of a summons is covered under Section 2–104. The Commission felt that the provision for punishment by fine not exceeding $30 is no longer appropriate.

The provisions of §§266 through 268 (Md), permitting the sequestration of the property of a recalcitrant witness is an anachronism traceable to the 1798 Act, which the Commission felt need no longer be retained.

The provisions of §269 (Md), which give the Orphans' Court the power to initiate an instruction to a personal representative to invest "any money or funds received" by him are rarely, if ever, resorted to, and the Commission therefore recommends their deletion. Even if the Court should approve a particular investment, such order might not protect the personal representative from attack by an heir or legatee for failure to act as a prudent fiduciary investor. See *Goldsborough v. DeWitt,* 171 Md. 225, at 257 (1937); also, *Zimmerman v. Coblentz,* 170 Md. 468 (1936). The Commission felt that the general power and authority given to the personal representative to deposit estate moneys in insured interest-bearing accounts or invest in such short-term loan arrangements as may be reasonable for use by trustees [Section 7–401(e)], coupled with the right of any interested person to petition the Court to resolve any quesiton concerning the administration of the estate [Section 2–102], or for removal of the personal

representative [Section 6–306], and the recognition of the personal liability of the personal representative for breach of his fiduciary duty [Section 7–404], afford ample protection to all interested persons.

No change is recommended in §23 of Article 10 which imposes upon the Orphans' Courts the duty to prefer charges against attorneys guilty of unprofessional conduct.

2–104. Rules of Court — summons; depositions; discovery.

The Maryland Rules for the summoning of a witness, and for depositions and discovery, shall apply to all actions and proceedings of the Court in the same manner and with like effect as they apply to the law and equity courts of this State.

COMMENT.

The present law provides for power in the Orphans' Court to summon witnesses [§265 (Md)] and extends the deposition procedure set forth in the Maryland Rules to the Orphans' Court [§279 (Md)]. The Commission's recommendation would continue these powers. In addition, the Commission felt that the general rule for the summoning of witnesses and for all discovery and not merely depositions, should be applicable to the Orphans' Court.

The Court may prescribe such other rules as it deems advisable, not inconsistent with the Maryland Rules. See §27 of Article 26. The Court of Appeals may also prescribe rules for the Orphans' Courts. See §18 of Article IV of the Maryland Constitution. Compensation of witnesses in the Orphans' Courts will continue to be governed by §18 of Article 35.

2–105. Plenary proceeding.

In any controversy in the Court, issues of fact may be determined by the Court or, at the request of any interested person made within such time as may be determined by the Court, by a court of law. Where such request is made before the Court has determined the issue of fact, the Court shall transmit the issues to a court of law. After the determination of the issue, whether by the Court or after transmission to a court of law, the Court shall enter an appropriate judgment or decree. This Section shall not apply where the estate is administered under the jurisdiction of a court having general equity jurisdiction.

COMMENT.

This Section is intended to continue the present practice now set forth in §§272, 278, 280 and 281 (Md). See *Sykes,* §§221–229. No substantive changes are intended.

Provisions for the taking of an appeal from a decision of the Court are contained in §§9 through 11 (appeal to Court of Appeals) and §§25 and 26 (appeal to Circuit Court) of Article 5.

2–106. Time and place of sessions.

(a) *Generally.* The Court, unless a different time is prescribed by local law, shall be held in each County at the usual place of holding court in said County, on the second Tuesday in every month of February, April, June, August, October and December, and oftener if need be, according to its own adjournment; and any one of the judges of the Court, in the absence of the others shall have power to hold court at a stated time of adjournment only for the purpose of adjourning; any two of them shall have full power to do any act which the Court is or shall be authorized by law to perform, and any two of them shall have power to hold court on any day not named in an adjournment, on the application of any person having pressing business in the Court; provided, notice thereof be given to all interested persons, and in such case the Register shall record that such notice has been given. Any one of the judges, in the absence of the others on account of prolonged illness, or in case of vacancy, shall have full power to do any act which the Court is authorized by law to do, provided there be attached to the proceedings or papers in each case a certificate signed by the Register, certifying to the vacancy or to the illness or inability of the judge or judges not attending court on said day. If the Court shall not meet on a day fixed for its meeting and shall not be adjourned as hereinbefore provided, the Register shall adjourn the Court from day to day until a meeting shall be had according to law.

(b) *Baltimore City.* The sessions of the Court in Baltimore City shall continue from 11 a.m. to 3 p.m., if necessary for the transaction of the business of the Court.

(c) *Montgomery County.* In Montgomery County any judge of the Circuit Court for Montgomery County at the time sitting as the Orphans' Court for said County shall have full power to do any act which the Orphans' Court of said County is or shall be authorized by law to perform, including the power to hold court on any day not named in an adjournment as hereinbefore provided.

(d) *Prince George's County.* Each Judge of the Court for Prince George's County shall spend at least three days each week in the conduct of the business of the Court.

COMMENT.

This Section is derived from subsection (r) of §255, §257 and the second clause of §258 (Md), without substantial change. Since the co-ordinate powers of the Registers of Wills are not made dependent upon the Court being in recess at the time, the Commission felt that the first clause of §258 (Md) could be eliminated.

2–107. Chief Judge.

(a) *General.* The Governor shall, of the three persons elected Judges of the Court in the several Counties, designate and commission

one as Chief Judge of his respective Court; and full power and authority are hereby vested in each of said Judges so designated and commissioned as Chief Judge to act as such Chief Judge, and all writs and other process tested in the names of said Chief Judges respectively are hereby declared valid to all intents and purposes.

(b) *Montgomery County.* Whenever reference is made in this Article to the Chief Judge of the Court of any County there shall be meant thereby, with regard to Montgomery County, the Judge of the Circuit Court for Montgomery County then sitting as the Orphans' Court for Montgomery County; and, whenever reference is made to the Judges of the Court in plural number, it shall be understood that, with respect to Montgomery County, such reference shall be to the Judge of the Circuit Court for Montgomery County then sitting as the Orphans' Court for Montgomery County, unless such Section shall otherwise specifically provide.

COMMENT.

This Section is derived from §§256, 287A and 287B (Md) without substantial change.

2–108. Judges' Compensation.

The Judges of the Courts in the several Counties (other than Montgomery County) shall receive compensation, and allowances, if any, as hereinafter prescribed, said compensation to be paid in monthly instalments, except as provided. No mileage or travel expenses shall be allowed to any Judge for attending sessions of his Court, except as otherwise specifically provided.

(a) *Allegany County.* Each of the Judges of the Court for Allegany County shall receive as an annual compensation the sum of eighteen hundred dollars ($1,800). Each Judge shall also receive an expense allowance in the amount of three hundred dollars ($300), annually, to be paid at the rate of twenty-five dollars ($25), monthly.

(b) *Anne Arundel County.* Each of the Judges of the Court for Anne Arundel County shall receive the sum of ten dollars ($10) for every day's attendance upon the sessions of the Court. Each Judge shall also receive an expense allowance, in addition, of up to one hundred dollars ($100) per month for personal expenses incidental to his duties, to be paid by the Controller of Anne Arundel County each month upon presentation of itemized vouchers in accordance with regulations prescribed by said controller.

(c) *Baltimore City.*

(1) *Compensation and pension.* The salary of each Associate Judge of the Court for Baltimore City shall be fourteen thousand dollars ($14,000) per annum, and the salary of the Chief Judge shall be fourteen thousand five hundred dollars ($14,500) per annum. Each Asso-

ciate Judge shall be paid after the termination of active service, if he is then at least 60 years of age or when he shall attain 60 years of age, a pension or salary calculated at the rate of seven hundred dollars ($700) per annum for each year, or any part thereof, of active service; but the maximum pension or salary for such service by any Associate Judge shall not exceed seven thousand dollars ($7,000) per annum. Each Chief Judge shall be paid, after the termination of active service, if he is then at least 60 years of age or when he shall attain 60 years of age, a pension or salary calculated at the rate of seven hundred and twenty-five dollars ($725) per annum for each year, or any part thereof, of active service, but the maximum pension or salary for such service by any Chief Judge shall not exceed seven thousand, two hundred fifty dollars ($7,250) per annum. The said pension or salary shall be paid by the City of Baltimore in the same manner as the salaries of the Judges of the Court for said City are paid.

(2) *Widow's pension.* The widow of every elected Judge of the Court for Baltimore City shall be paid one-half of the pension to which her husband was entitled at the time of his death, or would have become entitled to by reason of attaining sixty years of age or retirement after attaining sixty years of age. In each instance, the pension shall be paid to the widow until her remarriage or death. The provisions of this subsection shall not apply in the case of a widow who was married to a Sitting Judge for a period of less than three years prior to his death, and to a Retired Judge for a period less than three years before his retirement.

(d) *Baltimore County.* The salary of the Judges of the Court for Baltimore County shall be six thousand dollars ($6,000) per annum; and the Chief Judge shall receive an additional five hundred dollars ($500) per annum.

(e) *Calvert County.* Each of the Judges of the Court for Calvert County shall receive as annual compensation the sum of five hundred dollars ($500).

(f) *Caroline County.* Each of the Judges of the Court for Caroline County shall receive twelve dollars ($12) for every day's attendance upon the sessions of the Court, not to exceed eight hundred twenty-five dollars ($825) in any one year.

(g) *Carroll County.* The salary of the Judges of the Court for Carroll County shall be twelve hundred dollars ($1,200) per year to be paid monthly. Each Judge shall also be allowed one hundred dollars ($100) per year for traveling expenses, payable quarterly.

(h) *Cecil County.* Each of the Judges of the Court for Cecil County shall receive the sum of ten dollars ($10) for every day's attendance upon the sessions of the Court. Each Judge shall also receive an allowance for traveling expenses of two hundred fifty dollars ($250) per year, to be paid quarterly by the County Commissioners of Cecil County.

(i) *Charles County.* Each of the Judges of the Court for Charles County shall receive as annual compensation the sum of six hundred dollars ($600). Each Judge shall also be allowed one hundred dollars ($100) per year for traveling expenses, payable quarterly.

(j) *Dorchester County.* Each of the Judges of the Court for Dorchester County shall receive an annual salary in the amount of nine hundred dollars ($900).

(k) *Frederick County.* Each of the Judges of the Court for Frederick County shall receive an annual compensation in the amount of fifteen hundred dollars ($1,500), with no additional allowance for expenses.

(l) *Garrett County.* Each of the Judges of the Court for Garrett County shall receive annual compensation in the amount of six hundred dollars ($600), together with an allowance of five cents (5¢) per mile for each mile traveled in attending the sessions of the Court.

(m) *Harford County.* Each of the Judges of the Court for Harford County shall receive the sum of fifteen dollars ($15) for every day's attendance upon the sessions of the Court. Each Judge shall also receive an allowance for traveling expenses of two hundred fifty dollars ($250) per year, to be paid quarterly by the County Commissioners of Harford County.

(n) *Howard County.* Each Judge of the Court for Howard County shall receive compensation in the amount of twelve hundred dollars ($1,200) per year, to be paid monthly.

(o) *Kent County.* The Chief Judge of the Court for Kent County shall receive as his sole compensation, with no additional allowance for expenses, the sum of nineteen dollars and fifty cents ($19.50) for every day's attendance upon the sessions of the Court; and each Associate Judge shall receive as his sole compensation, with no additional allowance for expenses, the sum of seventeen dollars ($17) for every day's attendance upon the sessions of the said Court.

(p) *Prince George's County.* Each of the Judges of the Court for Prince George's County, except the Chief Judge, shall receive an annual salary in the amount of six thousand dollars ($6,000); and the Chief Judge shall receive an annual salary in the amount of seven thousand five hundred dollars ($7,500). No Judge shall be entitled to receive further or other allowances or expense money for the performance of his duties as a Judge.

(q) *Queen Anne's County.* Each of the Judges of the Court for Queen Anne's County shall receive the sum of eight dollars ($8) for every day's attendance upon the sessions of the Court. The Judges shall also receive an allowance for traveling expenses of seven hundred fifty dollars ($750) per year.

(r) *St. Mary's County.* Each of the Judges of the Court for St. Mary's County shall receive fifteen dollars ($15) for every day's

attendance upon the sessions of the Court. Each Judge shall also be allowed one hundred dollars ($100) per year for traveling expenses, payable quarterly.

(s) *Somerset County.* Each of the Judges of the Court for Somerset County shall receive the sum of eight dollars ($8) for every day's attendance upon the sessions of the Court. Each Judge shall also receive an allowance of fifteen dollars ($15) for mileage for every day's attendance upon the sessions of the Court.

(t) *Talbot County.* Each of the Judges of the Court for Talbot County shall receive twelve dollars ($12) for every day's attendance upon the session of the Court, not to exceed eight hundred twenty-five dollars ($825) in any one year. Nothing in this subsection shall be construed to limit the expenses of the Judges of the Orphans' Court for Talbot County as provided for in §3(e) of Article 25 of this Code, title "County Commissioners".

(u) *Washington County.* Each of the Judges of the Court for Washington County shall receive ten dollars ($10) for every day's attendance upon the sessions of the Court, not to exceed twelve hundred dollars ($1,200) in any one year.

(v) *Wicomico County.* Each of the Judges of the Court for Wicomico County shall receive fifteen dollars ($15) for every day's attendance upon the sessions of the Court, not to exceed the sum of six hundred dollars ($600) in any one year. Each Judge shall also receive an allowance of four dollars ($4) for mileage for every day's attendance upon the sessions of the Court.

(w) *Worcester County.* Each of the Judges of the Court for Worcester County shall receive the sum of eight dollars ($8) for each day's attendance upon the sessions of the Court. The Judges shall also receive an allowance for traveling expenses of eight hundred dollars ($800) per year.

COMMENT.

As to the compensation and allowances of Judges this Section is substantially the same as §255 (Md). Because of the detailed responsibility placed on the General Assembly by the present system of providing separately, and differently, for the compensation and various allowances, if any, to the Judges in each of the twenty-three Counties and Baltimore City, it is necessary at nearly every Session of the Legislature to give special consideration to these matters of purely local significance (see Chapter 672 of the Acts of 1967 and Chapter 329 of the Acts of 1968).

2–109. Restriction on judge's practice of law.

No Judge of the Court shall act as attorney or solicitor in any court of law or equity, or criminal court, in this State during his term of office.

COMMENT.

This Section is identical in effect to §29 of Article 10. If adopted the reference to the Judges of the Orphans' Court in Article 10, §29 should be deleted.

Part 2 — The Register of Wills.

2–201. Generally.

Register means the Register of Wills of any County, except with reference to an estate being administered in equity, in which case Register means, when appropriate, the clerk of such court.

COMMENT.

The office of Register of Wills is created by the provisions of Section 41 of Article IV of the Constitution of Maryland.

2–202. Full time position.

Each Register shall devote his full working time to the duties of his office, and he shall not practice law during the term of his office.

COMMENT.

This provision is derived from §§299 and 302(c) (Md). §28 of Article 10 also imposes a criminal penalty on a Register who practices law.

2–203. Fees and gifts not authorized by law.

(a) *Receipt by person in Register's office.* Any Register, deputy, clerk, or other employee who shall, with respect to the estate of a decedent being, or to be, administered in the office in which he is employed, ask for, take or receive from any person whatsoever any fee (other than the fees prescribed in Article 36), commission, gratuity, gift or reward for (1) giving his advice, (2) referring any business, (3) performing any service, other than for actual expenses of travel incurred in connection with the probate of a will, or (4) acting as agent or representative, or in any other capacity for which compensation is given directly or indirectly, for any surety corporation, shall be guilty of a misdemeanor and shall, upon conviction, pay a fine of $1,000 for each such offense.

(b) *Payment.* Any person, firm, or corporation who shall pay, offer to pay, or give any such fee, gratuity, gift or reward shall be guilty of a misdemeanor and shall, upon conviction, pay a fine of $1,000 for each such offense.

COMMENT.

This Section is derived from §§298, 298A and 299 (Md). The new provision is intended to be broader than §§298 and 299 (Md) in that subsection (b) is not included in either §298 or §299 and the

prohibition against representing a surety corporation has been extended to be uniform throughout the State instead of being confined to Prince George's County.

The Commission has been informed that in a few jurisdictions, "tips", "gifts", or other payments are made to the Register or employees in his office. The receiving of such payments presently is, and both the giving and receiving of such payments should be, violations of the criminal law. The penalty for each offense has been increased from $100 to $1,000.

2–204. Bond.

At the time of assuming his office, each Register shall give bond to the State of Maryland for the term of his office in such form and for such penal sum as the State Comptroller, with the advice of the Legislative Auditor, shall prescribe. The State Comptroller may, at any time, require that the penal sum of any such bond be supplemented or increased. If the Register shall fail to give such bond before he acts as Register, he shall be guilty of a misdemeanor and, upon conviction, pay a fine of $1,000.

COMMENT.

This Section combines §§288 and 289 (Md). The office of Legislative Auditor was created under the provisions of Chapter 456 of the Acts of 1968; see also §33 of Article 25, relating to payment of bond premiums, which should be repealed.

2–205. Salary.

Each Register shall be entitled to receive annually a salary of not less than $6,000 ($12,000 in Baltimore City) and not more than $17,000, to be determined, in each instance, by the Board of Public Works. In determining the annual salary of each Register, the Board of Public Works shall be guided in the exercise of its discretion by the population of his County determined by the last official United States Census, by the dollar volume of total fees and taxes collected and of excess fees turned over to the State for each of the preceding five years by the office of the Register for which the salary is being fixed, and by other pertinent data which have relation to the reasonableness of the salary in relation to the work done and volume handled by the office; it being the intent of this Section that each Register shall receive a fair and adequate compensation for the effort and duties required of him by his office and the volume and character of work done by him as Register in comparison to the salary fixed by the Board of Public Works for each of the other Registers.

The salaries of the Registers shall be payable semi-monthly from the fees and receipts of the office, after deducting the necessary expenses of the office, including salaries of deputies and clerks, books,

stationery, office supplies and other necessary and customary expenses of doing business.

If the fees and receipts of the office shall be insufficient in any month to pay all or any part of the expenses of the office and authorized salary of any Register, the deficiency shall be deducted by the Register for that month, from the taxes due the State Comptroller from said office for that month, provided, however, that written authority for such deduction shall be first obtained from the State Comptroller. In the event that tax collections for the given month are insufficient, the Comptroller shall make up the deficit from funds provided in the State Budget for this purpose.

COMMENT.

This provision is derived from §302 (Md). The provisions of §302 (Md) dealing with excess fees are now covered in Section 2–206. With regard to unfinished business of the Register during his term, see §§8 and 9 of Article 36.

2–206. Report of fees and expenses of the office.

Every Register shall return annually to the Comptroller a full and accurate account of the fees and receipts of his office and of all the expenses incident to the proper conduct of his office, such account to be verified and in such form and supported by such proofs as shall be prescribed by the Comptroller. Included in the report of expenses shall be a list of the employees of his office, stating the rate of compensation allowed to each and the duties performed by each, to which each employee shall append a verified certificate that said duties have been performed by him and that he has received the full sum charged to him and that he has not paid, deposited, assigned, or contracted to pay, deposit or assign any part of such compensation to any person, nor in any way, directly or indirectly, paid or given or contracted to pay or give any reward or compensation for his office or employment. The excess, if any, of fees and receipts over expenses shall be delivered by the Register to the Comptroller with each report.

COMMENT.

This Section is derived from §§303 and 306 (Md). As the provision for verification has been substituted for oaths [see Section 1–102], §305 (Md) dealing with the oath of a Register has been deleted.

2–207. Powers and duties of Registers.

In addition to all other powers and duties provided for in this Article, each Register shall:

(a) appoint such deputies and clerks as shall be required for the efficient operation of his office, such appointments and the compensation therefor to be approved by the Comptroller. When duly qualified, all such deputies shall have the power and authority to act in the

place and stead of the Register and all such acts performed by any such deputy shall have like force and effect as if they had been performed in person by the Register;

(b) receive, file and store safely every original paper and record left in his custody, in such repository of the Court House as the Court may direct, and the County Commissioners, County Council or the Mayor and City Council of Baltimore shall provide and keep in repair the said repository at the expense of the County or of Baltimore City, respectively;

(c) keep a proper docket showing the grant of letters and a short entry of every paper filed in the Court and every order of the Court or the Register, setting forth the nature of such order or paper, similar in every respect to the dockets as now required by law to be kept in the offices of the equity courts of this State, which dockets shall be subject to such supervision, examination and control as shall be ordered by the Comptroller;

(d) make out and issue every summons, process or order of the Court and, in every respect, act under the Court's control and direction as the clerk of a court of law acts under the direction of the court of law;

(e) issue and certify under the seal of the Court any copy of any part of the proceedings in the Court or in his office which any person may demand;

(f) diligently attend each meeting of the Court in his County and, under the Court's direction, make full and fair entries of Court proceedings. He shall also record by photographic process in strong bound books all probated wills, and record by photographic process all other papers filed in said Court or in his office in such mode and in such manner, consistent with the provisions of Section 2–210, as may be prescribed by the Comptroller and the Hall of Records to insure uniformity throughout the State;

(g) attend his office daily, except Saturdays and legal holidays, in person or by deputy, unless prevented by sickness, accident or necessity, for the dispatch of office business;

(h) audit all accounts filed with the Register and examine in detail all vouchers which may be submitted to substantiate payments made by any personal representative;

(i) inform the Court of any default in the past of any personal representative which may come to his attention;

(j) keep a seal of the Court and the Register.

COMMENT.

This Section collects into one statutory provision many of the Registers' powers now scattered throughout Article 93. Subsection (a)

is derived from §306 (Md). Subsection (b) is derived primarily from §293 (Md). Subsection (c) is derived from §292 (Md). Subsections (d) and (e) are derived from §§285 and 290 (Md). Subsection (f) is derived from §290, with the additional provisions that (i) all wills shall be recorded by photographic process and should not be completely retyped by clerks, and (ii) all other documents shall be recorded, likewise by photographic process, in such a manner as the Comptroller and Hall of Records shall prescribe. As to the specific record books, see Sections 2–210 and 5–505. Subsection (g) is derived from §293 (Md), except that the offices of all Registers may now remain closed on Saturdays. The provisions of §293 (Md) dealing with Registers in the military service have been deleted. Subsection (h) is derived from §294 (Md) but is not limited to recesses of the Orphans' Court. Subsection (i) is derived from §285 (Md). Subsection (j) is new.

Section 5–404 also gives the Register the power to examine witnesses in judicial probate, unless the Court otherwise orders. Part 3 of Subtitle V gives the Register the power to conduct administrative probate.

2–208. Custody of original wills and other papers.

No will, when proved, nor any other paper filed in the Register's office shall be delivered out of such office to any person; whenever any such will or other paper is properly demanded for introduction in evidence, the same shall be presented under the care of the Register, or by his deputy.

COMMENT.

This provision is substantially the same as §389 (Md). See also, Section 4–201 dealing with deposit of wills with the Register during the testator's lifetime.

2–209. Personal notice to heirs and legatees.

Within five days after receiving the later of the certification of publication as provided in Section 7–103 and the written notice from the personal representative of the names and addresses of the heirs and legatees as provided in Section 7–104, the Register shall forward to each such person, in writing, by delivery or by certified mail, directed according to the information received from the personal representative, a copy of the newspaper notice published according to Section 7–103.

COMMENT.

This Section expands the rule of §291 (Md). It is also designed to assure compliance with the due process requirements of the Fourteenth Amendment to the U. S. Constitution as propounded in *Mullane v. Central Hanover Bank & Trust Company,* 339 U.S. 306 (1950).

2–210. Maintenance of permanent records.

(a) *Generally.* The Register shall maintain in his office, for the purpose of recording the proceedings in connection with the administration of estates, a Wills record book, an Administration Proceedings record book, a Release record book and a Claims Docket in addition to the Claims Against Non-Resident Decedents book described in Section 5–505.

(b) *Completion of probate.* Immediately upon the administrative or judicial probate of any will the Register shall record the same, together with any papers incidental to said probate, in the Wills record book, and he shall index the same under the name of the decedent.

(c) *Closing estate.* Upon the entry of an appropriate order, as provided in Section 10–101, or upon the filing of a verified statement, as provided in Section 10–102, to close the estate, all papers relative to such administration and filed with the Court or Register shall be recorded by the Register in the Administration Proceedings record book, and indexed under the name of the decedent.

(d) *Releases.* Releases shall be promptly recorded by the Register in the Release record book, in the order of their filing, and shall be indexed under the name of the releasor.

(e) *Claims.* All claims filed with the Register under the provisions of Section 8–104(b) shall be entered by him in the Claims Docket promptly upon receipt in such manner that the record shall show the name of the claimant, the nature of the claim and the amount of the claim. All entries relating to an estate shall be indexed under the name of the decedent.

COMMENT.

At the present time the methods of maintaining permanent records of the proceedings in the several Orphans' Courts throughout the State vary. Likewise, the recording of the entries in different record books requires searches and reviews of records in several places in a single office, although they all relate to the same estate. Section 2–210 would provide a uniform and simplified system of keeping records.

The Claims Against Non-Resident Decedents book represents a part of the simplified procedures recommended for the recognition of foreign personal representatives.

ADDITIONAL COMMENT TO PART 2.

The Commission recommends that §301 (Md) dealing with the Register acting as an auditor be repealed; it has rarely been used. The Commission also recommends that §304 (Md) dealing with additional pay to clerks be deleted as it appears that the provisions of §304A (Md) make it obsolete. Finally, the Commission recommends that §304A and the first eleven lines of §306 (Md) relating to the Comptroller's responsibilities with respect to various employees and their compensation be shifted to Article 19.

Part 3 — Appraisers.

2–301. Appointment by Register; fees; review by Court.

(a) *Standing appraisers.* The Register may appoint standing appraisers to serve at his pleasure in such numbers, upon such conditions and for such remuneration as the Register may fix and determine.

(b) *Who makes appraisal.* If a Register exercises his authority hereunder to appoint standing appraisers, all property required to be independently appraised and which is not appraised by special appraisers under Section 7–202(b) shall be appraised by such standing appraisers. If a Register does not appoint standing appraisers, he shall, with respect to any estate which contains property required to be independently appraised and which is not appraised by special appraisers, appoint general appraisers as provided in Section 2–302.

(c) *Fees.* An appraisal fee shall be payable only to a person making an appraisal requested by the personal representative, and shall always be subject to review by the Court.

COMMENT.

This Section, derived from §§226 through 229 (Md), would provide a uniform, State-wide system for the appointment of appraisers. It gives all Registers the authority to appoint standing appraisers. At the present time this system is in effect only in Baltimore City. See section 290 of the Charter and Public Local Laws of Baltimore City (Flack's 1949 ed.).

§228 (Md) directs the Orphans' Court of Montgomery and Prince George's Counties to appoint a chief appraiser with authority to appoint assistants, who make all appraisals. A similar arrangement exists in Baltimore County. Baltimore County Code, §7–66 (1958 ed.). In the rest of the State, appraisers are nominated to the Court or Register by the personal representative, under the terms of §227 (Md).

The Commission believes that the Register, not the Court, is the appropriate authority to appoint appraisers. The differences between the volume of appraisal work between different Counties makes it appropriate to permit the Register, acting within the budgetary limits of his office, to appoint appraisers who will serve regularly in that capacity — perhaps daily in some areas and perhaps simply "on call" in other areas. In other words, this Section would provide the option for all Counties to follow, in one form or another, the present Baltimore City system, and, at the same time, take the Baltimore, Montgomery and Prince George's Counties Courts out of the appraisal process.

2–302. Designation of general appraisers.

Upon application by the personal representative in accordance with Section 7–202(a) for the appointment of general appraisers, the Register shall designate two qualified persons not related to the decedent

nor interested in the administration. Upon designation of the general appraisers, the Register shall issue a warrant authorizing and directing them jointly to appraise all property of the estate of the decedent required to be independently appraised and which is not specially appraised under Section 7–202(b). If any appraiser shall for any reason fail to act, the Register shall, upon application by the personal representative, make a new designation and issue a new warrant.

COMMENT.

A long statement of the qualifications of appraisers is unnecessary. It is enough to require that they be qualified and disinterested.

This Section contains all of the essentials of §§230 and 231 (Md). The Commission, in line with its general policy of avoiding all but the most essential statutory forms, believes that the form of warrant need not be more elaborately described than this Section provides.

2–303. Conduct of appraisal.

All appraisers shall expeditiously perform their duty. The appraisal shall be in columnar form, shall describe generally each item that has been appraised and its value in dollars and cents, and shall contain a statement signed and verified by the appraisers certifying that they have impartially valued the property described in the appraisal to the best of their skill and judgment. The appraisal shall, immediately upon completion and verification, be delivered to the personal representative.

COMMENT.

This Section is derived from §§232 through 234 (Md). An oath by the appraisers before entering upon their duties is unnecessary. Their verified certificates of the appraisal is sufficient.

SUBTITLE III

INTESTATE SUCCESSION AND STATUTORY SHARES

Part 1 — Intestate Succession.

3–101. Net intestate estate.

Any part of the net estate of a decedent not effectively disposed of by his will shall be distributed by the personal representative to the decedent's heirs in the order prescribed in this Part.

COMMENT.

See §134 (Md); 2–101 (UPC); see also Sections 1–101(n) and 1–301.

3–102. Surviving spouse — limitations.

(a) The share of a surviving spouse shall be:

(1) if there is also surviving issue, one-third (⅓);

(2) if there is no surviving issue but a surviving parent, one-half (½);

(3) if there is no surviving issue or parent but a surviving brother or sister, or issue of a brother or sister, four thousand dollars ($4,000) plus one-half (½) of the residue;

(4) if there is no surviving issue, parent, brother, sister or issue of a brother or sister, the whole.

(b) The share of a surviving spouse under subsection (a)(1) shall not be greater than the amount, if any, by which one-third of the value of all property passing by reason of the death of the decedent as defined in subsection (c) exceeds the value of any such property passing, other than under subsection (a), to such spouse by reason of the death of the decedent.

(c) For purposes of subsection (b), "property passing by reason of the death of the decedent" means all assets passing by reason of the death of the decedent and includes, but is not limited to, (1) property as defined in Section 1–101(p), (2) a dower or curtesy interest (or statutory interest in lieu thereof) created under the laws of another State, (3) an interest which was, at the time of the decedent's death, held by one or more persons and the decedent in joint ownership with right of survivorship, (4) a power exercisable solely by the decedent to appoint or dispose of an interest in any asset, and (5) proceeds of an insurance policy on the decedent's life in which at his death he possessed any incident of ownership; provided, however, that no asset

or interest therein shall be included more than once in the foregoing calculation.

COMMENT.

Subsection (a) preserves the proportional distribution to the surviving spouse now contained in §§134–137 (Md). The right of the surviving spouse to receive the first $4,000 under subsection (a)(3) would be limited to a cash payment. The right under existing law that this amount be paid in cash or "its equivalent in property, or any interest therein, at its appraised value" [see §§89, 137 and 329 (Md)] would no longer continue. See also Section 3–201, which provides a family allowance to the surviving spouse. This is paid before the computation of the "net estate" on which subsection (a) operates. See Section 1–101(n).

Subsection (b) pursues a recent approach of Maryland case law, *Gianakos v. Magiros,* 234 Md. 14, at 32 (1964). When Article 93 was originally adopted in 1798, virtually all of a decedent's personal estate was administered in the Orphans' Court. Similarly, real property passed either by the statutes of descent or by will (both before and after a spouse was entitled to take by inheritance) since realty was only infrequently held jointly by the spouses. Therefore, the share of a surviving spouse in the wealth of the decedent could be accurately apportioned by the statutes of descent and distribution.

In recent years, with the increasing use of various estates and interests created during lifetime, life insurance, etc., a great portion of the property owned by married persons does not become part of the "estate" of the spouse first dying. This has the result — frequently unintended — of allowing the surviving spouse a disproportionately large share of the decedent's total property, while at other times the share of the spouse is actually less than that contemplated by the statute.

The Boulder Draft of the Uniform Probate Code attempts to resolve this problem as to the share of the surviving spouse by giving the spouse of a testate or intestate decedent an elective share of a "net augmented estate." Under this proposal, the property in which the surviving spouse would have an interest would include, in addition to the probate estate, transfers incident to death, transfers with retained control or survivorship, and other gratuitous transfers, as well as life insurance proceeds, annuities, pensions and community property. See 2–202 (UPC).

The Commission felt that the question of whether an estate should be augmented by inclusion of property, other than that being administered upon, for purposes of *increasing* the interest of the surviving spouse could be satisfactorily handled in accordance with the existing law relating to fraud upon marital rights. See, *e.g., Sykes,* "Inter Vivos Transfers in Violation of the Rights of Surviving Spouses," 10 Md. L. Rev. 1 (1949); *Sykes,* §§183 and 184.

Of course, by measuring the share of the surviving spouse by the entire property passing at the death of the decedent, the Boulder Draft also created, in the converse situation, a limitation upon the share which could be taken by a surviving spouse who received a great deal of property collateral to the "estate" itself, e.g., property passing by

virtue of tenancies by the entireties. This aspect of the concept of the "augmented net estate," for which no provision is made in our present law, has been proposed here, although the Commission felt that the method employed by the UPC was too detailed, could be administratively unworkable, and would necessarily create loopholes for both the wary and unwary draftsman.

The theory of subsection (b) is that where the decedent leaves issue there should be a ceiling on the amount which the surviving spouse can take, based upon the total property passing by reason of the death of the decedent both to the surviving spouse and to the other members of the family or beneficiaries of the decedent. Examples of how the calculation under subsection (b) would be made are the following:

> If a decedent leaves a probate estate of $100,000 and has left $20,000 in joint tenancy to the wife, an amount equal to one-third of the value of all property passing by reason of the death of the decedent would be $40,000 (one-third of $120,000). The value of the property passing to the surviving spouse other than under Section 3–102(a) would be the $20,000 left to her in joint tenancy. The $40,000 exceeds the $20,000 by $20,000, which would be the maximum share which the surviving spouse could obtain under the Commission's formula. The result would, therefore, be that the spouse would obtain $20,000 outside the probate estate and $20,000 from the probate estate, and her total of economic benefit by reason of the death of the decedent would be $40,000, or one-third of the decedent's total economic estate.
>
> If the decedent left an estate of $100,000 for probate purposes and left $20,000 to each of three children in joint tenancy and $20,000 to the wife in joint tenancy his total property passing by reason of his death would be $180,000. One-third of this would be $60,000. The wife's property passing by reason of the death of the decedent was $20,000 and the $60,000 exceeds $20,000 by $40,000 which is more than the one-third of the probate estate of $100,000 and consequently subsection (b) would not be operative and the wife's share would be $33,333.33.
>
> If the decedent left an estate for probate purposes of $100,000 and left $20,000 in joint tenancy to his wife and $30,000 to a child, the total property passing by reason of the decedent's death would be $150,000, one-third of which would be $50,000. This figure of $50,000 exceeds the $20,000 passing to the wife by reason of the death of the decedent, other than under Section 3–102(a), by $30,000. The ceiling enacted by subsection (b) of $30,000 would, therefore, be applicable and the wife would receive $30,000 in this case instead of $33,333.33.
>
> The figure of one-third has been used in subsection (b) because the ceiling applies only when the share of the surviving spouse is one-third under section 3–102(a)(1), *i.e.*, in the case where there is surviving issue. Except when surviving issue is involved the Commission feels that the share of the surviving spouse provided in Section 3–102(a) should not be diminished by reason of other assets passing to the spouse due to the death of the decedent.

In adopting the concept of "property passing by reason of the death of the decedent" in subsection (c), the Commission has used the approach followed in sec. 2056(e) of the Internal Revenue Code of 1954, and it is intended that the interpretation of that section be availed of by the courts in construing this Section. However, the various limitations upon this definition found in other sections of the Internal Revenue Code relating to the meaning of "gross estate" would not be applicable.

3–103. Surviving issue.

The net estate exclusive of the share of the surviving spouse, or the entire net estate if there is no surviving spouse, shall be divided equally among the surviving issue, by representation.

3–104. No surviving issue.

If there is no surviving issue the net estate exclusive of the share of the surviving spouse, or the entire net estate if there is no surviving spouse, shall be distributed by the personal representative:

(a) *Parents* — to the surviving parents equally, or if only one parent survives, then to the survivor; or

(b) *Brothers and sisters, and their issue* — if there is no surviving parent, to brothers and sisters and their issue, by representation; or

(c) *Collaterals* — if there is no surviving parent, brother, sister or issue of a brother or sister, to all surviving collateral relations in equal degree, without representation, but not beyond the tenth degree by tracing relationship to a common ancestor counting upward from the decedent not more than five steps; or

(d) *Grandparents* — if there is no surviving parent, brother, sister, issue of a brother or sister, or collateral relation described in subsection (c), to the surviving grandparents equally, or if only one grandparent survives, then to the survivor.

COMMENT ON SECTIONS 3–102 TO 3–104.

The order of distribution in the present Maryland law is contained in §134 to §146, inclusive, and §152 (Md), and §§1, 2, 6 and 7 of Article 46. Sections 3–102 through 3–104 place all the provisions as to the normal order of intestate succession in their logical place in Article 93, and the provisions of Article 46 dealing with intestate succession should be repealed. The only substantive change is contained in subsection (a)(3) of Section 3–102 in which the right of the surviving spouse is continued as to the first $4,000, but the right to be paid this amount in property, instead of cash (see Comment to Section 3–102), is extinguished.

The Commission has not followed the proposals of the new Uniform Probate Code which are contained in 2–102 and 2–103

(UPC). These provide that where there is no surviving issue of the decedent the spouse is entitled to the whole estate, except that if the surviving spouse was married to the decedent for less than a year, then the parents, or living issue of the parents (if deceased), would take one-half. The new Uniform Code also provides that if there are surviving issue, and they all are issue of both the decedent and the surviving spouse, the latter would receive the first $50,000 plus one-half of the balance of the net estate; whereas, if one or more of the surviving issue is not also issue of the surviving spouse, the latter would then receive only one-half of the estate.

3–105. Escheat.

(a) *Generally.* If there is no person entitled to take under Sections 3–102 through 3–104, the net estate shall be paid to the Board of Education in the County in which the letters were granted, and shall be applied for the use of the public schools in such County.

(b) *Refund.* If after payment has been made to the Board of Education a claim for refund is filed by a relative within the third degree living at the decedent's death, or by the personal representative of such relative, and such claim is allowed, such claimant shall be entitled at any time to a refund, without interest, of any sum so paid.

COMMENT.

This Section combines the provisions of present §152 and §153 (Md), and extends the right to obtain a refund to real property. See §47 of Article 46, which can be repealed. The substance of these sections is preserved but the language has been modernized and adjusted to conform to the format of the proposed statute. The present law is discussed in *Sykes,* §§191 through 194.

3–106. Advancement.

If a person dies intestate as to any part of his net estate, property which he gave in his lifetime to an heir shall be treated as an advancement against the latter's share of the net estate if declared in writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose the property advanced shall be valued as of the time the heir came into possession or enjoyment of the property. If the recipient of the property fails to survive the decedent, the property shall be taken into account in computing the share of the recipient's issue. Any advancement to an heir other than the surviving spouse shall not increase the share of the surviving spouse under Section 3–102.

COMMENT.

The present law on advancements is contained in §140 (Md). Under that section the case law has held that a gift to a child is presumed to be an advancement in the absence of proof to the contrary but the intention of the donor is controlling as to whether a transfer is an absolute gift or an advancement. *Barron v. Janney,* 225 Md. 228

(1961). See Note, 21 Md. L. Rev. 344 (1961). The Commission has followed the new Uniform Probate Code in reversing the presumption, see 2–113 (UPC).

The Commission has recommended that written evidence be required of the intent that an inter vivos gift be an advancement because most inter vivos transfers today are intended to be absolute gifts and are carefully integrated into a total estate plan. If the donor intends that any transfer during his lifetime be deducted from the donee's share of his estate, the donor may either execute a will so providing or, if he intends to die intestate, may charge the gift as an advance by a writing within the proposed Section, which applies only when a decedent dies intestate.

This Section applies to advances to a surviving spouse and to collaterals such as nephews and nieces, as well as to lineal descendants, whereas the present Maryland statute is silent about advancements to anyone other than lineal descendants; but it does not spell out the method of taking account of the advance. This process is settled by the common law and is not a source of litigation. See discussion in *Sykes,* §901.

The last sentence of Section 3–106 continues the rule of §140 (Md).

3–107. Afterborn child.

A child of the decedent (whose estate is the subject of the administration) who is conceived before the decedent's death but born thereafter shall inherit as if he had been born in the lifetime of the decedent. No other afterborn relation shall be considered as entitled to distribution in his own right.

COMMENT.

This follows the present Maryland rule contained in §149 (Md). The suggested rule of the new Uniform Code, 2–108 (UPC), would extend the rule to all relatives of the decedent, and not merely to his children.

3–108. Inheritance from illegitimate person.

Property of an illegitimate person passes in accordance with the usual rules of intestate succession except that the father or his relations can inherit only if such person is treated as the child of the father pursuant to Section 1–208.

COMMENT.

See Section 1–208, and Comment.

3–109. Person related to decedent through two lines.

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

COMMENT.

This Section reflects the present Maryland non-statutory rule. It is derived from 2–112 (UPC).

3–110. Certain heirs not surviving decedent for thirty days.

In the event a spouse, descendant, ancestor, brother or sister, or descendant of a brother or sister, fails to survive the decedent by thirty (30) full days, he shall be deemed to have predeceased the decedent for purposes of family allowance and intestate succession, and shall not be entitled to the rights of an heir. If the time of death of the decedent or of the spouse, descendant, ancestor, brother or sister, or descendant of a brother or sister, who would otherwise be an heir, or the times of death of both, cannot be determined, so that it cannot be established that such person has survived the decedent by thirty (30) full days, such person shall be deemed not to have survived for the required period.

COMMENT.

This Section is new. It is designed to provide for a modern problem which has become serious in recent years because of the increased risks in modern transportation, *i.e.,* where an heir dies within a short time after the decedent. Perhaps the most frequent provision in wills for this situation states that a person who fails to survive a decedent by thirty days is deemed to have predeceased the decedent. The principal object of such a provision is to avoid multiple administration on the same assets, with regard not only to the expenses involved but also the extra tax burdens. This Section would provide such benefit for intestate estates.

The Section was made applicable only to the particular persons listed because in only those cases do their children and descendants take by representation whatever property they would have received if living. See Sections 3–103 and 3–104(a) and (b). For the meaning of representation in intestate succession, see Section 1–210(a).

On the other hand, where there is no taking by representation, that is, no taking by living descendants of property to which the ancestor would have been entitled if living, the Commission felt there was no advantage in changing the present law. For instance, if the nearest relations are first cousins, only those persons who could be classified in that collateral relationship could take [Section 3–104(c)]; which is the present law. Since the theory of the 30-day rule is that the same person would take under the new rule as under the old, but an extra set of death taxes and administration expenses could be avoided through the adoption of the new rule, when this is not the case, *i.e.,* where descendants of a deceased collateral would not take by representation, applying a 30-day survivorship rule would distort rather than preserve the decedent's presumed intent.

The Uniform Probate Code in 2–104 (UPC) suggests five days rather than thirty. The Commission feels that if the Section is desirable it would be more useful if extended to thirty days.

It is true that, as applied to a wife who survives her husband for less than thirty days, the savings resulting from the elimination of multiple administration could be offset by also eliminating the marital deduction. However, in an estate where the marital deduction is likely to be of consequence, the size of the estate would be such that intestacy would not be likely.

For a similar provision with respect to testate estates, but applying to all legatees without exception, see Section 4–401. See also 2–601 (UPC).

Part 2 — Family Allowance and Statutory Share of Surviving Spouse.

3–201. Family allowance.

After the payment of the allowable funeral expenses, the surviving spouse shall be entitled to receive an allowance of $1,000 for her own maintenance, and an allowance of $500 for each unmarried child of the decedent and his surviving spouse, provided such child is under twenty-one years of age and was being supported by the decedent prior to his death. Such allowance, which shall be available in both testate and intestate estates, shall be exempt from the Maryland inheritance tax.

COMMENT.

2–404 (UPC) provides a homestead allowance, and a "family allowance" to be determined by the Court. The Commission has rejected these concepts in favor of fixed allowances in cash [see §§336 and 337 (Md)] but has established the more realistic allowance based, in part, upon the number of children. The Boulder Draft (UPC) has also provided for exempt property, as does our present law [see §§241 and 242 (Md) providing an exemption for wearing apparel and provisions]. The Commission felt that mention of specific articles should be eliminated in favor of an increased cash allowance. The present law is discussed in *Sykes,* §173.

3–202. Dower and curtesy abolished.

The estates of dower and curtesy are abolished.

COMMENT.

This provision, based upon 2–117 (UPC), has the effect of eliminating from the testamentary picture the traditional estates of dower and curtesy which are presently defined and regulated in §§328, 329, 334, 335, and 339 through 343 (Md), §§33–37 and 138(b) of Article 16, §§6, 7, 12 and 13 of Article 45, and §4 of Article 46. The Commission is of the opinion that these estates no longer serve any significantly useful purpose and are now rarely availed of by a surviving spouse. The modern provisions of statutory shares of outright interests in the decedent's property seem to have replaced these ancient concepts. In addition, the intended protection of the estate of dower has often been nullified as a practical matter through the creation of a life estate with unrestricted power of disposition, or the creation of a "one cent" ground rent.

It will also be necessary to amend §18 of Article 27 and §15A of Article 75 to delete the references to dower therein.

3–203. Right to elective share.

The surviving spouse may elect to take, in lieu of such property, if any, as may be left to him by will, the share which he might take in intestacy under Section 3–102.

COMMENT.

This Section follows generally 2–201 (UPC), except that it rejects the concept of the "augmented net estate" under which certain property which does not form a part of the estate passing under the will of the decedent is taken into consideration in determining the elective share of the surviving spouse. The matter is discussed fully in the Comment to Section 3–102. Through incorporation of the provisions of Section 3–102 as determining the amount of the elective share, the proportional interest of the spouse under present law [§329 (Md)] is retained. The limitation upon the amount which may be received by the surviving spouse contained in Section 3–102(b) would also be applicable in this situation.

This Section is intended to be available to a surviving spouse whether or not any provision for him has been made in the will.

3–204. Right of election personal to surviving spouse.

The right of election of the surviving spouse is personal to him. It is not transferable and cannot be exercised subsequent to his death; but if the surviving spouse is a minor or otherwise under disability such election may be exercised by order of the court having jurisdiction of the person or property of the spouse under disability.

COMMENT.

This section is basically in accord with §§329 and 330 (Md) and §§12 and 13 of Article 45. It is also similar to 2–203 (UPC). See also *Sykes,* §175.

3–205. Waiver of right to elect.

The right of election of a surviving spouse may be waived before or after marriage by a written contract, agreement or waiver signed by the party waiving the right of election, after full disclosure of the nature and extent of such right, provided the waiver is fair under all the circumstances. Mutual waivers by spouses or prospective spouses of equivalent rights in each other's property, made after such full disclosure, are fair consideration for each other regardless of the relative value of the property of each and of the relative ages of the parties. Unless it provides to the contrary, a waiver of "all rights" in the property or estate of a present or prospective spouse, or a complete property settlement entered into after or in anticipation of separation or divorce, is a waiver of all rights to his family allowance as well as

to his elective share by each spouse in the property of the other and an irrevocable renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession, by statutory share, or by virtue of the provisions of any will executed before the waiver or property settlement.

COMMENT.

The format of this Section is substantially that of 2–204 (UPC).

The Section expands upon §334 (Md) and §§12–13 of Article 45. It is intended to be declaratory of the present Maryland law in those respects and also with respect to the specification of the conditions under which such waivers or agreements are valid. See *Sykes,* §181.

3–206. Time limitation for making election; withdrawal.

The election by a surviving spouse to take his elective share must be made not later than thirty days after the expiration of the time for filing claims. However, the Court shall have the power to extend the time for election, before its expiration, for a period not to exceed three months at any one time, upon notice being given to the personal representative and for good cause shown. The surviving spouse may withdraw his election at any time within thirty days after the expiration of the time for filing claims.

COMMENT.

The requirement for an election by the surviving spouse is contained in §329 (Md) of the present law. The period within which the election must be made has been changed to thirty days after the expiration of the time for filing claims. It is felt that this will provide sufficient time within which the surviving spouse may make an informed determination of whether or not the election should be made, and at the same time will facilitate the early settlement of estates. In this connection it was thought that this time period is somewhat more realistic than the rather arbitrary one in §329 (Md). See *Sykes,* §177. 2–205(a) (UPC) has been somewhat modified both as to the initial time limitation and by the addition here of a limitation upon the length of any extensions thereof.

Under Section 3–206, if an extension to file an election is made, and if the thirty day period after the time for filing claims has expired, an election once made cannot be withdrawn.

3–207. Form of election.

An election to take an intestate share of a decedent's estate shall be in writing and signed by the surviving spouse or other person entitled to make such election pursuant to Section 3–204, and shall be filed in the Court in which the personal representative of the decedent was appointed. Such election may be in the following form:

I, A. B., surviving spouse of C. D., late of the County (City) of _____, do hereby renounce all

provisions in the will of the said C. D. and do hereby elect to take my intestate share of the estate of the said C. D.

[signature]

COMMENT.

2–205 (UPC) provides for the filing of the election with the personal representative. The Commission felt that because of its importance, such election should be filed as a permanent record with the Court. Present Maryland law [§329 (Md)] provides a form of renunciation and election. The Commission felt that such form should be continued in order to provide uniformity throughout the State and in order to make it clear that the election could only be made as a concomitant to the renunciation of the entire will.

3–208. Effect of election upon will.

(a) Upon the election of the surviving spouse to take his intestate share of the property of the decedent, all property or other benefits which would otherwise have passed to the surviving spouse under the will shall be treated as if the surviving spouse had died before the execution of the will. Neither the surviving spouse nor any person claiming through him shall receive any property under the will.

(b) In the event of an election to take an intestate share, contribution to the payment thereof shall be made ratably by or on behalf of all other legatees from their respective shares of the decedent's estate (including any undisposed of portion of such estate). In lieu of contributing (or having contributed on his behalf) an interest in specific property to such intestate share a legatee may pay to the surviving spouse in cash, or other property acceptable to such spouse, an amount equal to the fair market value of such interest in specific property on the date the election to take an intestate share was made by the spouse. Unless otherwise specifically provided in the will, no legatee shall be entitled, on account of any contribution made by or on behalf of such legatee to the intestate share, to sequestration or compensation from any other legatee, or from any other part of the decedent's estate, except that any interest renounced by the surviving spouse and not included in the share of the net estate received by the surviving spouse under this Section may be subject to the equitable principle of sequestration for the benefit of specific, demonstrative and general legacies to avoid a substantial distortion of the testator's dispositions.

COMMENT.

Subsection (a), contrary to the provision of 2–206 (UPC), requires the surviving spouse to renounce the entire will and prohibits him from receiving any benefits thereunder. This is declaratory of the present construction of §329 (Md). See *Sykes,* §180. Any legacy

to the surviving spouse shall be considered void and shall not be treated as a lapsed legacy. See Section 4–404.

This Section is not intended to prevent the surviving spouse from acting as the personal representative even though he elects to take his intestate share.

Subsection (b) defines the manner in which the intestate share of the renouncing spouse is to be paid. The basic rule is similar to that under present Maryland law by which the spouse acquires a proportional interest in each item of property of the decedent. See *Hall v. Elliott,* 236 Md. 196 (1964). The Commission felt, however, that the present rule frequently operates to the disadvantage of both the surviving spouse and the other legatees since it creates awkward co-ownership of property not readily susceptible of division. In addition, it often works a hardship in cases such as those where a closely held family corporation is involved. The Commission feels that the intention of the testator and the rights of the surviving spouse and other legatees are more properly protected by permitting the legatees to "redeem" the proportional interest which the spouse might acquire in specific property.

Such a statutory provision, it is felt, will alleviate the necessity for expensive and time-consuming partition proceedings which do nothing more than achieve the same result.

This subsection also adopts the rule that, unless the will otherwise specifically provides, no beneficiary, such as a specific legatee, shall be entitled to be indemnified or compensated by way of sequestration or reimbursement because of any contribution that may have been made from his interest to the surviving spouse. However, in certain instances, chiefly where the surviving spouse's election has resulted in the acceleration of a remainder, the lack of sequestration can defeat a ratable disposition of the loss as provided for in subsection (b).

For example, suppose the testator dies leaving an estate of $300,000 and a will bequeathing $100,000 to each of two children, with the remainder in trust to pay the income for life to his widow, and then the principal to pass to charity A. The widow is relatively young and has a life expectancy of 30 years. If the widow renounces the will and takes an intestate share, the two children will lose one-third of their general legacies, leaving only $66,667 to each. Charity A would also lose one-third of its gift, but its remainder of $66,667 is accelerated and the value of the 30 year life estate of the widow in this $66,667 which was renounced is actually more than the $33,333 decrease in the total remainder. As a result the two children have borne the entire loss, while charity A has actually benefited. The application of the principle of sequestration will permit the use of this 30 year life estate in the $66,667 remainder to reimburse the two children, who were probably the primary objects of the testator's bounty, for their losses.

Part 3 — Statutory Share of Pretermitted Child and Issue.

3–301. When entitled.

No will shall be revoked by the subsequent birth, adoption or legitimation of a child by the testator except under the circumstances

referred to in Section 4–105(c). Such child, or the issue (if any, who survive the testator) of any such child who does not survive the testator, shall however, be entitled to a share in the estate to be determined and paid in accordance with Sections 3–302 and 3–303 if:

(a) the will contains a legacy for a child of the testator but makes no provision for a person who becomes a child of the testator subsequent to the execution of the will;

(b) such child was born, adopted or legitimated subsequent to the execution of the will;

(c) such child, or his issue, survives the testator; and

(d) the will does not expressly state that such child, or issue, should be omitted.

COMMENT.

§352 (Md), as originally enacted in 1937, provided for a forced statutory share to children of a testator who were born subsequent to the execution of the will. It resulted from the opinion of the Court of Appeals in *Karr v. Robinson,* 167 Md. 375 (1934), that the birth of a child subsequent to the execution of a will operated as a complete revocation of the testamentary instrument. See the comprehensive article by *Lentz,* "Revocation of a Will by Birth of a Child," 1 Md. L. Rev. 32 (1936).

This article, which appeared immediately before the Legislative Session which adopted the initial version of §352 (Md), indicated a number of questions which *Karr* left unresolved (pages 48–49) and reported that a number of alternative solutions were then under consideration by the State Bar Association for submission to the General Assembly (page 50).

The statute, as finally adopted, codified the former judicial rule that revocation of a will by the later birth of a child would occur only if the birth followed a marriage made after the will. [The rule is now re-codified as §351(c) (Md).] In addition, it was specifically provided that "No will shall be revoked merely by the subsequent birth, adoption or legitimation of a child by the testator . . . ." Instead, afterborn children were to be given the share which they would have taken in intestacy if (i) the child survived the testator; (ii) the will itself recognized other childen of the testator; and (iii) the will made no provision for afterborn children.

Thus the matter stood until 1963, when the Maryland State Bar Association recommended amendments to §352 (Md) (68 Transactions 68, 70, 330), recommended changes in §351 (Md), and proposed the addition of present §351A (Md). These suggestions died in committee in the General Assembly (68 Transactions 96, 336). They were again recommended by the Bar Association (69 Transactions 63, 461), introduced in Annapolis, and became law as Chapter 106 of the Acts of 1964. See also, 69 Transactions 462.

The 1964 statute worked four changes upon §352 (Md). First, it transferred the provisions regarding revocation of a will by subsequent marriage of the testator *and* birth of a child to §351(c) (Md). Second, it eliminated the specific statement, quoted *supra,* which overturned the rule in *Karr.* Third, it interpolated into the statute the present provisions relating to "descendants of a deceased child." Fourth, it removed the limitation as to persons dying on or after June 1, 1937.

With respect to the second change, the Commission feels that in view of the history of this particular provision, and its apparent need, at least at one time, it should be retained.

With respect to the third change, *i.e.,* the interpolation of the words "descendants of a deceased child," the Commission felt that they created a possible confusion in its interpretation. That is, it could be construed to add an entirely new class of persons — pretermitted grandchildren — to take under the same circumstances as a pretermitted child.

It was the understanding of the Commission that this result was not intended (see 68 Transactions 330 and 69 Transactions 462), and that the new phrase was intended to cover only the situation where there is a surviving descendant of a deceased pretermitted child. Therefore, its recommendations in subsection (a) are intended to clarify the existing law rather than to effect any substantive change. The Commission felt that this approach was preferable to the adoption of the somewhat different recommendations of 2–301(a) (UPC) because of the recent full legislative reconsideration of this aspect of testamentary law, as outlined above.

3–302. Amount of share.

Any child permitted to share in the estate of a decedent pursuant to Section 3–301 shall receive from the personal representative an amount equal to the lesser of (i) the distribution which such child would have taken in the event of intestacy or (ii) the value of all legacies to children of the testator and issue of deceased children divided by the total number of children of the testator who survive him and children leaving issue who take hereunder, including the pretermitted child. The issue of a pretermitted child who did not survive the testator shall take such amount by representation.

COMMENT.

This Section modifies §352 (Md) which gives a pretermitted child a full intestate share. The Commission felt that this would permit such an unintended situation as one in which a wife would be left an entire estate of $150,000 except for a watch (possibly an heirloom) to a son living at the time the will was executed. Under §352, the widow would receive $100,000, the after-born child $50,000 — and the firstborn would be left holding the watch.

The theory of pretermitted heir statutes — and the rule that the will is revoked only by the subsequent birth of a child, which gave rise to such laws in Maryland — is that an afterborn child should be

placed on a parity with his other relatives of the same degree. This is the reason for the Maryland provision that a pretermitted child takes nothing if his brothers and sisters take nothing under the will. 2–301 (UPC) suggests that the pretermitted child be limited to the smallest amount to be received by any child under the will. This would legalize a presumption as unfavorable to the child as the present Maryland statute is favorable to him. The most equitable result to all concerned would seem to be achieved by limiting the afterborn heir, or those who take through him by representation, to the average amount received by his siblings.

3–303. Payment.

Property distributed pursuant to Section 3–302 shall be paid by the personal representative from the legacies of children of the testator and issue of deceased children who take by representation; and each such person shall contribute in the proportion which his legacy bears to all legacies of children of the testator and issue of deceased children taking by representation. In lieu of contributing (or having contributed on his behalf) an interest in specific property to such pretermitted child, a legatee may pay to the pretermitted child or his issue, in cash or other property acceptable to such pretermitted child or his issue, an amount equal to the fair market value of such interest in specific property as of the date of death of the testator.

COMMENT.

The present Maryland statute makes no provision for the manner of payment of the share of a pretermitted child. Presumably, the normal rules of abatement would apply. 2–301 (UPC) suggests, under what appeared to the Commission to be an unnecessarily complex formula, contribution by other children of the testator. The Commission's recommendation directs that the share be paid in a manner which it is felt will only affect the expressed intentions of the testator to the extent absolutely necessary to satisfy the presumption that he intended also to benefit an afterborn child.

SUBTITLE IV

WILLS

Part 1 — Execution; Revocation; Revival.

4–101. Who may make a will.

Any person may make a will if he is eighteen years of age or older, and legally competent to make a will.

COMMENT.

The language "legally competent to make a will" is substituted for the present language of §349 (Md) "of sound and disposing mind, and capable of executing a valid deed or contract", which in turn is similar to the language of 2–501 (UPC). The Maryland Court of Appeals has developed a sound and consistent body of law on the subject of mental capacity to make a will which, in the opinion of the Commission, could be better described by the language "legally competent to make a will" than by the language presently contained in the statutory provision. See *Sykes,* §3. In fact, the Commission believes that in view of the substantial amount of decisional law on the subject a restatement of the present language, which would seem to have a little different significance than that attached to it by the Court of Appeals, would not be useful. See *Sykes, Contest of Wills in Maryland,* §61 at page 72. Thus, the Commission intends to adopt the present Maryland law in connection with legal capacity to make a will, as it has been construed, rather than as it might have been in view of the prior statutory language.

The Commission also recommends the establishment of an age limit for making a will disposing of both real and personal property. The present law [§349 (Md)] relates only to real property, the common law apparently applying to dispositions of personal property, whereby a male could make a valid will at the age of 14 and a female at the age of 12; see *Sykes,* §4.

Without making any specific recommendation thereon, the Commission calls to the attention of the General Assembly the provisions of the recently adopted §149G(a) of Article 43 [Chap. 467, Acts of 1968] which limits the disposition by a decedent of his body or any part thereof for reconstructive medicine or surgery, or for medical research, to persons over 21 years of age. An Amendment of §149G(a) to permit 18 year olds to make such testamentary dispositions would make Section 4–101 and 149G(a) of Article 43 uniform.

4–102. Execution — general.

Except as provided in Sections 4–103 and 4–104, every will shall be (i) in writing, (ii) signed by the testator, or by some other person for him, in his presence and by his express direction, and (iii) attested and signed by two or more credible witnesses in the presence of the testator.

COMMENT.

This Section follows closely §350(a) (Md) and, while surplus words have been omitted, no substantive change is intended. See *Sykes,* §§15 through 19. The Commission has retained the present requirement that the witnesses attest the will and subscribe their names. 2–502 (UPC) would have required the witnesses only to "sign" — a change which was said to be "sufficient formality to make the testator aware of the gravity of the execution process and to minimize chances of fraud." Confusingly, 2–503 (UPC) provides that when proving the will, witnesses must "attest" it in any event; they must make oath that "the testator was at that time eighteen years of age or over and was of sound mind and under no constraint or undue influence."

The Commission has not included 2–504 (UPC) in this draft. To the extent that it states that any competent person may be a witness to a will it is repetitious; and to the extent that it authorizes persons interested in the will to serve as witnesses, it is superfluous. See *Sykes,* §§21 and 22 for a discussion of the present law, which the Commission recommends should continue.

In addition, the Commission's recommendation would delete, as obsolete, the provision that the requirements of the Section for the execution of a will do not apply to wills executed before August 1, 1884.

The will must, of course, be the testator's. See the criminal provisions in §126 of Article 27 for altering a will, and in §44 of Article 27 for forging or counterfeiting a will. Before the enactment of §126 of Article 27 the penalty for altering a will was nailing the wrongdoer's ears to a pillory and then cutting them off. Chapter XI, Acts of 1715.

4–103. Execution — holographic will.

A will which is entirely in the handwriting of a testator who is serving in the armed services of the United States and signed by him shall be valid as a holographic will despite the absence of attesting witnesses if the testator makes such will at a place other than any of the States of the United States or the District of Columbia. Such will shall, however, be void after one year from the testator's discharge from the armed services unless the testator has died or does not then possess testamentary capacity.

COMMENT.

This Section is intended to restate §350(b) (Md). 2–502A (UPC) contains, but does not endorse, a provision permitting holographic wills in any case. The Commission agreed that such wills should not be permitted but felt that the present limited provision should be continued.

The Commission also recommends the deletion of §367 (Md), which sanctions "nuncupative" wills, *i.e.,* those which are oral, by "any soldier being in actual military service, or any mariner being at sea." Even then, only "movables, wages and personal estate" could be so devised. The provision originated in the Statute of Frauds. See *Sykes,* §13. It is probably true that in 1677, the provision was neces-

sary for illiterate soldiers and mariners — a circumstance which present military requirements negate.

To the extent that military personnel of today require a special rule, it appears to be adequately covered by the provision for holographic wills. It is also to be noted that a will made by a serviceman outside the United States would be valid if executed in conformity with the law of the foreign country where he was located. See Section 4–104.

4–104. Execution — will made outside Maryland.

A will executed outside this State shall be deemed to be properly executed if it is (i) in writing, (ii) signed by the testator, and (iii) executed in conformity with the provisions of Section 4–102, or the law of the testator's domicile, or the place where the will is executed.

COMMENT.

This Section is in accord with §368 (Md), and no substantive change is intended except that the description of the act of the testator has been changed from "subscribed" to "signed" in order to be consistent with Section 4–102. In the case of the testator, it is not felt that this has particular significance. Cf. *Shane v. Wolley,* 138 Md. 75, 78 (1921); see Note, "Validity, Interpretation and Probate of Foreign Wills", 4 Md. L. Rev. 400 (1940). However, under this Section a testator is not able to use an amanuensis unless execution is in accordance with Section 4–102.

2–505 (UPC) is worded somewhat differently from the Commission's proposal and would sanction wills executed where the testator has his "habitual residence" in addition to the places specified above. The UPC proposal would also permit application of the section as to wills executed within Maryland if the testator is domiciled or has his habitual residence elsewhere. While recognizing the desirability of uniformity on this subject, the Commission saw no particular need for our extending our present statute, particularly since it would add still another difficult concept to the already-muddy waters of "domicile" and "residence."

4–105. Revocation of will.

No will, or any part thereof, shall be revoked otherwise than as provided herein:

(a) *Subsequent will.* By provision in a subsequent, validly executed will which (1) revokes such prior will or part thereof either expressly or by necessary implication, or (2) expressly republishes an earlier will that had been revoked by an intermediate will but is still in existence.

(b) *Destruction.* By burning, cancelling, tearing or obliterating the same, by the testator himself, or by some other person in his presence and by his express direction and consent; or

(c) *Subsequent marriage and issue.* By the subsequent marriage of the testator followed by the birth, adoption or legitimation of a

child by him, provided such child or a descendant thereof survives the testator; and all wills executed prior to such marriage shall be revoked; or

(d) *Divorce.* By a divorce *a vinculo matrimonii* of a testator and his spouse, granted subsequent to the execution of the testator's will and after June 1, 1964; and all provisions in said will relating to the divorced spouse, and only such provisions, shall be revoked unless otherwise provided in the will or the decree.

COMMENT.

This Section adopts, without change or substance, §351 (Md) which was recently reconsidered and amended by the General Assembly. See the Comment to Section 3–301. The Commission therefore felt that the approach to the subject of 2–506 and 2–507 (UPC), which is somewhat more restricted than the present Maryland law, should not be followed. The Commission sees no reason to perpetuate the former time limitation upon the applicability of this Section as such was contained in §353 (Md). See also *Sykes,* §§31 through 37.

This Section is also intended to resolve the following problem: A executes a will; he then executes another will, which revokes the prior will; thereafter he executes a codicil which refers to the prior will and does not refer to the second will. Under the Commission's recommendation, if the codicil expressly republishes the first will the second will is automatically revoked under this Section, but if not, then the second will remains in effect and the codicil has no practical effect.

4–106. Revival of will.

If a testator makes a subsequent will intending thereby to revoke a prior will, the destruction or other revocation of the subsequent will shall not revive the prior will unless the will is still in existence and is republished with the same formalities as are required for the execution of a will in this Part.

COMMENT.

For the reasons stated in the Comment to the preceding section, the Commission has recommended the recodification of §351A (Md) rather than 2–508 (UPC), which permits other types of revival.

4–107. Incorporation by reference.

The terms of any writing which is in existence when a will or trust instrument is executed, including but not limited to a statement of administrative provisions and fiduciary powers recorded in any record office of this State, may be incorporated into such will or trust instrument by reference thereto if and to the extent that the language of the will or trust instrument manifests an intent so to do and describes the writing sufficiently to permit its identification. Nothing herein contained shall be construed as casting any doubt upon the

validity of any incorporation by reference made prior to the adoption of this Section.

COMMENT.

The first sentence follows 2–509 (UPC). There is no corresponding statutory law in Maryland, but the Court of Appeals has recognized the doctrine of incorporation by reference on the terms stated in this sentence. See *Sykes,* §23; *In re Hull's Estate,* 164 Md. 39, 44–46 (1933). The specific inclusion of recorded powers is thought to be a desirable particularization of this doctrine.

ADDITIONAL COMMENTS TO PART 1.

§§385, 386 and 388 (Md) set forth certain requirements before a foreign will can be admitted into evidence in this State. These are matters relating to the laws of evidence and can be covered by inserting the word "will" in §40 of Article 35.

2–503 (UPC) provides for a testator's proving his will during his lifetime. A similar suggestion was made by the Maryland State Bar Association in 1964 (69 Transactions 461). It encountered the opposition of the Registers of Wills Association (69 Transactions 61), and was rejected by the Association (69 Transactions 63). Subsequently, the Committee on Probate and Estate Law indicated that it had generated some enthusiasm for the provision, and was undertaking to reconsider the matter (69 Transactions 463–464). It is not included in the Commission's recommendations at this time.

2–510 and 2–511 (UPC) have been considered by the Commission but are also not included here. The first is the Uniform Testamentary Additions to Trusts Act, which is to some degree covered by Sections 4–411 and 4–412, *infra.*

COMMENT: CONTRACTUAL ARRANGEMENTS RELATING TO DEATH.

The Commission has considered and rejected the recommendations of 2–701 (UPC) "Contracts Concerning Succession" and 2–702 (UPC) "Payable on Death Contracts."

The language of 2–701 (UPC), if applied literally, would appear to eliminate the application of the equitable doctrine of part performance. The Commission feels that the doctrine of part performance is a valuable equitable aid conducive to substantial justice respecting claims of contracts to make wills and has, therefore, rejected the UPC proposal in favor of the present general statute of frauds as interpreted by the case law.

At the present time, no statute controls the making of contracts to devise or bequeath property, or that special form of the same problem, the joint or mutual will. Such contracts are, however, recognized; and they may be established by parol evidence: ". . . an oral contract to will real estate in return for services will be enforced in equity if the services have been performed, provided the terms of the contract are shown to be certain and definite and are affirmatively established by clear and convincing testimony." *Stevens v. Bennett,* 234 Md. 348, 351 (1964). That case makes it clear that such contract, based upon

the doctrine of part performance, may be enforced only in equity but is otherwise within Section 4 of the Statute of Frauds as to realty and the Maryland statute (currently, Article 95B, §1–206) as to personalty. See also *Sykes,* §§1051–1054.

Initially, it was unclear to the Commission whether the UPC intended simply to state the rule as it applies in Maryland, or whether it intended to preclude the application of the equitable doctrine of part performance. In either event it seems unwise to impose still another statute of frauds in addition to those already present.

2–702 (UPC) undertakes to codify the law which excludes from the definition of "will" certain instruments under which benefits pass to persons by reason of the death of another, e.g., insurance policies, annuity contracts, deposit agreements and the like.

The general theory of 2–702 (UPC) is that a contract containing an obligation on the part of one or more of the parties to dispose of property as therein provided in the event of death is not required to be executed with the formalities of a will. The UPC draft, however, appears to achieve its objectives imperfectly. The draft lists a great number of specific types of documents, creating the danger that other types within the purpose but not specifically listed may be held to be excluded. The Commission believes that the general rule without a statutory provision is already, in substance, in accord with the basic theory underlying the UPC draft and, accordingly feels the inclusion of the draft in Maryland, even in a revised form, is unnecessary.

Part 2 — Deposit of Wills.

4–201. Deposit of will in testator's lifetime.

(a) *Deposit of will.* A will may be deposited by the testator, or by his agent, for safekeeping with the Register of the place where the testator resides. The Register shall give a receipt for it, upon the payment of the required fee.

(b) *How enclosed.* The will shall be enclosed in a sealed wrapper, which shall have endorsed thereon "Will of", followed by the name of the testator, his address and his social security number, if available. The Register shall endorse thereon the day when and the person from whom it was received. The will is not to be delivered or opened except as provided in this Part.

(c) *To whom delivered.* During the lifetime of the testator a deposited will shall be delivered only to him, or to a person authorized by him in writing to receive it.

(d) *When will to be opened.* The will shall be opened by the Register after being informed of the testator's death. The Register shall notify any personal representative named in the will, and such other persons as the Register may deem appropriate, that the will is on deposit with the Register. The will shall be retained by the Register

as a deposited will until offered for probate. The Register shall keep a photographic copy of any will that is transmitted elsewhere for probate.

COMMENT.

2-901 (UPC) embodied all of the present Maryland provisions for the deposit of wills during a testator's lifetime as contained in §390 (Md) and a number of procedural requirements not presently found. In addition to the fact that these requirements were consistent with its understanding of the intent of §390 (Md), the Commission felt that it is wise to adopt standard procedures to provide uniformity throughout the State. No substantive change is intended to be made to the present law.

This Section changes two minor aspects of the UPC draft. That document would permit the filing of a will for safekeeping in any Orphans' Court in Maryland; the provision in subsection (a) above is the same as that now found in §390 (Md).

The second sentence of subsection (d) of the UPC proposal directed the Register to send notices to the executor "and to other appropriate persons as determined by the court." The Commission felt that this might unnecessarily suggest a preprobate notification as a prologue to the actual proceedings. The intention in changing the UPC language was to confer general discretion upon the Register as to how to go about bringing in the necessary people. See also the notices and orders which can be issued upon failure of the informal procedure provided here; see 5-401.

Article 36 should be amended to include the fee for filing wills during the testator's lifetime, now provided in §390 (Md).

4-202. Duty of person having custody of will; liability.

After the death of a testator, any person having custody of his will shall immediately deliver such instrument to the Register for the County in which administration should be had pursuant to 5-103. The custodian may, if he desires, also inform any interested parties of the contents of such will. Any custodian who wilfully fails or refuses to deliver a will to the Register after being informed of the death of the testator shall be liable to any person aggrieved for the damages sustained by reason of such failure or refusal.

COMMENT.

This Section follows generally §§372-373 (Md) and 2-902 (UPC). Grammatical and procedural changes have been made, *e.g.*, allowing the custodian to "inform" any "interested person" in lieu of opening and reading in the presence of assembled near relations. The time limit of three months for delivery of the will formerly found in §373 has not been continued, it being the Commission's feeling that the length of the period necessarily depends upon individual circumstances but that such period was too long in any conceivable case. The former provision in §373 (Md) for fining the custodian in a court of law for his delay was something of an anachronism, since the Orphans' Courts are now courts of record, and the matter would

best be handled there by contempt proceeding. For the criminal penalties for destroying or secreting a will, see §127, and for larceny or robbery of wills see §343 of Article 27.

The provision for damages in the last sentence of the Section was suggested by the UPC. The Commission felt that it was possibly declaratory of present law, was salutary in any event, and should be followed.

Part 3 — Legatees.

4–301. Who may be a legatee.

Any individual, firm, trust, partnership, unincorporated association, corporation, or any governmental body may be a legatee.

COMMENT.

This provision is intended to overrule old restrictions on the types of permissible legatees, such as unincorporated associations. See *Sykes,* §101. It is not, however, intended to repeal the restriction on legacies by inmates of penal institutions to officers or employees of the Department of Correction contained in §688 of Article 27. Aliens can continue to inherit property. See §1 of Art. 3, which should be retained. With respect to the enforceability of charitable trust legacies, see §§195 and 196 of Article 16 — respectively, the "Statute of Charitable Uses" and the "Uniform Charitable Trusts Administration Act."

Part 4 — Rules Relating to Legacies.

4–401. Legatee failing to survive testator by 30 days.

A legatee who fails to survive the testator by 30 full days is deemed to have predeceased the testator, unless the will of the decedent expressly creates a presumption that the legatee is deemed to survive the testator or requires that the legatee survive the testator for any stated period in order to take under the will and the legatee survives for the stated period.

COMMENT.

This Section parallels Section 3–110 requiring a spouse, descendant, ancestor, brother or sister, or descendant of a brother or sister, to survive by thirty days in order to inherit from an intestate decedent. See the Comment to that Section.

The language of this Section as suggested by the Commission follows that of 2–601 (UPC), except that the period of 5 days there suggested is enlarged to 30 days. Its application can be illustrated by the following examples involving specific bequests under a will:

i. "To A, if A survives the testator." Under this type of bequest, A will have to survive the testator by at least 30 full days in order to take the legacy.

ii. "To A, if A survives the testator by 5 days or more." Under this type of provision, if A survives the testator by five

days or more but not by thirty days, A will be entitled to the legacy.

iii. "To A, if A survives the testator, but if it cannot be determined whether A survives the testator, A shall be presumed to have survived the testator." Under this provision, A would take the legacy.

iv. "To A." Under this provision, if A survives the testator by less than 30 days, A will be deemed to have predeceased the testator, and the provisions of Section 4–403 will determine whether the legacy has lapsed or not.

4–402. Presumption that will passes all property; after-acquired property.

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

COMMENT.

This Section, in the form of 2–602 (UPC), is in accord with §369 (Md) as to realty, and the common law as to personalty. *Albert v. Safe D. & T. Co.*, 132 Md. 104, 110 (1918). Compare Sections 1–301 and 4–408. See also §§149G and 149I of Article 43, which permit the testamentary disposition of all or part of a body.

4–403. Lapse.

Unless a contrary intent is expressly indicated in the will, no legacy shall lapse or fail of taking effect by reason of the death, subsequent to the execution of the will but prior to the death of the testator, of any legatee who is (i) actually and specifically named as legatee, (ii) described or in any manner referred to or designated or identified as legatee in the will, or (iii) a member of any class in whose favor a legacy is made. Such legacy shall have the same effect and operation in law to direct the distribution of the property directly from the estate of the person who owned such property to those persons, who would have taken if said legatee had died, testate or intestate, owning the property.

COMMENT.

The first sentence of this Section is a combination of §§354 and 355 (Md). The Commission felt that its recommendation should be based upon existing Maryland law rather than the more radical change which would have resulted from following 2–603 (UPC). No change is intended in the distinction between such legacies and those referred to in Section 4–404, or in the interpretation that §354 (Md) does not apply where the legacy would not entirely fail, such as a stated gift over upon death of the legatee or a legacy consisting of a life estate or joint tenancy. See, *Mullen,* "The Maryland Statute Relating to Lapsing of Testamentary Gifts," 7 Md. Law Rev. 101 (1943).

As formerly construed, §354 (Md) operated to transfer property directly to the *heirs at law* of the deceased legatee, even though such person might himself have left a will. See, *Sykes,* §§131–134; *Mullen,*

loc. cit., pages 111–112. Thus, if A dies after the execution of B's will which leaves property to A, such property would pass to A's heirs at law even though A left a will which would have left the property to other persons. A second aspect of the former statute was that the property was not subject to administration in the estate of the deceased legatee (or to his debts) but passed directly to his heirs.

The somewhat anomalous result of the property passing to the heirs at law of the deceased legatee even though he left a will was felt by the Commission to be contrary to the intent of the original framers of the statute. Therefore, the second sentence of this Section provides that property which is the subject of a lapsed legacy is to pass "to those persons who would have taken if said legatee had died, testate or intestate, owning the property." The intended result is that such property would pass under the will of the deceased legatee to the persons nominated by him — most frequently, the residuary legatees.

The second feature of the construction of §354 (Md), that the property does not pass through the estate of the deceased legatee, is here expressly made a part of the statute to indicate the intention of the Commission that property passing by virtue of this Section should not be made the subject of two administrations. This has the secondary effect of preventing the testator's property from going to his deceased legatee's creditors, whom the testator undoubtedly never intended to benefit.

4–404. Void, inoperative, and renounced legacies.

Unless a contrary intent is expressly indicated in the will, any property failing to pass under a void or otherwise inoperative legacy, and which is not provided for in Section 4–403, and any property which is the subject of a renounced legacy, shall be distributed as part of the estate of the testator to those persons, including legatees, who would have taken said property if the void, inoperative or renounced legacy had not existed. Where a legacy to one of two or more residuary legatees is void, inoperative or renounced the other residuary legacies shall be proportionately augmented by the assets which are the subject of such legacy.

COMMENT.

There is presently no Maryland statutory law with respect to the disposition of a void legacy or an inoperative legacy. See, Note, "Disposition of Joint and Otherwise Failing Devises in Maryland," 2 Md. L. Rev. 142 (1938); *Sykes*, §135. The common law in Maryland is that real estate which is the subject of a void or inoperative legacy passes to the heirs of the testator, and personal property which is the subject of a void or inoperative legacy passes under the residuary clause in the will. A void or inoperative residuary legacy passes by intestacy unless the court can be persuaded to find some indicium of contrary intent in the will. *McElroy v. Mercantile-Safe Deposit and Trust Company*, 229 Md. 276 (1962). The Commission here recommends, however, that any property which is the subject of a void, inoperative or renounced legacy pass as part of the residue of the estate, recognizing, of course, that this does not affect the acceleration

of remainders where the void, inoperative or renounced gift is only a terminable interest, such as a legal or equitable life estate. Thus, if a person entitled to a life estate or an estate for years, either legal or equitable, renounces the legacy it passes immediately to the next designated taker under the will.

The Commission has rejected the suggestion of 2–604 (UPC) and the second sentence of 2–801 (UPC) for the single rule here stated. The recommendation of 2–604(b) (UPC) would have, in effect, created the "class gift" situation rejected as to lapsed legacies in 1929 [§354 (Md)] and in the Commission's draft of Section 4–403.

Again, the Commission does not intend to enlarge upon the definition of a "void" legacy or to change the distinction between such legacy and one which "lapses." An example of a "void" legacy would be: "To A," and A is not alive at the date of the execution of the will. An example of an inoperative legacy is: "To A, if A survives the testator," but in fact A does not survive the testator. (The example of an "inoperative" legacy should be distinguished from the example in the Comment to Section 4–401 where the legacy provided "to A.")

4–405. Change in securities; accession; non-ademption.

Unless a contrary intent is expressly indicated in the will, if securities are the subject of a specific legacy and subsequent to the execution of the will other securities of the same or another entity are distributed to the testator by reason of his ownership of the original securities, whether as a result of a partial liquidation, stock dividend, stock split, merger, consolidation, reorganization, recapitalization, redemption, exchange or other transaction, and if these securities are part of the testator's estate at his death, the specific legacy shall include the additional or substituted securities.

COMMENT.

Under present Maryland law shares of stock received by a testator as a dividend after execution of a will do not pass to the specific legatee of the original stock. *Hicks v. Kerr,* 132 Md. 693 (1918). Consistent with the Commission's purpose of having all provisions of a will speak as of the date of the testator's death, unless a contrary intention expressly appears, the language of 2–605 (UPC), which adopts such rule with respect to stock dividends received by the testator between the time of execution of the will and the time of his death, is proposed here. The word "expressly" has been added near the end of the sentence to indicate the feeling of the Commission that such determination should not be left to the sometimes elusive reasoning which has characterized quests for the "testator's intention" in the courts. See *Sykes,* §86.

4–406. No exoneration.

Unless a contrary intent is expressly indicated in the will, a legacy of specific property shall pass subject to any security interest or lien on the property which existed at the time of execution of the will or

which is a renewal, extension or refinancing thereof; but if any security interest or lien is created or attaches initially after the execution of the will the legatee shall be entitled to exoneration.

COMMENT.

At the present time, no Maryland statute exists concerning "exoneration," i.e., the payment from the estate of amounts encumbering specific legacies. The shortcomings of the situation are well summarized and illustrated in a case note to *Tobiason v. Machen,* 217 Md. 207 (1958), appearing in 19 Md. Law Rev. 247 (1959).

In the cited case the Court of Appeals, in directing payment of an encumbrance from the testator's personal estate, placed great (and perhaps controlling) weight upon the fact that the property became encumbered subsequent to the execution of the will. This factor is the criterion suggested in 2–607 (UPC) for determining whether exoneration should exist. It is proposed by the Commission in that form. It should also be noted that this Section applies equally to real and personal property.

Under Section 7–401(s) the personal representative may discharge any encumbrance or security interest. If he does so, the legatee may be required to reimburse the estate therefor if, pursuant to Section 4–406, there is no exoneration. Cf. 3–516 (UPC).

4–407. Exercise of power of appointment.

Subject to the terms of the instrument creating the power, a residuary clause in a will exercises a power of appointment held by the testator if, and only if, (i) an intent to exercise the power is expressly indicated in the will or (ii) the instrument creating such power of appointment fails to provide for disposition of the subject matter of the power upon its non-exercise.

COMMENT.

§359 (Md) currently creates a presumption of the exercise of a power of appointment held by a testate decedent, although the statute is limited in its application to "general" powers of appointment. The Commission felt that this rule was unnecessarily artificial, since most instruments creating such powers provide for a gift over upon failure of their exercise; and the expressed intention of the person establishing the power should logically control over a presumed intention of a person who is given such power. In addition, the present statute is limited in application to "general" powers of appointment which creates a distinction that is frequently difficult to apply. See Note, "Exercise of a General Power of Appointment Without Specific Reference to the Power," 2 Md. L. Rev. 155 (1938).

For these reasons, the Commission has recommended the adoption of 2–608 (UPC) but feels that this should be modified to direct a construction that any power of appointment has been exercised where the instrument establishing the power does not provide for the contingency of its non-exercise. Also, the Commission has considered the words "whether or not it contains a residuary clause" in the provision

suggested by the UPC to be redundant and has deleted them from its recommendation.

To satisfy the phrase "expressly indicated" in clause (i) of Section 4–407 it is not intended that the particular source of the power, *i.e.*, "under my father's will" must be identified. It is intended that such language as "All of the rest of my estate and property, including all property over which I may have any power of appointment, I give, devise and bequeath to" etc., will fully exercise any power, whether general or special, held by the testator whose terms of exercise are consistent with the language used in such testamentary disposition.

4–408. Will passes entire interest of testator.

Unless a contrary intent is expressly indicated in the will, a legacy shall pass to the legatee the entire interest of the testator in the property which is the subject of the legacy.

COMMENT.

§356 (Md), adopted in 1825, "reverses the principles of law, which considered an estate for life to pass by a general devise, without words of limitation, or other words clearly indicative of an intention to pass a larger estate, and says a larger estate shall pass by such general devise without words of limitation, unless the will contain a devise over, or manifest by some other words, an intention not to pass more than an estate for life." *Hammond v. Hammond,* 8 G. & J. 436, 441 (1837). A similar provision with respect to deeds is found in §7 of Article 21. See also Section 4–402 concerning the presumption that all property of the testator passes under his will. See also Comment to Section 1–301.

While the Commission has reworded §356 (Md) and by use of the word "property" has made it applicable to personal as well as real property, no other substantive changes is intended. It is also thought that this language is sufficiently broad to cover most situations referred to in Article 21, §107, "Title to street or highway where land binding thereon is conveyed." In those rare instances where land passes under a will by reference to a street, it is felt that the legal effect may be conveniently determined by reference to the latter section; and it is thought unnecessary to include it here. See *Sykes,* §64.

4–409. Perpetuities — formation of corporation.

No legacy for any charitable uses shall be void by reason of any uncertainty with respect to the donees thereof, provided (i) the will making the same shall also contain directions for the formation of a corporation to take the same, and (ii) a corporation shall be formed in accordance with such directions, capable and willing to receive and administer such legacy, within 12 months from the probate of such will, if the devise is immediate and not subject to a life estate, or at any time between probate of the will and the end of 12 months next following the expiration of a life estate or life estates, if the legacy is to take effect in possession after the expiration thereof.

COMMENT.

As to the application of the rule against perpetuities in general, including the Maryland exceptions to, and limitations on, its recognition, see Sections 11–102 and 11–103.

Section 4–409 is a recodification of §357 (Md). No substantive change is intended by the Commission through the changes in grammar or the arrangement of the statute nor is it intended to affect the holdings in *Yingling v. Miller,* 77 Md. 104 (1893); *Gray v. Orphans Home,* 128 Md. 592 (1916) and *Loats Asylum v. Essom,* 220 Md. 1 (1959). See also the Comment to Section 11–102.

The Commission has also considered the provisions for enforcement of charitable trusts as now contained in Article 16, §§195 and 196, the latter provision being the Uniform Charitable Trusts Administration Act. It is felt that such provisions are most frequently applicable to situations arising after probate and that they are most properly considered as a part of the jurisdiction of the equity court rather than as part of the probate proceeding. Therefore, these provisions are not recodified here but are intended by the Commission to have continued application to trusts created by will.

4–410. "Die without issue," and similar phrases.

In any legacy, the words "die without issue," or "die without leaving issue," or any other words which may import either a want or a failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or a failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intent is expressly indicated in the will.

COMMENT.

This is a recodification of §365 (Md). See, *Smith,* "Construction of the Phrase 'Death Without Issue' and Similar Terms," 11 Md. L. Rev. 25 (1950), *Carter,* "Recent Developments Relating to Devolution and Descent of Future Interests in Maryland," 11 Md. L. Rev. 187, 235 (1950), and *Sykes,* §59(p). A similar provision with respect to deeds is found in Article 21, §101.

4–411. Legacy to inter vivos trust.

(a) A legacy may be made in form or substance to the trustee under, or in accordance with the terms of, a written inter vivos trust (including an unfunded life insurance trust although the settlor has reserved any or all rights of ownership in the insurance contracts) which has been executed and is in existence prior to or contemporaneously with the execution of such will and is identified in such will, without regard to the size or character of the corpus of such trust or whether the settlor is the testator or a third person.

(b) Such legacy shall not be invalid because the trust is subject to amendment or modification or may be terminated or revoked after

the will is executed (whether by the settlor or any other person or persons), nor because the trust instrument or any amendment thereto was not executed in the manner required by this article for wills.

(c) Unless the will otherwise provides:

(i) Such legacy shall not be invalid because the trust was amended or modified after the will was executed; and such legacy shall be given effect in accordance with the terms of the trust as they appear in writing on the date of death of the testator, including any such amendment or modification;

(ii) Property passing under such legacy shall be deemed to pass directly from the personal representative to the trustee of the inter vivos trust, shall become a part of the assets of such trust, and shall not be deemed held under a separate testamentary trust;

(iii) An entire revocation of the trust prior to the death of the testator shall make the legacy inoperative within the meaning of 4–404, even though such revocation was not effected in the manner provided by this Article for the revocation of wills;

(iv) Subject to paragraph (iii) of this subsection (c), a termination of the trust in accordance with the terms of said trust or by its exhaustion or by operation of law or otherwise, shall not invalidate the legacy.

(d) The provisions of this Section shall apply to any legacy made by a testator living on June 1, 1959, or born subsequent thereto without regard to the date of the execution of the will, the trust instrument, or any amendment thereto. This Section shall not be construed as casting any doubt upon the validity as heretofore existing of (i) any legacy made by a testator who shall have died prior to June 1, 1959, or (ii) any legacy which does not come within the provisions of this Section.

COMMENT.

This Section restates §350A (Md). References to "devise", "bequest", and "codicil" and certain plural references have been rendered unnecessary by the definitions in Section 1–101 and the provisions of Section 1–104. Similarly, the use of the word "will" in this Section necessarily imports the validity of the instrument involved; hence, the words "otherwise valid under this article" are omitted in subsection (a). The words "from the personal representatives" have been interpolated in paragraph (ii) of subsection (c) after the word "directly" to make clear that the legacy is still subject to administration. In paragraph (iii), a cross-reference to 4–404 has been added for convenience. The Commission intends no substantive changes.

4–412. Legacy to testamentary trust.

(a) A legacy may be made in form or substance to the trustee under, or in accordance with the terms of, a testamentary trust established under another will. Such legacy shall not be invalid because the

testamentary trust or the will establishing such trust was not in existence when the will containing such legacy was executed, if the testator of the will establishing such testamentary trust predeceased the testator of the will containing such legacy, and such will establishing such testamentary trust has been or is subsequently admitted to probate.

(b) Unless the will otherwise provides:

(i) Property passing under such legacy shall be deemed to pass from the personal representative directly to the trustee of the testamentary trust, shall become a part of the assets of such trust, and shall not be deemed held under a separate testamentary trust;

(ii) A termination of the trust in accordance with its terms, by its exhaustion, by operation of law, or otherwise shall not invalidate the legacy.

(c) The provisions of this Section shall apply to any legacy made by a testator living on June 1, 1959, or born subsequent thereto, without regard to the date of execution of the will containing such legacy. This Section shall not be construed as casting any doubt upon the validity as heretofore existing of (i) any legacy made by a testator who shall have died prior to June 1, 1959, or (ii) any legacy which does not come within the provisions of this Section.

COMMENT.

This Section restates §350B (Md). As to words omitted from the statute and the addition in subsection (b)(i), see the preceding Comment.

4–413. Penalty clause for contest void.

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

COMMENT.

This provision is identical to 3–605 (UPC). As for a statement of the Maryland law, see Miller, *The Construction of Wills in Maryland* §310 (1927).

ADDITIONAL COMMENT TO PART 4.

For other rules of construction applicable to non-testamentary instruments as well as to wills, see Subtitle XI.

SUBTITLE V

OPENING THE ESTATE

COMMENT.

The over-all approach adopted by the Commission in this Subtitle is to codify much of the existing practice in Maryland with respect to the commencement of the administration of a decedent's estate. The existing practice in many Counties in Maryland, as well as in Baltimore City, permits the probate of a will and the appointment of personal representatives without the intervention or order of the Orphans' Courts. This procedure is handled exclusively by the various Registers of Wills.

The precise lines which describe the authority of the Register of Wills in proceedings such as these, and the circumstances under which a proceeding before the Orphans' Courts is mandatory, have never been completely clear in all situations. The purpose of this Subtitle is to fix those lines with some degree of definiteness and to set forth clearly and in logical sequence the procedures which should be followed to commence the administration of an estate.

Part 1 — General Provisions.

5–101. Scope of Subtitle.

This Subtitle is applicable to that portion of the probate proceeding which relates to the probate of a will, if any, and the grant of letters. Such action may be taken, after the filing of a Petition for Probate as provided in Part 2 of this Subtitle, either—

(a) Administratively, by the Register of Wills, in the manner described in Part 3 of this Subtitle, which shall be known as administrative probate; or

(b) Judicially, by the Court, in the manner described in Part 4 of this Subtitle, which shall be known as judicial probate.

COMMENT.

The division of probate proceedings into administrative probate and judicial probate reflects an old distinction which is still in force in Maryland. Chapter 101 of the Acts of 1798, which is, in large part, still the basic testamentary law of Maryland, referred to much the same type of proceedings as "plenary" and "summary". See, for instance, §§278 and 280 (Md) which are only slight modifications of paragraphs 16 and 17 of the third section of the Acts of 1798.

In some jurisdictions in Maryland, as elsewhere, the "summary" method — which may be generally characterized as action which can be taken by the Register of Wills without judicial proceedings — is by far the most common method employed in present practice. As stated in a Comment to Section 68 of the 1946 Model Probate Code

(the precursor of the UPC), ". . . a summary hearing on an application . . . was the English probate in common form and has been followed in a considerable number of states. It is still a part of the English probate system."

Most of the duties and powers associated with our probate courts are administrative rather than judicial.

The distinction between administrative and judicial probate is intended to reflect the fact that administrative probate can be conducted by the Register of Wills whereas judicial probate is conducted under the supervision of the Court.

Both the Model Probate Code and the UPC reflected this distinction. The Commission has substituted the words "judicial" and "administrative" for "plenary" and "summary", not so much because they are more in accord with modern usage, as that the words "plenary" and "summary" are so overladen with ambiguities from other fields of law that it was felt desirable to use words which, although not as rich in historical perspective, would not import these ambiguities into testamentary practice. Nor has the Commission adopted the language of the Uniform Probate Code, which divides these proceedings into "formal" and "informal". The Commission felt that "formal" and "informal" have connotations which are not relevant in describing the distinction between administrative and judicial probate.

The UPC also breaks down the two types of probate into separate proceedings for the probate of a will and for the appointment of a personal representative. The Commission believes that this separation is unnecessary and has, therefore, continued the current Maryland practice since a person who seeks to initiate such a proceeding (whether it be to probate a will or to have a personal representative appointed or both), has but one objective in mind, to wit, to commence the administration of the decedent's estate.

In view of the simplified procedures adopted in this Subtitle for the probate of wills and the appointment of personal representatives the Commission suggests that the more complex provisions of §§47 through 52 (Md) are no longer necessary or useful.

5–102. Necessity of proceeding.

(a) *Probate of will.* Unless it is admitted to probate administratively or judicially (or recorded as provided in Section 5–503), a will is ineffective to transfer property or to nominate a personal representative.

(b) *Letters.* Except for foreign personal representatives, no person shall be entitled to qualify as a personal representative or exercise powers and duties as such unless he has been appointed administratively or judicially.

COMMENT.

While this Section is more explicit than present Maryland provisions, it is intended to be no more than declaratory of the necessity for probate and the appointment of the personal representative. It is

patterned after 3–201 and 3–202 (UPC). See also Comment to Section 5–101.

With regard to foreign personal representatives see Section 5–501.

5–103. Venue.

(a) *Proper County.* The venue for administrative or judicial probate shall be in the County in which the decedent had his domicile at the time of his death, or, if the decedent was not domiciled in Maryland, the County in which the petitioner believes that the largest part in value of the decedent's property in Maryland was located at the time of his death.

(b) *Situs.* For the purpose of determining venue for the administration of the estate of a decedent who was not domiciled in Maryland at the time of his death, the situs of tangible personal property is its location. The situs of intangible personal property is the location of the instrument, if any, evidencing a debt, obligation, stock or chose in action, or, if there is no such instrument, the residence of the debtor. The situs of an interest in property held in trust is located in any County where the trustee may be sued.

(c) *Petition in more than one County.* Probate proceedings concerning a decedent shall not be maintained in more than one County. If such a proceeding is commenced in more than one County, the Court of the County where first filed shall have exclusive jurisdiction to determine venue. If proper venue is finally determined to be in another County, the proceeding, including any will, petitions or other papers filed therein, shall be transferred to the proper Court.

COMMENT.

Section 5–103 is patterned generally after 3–204 (UPC) and §§18 and 374 (Md). See also Note, "Domicil for Orphans Court Jurisdiction," 5 Md. L. Rev. 218 (1941), and *Sykes,* §333. The Commission recommends that the venue of proceedings be relatively more fixed than under the prior Maryland law which permitted the conduct of proceedings in the case of a non-domiciliary of Maryland where a substantial portion of the decedent's Maryland property was located. However, in order to avoid undesirable jurisdictional disputes the Commission draft makes determinative the *bona fide* belief of the petitioner, at the time of filing the petition, as to the County in which the largest part in value of the decedent's property was located at the time of his death. The Commission has eliminated the provision of the present law whereby the County in which death occurred is on that account alone necessarily a County of proper venue.

The Commission has likewise omitted any specific time limit for attacking venue. The number of instances in which such attack is likely to prevail will probably be small in view of the standard of *bona fide* belief, as above set forth, and the Court should deal with such an attack under general equitable doctrines.

The recommendation of the Commission as to venue differs also from the venue provisions of the Maryland Rules as to the jurisdiction in which a petition may be filed to assume jurisdiction of a fiduciary estate (which under Maryland Rule V70 is defined as generally excluding a decedent's estate); see Maryland Rule V71 b 1. The Commission concluded that the considerations as to venue for a decedent's estate are different from those involving an existing trust, where the convenience of the trustee already in office when the petition is filed may be given more weight in the formulation of the rule for trusts.

Subsection (a) is not intended to require proceedings to be conducted in Maryland where the decedent was not domiciled in Maryland. If the decedent is not domiciled in Maryland and if it is decided by the petitioner to have the primary proceeding conducted in Maryland, subsection (b) is intended merely to determine the proper county in which the proceeding shall be conducted. See also Note "Admissibility of Foreign Will to Probate," 5 Md. L. Rev. 213 (1941). The Commission does not intend to change the rule that a primary administration of the estate of a decedent who was not domiciled in Maryland may be in Maryland. See *Sykes,* §284.

The Commission has not dealt with the subject of conflicting claims of domicile in different States [cf. 3–204(d) (UPC)], inasmuch as full faith and credit is a matter of federal constitutional law and the problems of interstate conflicts in the determination of domicile, in addition to being beyond the control of the Maryland Legislature are probably too subtle and various to be treated by statute and should, therefore, be left to the general doctrines of the conflict of laws.

5–104. Order of right to letters; persons excluded.

(a) *Generally.* In granting letters in administrative or judicial probate, or in appointing a successor personal representative or a special administrator as provided in Part 4 of Subtitle VI, the Court and Register shall observe the following order of priority, with all persons in any of the following paragraphs considered as a class:

(1) executors named in a will admitted to probate;

(2) (a) the surviving spouse and children of an intestate decedent; or (b) the surviving spouse of a testate decedent;

(3) residuary legatees;

(4) the children of a testate decedent;

(5) the grandchildren of the decedent;

(6) the parents of the decedent;

(7) brothers and sisters of the decedent;

(8) other relations of the decedent;

(9) the largest creditor of the decedent who applies for administration;

(10) any other person having a pecuniary interest in the proper administration of the decedent's estate;

(11) any other person.

(b) *Exclusions.* Letters shall not be granted to a person who, at the time any determination of priority is made, has filed with the Register a declaration in writing that he renounces his right to administer or is

(1) under the age of twenty-one years;

(2) mentally incompetent;

(3) convicted of a serious crime;

(4) not a citizen of the United States;

(5) a Judge of any court established under the laws of Maryland or the United States or any Clerk of Court or Register, unless he is the surviving spouse or is related to the decedent within the third degree; or

(6) any person residing in any other State which by its laws denies to residents of Maryland the right to act or qualify as a personal representative of a deceased resident of such State at the time of his death.

(c) *Appointment within class.* When there are several eligible persons in a class entitled to letters, the Court or Register may grant letters to one of them, or to more than one of them, as necessary or convenient for the proper administration of the estate; except that, subject to subsection (b) of this Section, all executors are entitled to probate.

(d) *Appointment within different classes.* Within classes (2) through (9) of subsection (a), letters may be granted to two or more persons in different classes provided that the person or class first entitled to letters consents thereto.

COMMENT.

This provision is derived substantially from §22 through §39 and §59 (Md) except that §39 has been broadened to exclude from the class of permissible personal representatives a judge of any court established under the laws of Maryland or the United States or any clerk of court or Register of Wills unless he is the surviving spouse or a relative within the third degree. The Commission felt that the provision permitting a judge, clerk or Register to serve as a personal representative if the largest creditor should be deleted from the present law [see §39 (Md)]. The Commission recommends the adoption of

a similar statute in Article 16 with respect to judges serving as trustees of testamentary or inter-vivos trusts when the duties of the office of trustee are to be assumed after the effective date of this Act. The Commission feels that there is no substantial distinction in this regard between a personal representative and a trustee. See also the report of the Committee on Judicial Ethics of the Maryland State Bar Association. 73 Transactions 210, 211 (1968).

The Commission's recommendations are not intended to change the rule that, by agreement, one spouse may waive the right to serve as personal representative in the other spouse's estate. See Note, 2 Md. L. Rev. 75 (1937); *Hewitt v. Shipley,* 169 Md. 221 (1935).

The issuance of letters cum testamento annexo (*cf.,* §49), or letters de bonis non (§§77–81 and §317 (Md), see also Section 6–304), are not recognized in this Article as the Commission believes that the designation of special types of administration is not necessary or useful. See *Sykes,* §§351–353 and §§381–388.

The provisions of subsections (a)(1) and (a)(11) are consistent with §58 of Article 11 authorizing the appointment of a trust company as a personal representative.

Subsection (a)(11) carries forward the theory of §35 (Md) which provides for designation of a personal representative where all interested persons and creditors are incapable or decline or refuse to appear or neglect to comply.

The introductory provisions of subsection (b) are derived substantially from §42 and §53 (Md). The Commission has not included the last part of §53 (Md) in this draft. The provisions of Section 5–104 are intended to make a renunciation irrevocable. Clause (6) of subsection (b) is derived from §46 (Md).

The provisions of §60 through §64 (Md) have not been included in this Article because they relate merely to the manner of proving incapacity for purposes of subsection (b). The Commission believes that such rules of evidence should not properly be included as matters of statutory law.

The provisions of §65 (Md) were not deemed by the Commission useful since discrimination based on the marriage of a female has long since been eliminated in Maryland testamentary law.

Because the term personal representative as used in this draft includes, by definition, the terms executor and administrator, the provisions of §21 (Md) are no longer necessary.

The introductory provisions of subsection (c) are intended to be declaratory of present Maryland law.

The provisions of subsection (d) are derived from §19 (Md).

Part 2 — Commencement of Proceeding.

COMMENT.

Part 2 of Subtitle V must be read together with Sections 5–103 and 5–104. Section 5–103 is intended strictly as a venue section, namely, to designate the County in which proceedings must be brought if they are to be brought in Maryland. Part 2 of Subtitle V sets forth

the circumstances under which an interested person, a creditor, or a Register may institute proceedings in the court in which venue exists pursuant to Section 5–103.

The Commission considered and rejected a proposal that the statute declare invalid any attempted general administration of a Maryland domiciliary's estate by the courts of another State. It was felt that the statute should give the broadest possible opportunity to assure Maryland administration of such an estate but that if such opportunity is not availed of, it would be unduly harsh to cast a cloud over the acts taken in another State with the agreement or acquiescence of the persons who would have had an interest in administration in Maryland.

Part 2 deliberately omits any time limit for the commencement of Maryland proceedings in the event of proceedings for general administration of the estate of a Maryland domiciliary by the courts of another State, believing that such problems are best handled by the general doctrines of equity and the conflict of laws; see Comment to Section 5–103. Nothing in this Article is intended to limit the reach or effect of the Maryland tax laws relating to property passing by reason of the death of a decedent. Cf. 3–203 (UPC) (rejected for compulsory combined form); 3–205 (UPC) followed; 3–221(a) (UPC) followed.

5–201. Petition for Probate — information to be furnished.

The Petition for Probate shall contain all knowledge or information of the petitioner with respect to:

(a) *The decedent.* The name, age, domicile, and place and date of death of the decedent;

(b) *Petitioner's interest.* The interest of the person filing the Petition;

(c) *Venue.* The County in which the decedent was domiciled at the time of his death and, if not domiciled in Maryland, the County in this State which the petitioner believes was the situs of the largest part in value of the decedent's property at the time of his death;

(d) *Other proceedings.* All other proceedings filed in Maryland and elsewhere regarding the same estate;

(e) *Testamentary status.* Whether the decedent died testate or intestate and

(1) if testate, there shall be exhibited with the Petition the will or a copy of the will authenticated under Title 28 U.S.C.A. §1738 (the Act of Congress); or if such exhibit cannot be produced, a statement of the reasons for such inability, the name and address of any person in whose custody any of such documents may be, and a statement of the provisions of the will so far as known to the petitioner; and, in any event, a statement of the manner in which the exhibit came into the petitioner's hands as well as a statement that he knows of no later will or

(2) if intestate, a statement of the extent of any search for a will.

(f) *Interested persons.* The names and addresses of all interested persons and of all persons who are witnesses to any will referred to in subsection (e)(1).

5–202. Petition for Probate — explanation for lack of information.

The Petition shall state the reasons why any information required by Section 5–201 cannot be furnished by the petitioner and the extent of his efforts to locate all interested persons whose names or addresses are not included in the Petition.

5–203. Petition for Probate — request for administrative or judicial probate.

The Petition shall indicate whether the petitioner elects administrative or judicial probate.

5–204. Petition for Probate — requests respecting wills.

The Petition shall also contain, as appropriate, a request for one or more of the following:

(a) The probate or recording of any will exhibited with the Petition or deposited with the Register pursuant to Part 2 of Subtitle IV.

(b) An order directing witnesses to an alleged will to appear and give testimony regarding its execution.

(c) An order requiring any person alleged to have custody of a will to appear before the Court to show cause why he should not be cited for contempt.

(d) An order directing all interested persons to show cause why the provisions of any lost or destroyed will should not be admitted to probate as expressed in the Petition.

(e) A finding that the decedent died intestate.

(f) Any other relief that the petitioner may deem appropriate.

5–205. Petition for Probate — requests respecting personal representative.

The Petition shall also contain a request for either of the following:

(a) the grant of letters to the petitioner, if the Petition is filed by all of the persons named as executors in the will of a testate decedent, or if the persons entitled to administer the estate of an intestate decedent join in the petition or otherwise consent in writing

to such grant; but the joinder or consent of a person who has renounced his right to administer shall not be necessary; or

(b) an order requiring persons named as executors or entitled to administration, as the case may be, to appear and qualify for appropriate letters.

COMMENT TO SECTIONS 5–201 THROUGH 5–205.

Sections 5–201 through 5–205 contain all of the information which should be included in a Petition for Probate. The Commission is aware of the lack of uniformity throughout the State with respect to petitions for letters testamentary and letters of administration and feels that uniformity is a desirable goal in this area. Therefore, the Commission has also recommended the adoption of a uniform form in Section 5–206 which sets forth all of the information required in Sections 5–201 through 5–205.

As Section 5–201 fully covers the requirements of §262 (Md), this provision of the present law (dealing only with Cecil County) has been deleted.

The Commission also suggests that a restatement of the first part of §372 (Md), dealing with the propriety of the person having custody of a will to open and read it to near relations, is unnecessary; but this omission is not intended to imply any change in the present law.

Subsection (e)(1) incorporates the provisions of §380 (Md). "Will" as used in that subsection is intended to include all codicils thereto. See also Section 4–202, with regard to the duty of the person having custody of any will or codicil.

Section 5–204 sets forth certain requested findings or orders. The orders referred to in Section 5–204 will be orders issued by either the Court or the Register, depending on whether the proceeding is one for administrative probate or judicial probate. See Parts 3 and 4 herein for the provisions relating to whether a proceeding can be handled administratively or whether a judicial probate is required. Cf., 3–208 and 3–221 (UPC).

5–206. Form of Petition.

In any proceeding for administrative or judicial probate the Petition for Probate shall be in substantially the following form:

In the Matter of
_____,
deceased

Before the Register of Wills
for _____

PETITION FOR PROBATE

The Petition of _____ shows:

1. _____, the decedent, who resided at _____ in _____ County, _____, died at _____ on _____, at the age of _____.

2. The decedent died [with] [without] a will.

3. Petitioner is entitled to be appointed personal representative of the decedent's estate under Section 5–104 of Article 93 of the Maryland Code for the following reasons:

4. This is the proper office in which to file the Petition because:

5. The Petitioner has made a diligent search for a will of the decedent and, to the best of the knowledge of the Petitioner, [the will accompanying this Petition dated ---------- is the decedent's latest will, and said will came into Petitioner's hands in the following manner] [none exists]:

6. There is attached hereto as a part hereof a list showing to the best of the knowledge of the Petitioner, the names and addresses of: (a) the interested persons as defined in Section 1–101(g) of Article 93 and also, if the decedent died with a will, (b) the witnesses thereto.

7. All other proceedings regarding the decedent's estate are as follows:

8. The reason why any information required to be furnished by Sections 5–201 and 5–202 of Article 93 has not been furnished, is as follows:

WHEREFORE, the Petitioner prays that he be granted letters appointing him personal representative of the decedent's estate and that the aforesaid will, if any, be admitted to [administrative] [judicial] probate, and that the following additional relief be granted:

I (we) do(es) hereby solemnly declare and affirm under the penalties of perjury that the information and representations contained in the foregoing Petition are true and correct according to my (our) knowledge, information and belief.

(signature)

5–207. Caveat proceeding.

(a) *Petition to Caveat.* Whether or not a Petition for Probate has been filed, any interested person may, until the expiration of four months following an administrative or a judicial probate (unless caveat proceedings had once been held and finally disposed of), file a Petition to Caveat the will.

(b) *Effect of Petition.* If the Petition to Caveat is filed before the filing of a Petition for Probate, or after administrative probate, it shall

have the effect of a request for judicial probate. If filed after judicial probate the matter shall be reopened and a new proceeding held as if only administrative probate had previously been determined. In either case the provisions of Part 4 of this Subtitle shall apply.

COMMENT.

In place of all of the provisions of the prior law relating to a notice to caveat and the caveat procedures the Commission has substituted the single, simple procedure contained in Section 5–207 which it believes to be equally effective and protective of the caveator's rights. In the event of a caveat, judicial probate is mandatory. See Section 5–402.

Except for the reduction of the period of caveat from six months to four months (to be consistent with the period within which creditors' claims must be filed) Section 5–207 is intended to follow the present law in §§379 and 381 (Md). With the new procedure here proposed, including the extensive protection granted to interested persons through the requirement of formal notice, the Commission suggests that the sometimes used technique of first filing a notice of intention to caveat [§375 (Md)] is no longer necessary or useful. See also *Karwacki,* "The Right to Contest a Will in Maryland," 16 Md. L. Rev. 61 (1956).

The procedure for the hearing of a caveat case, including the transmission of issues to a court of law, is set forth in Sections 2–105 and 5–404. No change in the present law respecting such procedure is intended.

The Commission also believes that it would serve no useful purpose to outline in the statute the available grounds for caveat. It has assumed, and intends, that the existing law of Maryland will continue to apply; see *Sykes,* Contest of Wills in Maryland (1941), and Note, "The Presumption of Undue Influence arising from a Confidential Relation Between a Testator and Beneficiary in a Will Contest," 17 Md. L. Rev. 153 (1957).

Part 3 — Administrative Probate.

5–301. Nature of proceeding.

Administrative probate is a proceeding instituted by the filing of a petition for such probate by an interested person before the Register for the probate of a will or a determination of the decedent's intestacy, and for the appointment of a personal representative. Subject to the provisions of Section 5–402, such proceeding may be conducted without prior notice, and shall be final, to the extent provided in Section 5–304, subject to the right of interested persons to require judicial probate as provided in Part 4 of this Subtitle.

COMMENT.

For provisions of the present law permitting the Register to grant letters without the necessity of a Court proceeding see §§297, 371 and 376 (Md).

5–302. Action on Petition — in general.

The Register may, upon a request for administrative probate contained in a Petition for Probate, admit a will to probate, and shall appoint one or more personal representatives on the basis of the allegations contained in the Petition. The Register may require additional verified proof, and the same shall be filed in the proceeding.

COMMENT.

For conditions which a personal representative must satisfy at the time of his appointment see Section 6–101.

5–303. Action on Petition — proof of execution.

The Register shall assume due execution of the will (a) if the will appears to have been duly executed and contains a recital by attesting witnesses of facts constituting due execution; or (b), if it does not so appear, or if the will does not contain such a recital, then upon the verified statement of any person with personal knowledge of the circumstances of execution, whether or not the persons were in fact attesting witnesses.

5–304. Finality of action in administrative probate.

(a) *Generally.* Unless a timely request for judicial probate has been filed pursuant to subsection (b) of this Section, or unless such a request has been filed pursuant to Section 5–402 within four months of administrative probate, any action taken therein shall be final and binding as to all interested persons. Except as provided in subsection (b), no defect in a Petition or proceeding relating to administrative probate shall affect the probate or the grant of letters.

(b) *Exceptions.* An administrative probate may be set aside and a proceeding for judicial probate instituted if, following a request by an interested person within eighteen months of the decedent's death, the Court finds that

(1) the proponent of a later offered will, in spite of the exercise of reasonable diligence in efforts to locate any will, was actually unaware of such will's existence at the time of the prior probate; or

(2) the notice provided in Section 2–209 was not given to such interested person nor did he have actual notice of the Petition for Probate; or

(3) there was fraud, material mistake or substantial irregularity in the prior probate proceeding.

COMMENT.

The present Maryland law on revocation of probate is discussed in *Sykes,* §291.

In subsection (b)(1) the Commission felt that a later will should only be considered for probate when the proponent was unaware of its existence at the time of the probate of the prior will. This is at variance with the present law. See §40 (Md).

"Proponent" as used in subsection (b)(1) is intended to include any person interested in the establishment of a later offered will and not exclusively the person originally offering it.

Part 4 — Judicial Probate.

5–401. Nature of proceeding.

Judicial probate is a proceeding instituted by the filing of a petition for such probate by an interested person, or creditor, with the Court for the probate of a will or a determination of the decedent's intestacy, and for the appointment of a personal representative. Such proceeding is conducted after notice as provided in Section 5–403, and shall be final except as provided in Section 5–406. If no Petition is filed within a reasonable time the Register may file same with the approval of the Court.

COMMENT.

The last sentence of this Section is not intended to extend the time for filing a Petition beyond the limits prescribed in Section 5–304.

5–402. When mandatory.

A proceeding for judicial probate shall be instituted at any time before administrative probate or within the period after administrative probate provided by Section 5–304.

(a) at the request of an interested person;

(b) by a creditor in the event that there has been no administrative probate;

(c) if it appears to the Court or the Register that the petition for administrative probate is materially incomplete or incorrect in any respect;

(d) if the will has been torn, mutilated, burned in part or marked in any way so as to make a significant change in the meaning of the will.

(e) if it is alleged that a will is lost or destroyed.

COMMENT.

It is intended under the provisions of Section 5–304 and 5–402 that unless an administrative or judicial probate has in fact been instituted, there is no limitation of time within which such proceedings may be instituted.

5–403. Notice of request for judicial probate; form.

(a) *When given.* Notice that judicial probate has been requested shall be given promptly by the Register to all interested persons as shown in the Petition for Probate and any other documents in his file. It shall be the duty of the petitioner to advise the Register of the names and addresses of all interested persons not previously disclosed to the Register and of whom he may learn prior to the granting of judicial probate, and the Register shall thereupon give notice to such persons. In addition, the Register shall publish a notice in a newspaper of general circulation in the County where judicial probate is requested, once a week for two successive weeks.

(b) *Form of notice.* The notice required by this Section shall be in the following form:

IN THE ORPHANS' COURT
FOR _____, MARYLAND

In re:

ESTATE OF

_____
Deceased

TO ALL PERSONS INTERESTED IN THE
ESTATE OF _____:

YOU ARE HEREBY NOTIFIED THAT A Petition has been filed in this Court by _____ for judicial probate, including the appointment of a personal representative for said estate; and that said Petition will be heard at _____ on the _____ day of _____, 19____, or at such subsequent time or other place to which said hearing may be adjourned or transferred.

_____
Register of Wills

COMMENT.

This Section, together with the published notice required upon the appointment of the personal representative (Section 7–103), and the personal notice required under Section 7–104, is designed to give as full notice personally and by publication as can reasonably be accomplished for the protection of all persons having an interest in the proceeding. It includes, in substance, the provisions of §§377 and 378 (Md) and is designed to assure full compliance with the due process requirements of the Fourteenth Amendment to the U. S. Constitution as propounded in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

5–404. Hearing; witnesses.

(a) *Conduct of hearing.* A hearing for judicial probate shall be a plenary proceeding conducted in accordance with the provisions of Section 2–105. It shall adjudicate the issues raised in such hearing and shall determine the testamentary capacity of the decedent. After such hearing the Court shall appoint one or more personal representatives and shall, if appropriate, revoke, modify or confirm any action taken at the administrative or any prior judicial probate.

(b) *Witnesses to will.* Unless the Court shall otherwise order, the examination of the witnesses to the will shall be conducted by the Register.

COMMENT.

As conditions to his appointment the personal representative must also comply with the provisions of Section 6–101.

The examination of the witnesses to the will in judicial probate will follow the same procedures as provided in the prior law [§§383, 384 and 387 (Md)].

5–405. Effect upon appointment of personal representative.

After the filing of a request for judicial probate and prior to final determination therein, the powers of any personal representative appointed in an administrative probate shall be unaffected except that (a) he shall make no distribution of property without formal order of the Court and (b) the Court may, upon allegations of the unfitness of the personal representative so appointed and of danger to interested persons and creditors and after notice to the personal representative and hearing, suspend the powers of the personal representative and appoint a special administrator pending final determination in the judicial probate proceeding.

5–406. Finality of action in judicial probate.

Except as provided in Section 5–407, any determination made by the Court in a proceeding for judicial probate shall be final and binding as to all persons.

COMMENT.

This Section is intended to include the substance of §382 (Md) making final a judicial decision against the validity of a will, without the right to reconsider its validity in another County. However, it will be subject to the provisions of Section 5–407.

5–407. Successive proceeding.

A judicial probate may be reopened and a new proceeding held if, following a request by an interested person within eighteen months

from the death of the decedent, the Court finds the existence of any fact which would permit the holding of a proceeding pursuant to Section 5–304(b).

Part 5 — Foreign Personal Representatives.

5–501. Letters in Maryland not required.

A foreign personal representative shall not be required to take out letters in Maryland for any purpose.

COMMENT.

The requirement that a foreign personal representative take out letters in Maryland has generally been based on four theories: (i) foreign personal representatives have no power to sue or otherwise act in Maryland without first obtaining authority from a Maryland probate court; (ii) local creditors will be protected by being afforded an opportunity to file claims against the Maryland estate when the Maryland letters are obtained; (iii) letters should be obtained to enable the foreign personal representative to deal with Maryland real estate; and (iv) letters should be obtained to afford the Maryland taxing authorities a better chance to collect Maryland death taxes on Maryland assets.

The Maryland practice has not, however, been successful in affording whatever protection these theories were originally supposed to afford. The rule prohibiting suit by foreign personal representatives has easily been avoided by equitable assignments of the claims. §83 (Md) permitted District of Columbia personal representatives to sue in Maryland. §84 (Md) gave foreign personal representatives authority over stocks and bonds issued by Maryland corporations and public authorities, although §85 (Md) negated the authority of §84 (Md) if letters were obtained in Maryland. The protection of local creditors worked imperfectly because either local creditors were unaware of an administration in Maryland or the rules for the necessity of administration in Maryland were so ambiguous that many foreign personal representatives simply did not bother to take out letters absent some compelling reason.

The so-called "protection" for creditors also involved a hardship on debtors. Under the doctrine of *Citizens National Bank v. Sharp*, 53 Md. 521 (1880), a Maryland debtor generally paid a foreign personal representative at his peril because, if administration in Maryland had been commenced by the foreign personal representative, the Maryland debtor might be liable to pay the Maryland administrator a second time.

The real estate title problem could, in many instances, be solved without letters in Maryland because §95 of Article 21 permitted foreign personal representatives to sell Maryland realty without obtaining Maryland letters. The tax situation was not solved because the Maryland Code set forth no rules for determining whether a foreign personal representative was required to take out letters in Maryland.

The Commission felt that the most desirable method of handling these problems would involve a statutory pattern that would protect Maryland creditors, including the tax authorities, protect Maryland debtors, and insure full disclosure in the land records. These aims can be attained without the necessity of requiring the foreign personal representative to obtain letters in Maryland. Sections 5–502 through 5–505, inclusive, set forth the new pattern.

The Commission has rejected the approach of the UPC which requires ancillary administration in many instances. See 4–101 through 4–401 (UPC) and *Sykes,* §§474 through 476. The Commission has also avoided the use of the phrase "ancillary" administration, which, to many, implies that the Maryland administration is always a non-domiciliary one. This never has been the case in Maryland because the primary administration can be in Maryland even though the decedent was not domiciled in Maryland; if this occurs, the Maryland personal representative can take out "ancillary" letters in the State of the decedent's domicile, in which event it would be improper to refer to the Maryland administration as the domiciliary administration. See *Sykes,* §284 and Comment to Section 5–103. (The Commission notes that the title to §173 of Article 81, which is not part of the official statute, erroneously refers to "ancillary" administration. That statute deals primarily with the situation where the Maryland administration is the prime administration but is an administration of a non-domiciliary; it is not an "ancillary administration").

5–502. Powers of foreign personal representative.

Any foreign personal representative may exercise in Maryland all powers of his office, and may sue and be sued in Maryland, subject to any statute or rule relating to nonresidents.

COMMENT.

See explanation in Comment to Section 5–501. This Section adopts the basic theory of The Uniform Powers of Foreign Representatives Act. Its adoption would eliminate the rules in §§83-85 (Md). See *Sykes,* §§471 through 473. The Commission also proposes the repeal of §87 (Md) which gives to District of Columbia personal representatives certain powers given to Maryland personal representatives. The powers of a District of Columbia or any foreign representative would be governed by the laws of the jurisdiction in which he was appointed.

Since a foreign personal representative could sue and be sued without the need of ancillary administration the Commission felt that the provisions of §388 (Md) were no longer needed. As to the evidentiary aspects of §388 see the Additional Comment to Part 1 of Subtitle IV.

5–503. Procedure for fixing inheritance tax.

(a) *Application.* A foreign personal representative administering an estate which has property located in Maryland and subject to Maryland inheritance taxes shall file a verified application with the Register of any County in which the decedent owned property, and such applica-

tion shall describe all the property owned by the estate in Maryland and set forth the market value thereof and the basis upon which that value has been determined. The Register shall thereafter proceed to fix the amount of tax due and may require such other evidence of value, or make such independent investigation, as he deems appropriate. The Register's determination shall be final and subject to appeal to the Maryland Tax Court.

(b) *Register's receipt.* Upon payment of the tax finally determined to be due, the Register shall issue to the foreign personal representative a receipt.

(c) *No other action necessary.* It shall not be necessary for the foreign personal representative to institute any other proceedings before the Register with respect to the assets subject to the jurisdiction of Maryland.

(d) *Responsibility for payment of other death taxes.* Nothing contained herein shall in any way relieve the foreign personal representative from the responsibility for paying all death taxes due the State of Maryland.

COMMENT.

Because a separate administration will be unnecessary, this Section is required in order to set out a procedure which will enable the inheritance taxes to be paid to the Register of Wills. The procedures for payment of Maryland Estate Tax are already adequate.

This procedure is to be distinguished from the requirements of §173 of Article 81 which deals with Maryland administration of nondomiciliary decedents. See Comment to Section 5–501.

5–504. Real and leasehold property — recording; lien for payment of taxes.

A foreign personal representative may, upon the payment of appropriate fees, record in the land record office in the County in which real or leasehold property owned by the decedent was located an authenticated copy of his appointment as personal representative and of the decedent's will, if any. Unless and until the foreign personal representative pays, or secures to the satisfaction of the Comptroller, the payment of all death taxes due to the State of Maryland with interest and penalties, if any, as provided in Section 5–503, and records among such land records adequate evidence of such payment or security, the said obligations shall constitute a lien against the property. The Comptroller shall issue a certificate of such payment or security in such form as he may deem appropriate.

COMMENT.

Title and possession to all Maryland real estate and leasehold property will automatically vest hereunder in the personal representative, whether Maryland or foreign. See Section 1–301. Any dis-

tribution or sale of the property would be evidenced by a deed to be recorded in the Land Records. The separate provisions dealing with realty owned by foreign decedents, now contained in Article 21, Section 95 and in §88 (Md) would be unnecessary.

The new requirement that evidence of security or payment of Maryland death taxes be evidenced by a certificate recorded in the Land Records will be the most effective way of policing the payment of death taxes due to the State of Maryland. The Commission considered and rejected the suggestion that the tax certificate should refer only to taxes relating to the property whose title must be evidenced in the land records. The tax certificate should also relate to taxes due Maryland on other items, such as tangible personal property. Where real or leasehold property is not owned by the decedent, the Commission believes there is no effective procedure for enforcing a lien on items such as tangible personal property other than the integrity of the foreign personal representative.

5–505. Real and leasehold property — creditors.

(a) *Publication.* A foreign personal representative shall publish once a week for two successive weeks a notice in a newspaper of general circulation in each County in which any real or leasehold property of the decedent was located, announcing his appointment, his name and address, his consent to suit in the County, the name of the Court which appointed him, and a brief description of all real and leasehold property owned by the decedent in the County. He shall record in each appropriate Land Record Office a certification that he has published such notice as required.

(b) *Statement of claim.* Any creditor may, at any time within four months from the date of the first publication of such notice, file a written statement of his claim, substantially in the same form set forth in Section 8–104(b), with the Register and deliver or mail a copy of the statement to the personal representative. The Register shall maintain a book known as the "Claims Against Non-Resident Decedents" book in which all such claims and releases thereof shall be recorded. Unless and until a release of a validly recorded claim has been recorded, or the claim has finally been determined in favor of the personal representative, such claim shall constitute a lien against all real and leasehold property owned by the decedent in the County at his death.

COMMENT.

The procedure in this Section will afford greater protection to Maryland creditors than under present law. After filing a claim, a Maryland creditor could commence an action in Maryland to enforce the claim. The mere filing of the claim would not have any effect on the relevant statute of limitations for instituting suit. The rules of Subtitle VIII would not be applicable to claims against non-resident decedents where there is no Maryland administration.

5–506. Right of Maryland heir or legatee.

In the event a foreign personal representative fails within a reasonable time to transfer the title to real property located in Maryland to the person or persons legally entitled thereto, the Court may by appropriate order direct the transfer of title to such person or persons if: (i) the will, if any, or a copy authenticated pursuant to 28 U.S.C.A. §1738 is filed in the land record office; (ii) all death taxes (with interest and penalties) have been paid as contemplated in Section 5–503; (iii) notice in a form, and to the extent, approved by the Court has been published to the effect that the decedent died owning the real property; and (iv) all claims of creditors, if any, have been satisfied.

ADDITIONAL COMMENT TO PART 5.

As the requirement for ancillary administration has been abolished and the title to real estate would no longer pass directly to the heir or legatee, the Commission felt that the procedure outlined in this Part would adequately protect the decedent's estate, his creditors, the persons entitled to the property and the Treasury of Maryland.

Part 6 — Small Estates.

5–601. In general.

Where the property of the decedent subject to administration in Maryland is established to have a value of $3,000 or less, such estate may be administered in accordance with the provisions of Sections 5–602 to 5–607. No inheritance taxes shall be due or payable on any distribution from any such estate.

COMMENT.

Sections 5–601 through 5–607 are derived substantially from Maryland's present Small Estates Law in §162 (Md), except that the Commission has recommended that the maximum "small estate" qualification be increased from $1,000 to $3,000. See also *Sykes,* §§411 through 420.

§8 (Md) provides that where someone dies during a period of active service with the armed forces and his assets consist *only* of compensation due from the United States for such service, the notice to creditors need be published only once, the time for filing claims be limited to 30 days, and a simplified form of administration be permitted. Because the administration of such an estate would necessarily be simple, and will in most instances be covered by this Part 6, it was felt that the additional simplification would be unnecessary.

§8 (Md) also provides an exemption from Maryland inheritance taxes in such an estate. The Commission's recommendation would provide for equal treatment of all small estates by permitting all such estates to have the exemption regardless of the form of the assets.

5–602. Petition.

A Petition for Administration of a Small Estate may be filed by any person entitled to administration pursuant to Section 5–104 and shall contain, in addition to the information required by Sections 5–201 and 5–202:

(a) A statement that the petitioner has made a diligent search to discover all property and debts of the decedent;

(b) A list of the known property and its value;

(c) A list of the known creditors of the decedent, with the amount of each claim, including contingent and disputed claims;

(d) A statement of any legal proceedings pending in which the decedent was a party.

5–603. Proceedings after Petition.

(a) *Determinations on Petition.* If the Register shall find that the Petition and any additional information filed in the proceeding is accurate, he shall:

(i) Direct that the petitioner serve as personal representative of the small estate;

(ii) Direct the immediate payment of the allowable funeral expenses and the family allowances provided in Section 3–201;

(iii) Direct such sale of property as may be necessary to satisfy such expenses and allowances; and

(iv) If it appears that there will be any property remaining after such payments, admit any will to probate and direct that notice be given in accordance with subsection (b).

(b) *Notice.* If the Register directs a proceeding in accordance with subsection (a)(iv), notice shall be given in the form required by Section 7–103, but the period within which objection must be made to such informal action or within which claims must be filed shall be thirty days from the date of first publication of such notice.

5–604. Duties of personal representative.

(a) *Powers; bond; compensation.* No person appointed as a personal representative in accordance with Section 5–603 shall be required to give bond or be entitled to receive any commissions for the performance of his duties as personal representative.

(b) *Distribution.* After the expiration of notice, if any, which is required by Section 5–603(b), the personal representative shall file proof of publication of such notice; a list of all claims, including contingent and disputed claims, filed since the original Petition and the

amount of such claims. The Court shall hear any objections filed pursuant to such notice and, if satisfied that all action taken pursuant to this Part is proper, shall direct the petitioner to pay all proper claims, expenses and family allowance and to distribute the net estate in accordance with the will or, if the decedent died intestate, in accordance with Part 1 of Subtitle III.

5–605. After-discovered property.

Any property of the decedent discovered after the filing of the Petition shall be reported immediately by Supplemental Petition. If no administration was had in accordance with Section 5–603(a)(iv) because of the failure to include such after-discovered property in the original Petition, the Register shall direct such proceedings. If such after-discovered property increases the value of all property of the decedent to more than $3,000, no further proceedings shall be had under this Part, but administration shall proceed under the other provisions of this Article.

5–606. Fees.

In lieu of all other fees, costs and charges, the Register shall receive a fee of $10 for all services performed in connection with each small estate, plus (a) a fee of 25 cents for each certified copy of the entire proceeding, and (b) the fee for probate of a will, if any.

COMMENT.

This Section is substantially the same as §162(e) (Md); the fee has been increased from $7.50 to $10.00.

5–607. Applicability of other provisions of Article.

Except to the extent inconsistent with the letter and the spirit of Part 6 of Subtitle V, all the other provisions of this Article shall be applicable to a small estate.

COMMENT.

This provision is new. The phrase "except to the extent inconsistent with the provisions of Part 6" is intended to express the thought that even though the application of a provision of this Article (outside Part 6) may not be technically within any specific provision of Part 6, nevertheless, if not inconsistent with the spirit of Part 6 as expressed therein and in the Comments thereto, it should be applicable.

5–608. No administration required.

(a) *Two motor vehicles.* When the only property of a decedent's estate consists of not more than two motor vehicles, the Commissioner of Motor Vehicles may, upon proof satisfactory to him that all debts and taxes owed by the decedent have been paid, transfer the title to

such motor vehicles to the person entitled thereto and, upon application of such person, refund the amount of license fees for the unused portion of the year, calculated on a semiannual basis; and, in such case, no administration of the decedent's estate need be had.

If the person entitled to the motor vehicles is the surviving spouse, son or daughter of the decedent, said person may operate the motor vehicle or vehicles upon the highways of this State until the expiration of the current annual registration in the name of the deceased, without the necessity of applying for or obtaining the registration and certificate of title required under the provisions of Article 66½.

(b) *Boat or vessel.* When the only property of a decedent is a boat or vessel, the appraised value of which does not exceed $1,500, the United States Collector of Customs or the Maryland Department of Chesapeake Bay Affairs may, upon satisfactory evidence that all of the decedent's debts and taxes have been paid, transfer the certificate of registration to such boat or vessel to the person entitled thereto; and no administration shall be necessary under this Article. A verified statement signed by two persons to the effect that they have personal knowledge as to the value of boats of the type of the particular boat involved and that the value of said boat does not exceed $1,500 shall be sufficient evidence as to the value of the boat to warrant the transfer of the registration certificate.

COMMENT.

This Section preserves the provisions of §§260 and 261 (Md). Although the Commission has suggested that the limit for "small estates" be increased from $1,000 to $3,000 it has also recommended the retention of these Sections because of their simplicity and usefulness under the special circumstances of their applicability.

SUBTITLE VI

THE PERSONAL REPRESENTATIVE

Part 1 — Appointment and Issuance of Letters: Accrual of Duties and Powers.

6–101. Conditions of appointment.

As a condition to his appointment, a personal representative shall file (a) a statement of acceptance of the duties of the office, (b) any required bond, and (c) a written consent to personal jurisdiction in any action brought in this State against him as personal representative or arising out of his duties as such, where service of process is effected pursuant to the Maryland Rules at his address shown in the proceedings.

COMMENT.

This Section follows the present practice in Maryland except that it eliminates the necessity for the designation of an agent to receive service of process for a nonresident personal representative.

Likewise, the Commission is of the opinion that there should be no need for the oath now required of the personal representative upon his qualification in §45 and §56 (Md) in view of the provisions of Section 7–404 which subject the personal representative to personal liability for any breach of his fiduciary duties. See §§47 and 57 (Md); 3–301 and 3–303 (UPC). This Section is consistent with §59 of Article 11. See also Sections 5–302 and 5–404 for the procedures for the appointment of the personal representative by the Register (administrative probate) or the Court (judicial probate).

6–102. Bond; form.

(a) *When required.* Every personal representative shall execute a bond to the State of Maryland for the benefit of all interested persons and creditors with a surety or sureties approved by the Register, unless such bond is expressly excused by the decedent's will or by the written waiver of all interested persons. Even if a bond has not been required as a condition of the appointment of a personal representative, the Court may require such bond at any time during the administration upon the petition of an interested person or creditor and for good cause shown. Whenever a personal representative is excused by the will from giving bond, a bond shall nevertheless be given in an amount which the Register or the Court considers sufficient to secure the payment of the debts and Maryland inheritance taxes payable by the personal representative, and the bond shall be conditioned accordingly.

(b) *Surety.* The surety on such bond may be any corporation authorized to act as a surety in the State of Maryland or one or more

individuals approved by the Register. All sureties and the personal representative shall be jointly and severally liable on the bond, unless otherwise ordered by the Court.

(c) *Penalty.* The penalty sum of such bond shall be fixed by the Court or Register in an amount not exceeding the probable maximum value of the property of the estate at any time during administration less (1) the market value, as determined by the Court, of any collateral posted with the Court by the personal representative and (2) the amount of cash belonging to the estate if deposited with a banking institution approved by the Court in an account expressly made subject to withdrawal only in such manner as shall be approved by the Court. The penalty sum may be increased or decreased by the Court at its discretion for good cause at any time during administration.

(d) *Filing.* Every bond executed by a personal representative shall be filed in the office of the Register. Any person may obtain from the Register a copy of such bond certified by him.

(e) *Premium payable out of estate.* Premiums for such bond shall be chargeable against the property of the estate.

(f) *Form of bond.* Such bond shall be substantially in the following form:

> The condition of the above obligation is such, that if the said _____ shall well and truly perform the office of the personal representative of _____, late of _____, deceased, according to law, and shall in all respects discharge the duties required of him by law as personal representative aforesaid without any injury or damage to any person interested in the faithful performance of the said office, then the above obligation shall be void; it is otherwise to be in full force and effect.

(g) *Additional or new security; countersecurity; remedy.*

(1) *Requirement.* The Court may require additional security, new security and countersecurity in accordance with the procedure set forth in Maryland Rule H6.

(2) *Remedy upon failure to comply.* If the personal representative shall not within a reasonable time fixed by the Court give such new security or countersecurity as may be required by order of the Court, if the personal representative shall be removed therefor as provided by Section 6–306, and if such personal representative shall fail to account for and deliver the property belonging to the estate to the newly appointed successor personal representative or special administrator, the Court may direct the bond of such personal representative to be put in suit.

COMMENT.

Subsection (a) requires a bond as a condition of the appointment of a personal representative unless the bond is expressly excused by the testator or by interested persons; compare 3–304 through 3–307 (UPC). The provision for a nominal bond, now contained in §47 (Md), has been retained in substantially the same form on the advice of the Registers of Wills that it is necessary in enough instances to make its retention desirable. A bond may also be required by the Court at any time by a petition of an interested person or a creditor for good cause shown. Provisions with respect to qualifications of surety, recording and form of bond are substantially similar to the provisions of §§43, 47, 55 and 82 (Md).

The provision in subsection (b) as to joint and several liability of sureties and the personal representative, modeled after 3–307(a) (UPC), imposes primary liability (with the personal representative) upon sureties and thus removes some of the limitations upon actions against a surety provided in §117 (Md).

The determination of the penalty of the bond on the basis of the probable maximum value of the property of the estate, modified by collateral posted by the personal representative and cash of the estate deposited in a banking institution approved by the Court, as provided in subsection (c), is modeled after 3–305 (UPC).

Subsection (g), providing for new security, or countersecurity, in the event of a finding of the inadequacy of an existing bond incorporates Maryland Rule H6; if Section 6–102(g) is adopted, §§1 and 2 of Article 90 can be repealed.

The present Maryland law with respect to bonds is discussed in *Sykes,* §§431 through 444.

6–103. Issuance and content of letters.

After appointment, letters shall be issued to the personal representative by the Register. Letters shall contain:

(a) the name and location of the court or Register by whom appointment was made;

(b) the name of the decedent and the personal representative;

(c) the date of his appointment;

(d) the date of probate of the will admitted to probate in the proceeding; and

(e) a statement of whether the personal representative has general powers, extended powers or the limited powers of a special personal representative under this Article; and

(f) the signature of the Register and the seal of the Court.

6–104. Form of letters.

Letters of administration shall be in substantially the following form:

LETTERS OF ADMINISTRATION

To all persons who may be interested in the Estate of _____ _____, deceased: Administration of the Estate of the deceased has been granted on _____ to _____ [and the Will of the deceased was probated on _____ _____.] Said personal representative has _____ powers.

(SEAL) WITNESS:

_____

Register of Wills for _____

COMMENT TO SECTIONS 6–103 AND 6–104.

The information required under the provisions of Section 6–103 is more complete than that now required under §58 (Md).

6–105. Time of accrual of duties and powers.

The duties and powers of a personal representative commence upon the issuance of his letters, but his acts occurring prior to appointment, when done in good faith, shall have the same effect as those occurring thereafter. A personal representative may ratify and accept acts done on behalf of the estate by others where such acts would have been proper for a personal representative.

COMMENT.

This Section, adapted from 3–401 (UPC), codifies the doctrine that the authority of a personal representative relates back to death from the moment it arises. It also makes it clear that authority of a personal representative arises upon the issuance of his letters which, under Section 6–101 cannot occur until the appointee has qualified. The sentence concerning ratification is designed to eliminate technical questions that might arise concerning the validity of acts done by others, prior to appointment.

This Section, together with Sections 6–201 and 6–204 and, inferentially, with other Sections of this Article cover the various provisions now contained in §§41 and 54 (Md).

Part 2 — Several Personal Representatives.

6–201. Priority among different letters.

A person to whom letters are first issued has exclusive authority under the letters until his appointment is terminated or modified. If, in the absence of such termination or modification, letters are afterwards issued to another, the first appointed personal representative may recover any property of the estate in the hands of, and demand and secure an accounting from, the personal representative subsequently appointed, but the acts of the latter done in good faith before notice of the first letters, shall not be void for want of validity of appointment.

COMMENT.

This Section follows 3–402 (UPC). The qualification relating to "modification" of an appointment is intended to refer to the change that may occur in respect to the exclusive authority of one with letters upon later appointment of a co-representative or of a special administrator (Part 4 of Sub-title VI). See last sentence of Comment following Section 6–105.

6–202. Powers and duties of successor personal representative.

A successor personal representative shall have the same powers and duties to complete the administration and distribution of the estate as the original personal representative, including the powers granted in the will, but excluding any power expressly made personal to the executor named in the will.

COMMENT.

§192 of Article 16 provides that where a will gives the executors the powers to sell, mortgage, lease or otherwise dispose of property, any successor executors shall have the same powers, unless a contrary intent is set forth in the will. Section 6–202 adopts the same rationale and extends it to all powers and duties of the personal representative. The Commission also recommends that those provisions of §192 of Article 16 relating to executors can be deleted, if Section 6–202 is adopted. This Section follows 3–417 (UPC).

6–203. Co-personal representatives; when joint action required.

When two or more persons are appointed co-personal representatives, the concurrence of all is required on all acts connected with the administration and distribution of the estate, except: (a) where the act involved is receiving or receipting for property due the estate, (b) where all personal representatives cannot readily be consulted in the time reasonably available for emergency action, (c) where a personal representative has validly delegated to a co-personal representative his power to act, or (d) where the will or any statute provides otherwise.

Persons dealing with a co-personal representative without knowledge that he is not the sole personal representative shall be as fully protected as if the person with whom they dealt had been the sole personal representative.

COMMENT.

With certain qualifications, this Section, which follows 3–418 (UPC), is designed to compel co-personal 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-personal representative who abdicates his responsibility to co-administer the estate by a blanket delegation breaches his duty to interested persons as described by Section 7–101. However, even in the event of a limited delegation the delegating co-personal representative could still be held responsible for improprieties by the co-representative to whom the delegation was made.

The Commission felt that the rule of this Section is desirable, although it has the effect of modifying the present law of Maryland that in some circumstances "co-executors are regarded in law as one individual, and the acts of one . . are deemed to be the act of all" as reflected in the Maryland cases. *Crothers v. Crothers,* 121 Md. 114 (1913); *Sykes,* §452.

Subsection (d), however, permits this rule to be varied when the will, or some other statute of Maryland or any other jurisdiction provides otherwise. An example of such a statute is §44 of Article 23 which provides for a majority vote by the holders of stock in a Maryland corporation where there are three or more fiduciaries. See also §315 of Article 23 with respect to entry into safe deposit box.

6–204. Powers of surviving co-personal representative.

Unless the will otherwise provides: (a) every power exercisable by co-personal representatives may be exercised by the survivors or survivor of them when the appointment of one is terminated; and (b) where one of two or more nominated as co-personal representatives is not appointed, those appointed may exercise all the powers incident to the office.

COMMENT.

This Section follows 3–419 (UPC). The Commission felt that this Section was a desirable addition to this Article because there is no Maryland statute on the subject. See *Sykes,* §458.

Part 3 — Suspension and Termination of Powers.

6–301. Suspension.

On written application of any interested person the Court may suspend any of the powers and duties of the personal representative in accordance with the provisions of Rule BB (Injunction) of the Maryland Rules.

COMMENT.

The Commission felt that the provisions of Section 6–301, which are new, would constitute a desirable addition to the Maryland law.

6–302. Termination — generally.

The appointment of a personal representative shall be terminated in accordance with Subtitle X and may be sooner terminated by his death, disability, resignation or removal as provided in Sections 6–303 through 6–307.

6–303. Termination — effect.

(a) *Powers and duties.* Termination ends the right and power pertaining to the office of personal representative as conferred by will or by this Article. However, a personal representative whose appointment has been terminated shall (i) unless otherwise ordered by the Court, perform acts necessary to protect property belonging to the estate and (ii) deliver such property to the successor representative.

(b) *Liability.* Termination does not discharge a personal representative from liability for transactions or omissions occurring before termination, or relieve him of the duty to protect property subject to his control, to account therefor and to deliver such property to his successor. Termination shall not affect the personal jurisdiction to which he has given consent pursuant to Section 6–101 in proceedings which may be commenced against him arising out of the performance of his duties as personal representative.

(c) *Acts prior to termination.* All lawful acts of a personal representative before the termination of his appointment shall remain valid and effective.

COMMENT.

For the source of Sections 6–302 and 6–303, see 3–309 (UPC); also §41 (Md).

6–304. Termination — death or disability.

The appointment of a personal representative shall be terminated by his death or a judicial determination of his disability. In either such case, unless there is a surviving personal representative the personal representative of a deceased personal representative or the person appointed to protect the estate of a personal representative under legal disability shall have the duty to protect property belonging to the estate being administered by the deceased or disabled personal representative, shall have the power to perform acts necessary for the protection of property, shall immediately account for and deliver the property to a successor personal representative or special administrator, and shall immediately apply to the Court for the appointment of a special administrator or successor personal representative to carry on

the administration of the estate which was being administered by the deceased or disabled personal representative.

COMMENT.

See 3–310 (UPC). The provisions of Section 6–304 replace the cumbersome rules of §§77 through 81 (Md). See also *Sykes,* §§381–388.

6–305. Termination — resignation.

A personal representative may resign his position by filing a written statement of resignation with the Register after he has given at least 15 days written notice to all interested persons of his intention to resign. If, within such period, no one applies for the appointment of a successor personal representative or special administrator, and no appointment is made within such period, the resigning personal representative may apply to the Court for the appointment of his successor. Upon the appointment of such successor the resignation shall be effective and the resigning personal representative shall immediately account for and deliver the property belonging to the estate to such successor or special administrator. The resignation of a co-personal representative shall be effective upon the giving of notice and the filing of the statement of resignation as provided herein.

COMMENT.

See 3–311(e) (UPC). *Cf.,* §42 (Md) and *Sykes,* §515.

6–306. Termination — removal.

(a) *Cause for removal.* A personal representative shall be removed from office upon a finding by the Court that he (i) misrepresented material facts in the proceedings leading to his appointment, (ii) wilfully disregarded an order of the Court, (iii) is unable or incapable, with or without his own fault, to discharge his duties and powers effectively, (iv) has mismanaged property, or (v) has failed, without reasonable excuse, to perform any material duty pertaining to the office. Notwithstanding the existence of cause for removal for failure to perform any material duty pertaining to the office the Court may continue the personal representative in office if it finds that such continuance would be in the best interests of the estate and would not adversely affect the rights of interested persons or creditors.

(b) *Hearing.* A hearing shall be conducted by the Court prior to the removal of any personal representative. Such hearing may be held on the Court's own motion, on motion of the Register, or on written petition of any interested person. Notice of such hearing shall be given by the Register to all interested persons. After such notice has been given to the personal representative, he may exercise only the powers of a special administrator as permitted by Section 6–402.

(c) *Appointment of successor.* Upon the removal of a personal representative the Court shall, at the same time, appoint a successor personal representative or a special administrator.

(d) *Duty of removed personal representative.* A personal representative who is removed from office shall immediately account for and deliver the property belonging to the estate to such successor or special administrator.

COMMENT.

See 3–312 (UPC); also §§4, 273 and 274 (Md) providing the statutory authority for removal under present law. See Note, "Removal of Administrator Because of Conflict of Interests," 17 Md. L. Rev. 263 (1957), and *Sykes,* §§503 through 514 and 863.

The Commission suggests that the procedures set forth in §275 (Md) relating to the removal of personal representatives and guardians in war service are unnecessary, and as to personal representatives the subject is adequately covered in Section 6–306.

Subsection (c) of Section 6–306 is derived substantially from §277 (Md). Subsection (d) is derived substantially from §276 (Md).

6–307. Termination — change in proceeding.

The appointment of a personal representative who has been appointed by administrative probate is terminated by a timely request for judicial probate. Subject to any order in the proceeding for judicial probate a personal representative previously appointed shall have the powers and duties of a special administrator until the appointment of a personal representative in the judicial probate proceeding. Nothing in this Section is to be construed to prohibit the reappointment of a person whose appointment as a personal representative is terminated by a request for judicial probate.

COMMENT.

See 3–313 (UPC).

6–308. Termination — compensation.

A personal representative whose appointment is terminated may receive for his services such compensation, if any, as may be awarded by the Court at the time of the termination of his appointment, but not to exceed an appropriate proportion of the statutory limit allowable under Section 7–601.

COMMENT.

The Commission suggests that any allowance for such services must necessarily be left in the broad discretion of the Court because of the varied circumstances under which a termination could occur, such as death within a week, or two years, after appointment, removal for misfeasance in office, etc.

Part 4 — Special Administrator.

6–401. Purpose of appointment; qualifications.

(a) *When appointed.* Upon the filing of a Petition by an interested party, a creditor or the Register, or upon the motion of the Court, a special administrator may be appointed by the Court whenever it is necessary to protect property prior to the appointment and qualification of a personal representative or upon the termination of appointment of a personal representative and prior to the appointment of a successor personal representative.

(b) *Qualifications.* Any suitable person may be appointed as a special administrator, but special consideration shall be given to persons who will or may be ultimately entitled to letters as personal representatives and are immediately available for appointment.

COMMENT.

The special administrator eliminates the need for the miscellany of administrations that proliferate throughout Article 93. Accordingly, the Commission recommends the abolition of letters ad colligendum [§§67–73 (Md)]; letters durante minoritate [§§74, 76 (Md)]; and letters pendente lite [§§75–76 (Md)]. See also, *Sykes,* §§361–367 and §§401–403.

6–402. Bond.

The requirements for the filing of a bond, and all of the other provisions of Section 6–102 relating to the bond of a personal representative shall be equally applicable to a special administrator.

COMMENT.

The Comment with respect to bond for a personal representative under Section 6–102 is also applicable with respect to bond for special administrator.

6–403. Powers and duties.

A special administrator shall have the duty to collect, manage and preserve property and to account therefor to the personal representative upon his appointment. A special administrator has all powers necessary to collect, manage and preserve property. In addition, a special administrator has such other of the powers enumerated in Sections 7–401 and 7–402 as may be designated from time to time by Court order.

6–404. Termination of appointment.

The appointment of a special administrator terminates either upon the appointment of a personal representative or in the manner prescribed in Part 3 of this Subtitle; and the powers of a special administrator may be suspended or terminated in the same manner as is prescribed in Part 3 of this Subtitle for the suspension and termination of the powers, or the removal, of a personal representative.

SUBTITLE VII

ADMINISTRATION OF THE ESTATE

Part 1 — Duties of Personal Representative; Notice of Appointment to Heirs, Legatees and Creditors.

7–101. Duties of personal representative — generally; time for distribution of assets.

(a) *Fiduciary responsibility.* A personal representative is a fiduciary who, in addition to the specific duties expressed in this Article, is under a general duty to settle and distribute the estate of the decedent in accordance with the terms of the will and this Article as expeditiously and with as little sacrifice of value as is reasonable under all of the circumstances. He shall use the authority conferred upon him by this Article, by the terms of the will, if any, by any order in proceedings to which he is party, and by the equitable principles generally applicable to fiduciaries, fairly considering the interests of all interested persons and creditors.

(b) *Time for distribution.* Unless the time of distribution shall be extended by order of Court for good cause shown, the personal representative shall distribute all the assets of the estate of which he has taken possession or control within the time provided in subsections (a) (i) and (b) of Section 7–305 for rendering his first account.

COMMENT.

Subsection (a) is derived from 3–403 (UPC). It and the next Section are especially important because they state the basic theory underlying the duties and powers of the personal representative and the relationship he bears to interested persons. The fundamental responsibility is that of a trustee, although, unlike many trustees, a personal representative's authority is derived from appointment by the Court. For the right of an interested person to petition the Court with regard to questions concerning the estate or its administration see Sections 2–102 and 7–403.

As the Commission has recommended in Section 7–305 that the period for filing the first account should be reduced from fifteen months to a little over six months, it felt that the time for distributing some if not all of the estate assets should properly be required at the same time unless a special order of Court extending the time, for good cause shown, is obtained.

The Commission recognizes that in many cases, such as where, in a federally taxable estate, the use of the alternate valuation date one year after the date of death is significant, or where the holding of some if not all of the assets for a longer period is desirable, *i.e.*, until the completion of the federal estate tax audit, the personal representative should delay distribution, and would undoubtedly be granted an order of Court therefor. But, in the many cases where such problems as federal estate taxes are not involved, an effort to make an

earlier distribution should be required. Second, if not equal, to the complaint of the public as to the expense of administration of decedents' estates is the unreasonable delay permitted by presently established and accepted procedures.

§112 (Md) sets forth the actions which may be brought by or against personal representatives, including the special rule relating to slander. This section of the present law has been omitted since the matters are now covered by Maryland Rule 205a. See also Sections 8–103 and 8–104.

7–102. Duties of personal representative — possession and control of estate.

Every personal representative has a right to, and shall take, possession or control of the decedent's estate, except that property in the possession of the person presumptively entitled thereto as heir or legatee shall be possessed by the personal representative only when reasonably necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by the heir or legatee shall be conclusive evidence, in any action against the heir or legatee for possession thereof, that the possession of the property by the personal representative is reasonably necessary for purposes of administration. The personal representative may maintain an action to recover possession of any property or to determine the title thereto.

COMMENT.

Section 1–301 provides for the devolution of title on death. This Section 7–102 deals with the personal representative's duty and right to possess assets. It proceeds from the assumption that it is desirable whenever possible to avoid disruption of possession of the decedent's assets by his legatees or heirs. But, if the personal representative decides that possession of an asset is necessary or desirable for purposes of administration, his judgment is made conclusive in any action for possession that he may have to institute against an heir or legatee. Nothing in this Section is intended to preclude an heir or legatee from questioning the judgment of the personal representative in a later action for surcharge for breach of fiduciary duty; the Section is designed to make clear the personal representative's administrative authority as it relates to possession of the estate.

The Commission concluded that Section 7–102 is a desirable addition to the Maryland law because the questions dealt with in the Section frequently arise and there are presently no adequate provisions with regard to the subject matter. See, also, the Comment following Section 1–301 and 3–409 (UPC).

7–103. Notice of appointment to heirs, legatees and creditors; form.

A personal representative shall upon his appointment publish a notice in a newspaper of general circulation in the County of his ap-

pointment once a week for three successive weeks, announcing his appointment and address, and notifying creditors of the estate to present their claims. He shall file with the Register a certification that he has published such notice as required. Such notice shall be substantially in the following form.

TO ALL PERSONS INTERESTED IN THE ESTATE OF _____:

This is to give notice that the undersigned, _____ whose address is _____, has been appointed personal representative of the estate of _____ who died on _____.

All persons having any objection to such appointment [or to the probate of the decedent's will] shall file the same with the Register of Wills of _____ on or before _____ [four months from the date of first publication].

All persons having claims against the decedent must present their claims to the undersigned, or file the same with the said Register of Wills on or before _____ [four months from the date of the first publication.]

Any claim not so filed on or before such date shall be unenforceable thereafter.

_____

Personal representative

Date of first
publication:

COMMENT.

This Section contains two significant changes from the current Maryland law.

§123 (Md), in prescribing the customary notice to creditors, does not make notice to creditors a mandatory requirement in each estate. Of course, in most estates the personal representative would always cause the notice to be published since if the notice were not published the personal representative would continue to be liable for any claims of creditors. The Commission feels that the published notice to creditors should be a requirement in every estate. The published notice to creditors provides the principal means of notice of the decedent's death to many creditors. The Commission changed the number of weeks, feeling that three insertions, which is the number used in mortgage foreclosures, is more than adequate to provide the type of notice intended. See Rule W74 a 2(i).

The requirement that the personal representative certify to the Court that the notice has been published is intended to include the essence of §§125–127 (Md), inclusive.

The other substantial change is that the periods of limitations for the filing of claims by creditors have been changed. Under the Commission's proposal, creditors, in order to hold the personal representative liable if he made a distribution of the estate without honoring a valid claim, would have four months instead of the six months period in §123 (Md) after the date of the notice in which to file their claims. This Article also provides for a four month period of limitations against the heirs and legatees of the estate, which is entirely new in the Maryland law. For a more complete discussion on the periods of limitations on all claims, see the Comment following Section 8–103.

The procedures provided in Sections 7–103 and 7–104 are designed to comply with the demands of the due process of law provisions of the Fourteenth Amendment to the U. S. Constitution with regard to notice and opportunity to be heard; see, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). See, also, Section 5–403 as to the additional requirements for judicial probate.

7–104. Personal notice to heirs and legatees.

Not later than 15 days after his appointment every personal representative (except a successor personal representative when notice under this Section had already been given, or a person appointed pursuant to judicial probate) shall advise the Register of the names and addresses of the heirs of the decedent, and of the legatees, if any, to the extent known by him, so that the Register may issue the notices provided in Section 2–209.

COMMENT.

This Section requires the personal representative to give the necessary information to the Register so that all persons who appear to have an interest in the estate as it is being administered shall be advised of his appointment. It would include notice to the heirs whether or not there is a will. This Section was adapted from 3–405 (UPC). Although the latter required notice to the heirs only in the event the decedent leaves no will, the Commission recommends that all persons who might have an interest in the estate should be notified, regardless of whether they were mentioned in the will, if they would take by intestate succession.

The effect of this Section may be to have a new list similar if not identical to that required in the Petition for Probate, but the Commission felt that in each administration there should be a complete or "official" list on the sole reliance of which certain acts such as the notice in Section 2–209 may depend.

The Draftsmen of the Uniform Probate Code also placed the responsibility on the personal representative to send the notices. The Commission believes that it would be better practice to have the Register send the notices so that there would be, in effect, a double check that the notices are sent. This is consistent with the requirements of §291 (Md) and ties in with Section 2–209.

Part 2 — Inventory and Appraisal.

7–201. Generally.

(a) Subject to the provisions of Section 7–205, a personal representative shall, within three months after his appointment, prepare an inventory of property owned by the decedent at the time of his death, listing each item in reasonably descriptive detail, and indicating its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any such item. Such inventory shall include:

(1) real property;

(2) furniture, household goods and furnishings, wearing apparel and jewelry;

(3) corporate stocks;

(4) debts owed to the decedent, including bonds and notes and debts owed by the personal representative;

(5) bank accounts, building, savings and loan association shares and money;

(6) any other interest in property, tangible or intangible, owned by the decedent which passes by testate or intestate succession.

(b) The personal representative shall file in the proceeding (1) the inventory or (2), if he is permitted to act under Section 7–402, a certificate that a copy of the inventory has been mailed to all interested persons.

COMMENT.

The statutory framework of the inventory filing system now a part of the Maryland law is cumbersome, unnecessarily prolix and badly patched in several places. The Commission believes that substantial improvement may be gained by repealing §§225 to 254 (Md), inclusive, and substituting Sections 7–201 through 7–205 in their place.

These Sections (7–201 through 7–205) provide for the general retention of the existing inventory filing system, with modifications aimed principally at verbal clarity, organizational symmetry and administrative convenience. The major substantive reform here proposed is the elimination of the mandatory aspects of the court-appointed appaiser system of valuation.

In addition, Section 7–201(b) provides an optional method in which a personal representative having the extended powers provided in Section 7–402 may handle an inventory. If he elects to send copies to all persons directly concerned with the manner of administration, information concerning the assets of the estate will not become a part of the public records of the Court. The alternative procedure is to file the inventory with the Court and give copies to those persons upon request. This procedure would be indicated in estates where a large number of persons are "interested" and the burden of sending

copies to all would be substantial. The Court's role in respect to the second alternative is simply to receive and file the inventory with the file relating to the estate. Note, however, the obligation of the personal representative to give notice under Section 7–501. See also Section 7–307 as to information which must be filed with respect to inheritance taxes and taxes on commissions.

It is important to consider the history and background of the present practice in Maryland. The obvious original purpose for requiring the filing of inventories with the Court, as required under present law, was to afford an opportunity for those interested in a decedent's estate to know or be able to discover its extent and composition. An expression of this purpose may be found in Section 1 of subchapter 6 of Chapter 101 of the Laws of 1798, which Chapter effected the first, as well as the most recent, systematic and comprehensive Maryland enactment on the subject of wills and estates. This Section is presently codified, without amendment, as §225 (Md). Subsequently, of course, inventories came to be used for the purpose of setting a value on interests subject to the payment of inheritance tax.

Taking a narrow and functionally analytic view of inventories, both the information and the tax purposes to be served by them might well be served by combining in a single document the information normally contained in an inventory with that normally contained in an account. Indeed, it has been suggested that in large estates a duplicate original Federal Estate Tax Return could well be filed in lieu of both inventory and account.

However efficient this might be, it is submitted that retaining the present requirements of filing inventories, when the alternative procedure herein provided for those having extended powers is not to be followed, and requiring inventories to be filed in the form and manner that has varied little since 1798, has the unannounced but advantageous effect of providing early control over the decedent's representative: it makes him get quickly about his duties. When a person dies, orderly devolution of his estate requires that the personal representative be given legal sanction and authority to discover his assets and take possession of them.

ADDITIONAL COMMENTS RELATING TO THE PRESENT LAW.

It is recommended that the inventory exception for wearing apparel, laid up family provisions, heirlooms and ornaments of a widow contained in §§241, 242 and 244 (Md) be repealed. Their special importance has vanished since their original enactments well over a century ago.

The present treatment of sperate and desperate debts [§245 to §247 (Md)] should be repealed. The fiduciary duty of the personal representative to collect debts owed to the decedent, by suit or otherwise, is sufficient to the purpose.

The requirement that purchase money of land sold by a decedent and conveyed by his administrator be returned as a sperate debt [§250 (Md)] is unnecessary.

The Commission has recommended that §13 and §14 (Md) be repealed. These sections have remained unchanged since 1820. They

provide that every administrator may return a list of debts due from his decedent which shall be recorded by the Register and a certified copy of which shall be prima facie evidence of the amount of debts due by the decedent in a court in which the administrator alleges insufficient assets, but shall not be evidence of any claim controverted by the administrator and shall not take any debt out of the plea of limitations. The Commission felt that neither section serves any useful purpose.

The elaborate provisions now contained in §§248 and 249 (Md) dealing with debts owed by an executor or administrator are not really necessary as long as the personal representative discloses and inventories his debt, or a reasonable opportunity is afforded others to make him do so. The provisions of Section 7–201(a)(4) and (b) accomplish these objectives when considered in conjunction with Section 7–501.

7–202. Appraisers.

The value of each item listed in the inventory shall be fairly appraised as of the date of death and stated in the inventory. As to corporate stocks listed on any national or regional exchange and as to items in categories (4) and (5) of subsection (a) of Section 7–201, the appraisal may be made by the personal representative. As to items in the other categories, the personal representative shall secure an independent appraisal. The personal representative may select either of the following methods of independent appraisal:

(a) *Officially appointed appraisers.* The personal representative, may apply for appraisal by appraisers designated by the Register under Section 2–301(a) or Section 2–302; or

(b) *Special appraisers.* The personal representative may employ a qualified and distinterested appraiser to assist him in ascertaining the fair market value as of the date of the decedent's death of any asset the value of which may be fairly debatable. Different persons may be employed to appraise different kinds of assets included in the estate. The names and addresses of any appraiser shall be indicated on the inventory with the item or items he appraised.

(c) *Fees.* Reasonable appraisal fees shall be allowed as an administration expense.

COMMENT.

Subsection (a) provides for an official appraisal system like that presently followed in Baltimore City. Subsection (b), on the other hand, follows precisely 3–407 (UPC).

7–203. Supplemental inventory; reappraisal.

Whenever any property not included in the original inventory comes to the knowledge of a personal representative, or whenever the personal representative learns that the value indicated in the original

inventory for any item is erroneous or misleading, he shall make a supplemental inventory or appraisal showing the market value as of the date of the decedent's death of the item, or the revised market value, and the appraisers or other data relied upon, if any, and shall file it with the Court (if the original inventory was filed) or, if he is permitted to act under Section 7–402, he shall file a certificate that a copy of the supplemental inventory has been mailed to all interested persons.

COMMENT.

Cf. 3–408 (UPC).

7–204. Revision of inventory.

The State of Maryland or any interested person may, at any time before the estate is closed, petition the Court for revision of any value assigned to any item of inventory and the Court may, after hearing, require such revision as it may deem appropriate.

ADDITIONAL COMMENT ON SECTIONS 7–202 THROUGH 7–204.

The foregoing Sections, together with Sections 2–301 through 2–303, contain all of the essentials of appraisals contained in §§226 through 234 (Md) of the present law. The changes give the personal representative the power himself to appraise those items the value of which are not likely to cause dispute — listed securities, debts, money and money accounts — and give him the additional power to determine whether to use either special appraisers of his own selection or officially appointed appraisers to value the items which ought properly to be given independent treatment.

The present appraisal methods used in different subdivisions of the State have been subjects of considerable criticism. The Commission believes that the personal representative should have the opportunity to seek, as he often does now, genuinely professional assistance without having thereafter to present the professional's appraisal to an official appointee who may perhaps be less qualified, but who will still charge an additional fee for his official activity.

Sections 7–203 and 7–204 make it clear that the inventory and appraisal portion of administration is under the ultimate control of the Court, so that persons who might dispute either the composition or the valuation of the probate estate will have a forum within which to present their views.

§235 (Md) which, since its enactment as Chapter 669 of the Laws of 1916, has sought to require that a true copy of an appraisal be delivered by the appraisers to the local Supervisor of Assessments, to be forwarded to the State Tax Commission which may review it and, after hearing, direct changes to be made, should be repealed. It has been ignored in practice since 1939 and in law since 1957. *40 Ops. A.G.* 309, 312. It serves now only to confuse the tax review process.

7–205. Inventory of successor personal representative.

Within three months of the date of his appointment, any successor personal representative shall return either a new inventory to stand in place of the inventory filed by his predecessor or a written consent to be answerable for the items as listed and valued in the inventory filed by his predecessor.

COMMENT.

This is derived from §238 (Md) and is intended to preserve the observation that the Maryland law of administration "seems to contemplate a general practice of filing successive inventories for successive administrators." *Brown v. Tydings,* 149 Md. 22, 25 (1925).

Part 3 — Accounting.

7–301. Duty to account.

Every personal representative has the duty to prepare written accounts of his management and distribution of property at the times and in the manner prescribed in this Part and to file in the proceeding (a) the account or (b) a certificate that copies of the account have been mailed to all interested persons as permitted by Section 7–402.

COMMENT.

The alternative contained in clause (b) is new. This provision conforms to the theory discussed in the Comment to Section 7–201.

In preparing each account the personal representative should refer to the provisions of Section 7–304, formerly §5 of Article 75B (the Revised Uniform Principal and Income Act), which deals in detail with the accounting procedures to be followed in the settlement and distribution of a decedent's estate, including the handling both of expenses and income.

7–302. Initial account.

The initial account of the administration of the decedent's property shall contain the personal representative's certificate of:

(a) the total value of property as shown in all inventories made prior to the date of the account;

(b) all receipts of the estate during the period of administration;

(c) the date of each purchase, sale, lease, transfer, compromise, settlement, disbursement or distribution of assets of the estate, a description of each such transaction, and a statement of the amount by which it affects the amounts referred to in paragraphs (a) and (b);

(d) the value of any assets remaining in the hands of the personal representative; and

(e) a statement of whether the personal representative believes there are or may be any assets not referred to in any inventory, the nature of such assets, the extent of any effort to locate such assets, and any other information which the personal representative may deem desirable or appropriate.

COMMENT.

The requirements for the information to be contained in the account as provided in Section 7–302 are similar to those contained in §§5, 6 and 17 (Md). The provisions of §2 (Md), which provided that before the Court could pass the first administration account the personal representative would have to file with the Register a certificate that any real property owned by the decedent had been transferred on the assessment records have been deleted. The Commission felt that §2 was no longer of significance since, under this draft, the personal representative would have to execute a deed in any event, which would have to be recorded among the land records, in order to fully administer the estate.

Subsection (d) is not intended to imply that a revaluation need be made at the time of any accounting.

As real property is considered, like personal property, a part of the probate estate subject to the ownership and control of the personal representative, and as Section 7–302 provides for the reporting of any sale of either real or personal property in the next succeeding account of the personal representative, the provisions of §316 and §327 (Md) relating to the reporting of any such sale for ratification by the Court are omitted.

Premiums on the bond of a personal representative will continue to be a disbursement shown in the administration account. §9 of Article 24, which also treats bond premiums as an allowable expense, is unnecessary and can be repealed.

7–303. Subsequent accounts.

After an initial account has been rendered, subsequent accounts, whether filed by the same personal representative or by a successor, shall contain the personal representative's certificate of:

(a) the value of any assets remaining in the hands of the personal representative as shown in the last account;

(b) the value of assets as shown in any inventory made since the last account;

(c) all receipts of the estate since the date of the last account;

(d) the date of each purchase, sale, lease, transfer, compromise, settlement, disbursement or distribution of assets since the last account, a description of each such transaction, and a statement of the amount by which it affects the amounts referred to in paragraphs (a), (b) and (c);

(e) the value of any assets remaining in the hands of the personal representative; and

(f) a statement as required by Section 7–302 (e).

7–304. Treatment of expenses and income during administration.

(a) *Expenses.* Unless the will otherwise provides and subject to subsection (b), all expenses incurred in connection with the settlement of a decedent's estate, including debts, funeral expenses, estate taxes, interest and penalties concerning such taxes, family allowances, fees of attorneys and personal representatives, and court costs shall be charged against the principal of the estate.

(b) *Income.* Unless the will otherwise provides, income from the assets of a decedent's estate after the death of the testator and before distribution, including income from property used to discharge liabilities, shall be determined in accordance with the rules applicable to a trustee under Article 75B and shall be distributed as follows:

(1) to specific legatees, the income from the property to which they are entitled, respectively, less taxes, ordinary repairs and other expenses of management and operation relating to such property, and an appropriate portion of interest accrued since the death of the decedent and of taxes imposed on income (excluding taxes on capital gains) which accrue during the period of administration;

(2) to all other legatees, except legatees (other than a surviving spouse) of pecuniary legacies not in trust, the balance of the income, less taxes, ordinary repairs and other expenses of management and operation relating to all other property from which the estate is entitled to income, the balance of interest accrued since the death of the decedent, and the balance of taxes imposed on income (excluding taxes on capital gains) which accrue during the period of administration, in proportion to their respective interests in the undistributed property of the estate computed at the times of distribution on the basis of inventory value.

(c) *Income to trustee.* Income received by a trustee under subsection (b) shall be treated as income of the trust.

COMMENT.

This Section, in substantially the same form, presently appears as §5 of Article 75B (the Revised Uniform Principal and Income Act). In view of this relocation a reference should be inserted in Article 75B to note the removal.

7–305. When to render accounts.

(a) *Generally.* Accounts shall be rendered by the personal representative:

(1) within six months from the time notice is given pursuant to Section 7–103;

(2) within six months after the account referred to in paragraph (i) and within six months of each account thereafter until the estate is closed pursuant to Subtitle X;

(3) upon termination of his appointment, as provided in Part 3 of Subtitle VI;

(4) at such other times as may be ordered by the Court.

(b) *Extensions.* Upon written application of the personal representative stating substantial reasons for the request, the Court may extend the time for rendering an account. No such extension shall be for a period of more than thirty days. See Section 7–301(b).

COMMENT.

Under §§1 and 3 (Md) the personal representative is required to file with the Court his first account within fifteen months of his appointment, and subsequent accounts every six months thereafter. See also *Sykes,* §864. The Commission recommends that the first account should be filed within six months [see subsection (a)(i)] in view of the fact that every effort should be made to encourage the prompt administration and distribution of the estate, and since reports of sale have been abolished in favor of having such information included in the account.

The provisions of subsection (a)(iii), which require the filing of an account on the termination of a personal representative's appointment, are similar to the provisions of §§16 and 276 (Md).

The authorization provided in subsection (b) for an extension of the time to file an account is similar to the provisions of §4 (Md) except that the maximum period for an extension has been reduced from six months to 30 days.

7–306. Failure to render account.

Upon his failure to render an account or to file such account or certificate as required in this Part, a personal representative may be removed as provided in Section 6–306. In addition, he shall be liable to interested persons as provided in Section 7–404.

COMMENT.

This Section is derived from §4 (Md), but the Commission suggests that the remedies of sequestration, attachment and imprisonment provided in §276 (Md) are not appropriate, and so have been deleted. See also *Sykes* §863.

7–307. Payment of inheritance tax and tax on commissions.

(a) *Generally.* Inheritance taxes due with respect to any distribution, and taxes on commissions, shall be paid by the personal representative to the Register. An inheritance tax due with respect to any legacy shall be paid at the time of accounting for its distribution. Failure to pay the tax when due or to make full disclosure of the information necessary to the Register's determination of the tax due may subject a personal representative to reduction or forfeiture of commissions.

(b) *Personal representative with extended powers.* A personal representative exercising extended powers under Section 7–402 who elects not to file an inventory or account with the Register shall nevertheless deliver to the Register a verified copy of each of those documents, including inventories and accounts, necessary for the Register to determine the inheritance tax due with respect to distributions accounted for and the taxes due on commissions. The Register shall retain such documents in a separate file or files and, except in accordance with a Court order and except to an officer of this State or of the United States acting in his official capacity and having a right thereto, it shall be unlawful for the Register or any employee of his office to divulge or make known in any manner any of the particulars set forth or disclosed in such documents and any violation of this provision shall be a misdemeanor punishable by a fine of not more than $1,000 or imprisonment for not more than 6 months, or both. Documents received and filed by the Register under this Section shall be preserved for such period of time as the Comptroller may direct.

(c) *Certificate of payment.* Upon payment of inheritance taxes, determined by the Register to be due, the personal representative shall be entitled to receive a certificate reciting that such taxes have been paid. Such certificate shall set forth in detail, if requested by the personal representative, any items of real or leasehold property the inheritance taxes with respect to which have been paid. Any such certificate may be filed among the permanent records of the estate maintained by the Register.

COMMENT.

Subsection (a) is declaratory of the existing law, see §§147, 152 and 154 of Article 81.

Subsection (b) is necessary to spell out the procedure for determination of inheritance taxes and taxes on commissions due where the personal representative is exercising extended powers and, accordingly, not necessarily filing with the Register the documents needed for a determination of those taxes. Since the death tax reforms proposed by the Commission's First Report have not yet been enacted, these provisions are needed to adjust the practices of the proposed new Article 93 to the realities of death tax collection by the several Registers.

The provisions for non-disclosure and preservation of documents are derived from §§300 and 301 of Article 81 dealing with income tax.

The provisions of subsection (c) have been included in order to set out a clear means by which the personal representative can show or leave a permanent record that shows no inheritance tax lien on interests in real property.

Part 4 — Powers of Personal Representative.

7–401. General powers.

A personal representative, in the performance of his duties pursuant to Section 7–101, may exercise any power or authority conferred upon him in the will, without application to, the approval of, or ratification by the Court. Except as otherwise validly limited by the will or by an order of Court a personal representative may, in addition to any power or authority contained in the will and to any other common law or statutory power, properly:

(a) 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;

(b) receive assets from fiduciaries or other sources;

(c) perform the decedent's contracts that continue as obligations of the estate, and execute and deliver such deeds or other documents under such circumstances as the contract may provide;

(d) satisfy written charitable pledges of the decedent;

(e) deposit funds for the account of the estate, including moneys received from the sale of other assets, in insured interest-bearing accounts or in such short-term loan arrangements as may be reasonable for use by trustees;

(f) vote stocks or other securities in person or by general or limited proxy;

(g) hold a security in the name of a nominee or in other form without disclosure of the interest of the estate; but, in such case, the personal representative shall be liable for any wrongful act of the nominee in connection with the security so held;

(h) insure the property of the estate against damage, loss and liability, and himself, as personal representative, against liability in respect to third persons;

(i) effect a fair and reasonable compromise with any creditor or obligee, or extend or renew any obligation due by the estate;

(j) pay taxes, assessments and other expenses incident to the administration of the estate;

(k) sell or exercise stock subscription, conversion or option rights; consent to or oppose, directly or through a committee or other agent, the reorganization, consolidation, merger, dissolution or liquidation of a corporation or other business enterprise;

(l) pay the decedent's funeral expenses in accordance with the procedures provided in Section 8–106, including the cost of burial space and a suitable tombstone or marker, and the cost of perpetual care thereof;

(m) employ for reasonable compensation auditors, investment advisors or other persons with special skills, to advise or assist the personal representative in the performance of his administrative duties;

(n) prosecute, defend or submit to arbitration actions, claims, or proceedings in any jurisdiction for the protection of the estate; provided, however, that (1) no personal representative may institute an action for slander against the decedent, and (2) in any action instituted by the personal representative against a tortfeasor for a wrong which resulted in the death of the decedent, the personal representative shall be entitled to recover the funeral expenses of the decedent not in excess of $1,000;

(o) continue any unincorporated business or venture in which the decedent was engaged at the time of his death (1) in the same business form for a period of not more than four months from the date of appointment of a personal representative where continuation is a reasonable means of preserving the value of the business including good will, (2) in the same business form for any additional period of time that may be approved by order of Court in a proceeding to which all persons interested in the estate are parties, or (3) throughout the period of administration if the business is incorporated after the death of the decedent;

(p) incorporate any business or venture in which the decedent was engaged at the time of his death if none of the probable distributees of the business who are competent adults objects to its incorporation and retention in the estate;

(q) exercise any options, rights and privileges contained in any life insurance policy, annuity, or endowment contract constituting property of the estate, including the right to obtain the cash surrender value, convert any such policy to any other type of policy, revoke any mode of settlement, and pay any part or all of the premiums on any such policy or contract;

(r) pay any valid claim and distribute the estate as provided in this Article;

(s) when any assets of the estate are encumbered by mortgage, pledge, lien, or other security interest, 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 security interest, in whole or in part, whether or not the holder of the encumbrance has filed a claim, if any such act appears to be in the best interests of the estate;

(t) regardless of any contrary provision in the will, to execute, upon the written demand of the owner of a redeemable leasehold or subleasehold estate, a full and valid conveyance of the reversion or subreversion held by the estate;

(u) release or terminate any mortgage or security interest, if the obligation secured by the mortgage or security interest was fully satisfied during the decedent's lifetime or during the administration of the estate;

(v) make partial distributions, in cash, in kind, or both, from time to time during the administration;

(w) agree to deposit any of the assets of the estate with any financial institution in such a manner that the assets cannot be withdrawn or transferred without (1) the written consent of the surety on the bond or (2) an order of Court.

COMMENT.

The first sentence of Section 7–401 provides that where a will gives specific powers to a personal representative he may exercise those powers without application to, the approval of, or ratification by the Court. Persons interested in the estate, however, would have ample remedy under Section 7–404 against the personal representative who exercises any of these powers in an improper manner. For example, if a personal representative who was authorized by the will to sell any property sells property at less than its fair market value, the persons interested in the estate will have appropriate remedies against the personal representative. Likewise, and to the same extent, they would have available to them similar remedies if the personal representative should improperly exercise one or more of the specifically granted powers to the detriment of the estate such as, for instance, retaining assets which he is entitled to retain under subparagraph (a), for his own personal benefit and at the expense of the estate.

If the personal representative wishes to protect himself against a possible charge that he sold assets of the estate at less than fair market value or that he exercised any other power given to him under the will, or in this Section, in an improper manner, he can obtain the consent of the persons interested in the estate before exercising the power. On the other hand, in view of the paucity of authority in Maryland as to the effect of a court order in providing protection to a fiduciary who wishes to perform an act not authorized by the will or deed of trust [see *Goldsborough v. DeWitt,* 171 Md. 225, at 27 (1936), and also, *Zimmerman v. Coblentz,* 170 Md. 468 (1936)], and in view of the existing uncertainty as to the extent to which personal notice must be given in such a case [see *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950)], the Commission has taken no position as to the effect of a petition by the personal representative and an order of the Court thereon giving judicial approval of the manner in which he proposes to exercise the power.

The remainder of Section 7–401 is derived from 3–403, 3–416, 3–515 and 3–516 (UPC) and substantially adopts the assumption of the Uniform Trustees' Powers Act that it is desirable to equip

fiduciaries with the authority required for the prudent handling of assets, and extends it to the personal representative. These provisions will be applicable in all instances where a decedent dies intestate or where the will does not confer any of the enumerated powers set forth in this Section. In these instances, the personal representative may exercise any of the enumerated powers without application to, the approval of, or ratification by the Court.

Subparagraph (c) is intended to cover the provisions set forth in §86 (Md).

Subparagraph (g) is derived from §198 of Article 16. If adopted all references to executors in §198 of Article 16 can be deleted.

Subparagraph (m) covers the provisions now impliedly contained in §12 (Md).

The Commisison did not include in Section 7–401 specific statutory provisions relating to the power of the personal representative to avoid transfers made by the decedent in fraud of creditors, the power of the personal representative to recover embezzled or converted property, or a provision making sales by a personal representative directly or indirectly to himself voidable. These subjects are contained in 3–410, 3–411, and 3–414 (UPC).

With respect to the power of a personal representative to avoid fraudulent transfers made by the decedent, the Commission felt that the present Maryland law on the subject is adequate. With respect to the right of the personal representative to recover any embezzled or converted property, the Commission felt that subparagraph (n) is adequate. Subparagraph (n) is intended to cover the substantive provisions now contained in §270 (Md). The limitations on slander suits and the right to recover funeral expenses not exceeding $1,000 in wrongful death actions contained in subsection (n) are derived from §112 (Md).

Subparagraph (s) is intended merely to grant the powers therein set forth, but not to affect the substantive provisions of Section 4–406.

Subparagraph (t) extends to the personal representative the power to convey a reversion or subreversion in the event of a demand for the redemption of a redeemable ground rent without the necessity of a court order, as is required in §191 of Article 16 and Subtitle Y of the Maryland Rules.

Subparagraph (u) is derived from §23 of Article 66 which, if this Section is adopted, need no longer be retained.

Subparagraph (w) is derived from §44 (Md).

With respect to sales by the personal representative of either real or personal property belonging to the estate (covered in detail by §§307 through 315 (Md)), the Commission felt that if the will does not specifically authorize sales (as provided in the first sentence of Section 7–401), or unless he is authorized to proceed under extended powers (as described in Section 7–402), he should obtain the prior approval of the Court. In view of the complete provisions herein contained

therefor, the Commission felt that the significant provisions of §§307 through 315 (Md) were fully covered.

With respect to sales made by a personal representative directly or indirectly to himself, the Commission believes that the present common law in Maryland is adequate to cover the subject, see cases cited in *Sykes*, §621, and that a specific statute on the subject could perhaps be too easily avoided.

The Commission also did not include in Section 7–401 certain other powers which are contained in 3–416, 3–515, and 3–516 (UPC) on the theory that, where a decedent dies intestate, the powers which the personal representative should be permitted to exercise without Court approval should be limited to the basic authorities which might be considered as standard requirements for efficient administration—with the protection, of course, of a surcharge for improper or improvident conduct as mentioned in the first paragraph of this Comment. The Commission suggests that where a decedent should die testate after the adoption of this Section, without including in his will what might be called rather standard powers, the decedent would be presumed to have intended that the powers to be exercised by the personal representative without approval of Court should be limited to those set forth in the will and in Section 7–401.

No change is recommended in the Uniform Fiduciaries Act, see §§1 through 13 of Article 37A.

7–402. Extended powers.

(a) *Enumeration.* A personal representative authorized pursuant to subsection (b) of this Section to exercise the extended powers contained in this Section may, in addition to the powers contained in Section 7–401, without application to, the approval of, or the ratification by the Court:

(1) invest in, sell, mortgage, exchange or lease any property;

(2) borrow money for the purpose of protecting property and pledge property as security for such loan;

(3) effect a fair and reasonable compromise with any debtor or obligor; or extend or renew any obligation owing to the estate; and

(4) deliver copies of any inventory or account required by this Article to all interested persons and file in the proceeding, in lieu of such inventory or account, a certificate of such delivery. Such certificate shall include a statement of whether the inventory or account is partial or final.

(b) *How authorized.* Extended powers may be exercised by the personal representative to the extent specifically authorized:

(1) by will, and a statement in a will that the personal representative may act without application to any Court shall

be construed to confer all of the extended powers contained in this Section to which such statement in the will is applicable; or

(2) by written authorizations signed by all heirs (in case of intestacy) or legatees and filed in the proceeding, containing statements that each heir or legatee is aware of his right to require prior approval by the Court of any matter subject to the powers which may be exercised hereunder and of his right to make application for withdrawal of such authorization pursuant to subsection (c). Unless the will shall otherwise provide, a trustee as legatee shall have the power and authority to give such written authorization.

(c) *Withdrawal of authority.* At any time during a probate proceeding, any interested person, including a person who has filed an authorization pursuant to subsection (b) (2), may make written application to the Court to revoke any or all of the powers of the personal representative referred to in this Section. Such application shall be filed and determined in accordance with the proceeding provided in Section 6–301.

COMMENT.

The Commission suggests that there should be recognized under the law of Maryland a simplified procedure for the administration of a decedent's estate where all persons interested therein are of the opinion that the full and formal proceeding, including the filing in Court of inventories and accounts and the prior approval by the Court of each step of the administration of the estate is unnecessary to their full protection. Under such a simplified procedure the expenses and delays involved in the normal, formal administration proceeding could be avoided.

The Boulder Draft of the Uniform Probate Code provides such a simplified alternative. Likewise, it is not unlike similar procedures which have heretofore been developed and followed in many other jurisdictions of the United States in somewhat varying forms.

As a matter of fact, the adoption of such a proposal for the administration of decedents' estates would simply transpose to this field a method of administration which has been followed in Maryland for many years with regard to the administration of both inter vivos and testamentary trusts, whereby the separate administration thereof is conducted completely without reference to any Court unless a special request therefor is made by an interested party. Even then the Court will not assume jurisdiction or control over the administration if the controlling instrument directs otherwise, unless "justice clearly so requires" [Maryland Rule V71 c. 3]. The Commission's proposal for decedents' estates contains a similar protection [Section 7–402(c)].

Thus, consistent with other changes recommended by the Commission which are designed to encourage greater expedition, at less

expense, in the handling of estates, the Commission felt that the giving to the personal representative of extra, or extended, powers, where appropriate, would be useful in accomplishing the desired result.

However, for the complete protection of every interested person the Commission has first provided that extended powers are only available if the will so provides, or if all heirs or legatees agree in writing [subsection (b) of Section 7–402]. Then, the Commission has provided that any interested person dissatisfied with the conduct of the administration by the personal representative with extended powers may petition the Court for the termination of such powers [subsection (c) of Section 7–402]. The administration would then proceed in the traditional way.

Where the administration proceeds under extended powers then, after publishing the fact that he has been appointed [Section 7–103] and after the giving of written notice by the Register to all heirs and legatees [Section 2–209], the personal representative need not file with the Court any inventory or account, subject to the provisions of Section 7–307, provided that he submits copies thereof to all interested persons [Section 7–201(b) and 7–301(b)]. Likewise, he may close the estate by the simple filing of a verified statement that he has completed his responsibility [Section 10–102]. He may not, however, under any circumstances, claim or receive from the Court the payment of any debt, commission, fee or other compensation for himself, or for the attorney for the estate, without giving written notice to all interested parties, who would then have twenty days within which to request a hearing thereon before the Court [Section 7–502].

In short, the Commission felt that the granting of extended powers under the carefully limited circumstances, as herein provided, would permit the prompt and inexpensive administration of the many, many estates, both small and large, where all persons interested therein are in complete accord, and where the traditional safeguards admittedly essential in many situations would simply lead to the unnecessary and undesired additional expense and delay which in recent years have come more and more within the justified criticism, if not suspicion in some cases, of the general public.

§1 of Article 49A lists certain "lawful investments . . . for all fiduciary, guardianship and trust funds." The Commission understands that these limitations are seldom followed since they are considered by most experienced investment persons as unrealistic and inadequate to satisfy the requirements for the investment of trust funds under the prudent man doctrine. The Commission believes that a re-examination of these provisions in the light of the present day economy and the demands of a balanced investment portfolio would be useful to personal representatives faced with investment responsibility.

7–403. Court order.

A personal representative may at any time petition the Court for permission to act in any matter relating to the administration of the estate.

COMMENT.

This Section is modeled on 3–404 (UPC). It is intended merely to grant permission to the personal representative to initiate a proceeding at any time when it is necessary for him to resolve a question relating to administration. For the right of any other interested person to petition the Court with regard to such questions see Section 2–102. See also §4 of Article 31A. The Section is not intended to relieve the personal representative of any liability for the action taken. For example, an imprudent fiduciary investment, although authorized by the Court, may still subject the personal representative to liability [see *Goldsborough v. DeWitt,* 171 Md. 225 (1936), and also *Zimmerman v. Coblentz,* 170 Md. 468 (1936)].

7–404. Improper exercise of power; breach of fiduciary duty.

If the exercise of power concerning the estate is improper, the personal representative shall be liable for breach of his fiduciary duty to interested persons for resulting damage or loss to the same extent as a trustee of an express trust. The exercise of power in violation of Court order, or contrary to the provisions of the will may be breaches of duty. The rights of purchasers and others dealing with a personal representative shall be determined as provided in Section 7–405 and may not necessarily be affected by the fact that the personal representative breached his fiduciary duty in the transaction.

COMMENT.

This Section follows 3–413 (UPC). An interested person has two principal remedies to forestall a personal representative from committing a breach of fiduciary duty:

(1) Under Section 6–301, he may apply to the Court for 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 6–306, he may petition the Court for an order removing the personal representative.

An order, or pending proceeding seeking an order, restraining a personal representative from selling, leasing, encumbering or otherwise affecting title to real property, subject to any requirements of recording or for the acquisition of a *lis pendens,* would be effective to prevent a purchaser from acquiring a marketable title.

The Commission recommends the repeal of §109 of Article 16, which provides: "A suit in chancery may be maintained for a legacy, in cases where a bond has been given to pay debts and legacies." The Commission feels that this provision is unnecessary because of the broad sweep of Section 7–404.

See also §132 of Article 27 which provides for criminal penalties for misappropriation by an executor. No change is recommended here.

7–405. Protection of person dealing with personal representative.

In the absence of actual knowledge or of reasonable cause to inquire as to whether the personal representative is improperly exercising his power, a person dealing with the personal representative is not bound to inquire whether the personal representative is properly exercising his power, and is protected as if the personal representative properly exercised the power. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative.

COMMENT.

This Section, among other things, qualifies the effect of a provision in a will which purports to prohibit sale of property by a personal representative. The provisions of a will may prescribe the duties of a personal representative and subject him to surcharge or other remedies of interested persons if he disregards them. See Section 7–404. But, the will's prohibition is not relevant to the rights of a purchaser unless he had actual knowledge of its terms or had reasonable cause to inquire into the actual authority of the personal representative.

An analogous situation is discussed in Note, "Effect of Subsequently Probated Will Upon Bona Fide Purchaser from the Heirs," 18 Md. L. Rev. 151 (1958).

The provision in Section 7–405 that a person is not bound to see to the application of estate assets paid or delivered to a personal representative broadens the effect of §322 (Md), which only applies to purchasers of assets from a trust. The Commission suggests that this extension insofar as it affects persons dealing with trust should be incorporated into Article 16.

The Commission recommends the continuation of the Uniform Act for the Simplification of Fiduciary Security Transfers. See §§15 through 25 of Article 37A.

Part 5 — Notice to Interested Persons of Matters Filed in the Proceeding.

7–501. Inventory and account.

The personal representative shall give written notice to all interested persons of the filing with the Court of every inventory and account except to the extent otherwise provided by the Court for good cause shown.

COMMENT.

When acting under the grant of extended powers a personal representative who does not file an inventory or account in the proceedings must send to all interested persons a copy of each inventory and account required by this Article, see Sections 7–201(b), 7–301

and 7–402. The Commission felt that the same protection should be afforded to interested persons where such documents are filed in the proceedings.

Under the current Maryland law and practice it is possible that in many cases neither the heirs nor the legatees receive any notice whatsoever of the filing of inventories or accounts, and the Commission felt that some form of adequate notice should be given to the persons who might be materially affected. In order that this procedure does not become too cumbersome, authority is given to the Court to relieve the personal representative from sending the notices to such persons as specific and pecuniary legatees, if it deems the same appropriate.

7–502. Proposed payment to or for personal representative or attorney.

The personal representative shall give written notice to each creditor who has filed a claim under Section 8–104 which is still open and to all interested persons of any claim, petition or other request which could result, directly or indirectly, in the payment of a debt, commission, fee, or other compensation to, or for the benefit of, the personal representative or the attorney for the estate. The notice shall set forth in reasonable detail the amount to be requested and the basis therefor. Unless a request for a hearing thereon is filed within 20 days of the sending of the notice, any action taken by the Court in connection therewith shall be final and binding on all persons to whom the notice was given unless there was fraud, material mistake or substantial irregularity in the proceeding.

COMMENT.

When the Court is to be asked to pay out or distribute estate assets to the personal representative or to the attorney for the estate, or for their respective benefits, whether in payment of a claimed debt, as compensation for services rendered, or otherwise, the personal representative or the attorney becomes momentarily, in effect, an adverse party. Therefore, to this limited degree the Commission felt that not only should notice of such contemplated request be given to all interested persons, but also that there should be a period of 20 days within which any objection thereto could be filed, and a hearing held thereon, before any payment is actually made.

Even in the absence of any request for a hearing, or an objection filed, the Court would nevertheless on its own motion, and with the thoroughness that it would deem appropriate, scrutinize the validity, fairness and propriety of any such request for payment.

Part 6 — Compensation and Expenses of Litigation.

7–601. Compensation of personal representative.

(a) A personal representative is entitled to reasonable compensation for his services. If a will provides a stated compensation for the

personal representative he shall be entitled to additional compensation if the provision is insufficient in the judgment of the Court. The personal representative may, at any time, renounce all or any part of any right to compensation.

(b) Unless the will provides a larger measure of compensation, upon petition filed in reasonable detail by the personal representative the Court may allow such commissions as it shall deem appropriate but which shall not exceed those computed in accordance with the following table:

If the property subject to administration is:	*The commission shall not exceed:*
Not over $20,000	10% thereof.
Over $20,000	$2,000 plus 4% of the excess over $20,000.

For the purposes of this subsection (b) of Section 7-601 only, the phrase "property subject to administration" shall not include real property or income therefrom, and shall not be affected by expenses or charges attributable thereto.

(c) In the event of a sale of real property by the personal representative, the Court, upon petition filed in reasonable detail, may allow such commission, if any, on the proceeds of such sale as it shall deem appropriate but which shall not exceed ten percent (10%) thereof.

COMMENT.

The present provisions of the Maryland law relating to the compensation of personal representatives is found in §§6, 72 and 316 (Md), together with §146 of Article 81 relating to the time within which the Court shall fix the amount of commissions to be allowed as well as the time and manner of taking an appeal in the event of dissatisfaction with the Court's determination. See also discussion in *Sykes,* §§481 through 495.

The Commission is mindful of a number of weaknesses in Maryland practices for determining compensation to be paid to personal representatives. The greatest faults presently to be found in the award of commissions are (1) the complete lack of uniformity of practice between courts in the several subdivisions of the State and (2) the fact that maximum commissions are often allowed where they far exceed reasonable compensation for services rendered.

To find a fair statutory remedy for these and other shortcomings is a subject which is complex in its own right and which deserves independent study. It is, furthermore, readily separable from the subjects of the mechanics of efficient administration, and the rules of law governing passage of property after death — which are the principal ones dealt with in this Report.

Accordingly, the Commission has left undisturbed the present formula contained in §6 (Md) for determining maximum commis-

sions, intending to direct greater attention to reasonable compensation as the independent subject of a later Third Report, which will be devoted exclusively to this problem.

The one substantive change which the Commission does recommend at this time, however, is the elimination of the minimum 2% commission both on the first $20,000 of personal estate as contained in §6, and on the proceeds from the sale of real property as contained in §316 (Md).

Subsection (a) follows §11 (Md) and 3–420 (UPC). Subsection (c) follows §316 (Md).

§146 of Article 81 should be amended to be consistent with this Section.

7–602. Compensation for attorney's services.

(a) *Generally.* An attorney is entitled to reasonable compensation for legal services rendered by him to the estate or to the personal representative.

(b) *Petition.* Upon the filing of a petition in reasonable detail by the personal representative, or by the attorney, the Court may allow a counsel fee to an attorney employed by the personal representative for legal services, which compensation shall be fair and reasonable in the light of all the circumstances to be considered in fixing the same.

(c) *Considered with commissions.* If the Court shall allow a counsel fee to one or more attorneys it shall take into consideration, in making such determination, what would be a fair and reasonable total charge for the cost of administering the estate under this Article, and it shall not allow aggregate compensation in excess of that figure.

COMMENT.

The present limited statutory law on this subject is contained in §10 (Md). The Commission has expanded the procedure, and the reasons, for granting compensation in the form of a counsel fee.

This Section is not intended to limit an attorney from acting both as a personal representative or co-personal representative as well as an attorney. It is expected that if an attorney is named as a personal representative or co-personal representative he may well perform some if not all of the legal services which need to be rendered for the benefit of the estate during the course of administration. How, or whether, he renders services to the estate in two capacities is immaterial since his request for and acceptance of compensation for services in either or both capacities must be determined in accordance with the provisions of Canon 12 of the Code of Professional Ethics of the American Bar Association (adopted *in toto* by the Maryland State Bar Association).

The Commission has noted the confusion which has arisen on account of the varied allowances for attorneys' fees by the different

Orphans' Courts throughout the State which, in turn, have given substance to the considerable, and perhaps justifiable, criticism by members of the public. Likewise, it has noted that there appears to be a difference of opinion among lawyers as to the proper separation of the responsibilities and duties performed in the administration of an estate between legal and nonlegal acts.

Moreover, the Commission is fully cognizant of the substantial publicity which has been given to claims that the cost of administration of decedents' estates has been exorbitant in many cases. In the opinion of the Commission such publicity has been directed to many features in the administration of decedents' estates which fortunately have not been practiced to any great extent in Maryland, but it will attempt in its Third Report to eliminate the admitted inequities and opportunities for excessive charges which do presently exist.

7–603. Expenses of estate litigation.

When any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith and with just cause, whether successful or not, he shall be entitled to receive from the estate his necessary expenses and disbursements.

COMMENT.

Litigation prosecuted by a personal representative for the primary purpose of enhancing his prospects for compensation would not be in good faith. This follows 3–721 (UPC) and represents the Maryland law. See §§6 and 49A (Md).

SUBTITLE VIII

CREDITORS' CLAIMS

8–101. Claim not paid in normal course of administration. No proceeding to enforce a claim against a decedent's estate may be revived or commenced before the appointment of a personal representative. After appointment, and until the estate is closed, the procedures prescribed by Section 8–104 shall be followed. After the estate is closed, a creditor whose claim has not been barred may recover directly from the persons to whom property has been distributed as provided in Section 10–103, or from a former personal representative individually as provided in Section 10–104.

COMMENT.

This Section is taken from 3–501 (UPC). The Commission's recommendation would not abridge whatever rights may exist under present law against collateral security. See, *e.g.,* Maryland Rules W74 through W80 and the Uniform Commercial Code, Article 95B §§9–501 through 9–507. The language "no proceeding to enforce a claim against a decedent's estate" is not intended to refer to remedies solely against collateral security in accordance with a contractual undertaking. See also Section 8–103(c).

8–102. Effect of statute of limitations. No claim which was barred by any statute of limitations at the time of the decedent's death shall be allowed or paid. Subject to Section 8–103(a), any period of limitations which would terminate, except for the decedent's death, during the four months period following the decedent's death shall automatically be extended for an additional four months after its original termination date.

COMMENT.

The first sentence is a reversal of the present law, which is found in §106 (Md). It follows 3–503 (UPC). The Commission felt that to acknowledge one barred claim and not another, as is permitted under the present law which allows a personal representative to waive limitations in his discretion, is unfair both to the personal representative and the creditor as to whom limitations are not waived.

The extension of the period of limitations described in the second sentence is not intended to extend the period beyond what it would be if the period had not terminated during the four months as described.

8–103. Limitation on presentation of claim, and suit thereon. (a) *Claims arising before death; nonclaim; limitation.* Except as otherwise expressly provided by statute with respect to claims of the United States and the State of Maryland, all claims against a decedent's estate, which arose before the death of the decedent, whether

due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, shall be forever barred against the estate, the personal representative, and the heirs and legatees, unless presented within four months after the date of the first published notice to creditors, or if notice to creditors has not been published, within the expiration of the period of limitations otherwise applicable. A claim for slander against a decedent's estate, which arose before the death of the decedent, shall forever be barred unless suit was instituted against the decedent before his death.

(b) *Claims arising at or after death.* Except as otherwise expressly provided by statute with respect to claims of the United States and the State of Maryland, all claims against a decedent's estate which arise at or after the death of the decedent, other than any claim of the United States, the State of Maryland, and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, shall be forever barred against the estate, the personal representative, and the heirs and legatees, unless presented as follows:

(1) a claim based on a contract with the personal representative, within one year after performance by the personal representative is due;

(2) any other claim, within one year after it arises.

(c) *Liens not affected.* Nothing in this Section shall affect or prevent any action or proceeding to enforce any mortgage, pledge, lien, or security interest upon property of the estate.

COMMENT.

The Commission concluded that if a creditor has not filed his claim within four months after notice to creditors he should be barred from proceeding against not only the estate, but also the legatees or the heirs. This represents a fundamental change in the current Maryland law. Under the case of *Zollickoffer v. Seth,* 44 Md. 359 (1876), a creditor may proceed against the heirs or legatees even if he has not filed a claim against the estate. In many instances, the assertion of a claim against the heirs or legatees, after the final distribution of the estate, has resulted in considerable, and quite unexpected, hardship. The Commission felt that at some point after a decedent has died the heirs and legatees ought to be able to receive the property with the assurance that no further claims could be made against them. The selection of a four month date was felt to be reasonable in that it would give creditors sufficient time to file their claims, and would also encourage the prompt administration and settlement of the estate.

Section 8–103, which is based on 3–504 (UPC), also provides that if notice to creditors has not been published, despite the mandate of Section 7–103, any claim, to be valid against the personal representative of the estate, the heirs or the legatees, must be filed within the applicable statute of limitations for the claim.

Subsection (a) is not intended to affect the rule of *Burket v. Aldridge,* 241 Md. 423 (1966), which holds that a claim barred at death cannot validly be brought within the time for filing unbarred claims. The provision of subsection (a) relating to a claim for slander is derived from §112 (Md). In view of the detailed provisions for the limitation of the time within which claims can be filed, the Commission felt that §121 (Md) was no longer useful.

Subsection (b) is new in the Maryland law and provides a statute of limitations for claims that arise at or after death. The Commission felt that in order to insure the prompt administration and settlement of estates, a one year statute of limitations would be reasonable. This subsection is derived from 3–504(b) (UPC).

Subsections (a) and (b) both exclude from their operation claims of the United States and the State of Maryland which are based on other statutes, such as tax statutes.

Subsection (c) is derived from 3–504(c) (UPC), except that the second clause reading "or any action to establish liability of the decedent or the personal representative for the sole purpose of enforcing the liability of any insurer of the decedent or of the personal representative" has been deleted. A concept similar to the deleted phrase appears at the end of §112 (Md) and has been incorporated in Section 8–104(c).

The handling of secured claims is further discussed in Sections 8–110 and 8–111. Section 8–103(c) makes it clear that the failure of the secured creditor to file his claim does not impair his right against the security; it only impairs his rights to a personal judgment against the personal representative, the heirs, or the legatees. The failure to file a claim has, therefore, the same effect as an exculpatory clause in the security agreement.

The Commission is of the opinion that the period of four months from the date of publication of the first notice to creditors as the limitation period for the filing of claims should be uniform in all cases. The policy of §112 (Md), which provides that any action for injuries to the person brought against the decedent's estate must be commenced within six months after the personal representative has qualified, is, in effect, continued in Section 8–103, but the time limit has been changed from six months after qualification of the executor to four months after the date of the first published notice to creditors. The plaintiff, of course, need only file his claim within the four month period; if the claim is disallowed, then he must file suit within the period set forth in Section 8–107(a).

The Commission does not intend in Section 8–103 to affect or reflect in any way on the decision in *Chandlee v. Shockley,* 219 Md. 493 (1959), which held that the personal representative may unintentionally waive, or be estopped to assert, limitations under the particular circumstances of that case. See Note, "Time Limitations On Actions Against Administrators Or Executors," 20 Md. L. Rev. 170 (1960).

The Commission recommends the repeal of §10 of Article 52, which gives justices of the peace jurisdiction to try actions against personal representatives at any time after letters had been issued

for thirteen months, unless the personal representative disputed the claim within six months.

The Commission also recommends the repeal of the last five lines of §1 of Article 67, the wrongful death statute, which contains a cross-reference to §112 (Md).

The repeal of §10 of Article 52, the last five lines of §1 of Article 67, and §112 (Md) will result in the provisions of Sections 8–103, 8–104(c), and 8–107 being uniform in all courts. Justices of the peace will continue to have jurisdiction in actions involving personal representatives in those types of actions enumerated in Article 52.

8–104. Manner of presentation of claim; form.

Claims against a decedent's estate may be presented in the following manners:

(a) *To the personal representative.* The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant and the amount claimed. If the claim is not yet due, the date when it will become due shall be stated. If the claim is contingent, the nature of the contingency shall be stated. If the claim is secured, the security shall be described. The failure of the claimant to comply with the foregoing or with the personal representative's reasonable requests for additional information may be, in the discretion of the Court, a basis for disallowance of a claim.

(b) *Filing with Register.* The claimant may file a written statement of the claim, substantially in the following form, with the Register and deliver or mail a copy of the statement to the personal representative:

CLAIM AGAINST DECEDENT'S ESTATE

The below-named creditor certifies that there is due and owing by ----------, deceased, in accordance with the statement of account attached hereto as a part hereof the sum of ----------, together with interest at the rate of ---------- from ---------- until paid, and that the aforesaid account is correct as stated and is unpaid.

On behalf of the below-named creditor, I do solemnly declare and affirm under the penalties of perjury that the information and representations made in the aforegoing claim, and the aforesaid account are true and correct according to my knowledge, information and belief.

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(Name of Creditor) (Name of person making verification on behalf of creditor)

(c) *Revival or commencement of suit.* Without filing a claim under subsections (a) or (b), the claimant may revive against the personal representative or against any person to whom property has been distributed any action or suit pending against the decedent at the time of his death based on a cause of action which survives death, or may commence an action against the personal representative or against any such person, to obtain payment of his claim against the estate or against any such person, but the revival or commencement of action must occur within the time limited for presenting the claim. Notwithstanding the foregoing, any such action against a personal representative may be instituted after the expiration of the time for filing claims but within the regular statute of limitations in the event the decedent was covered by an existing insurance policy at the time of the occurrence, the existence of such insurance coverage not being admissible at the trial of the case and the recovery, in the event of a judgment against the estate, to be limited to the extent of such existing insurance. The provisions as to such time for filing of a suit shall also be deemed to permit claims made against the Unsatisfied Claim and Judgment Fund of the State of Maryland, in the event such claim could otherwise legally be made.

COMMENT.

The present Maryland law, contained in §§90 through 105 (Md), prescribes a number of detailed and archaic rules with respect to the manner of presenting claims. The Commission has greatly simplified these rules in Section 8–104, and has included in subparagraph (b) a form applicable for the filing of all claims with the Court.

The Commission has also provided alternate means of presenting claims: either directly to the personal representative or by filing the claim with the Register. This provision is derived from 3–505 (UPC), with minor modifications.

Subsection (c) authorizes the claimant, instead of first filing his claim under subsection (a) or (b), to institute suit or to revive any suit against the decedent, so long as such commencement or revival occurs within the period of time for presenting his claim under (a) or (b). The last two sentences are derived from the amendment to §112 (Md) adopted by Ch. 642 of the Laws of 1966. See also Comment to Section 8–103 for a discussion of limitations on suits against personal representatives.

8–105. Classification of claim.

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:

(a) Fees due to the Register.

(b) Funeral expenses as provided in Section 8–106.

(c) Costs and expenses of administration, including compensation of personal representative as provided in Section 7–601, for legal services as provided in Section 7–602, and commissions of licensed real estate brokers and salesmen.

(d) Family allowance as provided in Section 3–201.

(e) Taxes due by the decedent.

(f) Reasonable medical, hospital and nursing expenses of the last illness of the decedent.

(g) Rent payable by the decedent for not more than three months in arrears.

(h) Wages, salaries or commission for services performed for the decedent within ninety days prior to decedent's death.

(i) Old age assistance claims under §77 of Article 88A.

(j) All other claims.

No preference shall be given in the payment of any claim over any other claim of the same class, nor shall a claim due and payable be entitled to a preference over claims not yet due.

COMMENT.

This Section is intended to be substantially similar to §6 (Md). See also, 3–506 (UPC). The major substantive change is that the unrealistic monetary limits on medical, hospital and nursing expenses in connection with the decedent's last illness have been eliminated. The provision in §6 for "allowance for things lost or which have perished without the party's fault, which allowance shall be according to the appraisement", has also been eliminated because Section 8–105 deals only with payment of claims.

The Commission has also provided, in clarification of §6 (Md), that claims for wages, salaries or commissions be entitled to priority over claims founded on judgments and decrees, and that any claims for such wages, salaries or commissions must relate to claims based on services performed within the ninety day period before the decedent's death rather than on contracts made "not more than three months prior to decedent's death."

The Commission has added subsection (i) to clarify an ambiguity in the present law.

8–106. Funeral expenses.

Subject to the priorities contained in Section 8–105, every personal representative, within four months after the date of the first published notice to creditors, shall pay the funeral expenses of the decedent. Said expenses shall be allowed in the discretion of the Court according to the condition and circumstances of the decedent, but in no event shall such allowance exceed $500 unless the estate of the decedent is solvent and a special order of Court has been obtained;

provided, however, that if the estate is solvent and (a) the personal representative is proceeding under a grant of extended powers as provided in Section 7–402, or (b) if the will expressly empowers the personal representative to pay such expenses without an order of court, no such allowance by the Court shall be required. If the funeral expenses are not paid within such period the creditor may petition the Court to require the personal representative to show cause why he should not be compelled to make such payment. If the Court finds that such claim is valid, it shall fix the amount due and shall order the personal representative to make payment within ten days after the order is served upon the personal representative, or such proportion thereof as the money in the hands of the personal representative will permit. If the personal representative does not have sufficient funds, the claimant may at a later date resubmit his petition at such time as the personal representative has sufficient funds.

COMMENT.

No allowance by the Court would be needed if the estate is solvent and either the personal representative has been granted extended powers under Section 7–402, or the will expressly so permits. Otherwise, the substance of this Section, except for the date of payment, is intended to be identical to §7 (Md), but simplifies the detailed procedures set forth therein.

The Commission felt that where the personal representative does not have sufficient funds in his hands, the procedures now set forth in §7 (Md) are unnecessarily complex and the situation can be handled by subsequent petitions filed by the claimant, and by subsequent orders of the Court, as the occasion may arise. The present law provides for payment "within ninety days after his appointment"

The Commission felt that fixing the date of payment at four months after the first publication of the notice to creditors and thereby conform the payment for funeral expenses to the time for payment of other claims, would make the procedure consistent with the period of limitations (four months) for the enforcement of claims against the estate, which is the first time the question of solvency could be determined.

The Commission has eliminated the concept of §9 (Md), which provides a separate rule with respect to the funeral expenses of a married woman. The Commission has concluded that there should be no distinction with respect to the payment of funeral expenses for married men and married women.

8–107. Allowance of claim.

(a) *By the personal representative.* As to claims presented in the manner described in Section 8–104(a) and (b) within the time limit prescribed in Section 8–103, the personal representative shall mail a notice to each claimant stating (i) that the claim has been allowed in a stated amount; (ii) that the claim has been disallowed;

or (iii) that the personal representative will petition the Court to determine whether the claim should be allowed. If, after notifying a claimant of allowance of a claim, the personal representative rescinds the allowance, he shall notify the claimant of the extent of the rescission. If the claim is disallowed in whole or in part the claimant is forever barred to the extent of the disallowance unless he files a petition for allowance in the Court or commences an action against the personal representative or against one or more of the persons to whom property has been distributed, not later than 60 days after the mailing of the notice; and the notice shall warn the claimant to this effect. Failure of the personal representative to mail notice to a claimant of action on his claim within 30 days after the time for original presentation of the claim has expired shall have the effect of a notice of disallowance.

(b) *By the Court.* Upon the petition of the personal representative or of a claimant the Court shall allow or disallow in whole or in part any claim or claims presented to the personal representative or filed with the Register of Wills in due time and not barred by subsection (a) of this Section. Notice in this proceeding shall be given to the claimant, the personal representative and such interested persons as the Court may direct by order entered at the time the proceeding is commenced.

(c) *In an action against the personal representative.* A judgment in an action against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

COMMENT.

This Section is substantially the same as 3–507 (UPC) with only two changes of substance. In subsection (a) the time within which a creditor must file a petition for allowance or commence an action against the personal representative has been extended from 30 days to 60 days after the personal representative has mailed a notice of disallowance or partial allowance. For similar provisions of the present law see §107 and §108 (Md).

This provision is similar to §120 (Md) and the second sentence of 3–505 (c) (UPC). The Comission has changed the present Maryland rule which requires an action to be commenced by a creditor within six months after the personal representative has mailed his notice of disallowance, to a sixty day period, in order to encourage the more prompt administration and settlement of estates.

Although the Court has the power to adjudicate the validity of the claim, either party may request a jury trial and thereby require the adjudication to be shifted to a law court.

Subsection (d) of 3–507 (UPC), dealing with interest on allowed claims, has been eliminated. The Commission felt that the common law rules with respect to allowability of interest were preferable. See *Sykes,* §731.

8–108. Payment of claim.

(a) Upon the expiration of four months from the date of the first published notice to creditors, the personal representative shall proceed to pay the claims allowed against the estate in the order of priority prescribed in Section 8–105. Any person with a valid unbarred claim or with a valid unbarred judgment who has not been paid as provided herein may petition the Court for an order directing the personal representative to pay the claim to the extent that funds of the estate are available for such payment.

(b) The personal representative may, at any time, pay any just claim which has not been barred, with or without formal presentation, but he is personally liable to any other claimant whose claim is allowed and who is injured by such payment if

(1) the payment was made before the expiration of the time limit stated in (a) of this Section and the personal representative failed to require the payee to give adequate security to refund any of the payment necessary to pay other claimants; or

(2) the payment was made, due to the negligence or wilful fault of the personal representative, in such manner as to deprive the injured claimant of his priority.

COMMENT.

This provision is substantially the same as 3–508 (UPC). For the present Maryland law see §109 through §111 (Md). In view of the detailed provisions in this draft for the giving of notice to creditors, the limitation on the time allowed creditors for the filing of claims, and the procedures for the payment of claims, the Commission felt that the provisions of §§109 through 111 would be no longer useful.

The effect of §§122, 132 and 133 (Md) is intended to be preserved in Sections 8–108 and 8–109.

8–109. Liability of personal representative.

(a) The individual liability of a personal representative to third parties, as distinguished from his fiduciary accountability to the estate, arising from the administration of the estate is that of an agent for a disclosed principal.

(b) A personal representative is not individually liable on contracts properly entered into in his fiduciary capacity in the course of administration of the estate unless he expressly agrees to be.

(c) A personal representative is not individually liable for obligations arising from possession or control of property of the estate or for torts committed in the course of administration of the estate unless he is personally at fault.

(d) Claims based upon contracts, obligations and torts of the types described in subsections (b) and (c) may be allowed against the estate whether or not the personal representative is individually liable therefor.

(e) The individual liability of the personal representative to third parties arising from the administration of the estate may be determined in the same action, suit or court proceeding in which a claim by such third party against the estate is considered.

(f) When there is doubt whether a claim should be allowed against the estate or against the personal representative as an individual, or both, a court in which a proceeding or action to enforce the claim is pending shall direct that notice be given to distributees or major creditors whose interests will be affected by the result and shall give them an opportunity to be heard.

(g) When the Court allows a claim against the personal representative individually, the allowance has the same effect as a judgment against him.

COMMENT.

This provision is substantially the same as 3–509 (UPC) and represents the probable state of the current Maryland law. As for §§122, 132 and 133 (Md) see also Section 8–108.

8–110. Claim not yet due.

Upon proof of an unsecured claim which will become due at some future time, the same may be paid immediately if the claimant will consent to such discount, if any, as the Court thinks reasonable; otherwise, the Court shall direct the investment of an amount which will provide for the payment of the claim when it becomes due. When a creditor holds any security for an allowable claim due at some future time he may rely on his rights under Section 8–111 or may file his claim as an unsecured claim not yet due, with the right of withdrawing the claim prior to the taking of any action thereon, and, after such withdrawal, rely on his rights as provided in Section 8–111.

COMMENT.

This Section is taken from §138 of the Model Probate Code (1946) and §421 of the Iowa Probate Code (1963). See also 3–510 and 511 (UPC).

8–111. Secured claim.

Payment of a secured claim shall be upon the basis of the full amount thereof if the creditor shall surrender his security; otherwise payment shall be upon the basis of one of the following:

(a) if the creditor shall, during the course of administration, exhaust his security before receiving payment, upon the

full amount of the claim allowed, less the amount realized upon exhausting the security; or

(b) if the creditor shall not have exhausted, or shall not then have the right to exhaust his security, upon the full amount of the claim allowed, less the value of the security determined by agreement, or as the Court may determine.

COMMENT.

Under current practice, where the decedent owned real property subject to a mortgage, the mortgagee would not be required to file any claim against the estate. If, five years after the decedent's death, there was a default under the mortgage, and the mortgagee foreclosed, the mortgagee could presumably obtain a deficiency judgment against the distributees of the estate. The Commission felt that this right of mortgagees has been rarely availed of, and in order to avoid the unexpected hardship that can occur to the distributees of an estate, the Commission has recommended that unless the creditor has filed his claim within four months after notice to creditors, he should be barred from obtaining any deficiency judgment, having to rely exclusively on his security interest. See also Comment to Section 8–103. In the mortgage situation, the mortgagee will now have the option of (a) filing his claim upon the basis of the full amount of the indebtedness, if he surrenders his security, (b) foreclosing upon his security during the course of administration, if the debt is in default, and if he does not receive full satisfaction, he would be allowed the balance if he files his claim within four months of notice to creditors, or, (c) if he does not foreclose, filing his claim within the four month period, in which event he will be entitled to receive the amount of his claim less the value of the security.

8–112. Contingent claim.

If a contingent claim becomes absolute before the distribution of the estate, it shall be paid in the same manner as absolute claims of the same class. 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 in any one of the following ways:

(a) The creditor and personal representative may determine, by agreement, arbitration or compromise, the value thereof, according to its probable present worth, and where the personal representative does not have extended powers, upon approval by the Court, it may be allowed and paid in the same manner as an absolute claim.

(b) The Court may order the personal representative to make distribution of the estate except for sufficient funds to be retained to pay the claim if and when the same becomes absolute.

(c) The Court may order distribution of the estate as though such contingent claim did not exist, but the distributees shall be liable to the creditor to the extent of the estate received by them, if the contingent claim thereafter becomes absolute; and the Court may require such distributees to give bond for the satisfaction of their liability to the contingent creditor.

(d) Such other method as the Court may order.

COMMENT.

The present Maryland law, as contained in §94 (Md), provides that upon the presentation of the contingent claim the Court, if satisfied by the proof exhibited, may order the personal representative to retain sufficient assets to pay the same when it becomes absolute, or if the estate is insolvent, sufficient to pay a percentage thereof equal to the securities of the other creditors.

The provisions of Section 8-112 are new in the Maryland law and will enable estates safely to be closed notwithstanding the existence of contingent claims.

This Section is adapted from §140 of the Model Probate Code, with subsection (d) added from §424 of the Iowa Probate Code.

Contingent claims under this Section would be treated in the same manner as matured claims, i.e., a creditor would have to file his claim within the designated period or be forever barred, even though his claim will not mature for a substantial period thereafter. This is the view of the Uniform Probate Code and the Model Probate Code, and is explained by the draftsmen of the Model Probate Code as follows:

> "If contingent claims are not barred, the distributee can never spend his legacy or his inheritance safely. Moreover, such provisions are in accordance with the policy of the Federal Bankruptcy Act and with modern legislation for the liquidation of corporations. Death of a debtor is a hazard which all creditors should assume, and if the creditor seeks to avoid it, he can do so by taking security for his claim."

8-113. Counterclaim.

In allowing a claim the personal representative may deduct any counterclaim which the estate has against the claimant.

8-114. Execution and levy prohibited.

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

COMMENT.

This is taken from 3–514 (UPC). The rule of this Section is the reverse of what appears to be the present law of Maryland as contained in §§115 and 116 (Md) and §78 of Article 52, which provides for a supersedeas bond by administrators where executions are made on orders of a justice of the peace.

§§113 and 114 (Md) and §11 of Article 52, which deal with claims against estates where the personal representative alleges insufficient assets, are also no longer necessary and should be repealed. The judgment creditor is afforded a remedy under Section 8–108(a).

8–115. Exemption from claim — proceeds of life insurance and annuity contracts.

The proceeds, including death benefits, cash surrender and loan values, premiums waived, and dividends, whether used in reduction of the premiums or in whatsoever manner used or applied, except only where the debtor has, subsequent to the issuance of the policy, actually elected to receive dividends in cash, of any policy of life insurance or under any annuity contract upon the life of any person heretofore or hereafter made for the benefit of or assigned to the wife or children or dependent relative of such person, shall be exempt from all claims of the creditors of such person arising out of or based upon any obligation created after June 1, 1945, whether or not the right to change the named beneficiary is reserved or permitted to such person. The provisions of this section shall not prohibit any creditor from collecting the amount of any debt out of the proceeds of any life insurance policy pledged by the insured as security for such debt.

A change of beneficiary or assignment or other transfer shall be valid except in cases of transfer with actual intent to hinder, delay, or defraud creditors.

COMMENT.

This Section is the same as present §385 of Article 48A. Its provisions are also substantially the same as §§8, 8A, 9 and 10 of Article 45. The Commission felt that it should more logically appear in that Part of Article 93 dealing with the rights of creditors and the enforcement thereof against assets owned by the decedent prior to his death. §385 of Article 48A and §§8, 8A, 9 and 10 of Article 45 should be repealed, to avoid unnecessary duplication.

For a history of certain aspects of these problems, see *Arnold,* "Life Insurance as an Asset Available to Creditors," 6 Md. L. Rev. 275 (1942) and Note, "Exemption of Life Insurance Cash Surrender Values from Bankruptcy Proceedings in Maryland," 22 Md. L. Rev. 66 (1962), reviewing *In re Posin,* 183 F. Supp. 380 (D. Md. 1960) aff'd 284 F. 2d 300 (4th Cir. 1960).

8–116. Exemption from claim — benefit from fraternal benefit society.

No money or other benefit, charity, relief or aid to be paid, provided or rendered by any fraternal benefit society, shall be liable to attachment, garnishment or other process, or to be seized, taken, appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary, or any other person who may have a right thereunder, either before or after payment by the society.

COMMENT.

This Section is the same as the present §328 of Article 48A relating to fraternal benefit societies as defined in §302 thereof. As in the case of Section 8–115 the Commission felt that this provision should be included in Article 93; see Comment above. §328 of Article 48A should be repealed, and §327 should be amended to include a reference to the exemption from creditors' claims afforded under this Section.

SUBTITLE IX

SPECIAL PROVISIONS RELATING TO DISTRIBUTION

9–101. Renunciation — legatee or heir.

A person may renounce testate or intestate succession or both, wholly or partially, if he has not accepted possession as legatee or heir, by delivering to the personal representative a written renunciation. Property renounced by a legatee shall pass pursuant to Section 4–404; and property renounced by an heir shall pass as if such person had predeceased the decedent. Creditors of the renouncing legatee or heir have no interest in the property renounced, whether their claims are based on contract, tort, tax obligations or otherwise.

COMMENT.

This Section is designed to facilitate renunciation in order to aid post-mortem planning. Although present Maryland practice acknowledges that renunciation of a legacy is permissible, it does not appear to permit renunciation of an intestate share. The Commission felt that there is no reason for such a distinction, and some other States have already adopted legislation permitting renunciation of an intestate share.

Under the rule of this Section, property renounced by a legatee will pass under Section 4–404. If the renouncing person is an heir, the heir who would be next in line in succession would take, which will often result in the issue of the renouncing person taking by representation.

This Section is based on 2–801 (UPC) and, as stated in the Comment thereto, "The presence of a spendthrift clause does not prevent renunciation under this Section."

In the UPC Draft the time for renunciation is limited to six months after the death of the decedent unless the taker of the property is not then ascertained. The Commission felt that it was not necessary to have such a time limitation since circumstances can vary so greatly in different cases and it would be most unusual for any other person's interest to be substantially prejudiced if the renunciation is permitted any time up to the acceptance of possession or receipt of benefits accruing from the right to succession.

9–102. Renunciation — testamentary trustee.

Any trustee appointed by will to execute any trust contained therein may decline to accept such appointment by filing a statement of renunciation with the Register of the County in which such will is admitted to probate at any time before he receives any property or performs any act pursuant to said trust. Unless the will otherwise provides, the trust shall thereafter be administered as if such trustee had not been appointed. Such renunciation shall not be construed to release or impair the right of such person to any legacy under the will

by which he was appointed trustee, unless such legacy shall be expressly declared in the will to be as compensation for his services as trustee. In all cases not provided for in this Section, a trustee may renounce or resign his trust only in accordance with the Maryland Rules.

COMMENT.

§§324–326 (Md) set forth a procedure for the "relinquishment, disclaimer or refusal" of a joint trustee appointed under a will. The import of these provisions is that one joint trustee may resign, presumably only where the will indicates that the remaining trustees will continue to discharge their functions by right of survivorship, and the trust property and all powers relating thereto devolve upon the remaining trustees.

The Commission believes that this would permit a trustee to resign at any time during the course of administration of the trust, even several years later, without making any accounting for his actions. This would leave the other trustees in a difficult position. For these reasons, and because the procedure for resignation and accounting of a trustee are so carefully spelled out in Subtitle V of the Maryland Rules, the Commission suggests that the right of resignation without accounting should be confined to those situations where the trustee does not take office. Therefore §§ 324 and 325 (Md) have been modified accordingly. The third sentence of the Section is intended to be declaratory of §326 (Md). The new language also refers to "renunciation" instead of "resignation".

9–103. Rights of heirs and legatees where no administration.

In the absence of administration, the heirs and legatees are entitled to the assets of the decedent's estate in accordance with the terms of a probated will or the laws of intestate succession. Legatees may establish title by the probated will to property disposed of thereunder. Persons entitled to property by intestacy may establish title thereto by proof of the decedent's ownership, his death, and their relationship to the decedent. Heirs and legatees take subject to all charges incident to administration, including all claims referred to in Section 8–105, family allowance under Section 3–201, rights of the surviving spouse under Section 3–203, and the rights of others resulting from abatement, advancement and ademption.

COMMENT.

This Section is derived from 3–601 (UPC) and indicates how heirs and legatees may establish record title in the absence of administration. There is no counterpart in the present Maryland law.

9–104. Distribution; order in which assets appropriated; abatement.

(a) *General rules.* Except as provided in subsection (b) hereof, in Section 3–301 dealing with the shares of pretermitted children and

their issue, or in Section 3–203 dealing with the share of the surviving spouse who elects to take against the will, or unless the will otherwise requires, or the legatee is the surviving spouse, creditor or dependent, shares of legatees abate, without any preference or priority as between real and personal property, in the following order:

(1) property not disposed of by the will;

(2) residuary legacies;

(3) general legacies;

(4) specific and demonstrative legacies.

Abatement within each classification is in proportion to the amounts of property each of the legatees (or heirs) would have received, had full distribution of the property been made in accordance with the terms of the will.

(b) *Abatement; sales, contribution.* When the subject matter of a preferred legacy is sold or used incident to administration, appropriate adjustments in, or contributions from, other interests in the remaining assets shall be effected.

COMMENT.

This Section follows generally 3–602 (UPC) and what the Commission believes to be the common law of Maryland on the subject. See, *Reno,* "The Maryland Order of Abatement of Legacies," 17 Md. L. Rev. 285, 293–298 (1957), and *Sykes,* §§87–88.

The rules of subsection (a) are to apply without distinction as to real or personal property. This is consistent with the provisions of Section 1–301 making real property a part of the probate estate and necessitates the repeal of §364 (Md) and §8 of Article 57.

Subsection (b) is not intended to apply to the renunciation of a will by a surviving spouse, nor to affect or modify the provisions to Section 3–208.

A testator may determine the order in which the assets of his estate are applied to the payment of his debts. If he does not, then the provisions of this Section lay down rules which may be regarded as approximating his intent. However, his intent may be indicated not only by an express designation of a property or fund, or by statement of the order in which assets are to be applied, but also by the implied purpose of the legacy or by the general testamentary plan.

9–105. Distribution in kind — valuation; method.

Subject to the terms of any will and the needs of administration, the assets of a decedent's estate shall be distributed in kind to the extent possible through application of the provisions herein.

(a) A specific legatee shall receive distribution of the thing given to him.

(b) Any family allowance or legacy payable in money may be satisfied by value in kind provided

(1) the person entitled to the payment has not demanded payment in cash,

(2) the property distributed in kind is valued at fair market value as of the date of its distribution, and

(3) no residuary legatee has requested that the asset in question remain a part of the residue of the estate.

(c) The residuary estate shall be distributed in kind when there is no objection to the proposed distribution, or when it is practicable to distribute undivided interests. In other cases, residuary property may be converted into cash for distribution.

(d) 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 if not waived in writing, terminates if he fails to object in writing received by the personal representative within 30 days after mailing or delivery of the proposal.

COMMENT.

This provision is substantially the same as 3–606 (UPC). It establishes a preference for distribution in kind, and directs the personal representative to make distribution in kind whenever feasible and to convert assets to cash only where there is a special reason for doing so.

The Commission believes that the procedure herein provided is more economical, complete and satisfactory than that presently available under §160 (Md). However, it has not included in its draft subsection (c) of 3–606 (UPC), which contains detailed rules for the method of valuing certain assets. The Commission felt that the personal representative could use any reasonable method, and if the legatee disputed the method of valuation, the legatee would have the opportunity to object. The Commission also intends that in making distributions in kind, the personal representative will have the power to ascertain the value of the assets so distributed as of the time of the proposed distribution, and in doing so, to employ qualified appraisers, even though the assets may have previously been appraised at a previous appraisal date. The expenses of the additional appraisal should be a cost of administration.

9–106. Distribution in kind — evidence.

When 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 Section is identical to 3–607 (UPC). With respect to real property, in view of the Commission's recommendation that title to real property will automatically vest in the personal representative at the death of the decedent, the personal representative will be required to execute an executor's deed in order to distribute any real property to any legatee. With respect to securities, the normal method of distribution would be to cause the securities to be re-registered. All disbursements incurred in the distribution of the estate should be considered expenses of administration.

§156 (Md) contains a provision similar to Section 9–106 by directing a personal representative who is making a distribution of chattels real to execute a deed in favor of the distributees of such chattels real. The Commission recommends the repeal of §156 because Section 9–106 will encompass the method of distributing not only chattels real but all types of property.

9–107. Distribution in kind — effect.

(a) *Title of distributees.* The title of the distributees who shall receive from the personal representative an instrument or deed of distribution of assets in kind is conclusive against all persons interested in the estate, except that the personal representative shall recover the assets or their value if the distribution was improper.

(b) *Improper distribution; liability of distributee.* A distributee of property improperly distributed is liable to return the property received if he has it or its value unless the distribution can no longer be questioned because of adjudication or limitation. If a distributee has disposed of any property improperly distributed to him his liability shall be the lower of the value of the property on the date of distribution or the value of the date of disposition.

(c) *Purchasers from distributees protected.* If property distributed in kind is sold to a purchaser for value by a distributee who has received an instrument or deed of distribution from the personal representative, the purchaser takes good title free of any claims of the estate and incurs no personal liability to the estate. To be protected under this provision, a purchaser need not inquire whether a personal representative acted properly in respect to a distribution in kind.

COMMENT.

Section 9–107 is derived from 3–608 through 3–610 (UPC). The Commission felt that these provisions clarified certain aspects of the law with respect to distribution of property by a personal representative.

9–108. Partition for purpose of distribution.

When two or more heirs or legatees are entitled to distribution of undivided interests in any property of the estate, the personal repre-

sentative or one or more of the heirs or legatees may petition the Court prior to the formal or informal closing of the estate, to make partition. After notice to the interested heirs or legatees, the Court shall partition the property in the same manner as provided by the law for civil actions of partition. The Court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party.

COMMENT.

This provision is derived from 3–611 (UPC). Ordinarily heirs or legatees desiring partition of a decedent's property will resolve the issue by agreement without resort to the Court. If Court determination is necessary, however, the Court with jurisdiction to administer the estate will have jurisdiction to partition the property.

The Commission recommends the repeal of §§154-155 (Md) because Section 9–108 would seem to encompass all of the problems to which those sections are directed. §154 provides that if the legatees of various articles of personal property are not satisfied by the method of division suggested by the personal representative he can request that a proceeding be held before the Court, at which a supervised procedure for distribution can be effected. §155 (Md) provides for the appointment by the Court of disinterested persons to make such distribution, or recommend to the Court a sale thereof.

9–109. Legatee not found; or residing outside the United States.

(a) *Unknown whereabouts; nonresident.* Whenever it shall appear to the satisfaction of the Court that (1) a personal representative has beeen unable to contact an heir or legatee because of his lack of knowledge of the heir's or legatee's whereabouts and the Court is satisfied that reasonable efforts have been made to locate such heir or legatee, or (2) an heir or legatee is a nonresident of the United States and would not have the benefit of use or control at its full value of money or other property comprising his distributive share or legacy, or where other special circumstances make it appear desirable that payment or delivery should be withheld because of national or international action affecting such money, property or value or the full use and enjoyment thereof, the personal representative shall, in such manner as he may be instructed by order of Court, pay over or transfer such money or other property (or the proceeds thereof if converted to cash by order of Court) to the Board of Education in the County where the letters were granted, and the same shall be applied for the use of the public schools in such County.

(b) *Refund.* If after payment has been made to the Board of Education a claim for refund is filed by such heir or legatee, or by the personal representative of such heir or legatee, such claimant shall be

entitled at any time to a refund, without interest, of any sum so paid, or the proceeds from the sale of any such property if not in the form of cash when transferred to the Board of Education, or the fair market value thereof at the time of transfer if not converted to cash.

COMMENT.

This provision replaces §161 and §§299A and 300 (Md). *Cf.*, 3–612(b)(UPC).

§161 deals with the disposition of property in the hands of a personal representative where the heir or legatee is behind the Iron Curtain or in similar circumstances. §§299A and 300 deal with the disposition of funds where an heir or legatee cannot be found. The Commission felt that these provisions relate to substantially the same type of a problem and should, therefore, be combined. As to whether or not subsection (a)(2) might be held unconstitutional, see *Zschernig v. Miller,* 389 U.S. 429 (1968), *Matter of Laikind* (New York Court of Appeals, decided 6/14/68) and *Estate of Kish* (New Jersey Supreme Court, decided 7/31/68).

Several substantive changes have been recommended by the Commission in the revision of these sections:

(1) The present law of Maryland provides that, in these circumstances, the personal representative may deliver the property to the Register of Wills, and if no claim is made within seven years after such delivery, the Register of Wills is directed to deliver the property to the Board of County Commissioners of the County in which the estate was being administered. The Commission felt that it would be more desirable to have the money used for purposes such as education, even during the seven year period, than to keep it in an unproductive manner, as presently. This approach is similar to the approach in Section 3–105 relating to property subject to escheat.

(2) Various procedural technicalities, such as newspaper notice provided in §299A, have been eliminated.

The Commission is mindful of the fact that §161 and §300 also deal with trustees and guardians. Because the Commission has recommended the deletion of these provisions it also recommends that a section be added to Article 16 which would continue the effect thereof for trustees and guardians.

The Commission also recognizes that Rule V79 deals with the same type of problem, including that of the personal representative, and recommends that the Rule be revised to make it consistent with this Section.

9–110. Distribution to a minor.

(a) *Money.* Whenever money is distributable by a personal representative to a minor and there is no legally appointed and qualified guardian of the property of the minor, the Court may order that such cash shall be deposited in any banking institution or insured savings

and loan association formed under the laws of this State or in this State under the laws of the United States to be named in the order, in which it may draw interest, in the name of the minor, subject to the further order of the Court. The personal representative shall deliver the account book to such person (including the Register) as the personal representative, with the approval of the Court, deems responsible and appropriate. When the minor reaches the age of 21, or a guardian is appointed the funds so deposited and the account book shall be delivered to the minor, or to such guardian.

(b) *$300 or less in cash.* Notwithstanding the provisions of subsection (a), if any minor is entitled to an amount not in excess of $300, the personal representative may, with the approval of the Court, pay such amount to such person as the personal representative, with the approval of the Court, deems responsible and appropriate, for the minor's past or future maintenance and support.

(c) *Appointment of custodian.* In addition to the procedures in subsections (a) and (b), whenever a personal representative is required to distribute any property included within the definition of "custodial property" [as defined in Article 16, §213(e)] the personal representative, with the approval of the Court, may transfer such property to a custodian who shall hold or dispose of the property in accordance with the provisions of the Maryland Uniform Gifts to Minors Act. The personal representative shall, subject to the approval of the Court, designate the custodian, who shall be an adult, a guardian of the minor, or a trust company as defined in Article 16, §213(a), (h) and (p).

(d) *Tangible personal property.* Whenever a personal representative must distribute tangible personal property to a minor and there is no guardian of the minor, the personal representative shall distribute the same to such person as the personal representative, with the approval of the Court, deems responsible and appropriate, and under the conditions set forth in the order of the Court.

COMMENT.

§§171–174 and §214 (Md) deal with certain problems that arise when a minor is a beneficiary of an estate. The Commission has combined and changed slightly the provisions of §173, §214 and the latter part of §172, and has eliminated the first clause of §172 and the whole of §§171 and 174.

§171 provides that the personal representative shall serve as the guardian for a minor with respect to real property until the close of the administration of the estate. This provision was important because it gave the personal representative control over the real estate when devised to a minor. Since the Commission has recommended that real estate become a part of the probate estate (see Section 1–301), this provision is no longer necessary. The personal

representative will be acting in a fiduciary capacity with respect to the real estate, whether or not the beneficiaries are minors.

§172 relates to the distribution of cash to a minor and provides that the Court may order that the cash be deposited in a bank account, subject to the further order of the Court. §214, however, has created an exception to this provision in cases where the minor is entitled to not more than $300. The Commission has recommended retention of these provisions and adoption of the provisions of §172(b) (Md) relating to the custody of the bank book.

Until 1968, the law provided that the personal representative should retain the bank book. It was brought to the attention of the General Assembly that where bank books are kept by the personal representative, they have a tendency to be forgotten after the passage of years. The General Assembly felt that with the approval of the Court, the personal representative should have the power to deliver the custody of the bank book to a person who has a closer personal relationship with the minor. In 1968, therefore, the General Assembly amended §172 (Md) by adopting subsection (b), which authorizes the personal representative to deliver the bank book to someone with custody of the minor. The Commission, in Section 9–110(a), has adopted this philosophy.

§173 permits the Register to hold jewelry, gems and precious stones to which a minor is entitled. The Commission felt that the Register of Wills is, in most instances, not the appropriate person to have custody of these items.

The Commission also felt that this Section should be broadened to include all items of tangible personal property. In such case the distribution would be subject to the order of the Court with respect to such questions as whether or not the property should be sold before the minor reaches 21, the disposition of the property in the event that the original custodian of the property dies before the minor attains the age of 21, and the extent to which the custodian should be responsible, if at all, for damage, loss or breakage.

However, the Commission's recommendations are not intended to abrogate the power which a testator has to provide in his will for alternative means of distributing assets to minors, including distributions directly to the minor or through the use of the Uniform Gifts to Minors Act.

The Commission is also mindful of §383 of Article 48A, which provides that any minor who has attained the age of 15 years may receive under the provisions of an insurance policy amounts not exceeding $3,000 in any one year. The Commission calls attention to the fact that the policy of §383 of Article 48A, both with respect to age and amount, is inconsistent with the provisions of §214 (Md), as contained in Section 9–110(b).

Subsection (c) is entirely new but is a logical extension of the 1967 amendments of the Maryland Uniform Gifts to Minors Act. Those amendments permitted testamentary gifts to a custodian. Article 16, §214(a)(5) provides that the testator may designate the custodian in his will, and if he does not designate the custodian, the

personal representative shall have the power to do so. Subsection (c) of Section 9–110 will, even where the will has not specifically provided for the use of the Maryland Uniform Gifts to Minors Act, permit the personal representative, with the approval of the Court, to designate a custodian and to transfer any custodial property to the custodian, to be held for the benefit of the minor in the same manner as set forth in the Maryland Uniform Gifts to Minors Act.

9–111. Payment of legacy to fiduciary for nonresident person non compos mentis.

If a nonresident person who has been declared to be non compos mentis by a court of competent jurisdiction in the foreign jurisdiction in which such person resides, shall be entitled to share in any estate, and such person has had a committee or other fiduciary appointed where he resides, such foreign fiduciary may, upon application by a verified petition to the Court, obtain an order for the payment, transfer or delivery of such share, provided that the petition shall set forth the entire amount of the property of such person, including the property in this State, and shall be accompanied by duly authenticated copies (a) of the decree adjudicating such person non compos mentis, (b) of such fiduciary appointment and qualification, and (c) of the bond or other security given by such fiduciary, and the sufficiency of the security shall be certified by the chief clerk of the court by which such security was taken; and, provided further, that the Court is satisfied of the truth of the facts set forth in the petition and of the sufficiency of such security.

COMMENT.

This Section is derived from §272A (Md).

9–112. Release.

Upon making a distribution, a personal representative may, but shall not be required to, obtain a verified release from the heir or legatee.

COMMENT.

This Section continues the present Maryland practice of not requiring releases, although personal representatives, out of caution, have, in the past, obtained releases in many instances.

The Commission felt that the detailed requirements with respect to the form of releases contained in Article 79, §§1 through 6 are unnecessary and recommends that those provisions be amended and abbreviated as herein provided.

ADDITIONAL COMMENTS TO SUBTITLE IX.

(1) The Commission recommends the repeal of §§157 and 158 (Md). These provisions were included in the original Act of 1798 and appear to be of little or no contemporary use. For instance,

§157 enables a legatee who "shall be in want of subsistence, or greatly straitened in his circumstances" to petition the Court for the payment of one-third of his legacy, upon the legatee's "giving bond". The Commission felt that welfare programs, ease of borrowing, and other temporary economic opportunities have rendered these provisions of little use and, in the interest of simplicity, their repeal is recommended. The Commission does not, however, intend to imply that a personal representative is not authorized to make partial distributions to heirs or legatees during the course of administration, nor to imply that an heir or legatee does not have the right to petition a Court to compel the personal representative to make a distribution, if the personal representative is abusing his discretion in withholding any distribution.

(2) The Commission recommends the deletion of §159 (Md) which provides that if money or personal property are given to a female upon her attaining "full, mature or lawful age," she shall be entitled to receive the same upon reaching 21. In view of the fact that the word "maturity" is equivalent to "lawful age", *Carpenter v. Boulden,* 48 Md. 122 (1878), and since the legislature in recent years has made attaining the age of 21 years uniform, except in special cases, for the termination of minority, the Commission felt that this section no longer has any usefulness.

(3) The Commission recommends the deletion of §148 (Md) which provides for the payment of a legacy to the personal representative of a legatee who died after the decedent's death. It believes these provisions to be unnecessary.

SUBTITLE X

CLOSING ESTATES

10–101. Petition to close estate and discharge personal representative.

After the time has passed for presenting claims which arose prior to the death of the decedent, a personal representative may petition the Court for an order to close the estate and terminate his appointment as personal representative. After notice to all interested persons, and a hearing if requested in writing filed with the Court within twenty days, the Court may enter an appropriate order.

COMMENT.

Subtitle X is new in the Maryland law.

10–102. Closing estate pursuant to verified statement of personal representative with extended powers.

A personal representative administering the estate with extended powers under Section 7–402 may close the estate and terminate his appointment by filing with the Court, at any time after the time has passed for presenting claims which arose prior to the death of the decedent, a verified statement that he has:

(a) published notice to creditors as provided by Section 7–103, showing the dates of publication thereof;

(b) paid, settled or otherwise disposed of all claims which were presented, all expenses of administration and all estate, inheritance and other death taxes, except as specified in the statement, and if any claim or tax remains unpaid or has not been finally determined, the statement shall state in detail what arrangement has been made to accommodate the same;

(c) has distributed all of the assets of the estate to the persons entitled in accordance with the account or accounts either filed or certified as provided in Section 7–301;

(d) sent a copy thereof to all persons entitled to distribution of the estate, and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred.

10–103. Liability of heir or legatee to creditor.

After an estate has been closed, a claim not barred may be prosecuted against one or more of the persons to whom property has been distributed. No heir or legatee shall be liable to claimants for amounts in excess of the value of his distribution, valued at the time of distribution or the time of filing suit, whichever is lower. Any such

heir or legatee shall have a right of contribution against other heirs and/or legatees; and as between them each shall bear the cost of satisfaction of unbarred claims as if the claim had been satisfied before distribution.

COMMENT.

See Section 8–103.

10–104. Limitations.

(a) *Proceedings against personal representative.* If no action or proceeding involving the personal representative is pending one year after the termination of the appointment of the personal representative pursuant to Section 10–101 or Section 10–102, the personal representative shall be discharged from any claim or demand of any interested person. The rights so barred do not include rights to recover from a personal representative for fraud, material mistake or substantial irregularity.

(b) *Claims against heirs and legatees.* The right of any person seeking to recover property improperly distributed, or the value thereof, from any person to whom property has been distributed shall be forever barred at the later of:

(1) 3 years from the decedent's death, or

(2) one year from the time of distribution thereof.

This Section shall not bar recovery of property or the value thereof received as the result of his participation and fraudulent distribution.

10–105. Subsequent administration.

If other property is discovered after an estate has been closed and the appointment of the personal representative has been terminated pursuant to Section 10–101 or Section 10–102, the Court, upon petition of any interested person and upon such notice as it may direct, may appoint the same or a successor personal representative and make any other appropriate order. Any further proceedings shall be conducted pursuant to such provisions of this Article as may be applicable, but no claim previously barred may be asserted in the reopened administration.

SUBTITLE XI

MISCELLANEOUS RULES AFFECTING DECEDENTS' ESTATES AND TESTAMENTARY AND NON-TESTAMENTARY TRANSFERS.

11–101. Destructibility of contingent remainders.

Any contingent remainder arising under any will or inter vivos transfer shall be capable of taking effect, notwithstanding the determination of any preceding estate of freehold, in the same manner and in all respects as if such determination had not happened; and it shall not be necessary to appoint trustees to support such contingent remainder in order to prevent the destruction thereof.

COMMENT.

This Section is a recodification of §323 (Md), except that the statement that the provision shall be effective only as to documents executed after July 1, 1929, has been transferred to Section 12–102. Omission of the words "by forfeiture, surrender, or merger, or otherwise" is considered by the Commission to be merely the elimination of a rhetorical extension of the word "determination". §323 (Md) applies to deeds and "other instruments" as well as wills.

11–102. Perpetuities — exceptions.

Subject to Sections 4–409 and 11–103, the common law rule against perpetuities as now recognized in this State shall be preserved, but such rule shall not apply to the following:

(a) *Cemetery perpetual care.* A legacy or inter vivos conveyance having a value of $5,000 or less, or of any burial lot of any value, in trust or otherwise, for the purpose of providing for the perpetual care or keeping in good order and condition, or making repairs to, any lot, vault, mausoleum or other place of sepulture belonging to any individual or several individuals in any cemetery or graveyard, the lots in which are intended for the burial of members of the family, family connections, relatives or friends of the owners thereof, or their successors in ownership.

(b) *Transfer from charitable corporation on contingency.* A legacy or inter vivos conveyance intended to transfer assets from any corporation incorporated for charitable objects, to any other charitable corporation on a contingency or future event.

(c) *Employees' pension, stock bonus, etc., trust.* A trust heretofore or hereafter created by an employer as part of a pension, stock bonus, disability, death benefit, profit-sharing, retirement, welfare or other plan for the exclusive benefit of some or all of the employees of such employer or their beneficiaries, to which con-

tributions are made by the employer or employees, or both the employer and employees, for the purpose of making distributions to or for the benefit of employees or their beneficiaries out of the income or principal or both the income and principal of such trust, or for any other purposes set out in such plan.

COMMENT.

In a recent examination of the status of the Rule Against Perpetuities ["Reforming the Law — The Rule Against Perpetuities," 22 Md. L. Rev. 269 (1962)], Professor Laurence M. Jones of the Maryland Law School recognized that the Rule is most complex, after several centuries is still evolving, and "has deserved much of the criticism which is directed at it." He argued persuasively that efforts at reform "should not attempt to provide a substitute for the Rule but merely modify its application." This has been the direction heretofore taken by the General Assembly, and the forms adopted by it have been followed here. Subject to these exceptions, the Rule is retained. Cf. §347 (Md).

Subsection (a) contains the exceptions to the Rule added in Maryland in 1906 which now appear as §§345 and 358 (Md).

Subsection (b) is derived from a 1908 exception, now §348 (Md). The grammatical changes in this subsection are intended to make the provision more concise and facilitate its inclusion in this Section. The only substantive change intended in this subsection is the elimination of the exemption from the Rule of shifting executory legacies to an individual. This is in accord with the general American rule, see 6 American Law of Property §24.39 (1952).

Subsection (c) is a recodification of Article 16, §197, with only minor amendments in phraseology. The Commission suggests that it is convenient to combine all portions of the law relating to the rule against perpetuities, but it is recommended that a cross-reference be added by statute in Article 21.

As to the validity of a legacy for charitable uses where the formation of a corporation to take the same is directed by will, see Section 4–409.

11–103. Perpetuities — limitations on application of common law rule.

(a) In applying the rule against perpetuities to an interest limited to take effect at or after the termination of one or more life estates in, or lives of, persons in being when the period of said rule commences to run, the validity of the interest shall be determined on the basis of facts existing at the termination of such one or more life estates or lives. In this Section an interest which must terminate not later than the death of one or more persons is a "life estate" even though it may terminate at an earlier date.

(b) If an interest would violate the rule against perpetuities as modified by subsection (a) because such interest is contingent upon

any person attaining or failing to attain an age in excess of twenty-one, the age contingency shall be reduced to twenty-one as to all persons subject to the same age contingency.

(c) This Section shall apply to both legal and equitable interests.

COMMENT.

This Section is recodified from Article 16, §197A. No substantive change is intended. See the Comment to the preceding Section, and see *Jones,* "Reforming the Law — The Rule Against Perpetuities," 22 Md. L. Rev. 269 (1962), *Jones,* "The Rule Against Perpetuities as Applied to Powers of Appointment in Maryland," 18 Md. L. Rev. 93 (1958); *Dunn,* "An Attack on the Twenty-One Year Rule," 18 Md. L. Rev. 34 (1958); Note, "Effect of Power of Revocation Vesting Subsequent to Execution of Deed of Trust on Measuring Period of Perpetuities," 20 Md. L. Rev. 142 (1960).

11–104. Rule in Shelley's case abolished.

Whenever by any form of words in any will or inter vivos conveyance a remainder shall be limited, mediately or immediately, to the heirs or heirs of the body of a person to whom a life estate in the same subject matter is given, the persons who on the termination of the life estate are then the heirs or heirs of the body of such tenant for life, shall take as purchasers by virtue of the contingent remainder so limited to them.

COMMENT.

This abolition of the Rule in Shelley's Case, originally adopted in Maryland in 1912 and now §366 (Md), is here recodified. References to property in the former statute have been deleted in order not to be limited by the definition of the word in Section 1–101(p). The Commission does not intend that such deletions affect the substance of the statute as it now exists. Note, however, the applicability of the definition of "heir" as it appears in Section 1–101(f). See also Note, "Shades of the Rule in Shelley's Case," 19 Md. L. Rev. 43 (1959).

The language of §366 (Md) has not materially changed because it is an old statute relating to property; however, the Commission has recommended the abolition of estates tail (Section 1–301), and the continuation in Section 11–104 of the words "heirs of the body" is intended to preserve rights which heretofore existed, and not to impair the abolition of estates tail.

The Commission also recommends that a cross-reference be added in Article 21.

11–105. Death benefits payable to inter vivos and testamentary trusts.

(a) *Definition.* As used in this section, the words "death benefits" shall mean death benefits of any kind, including, but not limited to, pro-

ceeds of life insurance policies and payments under an employees' trust (or contract purchased by such a trust) forming part of a pension, stock bonus or profit-sharing plan, or under a retirement annuity contract.

(b) *Payments to trustee under existing inter vivos trust.* Death benefits may be made payable to the trustee under a trust agreement, or declaration of trust, in existence at the time of the death of the insured, employee or annuitant. Such death benefits shall be held and disposed of by such trustee in accordance with the terms of the trust as they appear in writing on the date of the death of the insured, employee or annuitant. It shall not be necessary to the validity of any such trust agreement or declaration of trust, whether revocable or irrevocable, that it have a trust corpus other than the right of the trustee to receive such death benefits.

(c) *Payments to trustee under testamentary trust.* Death benefits may be made payable to the trustee named, or to be named, in a will of the insured or the owner of the policy, or the employee covered by such plan or contract, as the case may be, whether or not such will is in existence at the time of such designation. Upon the admission of such will to probate, and the payment of the benefits to the trustee, such benefits shall be held, administered, and disposed of in accordance with the terms of the testamentary trust created by the will.

(d) *Payments where no trustee makes claim.* In the event no trustee makes proper claim to the death benefits within a period of one year after the date of death of the insured, employee or annuitant, or if satisfactory evidence is furnished to the insurance company or other obligor within such one-year-period that there is or will be no trustee to receive the proceeds, payment shall be made by the insurance company or other obligor to the personal representative of the person making such designation, unless otherwise provided by agreement.

(e) *Exemption from taxes and debts.* Death benefits payable as provided in this Section, unless paid to a personal representative under the provisions of subsection (d), shall not be deemed to be part of the decedent's estate, and shall not be subject to any obligation to pay taxes, debts or other charges enforceable against the estate of the decedent, except as provided in Section 11–109.

(f) *Commingling of assets.* Death benefits so held in trust may be commingled with any other assets which may properly come into such trust.

COMMENT.

This Section restates §350C (Md). It was thought by the Commission that it would be helpful to define the term "death benefits" at the outset of the statute rather than restate it at length or by reference in each subsection. This has been done in subsection (a). As to other words omitted from the statute, see the Comment to 4–411.

11–106. Tax elections by fiduciaries.

(a) Unless otherwise expressly provided by a will or other controlling instrument under which a trust is created or other provision made whereby any person is given an interest in income, an estate for years or for life, or other temporary interest in any trust or other assets and, under any tax law of the United States, the personal representative or other person acting in a fiduciary capacity for the deceased maker of such will or other instrument (hereinafter called the "fiduciary"), is given an election to treat administration expenses of the decedent's estate paid from or chargeable to the principal of such trust or other assets either as income tax deductions or estate tax deductions, and such fiduciary elects to treat such expenses in whole or in part as income tax deductions, with the result that estate taxes imposed under such law and paid from or chargeable to such principal are greater than if the contrary election had been made, an amount equal to such difference in such estate taxes shall be reimbursed to such principal from the income of such trust or other assets.

(b) Unless otherwise expressly provided by a will or other controlling instrument under which a gift is made to or for the benefit of the surviving spouse of the decedent which qualifies for an estate tax marital deduction under any tax law of the United States and the amount or size of such gift is defined by the will or other controlling instrument in terms of the maximum marital deduction allowable under such tax law, no adjustment shall be required to be made between such gift and the other interests in the decedent's estate, or governed by such instrument, by reason of (i) any increase in the amount or size of such gift resulting from any election by the fiduciary, under such tax law, to treat estate administration expenses as income tax deductions over the amount or size of such gift had the contrary election been made, or (ii) any increase or decrease in the amount or size of such gift resulting from an election by the fiduciary, under such tax law, of an estate tax valuation date other than the date of the decedent's death as compared with the amount or size of such gift had the contrary election been made.

(c) Unless otherwise expressly provided by a will or other controlling instrument under which a gift is made to or for the benefit of the surviving spouse of a decedent which qualifies for an estate tax marital deduction under any tax law of the United States and the amount or size of such gift is defined by the terms of the will or other controlling instrument in terms of the maximum marital deduction allowable under such tax law, such definitions shall not be construed as a direction by the decedent to the fiduciary to exercise any election respecting the deduction of estate administration expenses or the determination of the estate tax valuation date, which the fiduciary may have under such tax law, only in such manner as will result in a larger

allowable estate tax marital deduction than if the contrary election had been made.

COMMENT.

This Section was adopted in 1967 and now appears as §393 (Md). The Commission has made several grammatical changes in subsection (a) to avoid conflict with the definition of "property" in Section 1–101. No substantive change is intended. The last sentence of the Section is in accord with Sec. 2 of Chapter 238 of the Acts of 1967.

11–107. Distribution in kind, using federal estate tax values.

Whenever a will or other governing instrument (i) specifically authorizes a fiduciary to satisfy a legacy or transfer by selection and distribution of assets in kind and (ii) provides that the value of the assets to be so distributed shall be determined by reference to their value for purposes of payment of federal estate taxes, the fiduciary shall distribute assets, including cash, having an aggregate fair market value at the date or dates of distribution amounting to no less than the amount of such legacy or transfer as finally determined for federal estate tax purposes unless the will or other governing instrument expressly directs otherwise.

COMMENT.

In 1964, the Internal Revenue Service issued Revenue Procedure 64–19, which was thought by many in Maryland to invalidate marital deductions contained in many wills. The matter is discussed at length in committee reports (69 *Transactions* 465–467; 70 *Transactions* 394, 399–400) and meetings (69 *Transactions* 131–132; 70 *Transactions* 56–65, 143–144) of the Maryland State Bar Association. Later, pursuant to action recommended by the Association, the General Assembly adopted §392 (Md) as Chapter 918 of the Acts of 1965.

Without here providing a detailed review of the matters fully covered in Procedure 64–19 or the proceedings of the State Bar Association, it is sufficient to state that a will or a law of the State is required to contain one of two procedures to be followed by a fiduciary when making distribution of an estate in accordance with a direction to distribute assets at their valuation for federal estate tax purposes. §392 (a) (Md) adopted the first such procedure as the one to be applied in the absence of a contrary direction in the will. The second IRS procedure was set forth as subsection (b) of §392 (Md), to be applied only when the will specifically directed such manner of distribution.

This Commission, which includes five members of the State Bar Association committee which drafted §392 (Md), feels that the procedure prescribed in the statute was an improvident one for it establishes the more complicated of the two methods of apportionment permitted by Revenue Procedure 64–19. Experience with the IRS procedures has indicated that, where the alternative now provided in §392(a) is desirable or beneficial to a particular estate, it can be

directed in the will, although, in fact, it appears to be seldom so used. In the absence of such specific direction, there seems to be no need to burden estates — particularly smaller estates in which specific direction on the point is most likely to be absent — with the expense and delay occasioned by sophisticated accounting problems.

Therefore, the Commission here recommends, as the rule to be applied where the will itself is silent, the method of valuation permitted by the second alternative of Revenue Procedure 64–19, as formerly contained in §392 (b) (Md). Of course, the will may specifically direct the alternative procedure. The careful practitioner will remember, however, that the fiduciary must have no discretion in which of the procedures he follows, so that the will should either remain silent on the subject or specifically designate which of the procedures is to be followed.

No other changes in the substance of §392 (Md) are intended.

The last two sentences of the Section were added to avoid the sort of controversy which arose with the presentation of the former statute at the 1965 Mid-Winter Meeting of the State Bar Association (70 *Transactions* 61) and to provide a transitional period during which testators and their scriveners can adapt their estate plans to the change in the rule.

11–108. Release of powers of appointment.

(a) Unless the instrument creating a power of appointment expressly provides to the contrary, such power may be wholly or partially released as to all or any portion of the assets subject thereto by an instrument signed by the person holding the power and attested by two witnesses. If such person is a minor or is otherwise under disability, a release pursuant to this Section may be exercised by order of the court having jurisdiction of the person or property of the individual under disability. A release pursuant to this Section shall identify the instrument creating the power of appointment; the place such instrument was recorded or admitted to probate; a statement of the extent to which the power is released; and any limitation which the release, if partial, places upon the persons, objects or classes thereof in whose favor the power would otherwise be exercisable. Such release, whether or not for consideration or under seal, after delivery as provided in subsection (b), shall be irrevocable from and after the time that it is delivered.

(b) A release pursuant to subsection (a) shall be delivered—

(i) to the Register of the County in which the will creating the power of appointment was admitted to probate or recorded; or

(ii) to the Clerk of the appropriate court for recordation among the land records of any County in which the instrument creating the power of appointment has been recorded; or

(iii) in the case of all instruments creating powers of appointment which are not recorded, to the person making the instrument which created the power of appointment or to any person holding, individually or jointly with others, a substantial portion of the assets subject to such power of appointment. In addition, any release referred to in this Section may be recorded among the land records of the County in which such maker or fiduciary resides.

The Register or Clerk shall index and record any such release in the same manner as the instrument creating the power of appointment was recorded and shall make a reference in the margin of the place of recording of such original instrument of the date and place of recording of such release. Such releases shall be subject to the usual fees for indexing and recordation; but shall not be subject to a recordation tax now or hereafter imposed.

(c) A power of appointment may also be released by any means or method valid or effective in the absence of this Section.

COMMENT.

§§360–363 (Md) purport to establish a procedure for releasing powers of appointment. Even as originally adopted in 1943, such procedures were specifically stated to be non-exclusive. Moreover, in 1951, such procedural requirements as were contained in the original act were waived as to all releases made after June 1 of that year and as to virtually all made before that time.

The Commission feels that there should be some convenient way for establishing the fact of a release of a power of appointment. The Commission concurs with the theory of the present statutes that such method should be non-exclusive, but feels that the purpose can be accomplished in much simpler fashion. Therefore, the above section, while based upon §§360–363 (Md), is designed to provide a simplified statutory method for releasing powers of appointment.

11–109. Uniform Estate Tax Apportionment Act.

(a) *Definitions.* When used in this Section—

(1) *"Estate"* means the gross estate of a decedent as determined for the purpose of the federal estate tax and the Maryland estate tax.

(2) *"Fiduciary"* means personal representative and trustee.

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

(4) *"Person interested in the estate"* means any person, including a personal representative, guardian, or trustee, entitled to receive, or who has received, from a decedent while alive or by

reason of the death of a decedent, any property or interest therein included in the decedent's taxable estate.

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

(6) *"Tax"* means the federal estate tax and the Maryland estate tax and interest and penalties imposed in addition to the tax.

(b) *Persons among whom tax to be apportioned.* The tax shall be apportioned among all persons interested in the estate. The apportionment shall 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 shall be used for that purpose.

(c) *Procedure for determining apportionment.*

(1) The Court shall determine the apportionment of the tax. If there are no administration proceedings, the Court of the County wherein the decedent was domiciled at death shall determine the apportionment of the tax upon the application of the person required to pay the tax.

(2) If the Court finds that it is inequitable to apportion interest and penalties in the manner provided in this Section because of special circumstances, it may direct apportionment thereon in the manner it finds equitable.

(3) The expenses reasonably incurred by any fiduciary and by any other person interested in the estate in connection with the determination of the amount and apportionment of the tax shall be apportioned as provided in subsection (b) and charged and collected as a part of the tax apportioned. If the Court finds that it is inequitable to apportion the expenses as provided in subsection (b), it may direct apportionment thereof equitably.

(4) 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 the fiduciary with the amount of the assessed penalties and interest.

(5) In any suit or judicial proceeding to recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this Section, the determination of the Court in respect thereto is prima facie correct.

(d) *Method of proration.*

(1) The fiduciary or other person required to pay the tax may withhold from any property of the decedent in his possession,

distributable to any person interested in the estate, the amount of tax attributable to his interest. If the property in the possession of the fiduciary 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 fiduciary 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 fiduciary or other person required to pay the tax, the fiduciary or 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 Section.

(2) If property held by the fiduciary or other person is distributed prior to final apportionment of the tax, the fiduciary or other person may require the distributee to provide a bond or other security for the apportionment liability in the form and amount prescribed by the fiduciary, with the approval of the Court.

(3) If the fiduciary or other person transfers any property included in the estate to another person, other than a bona fide purchaser for value, such transferee shall be jointly and severally liable with the transferor for the amount of tax apportioned to the transferor under this Section, less the value at the time of such transfer of any consideration furnished by the transferee for such property.

(e) *Allowance for exemptions, deductions and credits.*

(1) In making an apportionment, allowances shall be made for any exemptions granted, and for any deductions and credits allowed by the law imposing the tax.

(2) Any exemption or reduction 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 that relationship or receiving the gift. When 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 credit for property previously taxed, any credit for state death taxes, and any credit for gift taxes or death taxes of a foreign country, inures to the proportionate benefit of all persons liable to apportionment.

(4) To the extent that property passing to or in trust for a surviving spouse or any charitable, public or similar gift or bequest does not constitute 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 shall not be included in the computation provided for in this Section, and to the extent no apportionment shall be made against the property. This does not apply in any instance where the result will be to deprive the estate of a deduction otherwise allowable under §2053(d) of the Internal Revenue Code of 1954 of the United States, relating to deduction for State death taxes on transfers for public, charitable or religious uses.

(f) *No apportionment between temporary and remainder interests.* 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) *Exoneration of fiduciary.* Neither the fiduciary nor other person required to pay the tax is under any duty to institute any suit or proceeding to recover from any person interested in the estate the amount of the tax apportioned to that person until the expiration of the six months next following the payment of any tax. If the fiduciary or other person required to pay the tax cannot collect from any person interested in the estate the amount of 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) *Action by nonresident.* Subject to this subsection, a fiduciary acting in another State or a person required to pay the tax who is resident in another State may institute an action in the courts of this State and may recover a proportionate amount of the federal estate tax or 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 resident in this State or who owns property in this State subject to attachment or execution. For the purpose 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. The provisions of this subsection apply only if the State in which the determination of apportionment was made affords a substantially similar remedy.

(i) *Uniformity of construction.* Such of the provisions of this Section as are uniform with statutes enacted in other States shall be so construed as to effectuate their purpose to make uniform the laws of those States which enact such provisions.

(j) *Short title.* This Section may be cited as the Uniform Estate Tax Apportionment Act.

COMMENT.

Section 11–109 removes *verbatim* §162 from Article 81 and places it in Article 93 along with the other rules relating not only to wills but also to non-testamentary instruments.

ADDITIONAL COMMENT TO SUBTITLE XI.

For additional rules relating to legacies see Part 4 of Subtitle IV.

SUBTITLE XII

EFFECTIVE DATE AND APPLICABILITY

12–101. Effective date.

The effective date of this Article shall be 12:01 A.M. on July 1, 1969.

12–102. Applicability.

Unless otherwise specifically provided in another Section of another Subtitle of this Article, the provisions of this Article shall apply as follows:

(a) Subtitles I, III, V, VI, VII, VIII, IX and X shall apply to the estates of decedents, dying on or after the effective date of this Article.

(b) Subtitle II shall apply, in every instance, on and after the effective date of this Article.

(c) Subtitle IV shall apply to all wills executed on or after the effective date of this Article, except that Section 4–105 shall apply to any act or acts of revocation occurring on or after the effective date of this Article.

(d) Section 11–101 shall apply to any will or inter vivos transfer executed after July 1, 1929.

(e) Section 11–102(b) shall apply to all wills or inter vivos instruments executed on or after the effective date of this Article. All other provisions in Subtitle XI shall become effective on the effective date of this Article.

(f) Section 11–103 shall apply to (1) inter vivos instruments which took effect after June 1, 1960; (2) wills where the testator died after that date; or (3) appointments made after that date, including appointments by inter vivos instruments or wills under powers created before that date.

(g) Section 11–104 shall apply to any will or inter vivos conveyance executed after May 31, 1912.

(h) Section 11–106 shall apply to estates of decedent's dying on or after June 1, 1967.

(i) Section 11–107 shall apply to the estates of decedents dying on or after July 1, 1968. As to the estates of decedents dying

between October 1, 1964, and December 31, 1969, the provisions of Chapter 918 of the Acts of 1965 shall apply.

(j) Except as otherwise provided in the will, or other controlling instrument, Section 11–109 shall apply to the apportionment of, and contributions to, the federal and Maryland estate taxes of estates of decedents dying on or after June 1, 1965.

TABLE I

Cross-References

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	109	See 7–101, 7–404 and comment thereto; and 6–102
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Third Report

of

GOVERNOR'S COMMISSION

TO STUDY AND REVISE THE TESTAMENTARY LAW OF MARYLAND

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Article 93

Compensation of Personal Representatives

•

January 30, 1970

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Article 93

Compensation of Personal Representatives

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THE COMMISSION:

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Letter of Transmittal

To: The Governor and the General Assembly of Maryland

This is the Third Report of the Governor's Commission to Study and Revise the Testamentary Laws of Maryland.

The Commission's First Report, dated December 26, 1966, dealt exclusively with the subject of death taxes in Maryland.

The Second Report, dated December 5, 1968, represented a comprehensive restatement of the testamentary laws of Maryland. The substance of that Report, rewritten in statutory form and amended in some particulars, was enacted as Chapter 3 of the Regular Session Laws of 1969, and became effective on January 1, 1970.

As explained in the Letter of Transmittal introductory to the Second Report, the Commission had reserved for this Third Report the question of what changes should be made in the existing pattern for compensation of personal representatives administering the estates of decedents in Maryland.

This Report recommends that Section 7–601 of Article 93 of the Annotated Code of Maryland be revised by substituting an entirely different, generally lower statutory schedule for the allowance of commissions to personal representatives with respect to both the amounts and the manner of such allowance. A detailed commentary explaining the Commission's reasons for proposing these changes is appended.

The selection of an appropriate guideline for the compensation of personal representatives in Maryland which it could recommend for adoption by the General Assembly has been one of the most difficult tasks for the Commission in its entire studies relating to the revision of the Maryland laws controlling the administration of decedents' estates. Many States have made statutory schedules available, and many have not. A detailed study of the practice of all fifty States indicates that there are no two States which agree completely on how specific amounts of commissions should be fixed; and the substantial variations appear not only in the percentages applicable to varying amounts of assets constituting decedents' estates, but also in the assets which should be included in the base to which the designated percentage figures should be applied.

However, there appears at least a general pattern among those States which seem to be most comparable to Maryland, whether it is fixed by statute or by practice, which the Commission has tried to follow as its basis for the recommendations in this Report.

After completing what it considered the last of its Discussion Drafts, the Commission submitted its studies and conclusions to the Trust Committee of the Maryland Bankers Association for its observa-

tions and comments. This procedure was in keeping with the cooperation which the Commission has enjoyed since the beginning of its studies in 1966 with representatives of the various Maryland banks and trust companies and The Trust Association of Maryland.

Thereafter, at the request of the representatives of the Maryland corporate fiduciaries, the full Commission held a hearing at which the various viewpoints of the trust institutions were set forth, orally and in writing. Since then, representatives of the Commission have had several meetings and discussions with representatives of the Maryland banks and trust companies in an effort to work out a plan which would be mutually acceptable. However, complete agreement proved to be unattainable because of a basic difference of viewpoint.

The objections of the representatives of the banks fell into four general categories, which may be summarized thus: (1) a failure on the part of the Commission to provide for the increase in costs which greater complication in the administration of decedents' estates had brought inevitably about, has made unacceptable any reduction in the presently allowable compensation; (2) where there are two or more co-personal representatives and one of these is a corporate fiduciary, the corporate fiduciary should be entitled to whatever the commission may be that is fixed in accordance with the statutory schedule, and a separate commission should be provided for the one or more additional co-personal representatives so that the corporate fiduciary would not have to bear the risk, as well as the family pressure, of having to share its due compensation with one or more non-professional co-personal representatives, be they laymen or attorneys; (3) inadequate provision had been made for services often required in connection with the handling of non-probate assets, as well as the extraordinary services sometimes required in connection with the administration of the probate assets themselves; and (4) the Discussion Draft implied that the Commission intended that even the statutory schedule of commissions could be denied the personal representative where attorneys' fees were sufficiently substantial to result, otherwise, in producing a total cost of administration too burdensome to the particular estate.

In response the Commission believes: As to (1), the compensation generally, if not universally, allowed personal representatives in the administration of the small (below $20,000) as well as the larger (above $100,000) estates is too often unreasonably high and, as a result, the public often has reason to complain. As to (2), the traditional Maryland rule of providing for only one commission, which can be divided among the several co-personal representatives as they may agree, or as may otherwise be determined by the Court, is important and should be retained but should be modified to provide that if one of two or more co-personal representatives does all, or substantially all, of the work the statutory provision should direct that such co-personal

representative, alone, should receive all, or substantially all (as the case may be), of the total compensation allowed therefor.

As to (3), subsection (c) of Section 7–601 has been revised to attempt to meet the criticisms of the representatives of the corporate fiduciaries, and the statute now more fully and clearly defines what the Commission believes should qualify as "unusual services" in any particular case, so as to entitle the personal representative or representatives to additional compensation over and above the maximum allowable under subsection (b).

As to (4), the Comment following the proposed text of Section 7–601 has been revised to make it clear that the provision in Section 7–602(c) to the effect that in fixing the attorney's fee the Court shall take into consideration "what would be a fair and reasonable total charge for the cost of administering the estate," is not intended to affect in any way what the Court may determine to be a fair and reasonable commission for the personal representative or representatives.

Further answering the first criticism, the Commission does not object to the schedule of commissions under present Maryland law as such. Its objections are directed, rather, to how that schedule works out in practice. The present law places in each Orphans Court the discretion to fix commissions between 2% and 10% on the first $20,000 of the personal estate, and in an amount not in excess of 4% on the remainder. However, experience has shown that, when requested, the maximum amount of commissions is almost invariably granted by the courts. In fact, the Commission has been advised of situations where the Court has insisted upon granting the maximum even when it was not requested. Thus, the theoretically sound ideal of the Maryland statute has simply not worked out.

As a result, the Commission presents its recommendations for a new schedule on the basis of what it believes to be fair compensation in normal or usual cases, and has then provided for the allowance of additional compensation for "unusual services" rendered in the special situations that arise in some administrations. It should be noted that this is an entirely new concept in the Maryland law. Heretofore the personal representative has been held inflexibly to an amount within the statutory figures. Although extremely generous in most cases, there have been to the Commission's knowledge many estate administrations where the statutory maximum has denied the personal representative a fair and reasonable fee under the circumstances of the "unusual services" which were required in order properly and adequately to protect the beneficiaries of the decedent's estate. Through the method of compensation here proposed the Commission believes that a far better system will be provided for the full protection of both the personal representative and the beneficiary of the estate.

Answering the second criticism — that multiple commissions should be provided for multiple personal representatives — the Commission simply believes that the traditional Maryland rule, with the safeguards and flexibility added by the present proposal, fully and more assuredly protects both the personal representative and the estate beneficiary.

That is, if the corporate representative or any other co-personal representative performs all, or substantially all, of the services rendered in the administration of an estate the Commission believes that the Court should, and under its proposal will, direct that what it deems appropriate as fair compensation be paid in full to such co-personal representative. In this way justice will have been done to all, whereas if there were in the statute a provision for a second and separate fee for the other one or more personal representatives who have contributed little or nothing to the effectiveness of the administration, past experience would indicate that in at least some of the Orphans Courts in the State additional commissions would be awarded, thereby unjustifiably increasing the total cost and expense for the estate beneficiaries.

Although it could perhaps be assumed that for all practical purposes the naming of a corporate personal representative would justify the payment of all, or substantially all, of the commission to it, since most co-personal representatives are friends or members of the family who often contribute little to the technical and mechanical or administrative aspects of the estate administration, the Commission believes it would be unwise for the statute to single out one separate class of co-personal representatives for special treatment; and to legislate as to which of two natural persons should receive preferred consideration would be extremely difficult, if not impossible.

On the other hand, it would be relatively simple to make provision against any such incipient problem. For instance, it would be perfectly proper for the two or more co-personal representatives to make some agreement as to the division of the labor in the administration of the estate which would, presumably, result in the proper proportional distribution of the allowed commissions. Thus any dissatisfied person could withdraw in the beginning.

On the other hand, perhaps the problem could best be resolved at the time of the writing of the will when the attorney would explain to the testator the Maryland rule with regard to the division of commissions among co-personal representatives, and satisfactory arrangements could then be included in the will, such as provisions for additional commissions.

If, as is often undoubtedly the case, the testator desires two or more personal representatives, all of whom he believes can contribute

substantially to the administration of the estate and all of whom would expect some compensation, so that the aggregate would exceed the maximum provided in Section 7–601(b), he should himself make special provision therefor, in the will. The Commission believes that the public would be better served in the long run if this responsibility were imposed upon the attorney who prepares the will and who would, at that moment, have the best opportunity to know precisely what the testator's particular desires are in this respect. The Commission further believes that unless the testator is fully advised on the subject at that time he may unwittingly create completely unnecessary conditions of confusion, delay and duplicated labor.

The position of personal representative involves a purely business responsibility, and should not be treated as an opportunity to make a testamentary gift. If this is intended the provision should take the conventional form of a legacy.

Turning then to the preparation of a proposed statutory schedule of commissions for all estates, the Commission has made an exhaustive study of the compensation arrangements allowed, or followed, in other jurisdictions. It is almost impossible to make specific comparisons of the compensation allowed to personal representatives in one State against that allowed in another State on the basis of the same assets and problems. This is so because, not only do the rates vary so much in the different states, but the composition of the basis for the allowance of commissions also varies widely.

For instance, in New York, no commissions are allowed on the handling and distribution of specific bequests, and in Texas statutory commissions are provided only for cash received and paid out. In most States, commissions are allowed only on personal property, whereas other States include real property. Again, some States include only the real property sold by the personal representative in order to pay debts or expenses, whereas others permit commissions on the proceeds of all real estate sold under either a direction in the will or a court order. Some even include mileage allowances for the personal representative. Finally, whereas in some States the statutory law provides specific percentage allowances, others simply state that a reasonable allowance shall be made — and then the practice in different portions of the same State varies considerably.

In its Discussion Draft the Commission took as a basis for comparison certain States which it believed to have similar characteristics of geography, population and wealth, as well as traditions, similar to those found in Maryland.

After the discussions with the representatives of the Trust Committee of the Maryland Bankers Association, and further study, the

Commission decided that eleven States seemed to qualify as the most appropriate comparisons for setting up a schedule of compensation for the personal representative in Maryland, and the schedule which follows illustrates in detail how the allowable fees in these States — together with separate figures showing the average of the eleven States — compare with the commissions presently allowed under the Maryland statute and those which would be allowable under the Commission's proposal.

In its study the Commission has relied to a very large extent upon the monograph entitled "Fees of Executors, Administrators and Testamentary Trustees", compiled by W. Harry Jack, Esquire, of the Dallas, Texas, Bar and a former President of the American College of Probate Counsel. It was prepared for distribution among the Fellows of the College the restricted membership of which on a national basis is supposed to include those persons who are recognized as having the requisite experience in estate planning and probate matters to warrant their election to membership in the College.

Mr. Jack's compilation is based upon the contributions of the members in each State who have provided abstracts of the statutes, customs and/or practice prevailing currently in each State. It has been revised from time to time over the years. The most recent revision having occurred in March, 1969. Thus, the figures used in the Commission's schedule for some States, such as New York for instance, are those which became effective in July, 1969, and not those in Mr. Jack's compilation.

The following table, then, represents a comparative schedule of commissions allowable in the eleven States selected, as compared (i) with the *net* commission now payable to personal representatives in Maryland, and (ii) the *net* commission which would be payable to a personal representative under the proposed schedule set forth above in subsection (b).

The word "net" is emphasized in the foregoing sentence since Maryland imposes a special tax (in addition to the income tax) on "all commissions allowed to personal representatives and special administrators . . . of an amount equal to (1) one per cent of the first twenty thousand ($20,000) dollars of the estate plus one-fifth of one per cent on the balance of the estate, or (2) ten per cent of the total commissions allowed, whichever is greater" (§144 of Article 81). Thus, in the following schedule, the figures representing the maximum allowable commissions in Maryland have all been adjusted for (reduced by) this special tax, with the figures included in the schedule representing the net payment (after tax) to which the personal representative is, or would be, entitled:

Estate amounting to —	*$20,000*	*$50,000*	*$100,000*	*$250,000*	*$500,000*	*$1,000,000*
The allowable commission would be:						
MARYLAND *(present net rates)*	1,800	2,880	4,680	10,080	19,080	37,080
California	730	1,630	2,630	5,130	8,880	13,880
Connecticut	800	1,700	2,950	6,700	11,700	21,700
District of Columbia	1,000	2,500	5,000	10,250	16,500	24,000
Illinois	1,000	2,188	3,813	7,938	13,563	24,813
Indiana	1,000	2,250	3,750	6,750	11,750	20,500
Michigan	450	1,050	2,050	5,050	10,050	20,050
Missouri	850	1,800	3,300	7,425	14,050	26,550
New York	800	1,875	3,625	8,375	13,875	23,875
Ohio	520	1,120	2,120	5,120	10,120	20,120
Pennsylvania	666	1,665	3,333	7,333	14,000	24,000
Virginia	1,000	2,500	4,500	9,000	16,500	31,500
Average of 11 States other than Maryland	801	1,843	3,370	7,189	12,817	22,817
MARYLAND *(proposed net rates)*	800	1,940	3,330	7,155	12,780	21,780

The rates in *California* start at 7% on the first $1,000 and decrease to 1% on the value of the estate in excess of $500,000. The rates are statutory.

The rates in *Connecticut* begin at 5% on the first $10,000 and reduce to 1½% on all property in excess of $1,000,000, and 1% on all above $2,000,000. There is no statutory provision but the study prepared by the American College of Probate Counsel (herein called ACPC) states that the figures herein used "have been suggested as reasonable minimum rates."

In the *District of Columbia* the statute provides for commissions of not under 1% nor exceeding 10% of the inventory which, as in most States, would not include real estate. As a matter of practice the statutory limits cover both the compensation for the personal representative and for the attorney, although if the personal representative is a member of the D.C. Bar no attorney's fee will be allowed. Likewise, the ACPC study states that whereas the allowed fee for the personal representative might equal 5% on smaller estates a decreasing rate is perhaps customary in estates in excess of $100,000, adding "There is too much variance in rates of commissions claimed to permit a more specific schedule to be used." The Commission has therefore used for comparative purposes the schedule submitted by one of the large trust institutions in the District.

In *Illinois* there is no statutory provision other than that the compensation be reasonable. The ACPC study states that a schedule showing rates beginning at 5% on the first $25,000, gradually reducing to 1½% to 2% on gross probate estates in excess of $1,000,000 is followed by the Probate Division of the Circuit Court in Cook County; and the Commission's schedule adopts a rate midway between the high and low figures for each category above $25,000. "Fair and reasonable value of real estate will be considered when sold pursuant to direct powers and directions of will or to pay debts; or when services are rendered in connection therewith."

In *Indiana* the statute simply provides for reasonable compensation. The ACPC study states that the fees charged by corporate fiduciaries in Indianapolis follow a pattern beginning with 5% on the first $25,000, gradually reducing to 1% on the value of the estate in excess of $1,000,000. Also a reasonable fee, not exceeding 1%, is allowed for property not included in the probate estate but which is included in the taxable estate, or requires other services.

The rates in *Michigan* begin at 5% on the first $1,000 and drop to 2% on all "personal estate collected and accounted for . . . and the proceeds of sale of real estate sold" in excess of $5,000. The rates are statutory.

The rates in *Missouri* begin at 5% on the first $5,000 and gradually reduce to 2% of the estate in excess of $1,000,000 on "personal property administered . . . and the . . . proceeds of all real property sold under order of the probate court." The rates are statutory.

The rates in *New York,* effective September 1, 1969, begin with 4% on the first $25,000 and gradually drop to 2% on all personal property in excess of $300,000, plus 5% of all income received from real property which the personal representative is required to manage. These rates are statutory and apply only to assets coming into the hands of the executor for administration, except that no commissions are allowed on personal property specifically disposed of by the will.

The rates in *Ohio* begin at 6% on the first $1,000 and reduce to 2% on the excess of the estate over $5,000. They are based on "personal estate . . . received and accounted for" and "proceeds of real estate sold" under authority contained in a will. These rates are statutory.

The rates in *Pennsylvania* are fixed by custom, as there is no statutory provision, but they are always subject to the control of the Court. The ACPC study states "that most corporate fiduciaries in the Philadelphia area seek to obtain an agreement for their services as personal representatives on the basis of 5% on income and the following percentage on principal": the figures varying from 3⅓% on the first $100,000 to 1⅔% on estates in excess of $1,000,000. A slightly higher schedule is indicated in Pittsburgh.

In *Virginia* the statute provides for reasonable compensation. The example given of the charges of a corporate fiduciary shows the rate to vary from 5% on the first $50,000 to 2% on the excess over $1,000,000, plus 5% on gross income, although on the distribution in kind of stocks and securities the fee is limited to 2½%. The Commission's Virginia correspondent indicates that except in very exceptional cases, the foregoing schedule would take care of the "unusual services" for which an extra allowance is provided in subsection (c) of the Commission's proposal.

Delaware, although an adjoining State, was not considered either by the Commission or the corporate fiduciaries as sufficiently comparable. It has no statutory provisions, and the customs in all three counties vary considerably. As stated by the Commission's Delaware correspondent, "Our system is thoroughly antiquated . . . [and] I should suppose that our law and procedure in this area would not be particularly helpful to your Commission."

Massachusetts was not included because it appears to be in a state of flux. The ACPC study explains that, although there are no statu-

tory rates, the custom supports a 3% rate on the personal estate plus 3% on any real estate sold. "Some fiduciaries reduce rates as size of estate increases". However, since the Massachusetts compilation was submitted to Mr. Jack, several of the Boston banks have revised their schedules. These indicate a somewhat higher rate of compensation than that contained in the Commission's proposal but the Commission's Massachusetts correspondent advises that these new rates, which vary from 4% on the first $50,000 down to 1% on amounts over $1,000,000, have not been generally adopted throughout the State as yet. He further states that the rates remain the same regardless of the number of co-personal representatives (i.e, it must be divided among them as recommended by this Commission), and an additional charge for unusual services would be "most unusual".

The Commission has omitted *New Jersey* from its comparative schedule because of the lack of precise information. Also, the rates indicated by the one bank in Northern New Jersey which have been submitted to the Commission are substantially out of line with those which could be called a general average in nearly all of the other States (in addition to those included specifically in the Commission's schedule of comparison). The New Jersey statute allows commissions "not in excess of 5% as the court may determine, according to actual services rendered." The bank schedule submitted indicates its practice to be 5% on the first $100,000 of the personal estate and 3½% on the balance. However, the Commission's correspondent in New Jersey, who practices in the same area, states that this schedule is not followed by the New York banks which also do business in the area. He states that "the New York banks who are accustomed to about 2½% under the New York statutory rates would be satisfied with a commission of 3% on the excess and, in some instances, with commissions not to exceed the New York statutory rates" [which is 2% above $300,000].

Likewise, *North Carolina* has not been included in the Commission's schedule since it, also, seems to present some confusion. The schedule from one of the largest banks indicates that it normally requests fees of 5% on the personal estate up to $100,000, reducing to 1½% on amounts in excess of $3,000,000. However, the Commission's correspondent in North Carolina advises that final determination of compensation "is entirely in the judgment of the Clerk of Superior Court, who takes into consideration the services rendered on a *quantum meruit* basis. The approved compensation almost never exceeds that set forth in the schedules and frequently is less". At the same time, the ACPC study gives as an example "of customary rates" in North Carolina: 5% on the first $25,000, 4% on the next $50,000, 3½% on the next $275,000 and 1% on the excess over $650,000.

Texas has not been included since the Commission has not been able to acquire any kind of comparative schedule of the practice followed there. The ACPC study states that the statutory rate is 5% on all sums received in cash and 5% on all sums paid out in cash, although no commission is allowed for receiving cash on hand at the time of decedent's death, nor for paying out cash to the heirs or legatees as such. Additional compensation can be allowed, however, if the Court feels that the foregoing produces too meager an amount.

It appears that after adjusting to the extent feasible for the variations and peculiarities which seem to distinguish the computation of allowable commissions in each State from all the others, a general review of the rates in all of the forty-nine States (and the District of Columbia) other than Maryland would seem to indicate an average quite close to the proposal of the Commission. It might be a little higher or a little lower, but in general the total picture would indicate that within the area of the first million dollars of personal estate the rates begin on the smaller estates at approximately 5% and drop to approximately 2% for the last few hundred thousand dollars.

The only concern which the Commission has with regard to the proposed new schedule of commissions payable to personal representatives in Maryland is whether it may be too high in some situations, since, under the provisions of Section 1–301, the probate estate, against the gross value of which the commissions are calculated, now includes all real estate owned by the decedent individually at the time of his death.

Whether or not the inclusion of the value of the real estate in the calculation of the commissions would make a big difference in most estates is something on which the Commission has and can obtain no satisfactory figures. Undoubtedly, in some Counties where real estate has dramatically appreciated in value, its inclusion in calculating commissions would make a very substantial difference. On the other hand, in many instances, such real estate is held in joint names of husband and wife as tenants by the entirety and in such cases it would not be included for the fixing of commissions unless special circumstances existed which would permit the application of subsection (d) of Section 7–601 relating to "unusual services".

Perhaps, in many of the cases where the real estate which is involved is that which is located in an area of great demand, the problems involved in valuation, obtaining clear title and the like, could justify its inclusion in the fixing of commissions. Thus, it is certainly not clear that the inclusion of real estate should necessarily depress the figures which otherwise might be considered fair in the fixing of proper commissions.

On the other hand, the experience of the corporate fiduciaries in Baltimore City would seem to indicate clearly that real estate is not a very substantial factor in most estates in that area. Maryland has had the same rule which seems to exist in most of the other States with regard to real estate, to wit, that real estate is not included for the fixing of commissions unless sold in accordance with a provision of the will or under a court order. The experience of one Baltimore bank for the year 1967 shows that the amount of real estate which was inventoried and not sold amounted to only 2.85% of the aggregate gross probate estates (including proceeds from the disposition of real estate sold under will or court order). In addition, this real estate was held in the larger estates where the commission rates would be lower.

The State of Connecticut is one of the few which includes all real estate in the probate estate against which commissions are calculated. As can be seen from the Commission's detailed schedule the allowable rates there are somewhat less than those proposed by the Commission. The difference is not very great, and perhaps the Connecticut schedule more nearly reflects the average of all comparable States than that proposed by subsection (b) of Section 7–601. However, in view of the lack of satisfactory statistics the Commission believes that its proposed schedule is reasonable.

In this connection it should be added that a possible (but perhaps not probable, and certainly, in any event, unintended) by-product of the Commission's proposals would be a slight increase in the revenue to the State of Maryland from the Tax on Commissions of Executors and Administrators [Art. 81, §144].

Although the adoption of the Commission's rate schedule would presumably have the effect of reducing the cost of administration as far as the compensation to personal representatives is concerned, there are three counter-balancing factors which could have the effect of increasing the tax to at least some degree: (1) real estate, which will become a part of the probate estate under the proposed amendment for the purpose of fixing commissions, will increase the base for the imposition of the tax; (2) in the relatively few instances when additional commissions might be allowed for "unusual services" — a new concept in Maryland which is created by the proposed amendment — the taxable base will be increased; and (3) §144 of Article 81 provides alternative methods for the determination of the tax, i.e., it is either calculated as 10% of the commissions allowed, or as a specific percentage of the probate estate, whichever is the greater. Thus, it is possible that a combination of either of the alternatives in clause (3) with either clause (1) or clause (2) could provide a greater aggregate tax for all estates than the same estates would develop under the present

arrangement for the allowance of commissions to executors and administrators. The loss would occur in the smaller estates, whereas it would normally be the larger estates which would contribute to the increase, if any, in the tax revenue.

Finally, the Commission recommends that if its proposals are adopted by the General Assembly, some consideration should ultimately be given to modifying or repealing the tax on commissions now set forth in Section 144 of Article 81. Of course, if the tax were abolished the Commission's proposed schedule would be approximately 10% higher than intended since the figures therein listed are "net" (i.e., after deduction of the tax). But the Commission feels that beyond this technical matter, some consideration should ultimately be given to the wisdom of the Maryland tax on commissions — a tax which is unique in the United States.

In conclusion, the Commission wishes to acknowledge the cooperation and assistance of The Trust Association of Maryland and the Trust Committee of the Maryland Bankers Association in the preparation of this Third Report. It was also through the cooperation and financial assistance of The Trust Association of Maryland that the completion of the new Uniform Probate Code under the sponsorship of the National Conference of Commissioners on Uniform State Laws and the Section of Real Property, Probate and Trust Law of the American Bar Association was made possible. It was the available draft of the Uniform Probate Code upon which the Commission relied so heavily in the preparation of its Second Report which is now, in substance, Article 93 of the Maryland Code.

Respectfully submitted,

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ARTICLE 93

[proposed new Section 7–601]

7–601. Compensation of personal representative and special administrator.

(a) Every personal representative is entitled to reasonable compensation for his services. If a will provides a stated compensation for the personal representative he shall be entitled to additional compensation if the provision is insufficient in the judgment of the Court. The personal representative may, at any time, renounce all or any part of any right to compensation.

(b) Unless the will provides a larger measure of compensation, upon petition filed in reasonable detail by the personal representative the Court may allow him compensation, in the form of commissions, in such amount as the Court may deem appropriate for services actually rendered to the date of the order, but which shall not exceed those computed in accordance with the following table:

If the property subject to administration is:	*The commission shall not exceed:*
Not over $35,000	5% thereof.
Over $35,000 but not over $200,000	$1,750 plus 3% of the excess over $35,000.
Over $200,000 but not over $500,000	$6,700 plus 2.5% of the excess over $200,000.
Over $500,000 but not over $1,000,000	$14,200 plus 2% of the excess over $500,000.
Over $1,000,000 but not over $3,500,000	$24,200 plus 1.5% of the excess over $1,000,000.
Over $3,500,000	$61,700 plus 1% of the excess over $3,500,000.

(c) Unless the will provides a different division of compensation, if there are two or more co-personal representatives, they shall divide the total commissions, or one co-personal representative shall be entitled to receive all the commissions allowed, as the case may be, in proportion to the services actually performed and the responsibilities actually assumed by each. They shall be entitled to agree to the manner of division so long as the foregoing standard is used in arriving at

such agreement and such agreement is made at the time of or shortly before the preparation of the petition for compensation filed under Section 7–502. If they are unable to agree, the Court shall make the division by applying strictly the foregoing standard.

(d) The Court may allow the personal representative additional compensation for unusual services, but in such event the reasons for such additional allowance shall be set out in full in the order of Court granting the same.

(e) Any personal representative who has given notice under the provisions of Section 7–502, or any interested person or creditor who has filed a request for a hearing as provided in Section 7–502, may, within thirty (30) days of an allowance of commissions hereunder, appeal any such allowance or division of commissions to the Circuit Court of the County, or the Circuit Court or Circuit Court No. 2 of Baltimore City, which shall review the allowance and/or division of the commissions and affirm, increase (but not in excess of the above schedule), decrease, or reapportion them, as the case may be.

(f) All the provisions herein relating to personal representatives shall be equally applicable to special administrators.

COMMENT.

The present provisions of the Maryland law relating to the compensation of personal representatives are found in Section 7–601 of Article 93 of the Annotated Code of Maryland, as enacted by Chapter 3 of the Laws of 1969.

The law of Maryland relating to the compensation of personal representatives presently remains basically the same as it was prior to the passage of Chapter 3. See §6, §72 and §316 of former Article 93, together with repealed §146 of Article 81 of the Annotated Code of Maryland, relating to the time within which the Court shall fix the amount of commissions to be allowed, as well as the time and manner of taking an appeal in the event of dissatisfaction with the Court's determination. See, also, discussion in *Sykes Probate Law and Practice* (1956 ed.), §481 through §495. Chapter 3 did, however, eliminate the minimum 2% commission both on the first $20,000 of personal estate, and on the proceeds from the sale of real property. It also added the requirement that commissions would be allowed only upon the filing of a petition therefor in reasonable detail.

Subsections (a) and (b) above (except that part relating to the specific percentages of allowable commissions) are identical to the present law.

It is in the provisions in subsection (b) relating to the specific percentages of allowable commissions that the Commission has made the changes referred to in its official Comment to present Section 7–601. This suggested new schedule represents a lowering in the rate

of maximum allowable commissions in all estates, as compared with the present law.

The Commission believes that the proposed reductions are fair and fully justified if adopted in connection with the following three additional recommendations, namely: (i) the inclusion of real property in the probate estate for the fixing of commissions; (ii) the allowance of additional compensation for "unusual services"; and (iii) the payment of whatever is allowed under subsection (b) to the personal representative or personal representatives who actually do the work but who, in the past, often had to share commissions with one or more members of the decedent's family or friends even though the personal representative or personal representatives who were intended to perform the real work did in fact do so.

In its deliberations as to what it should recommend as a fair and proper rate schedule the Commission has taken into account the following considerations:

(1) The Commission is of the opinion that the existing schedule of executors' commissions which permits the payment of 10% on the first $20,000 of the probate estate (exclusive of real estate) and 4% [it was 2% until 1959] on the balance is excessive with respect to the smaller estates as well as to those, generally, in excess of $100,000. As a result, the present practice results, in many instances, in far greater compensation than is "reasonable".

The Commission has, therefore, suggested a reduced and more appropriately graduated rate scale, plus the availability of an additional allowance under subsection (d) for unusual services. In addition, it is contemplated that more often than not the simplified procedures now available under the new law will require less time and effort in the administration of decedents' estates.

(2) The Commission has seriously considered the alternative of providing no maximum or other fixed schedule as a guide for fixing executors' compensation, and leaving the entire decision, instead, to the judgment of the Court. But, it decided against this recommendation at the present time.

On the other hand, the Commission wishes to emphasize that the proposed schedule is not at any time to be used automatically as the necessarily appropriate rate allowance in any given case. As stated, except for unusual conditions, it is to be considered as an outside allowance where an estate has the normal albeit substantial problems, difficulties and responsibilities of administration.

In the many cases where the administration is relatively simple and uncomplicated the Commission intends that the Court, after care ful consideration, should fix a "fair and reasonable" compensation which may well not approach the *maximum* allowable under the schedule. That is, the Court should in every case examine the contents of the petition and any supporting comment or explanation on the part of the personal representative or his attorney before finally setting the ultimate compensation to be allowed.

(3) The estate which the personal representative now administers includes all real property owned by the decedent. However, the present schedule of commissions does not include real property in the base for computing such commissions. As the personal representative often spends considerable time and effort in connection with the administration of the real property, the Commission believes that the gross value of the real property should properly be considered in any schedule of maximum fees.

(4) The Commission has noted the not uncommon practice of an attorney named as a personal representative using another attorney (often an associate or a friend) in the administration of the decedent's estate, which has had the result of imposing unnecessary and unwarranted additional expenses on decedents' estates. The Commission agreed that it might often be beneficial to the legatees to have a more experienced attorney handling the actual administration than the attorney named in the will, who was perhaps the decedent's longtime business adviser with knowledge and experience generally in other fields of the law; but, under such circumstances, the estate should not have to bear an additional burden. Thus, it is intended that the personal representative under such circumstances either share his fee with his lawyer, or reduce his request to the extent that their combined charges to the estate shall not exceed a "fair and reasonable" total cost.

(5) In many instances more than one personal representative is named in the will. Although additional personal representatives accepting the serious responsibilities of the office might devote separate time to the problems of the estate, the making of decisions, the approval of actions, and the like, the Commission does not believe that the traditional Maryland rule should be varied, which provides that where there are two or more personal representatives, they are together entitled to only one commission — to be granted under subsection (b), and to be divided among them as they may agree, or as the Court may otherwise order.

The Commission has set forth in subsection (c) the standard to be used in dividing commissions in all cases where the will does not provide a different method of division. The standard is that the commissions must be divided in proportion to the services actually performed and the responsibilities assumed by each. The theory is that one should be paid only for services performed — no one should be entitled to a free ride. If a co-personal representative, be he an attorney or a layman, does little of the work of the personal representative, leaving the prime responsibility to another co-personal representative, the latter should receive all or substantially all of the commissions. (Of course, if an attorney who is a co-personal representative, performs legal services, he would be entitled to a legal fee under Section 7–602 whether or not he performs services as a co-personal representative.)

An agreement to divide the commissions can only be reached after the services have been performed, when the co-personal representatives can reflect on the actual services already performed by each. This is not intended to prohibit an understanding at the commencement of the administration that one or more of the personal repre-

sentatives will do all or substantially all of the work, and that if they do the work, they will get all or substantially all of the commissions. If the facts ultimately reflect the original understanding, the final agreement will reflect that understanding.

The rule is, however, intended to prevent a co-personal representative from saying at the commencement of the administration that he wants a designated percentage of the commissions, whether or not he subsequently performs a commensurate amount of the services. The thrust of the Commission's recommendation, therefore, is that only the people who do the work should get paid.

The co-personal representatives should reach their final agreement on division of commissions when they are preparing their petition for commissions under Section 7–502. If they are unable to agree, they should set forth their respective services and responsibilities in the petition and request the Court to determine a fair division. Any agreement between the co-personal representatives must reflect the statutory standard for division. Considerations other than this standard may not validly affect either the Court's decision or the personal representatives' agreement.

If a co-personal representative renounces all or any part of his right to commissions, the portion so waived may not be allocated to the other co-personal representatives. Thus, if *X* and *Y* are named as co-personal representatives, each performs half of the services, and the total commission for all services would be $3,000, *X* is entitled to only $1,500 whether or not *Y* renounces his right to the other $1,500. This is consistent with the notion that one should be paid only for the work one does, not for the work someone else does.

(6) It should be added that by the provision in Section 6–702(c) to the effect that the Court, in allowing a counsel fee, if any, shall take into consideration what would be a fair and reasonable total charge for the cost of administering the estate, the Commission intended that the application of this provision be limited to the consideration of an appropriate allowance for counsel fees only. Since the law permits a layman to act as a personal representative it thereby acknowledges that the personal representative in performing his special function does not participate in the practice of law in the rendering of his services, but performs only lay duties and responsibilities. As the personal representative is, and should be, "worthy of his hire", and should be entitled to receive compensation without any diminution therein because of ethical concerns, his fair and reasonable fee should not be reduced because of any other person being likewise entitled to separate compensation.

On the other hand, as explained in Canon 12 of the Canons of Professional Ethics adopted by the Maryland State Bar Association, "a client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all". Also, "In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade". Thus, the nature of the professional relationship of the attorney to the administration of the estate makes it possible that in the particular case the attorney might not be as

fully compensated as might otherwise be fair and reasonable, due to the small size of the estate or the insufficiency of the assets in comparison to the suggested fee; whereas this ethical relationship does not exist with regard to the lay personal representative.

(7) Although under subsection (d), providing for additional compensation "for unusual services," a personal representative could be entitled to commissions in excess of those allowed under subsection (b), the Commission believes that such additional allowance would be appropriate in very few cases.

The normal duties performed by the personal representative with regard to joint accounts, death benefits from life insurance or trusteed arrangements, jointly held property and property over which the decedent has a power of appointment — including problems of valuation, reporting for estate or inheritance taxes, and the like — as well as assisting in the preparation of the decedent's own or his estate's regular income and estate tax returns, would ordinarily not entitle such personal representative to extra compensation. Such rather standard responsibilities, which could be expected in almost every estate other than the smallest are intended to be fairly covered in the allowance of the maximum commissions under subsection (b).

Unusual services, on the other hand, might include such activities as tax settlements requiring extended negotiations; litigation on behalf of or against the estate, including tax, caveat and construction proceedings; evaluation, management or disposition of a closely-held business interest; duties in connection with the management or disposition of real estate or unusual assets, or out-of-state real estate; problems resulting from the possible failure of the decedent to have filed proper or complete gift or income tax returns; special problems relating to assets constituting the non-probate estate; and similar types of activity which would not constitute a part of the personal representative's normal or usual responsibilities in the administration of an estate of comparable size.

(8) Inquiry has been made of the Commission as to the question of whether or not the commissions of agents, brokers or salesmen, incurred by a personal representative in the sale of any real or personal property constituting a part of the decedent's estate are payable out of his commissions allowable under this Section 7–601, as determined by the Attorney General of Maryland [48 Op. A.G. 379 (1963)], or whether they should be charged separately as an ordinary administration expense as subsequently indicated by the General Assembly in Chapter 408 of the Laws of 1966. The Commission believes that in view of the history of this issue, and the fact that the rates of commissions are substantially less in each category than those now permitted upon the sale of real estate, the commissions accruing from the sale of either real or personal property should not be chargeable against the commissions payable under Section 7–601, but should be treated separately as an ordinary expense of administration; see, Section 8–105(c), which carried over the language of former §6 of Article 93 but was not intended to exclude commissions on the sale of personal property from being treated similarly.

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STATUTORY REFORM IN THE ADMINISTRATION OF ESTATES OF MARYLAND DECEDENTS, MINORS AND INCOMPETENTS

By SHALE D. STILLER* and ROGER D. REDDEN**

> *"The time is ripe for betterment. . . .*
> *Let us gather up the driftwood, and*
> *leave the waters pure."*[1]

On Monday morning, March 24, 1969, Governor Mandel signed Senate Bill 316 and House Bill 558. Other than two items of emergency legislation, these were the first Acts signed by the new Governor, and they became Chapters 3 and 4 of the Laws of Maryland of 1969.

It may not be hyperbolic to refer to these two measures jointly as the most significant statutory reform of private law to have been originated in Maryland in this century. Chapter 3 is a recodification and revision of what is commonly known as the "testamentary law" but which is more appropriately denoted as the law of decedents' estates. Chapter 4 is a recodification and revision of the laws relating to the conservation and administration of property belonging to minors, incompetents and other legally "disabled" persons. The purpose of the enactment of a new Article 93 by Chapter 3 is set forth in Section 1–105(a):[2]

> The purposes of this Article are to simplify the administration of estates, to reduce the expenses of administration, to clarify the law governing decedents' estates, and to eliminate certain provisions of existing law which are archaic, often meaningless under modern procedures and no longer useful. This Article

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1. Cardozo, *A Ministry of Justice,* 35 HARV. L. REV. 113, 126 (1921).

2. Ch. 3, § 1, [1969] Md. Laws 9 [hereinafter cited by section number of new Article 93 only].

shall be liberally construed and applied to promote its underlying purposes.

Almost identical language appears in Section 104 of new Article 93A, enacted by Chapter 4, with respect to the estates of minors and disabled persons.

Chapter 4 takes effect on July 1, 1969. Moreover, all guardians, committees, conservators, and custodians appointed before July 1, 1969, are thereafter to proceed under and be governed by the new law.[3] The old procedures have been abolished. Chapter 3, on the other hand, does not become effective until January 1, 1970 and will then apply generally to the estates of persons dying on or after that date.[4]

The purpose of this Article is to explain the history and substance of both pieces of legislation.

HISTORY OF THE LEGISLATION

The testamentary law of Maryland was originally codified as Chapter 101 of the Acts of 1798.[5] Although this was an elegant and organic statute, one hundred seventy years of amendments located in odd places and using inconsistent language not only destroyed the 1798 elegance but often deprived it of its meaning and left a rather shabby statutory system for administering decedents' estates.

> The testamentary law is archaic: the framework is patterned on Chapter 101 of the Acts of 1798, legislation which, while coherent and viable in an essentially agricultural and less dynamic economy, has little relevance to 1968. It is disorganized: changes seem to have been tossed into the Code at random. As the Report demonstrates, the testamentary law of Maryland, although it is supposed to be contained in the Article of the Maryland Code titled "Testamentary Law," is scattered through at least 15 different Articles. Even Article 93 itself is devoid of any coherent order. It is cumbersome: it requires a maximum of red tape in the administration of an estate; yet, in some instances, its procedures may well be unconstitutional because of the availability of so many ex parte actions which can be taken without notice to those primarily interested in the proper administration of the

3. Ch. 4, § 5, [1969] Md. Laws 135. The Standing Committee on Rules of Practice and Procedure of the Court of Appeals is currently revising Rules H, L, R and V of the Maryland Rules of Procedure to reflect the changes in Chapter 4.

4. § 12-102(a). *See also* Ch. 3, § 10, [1969] Md. Laws 105.

5. A history of this codification is set forth in Gans, *Sources of Maryland Testamentary Law,* 18 TRANS. MD. STATE BAR ASS'N 193 (1913). It is interesting to note one aspect of reverse inflation referred to in Mr. Gans' article. Chancellor Hanson, who drafted the 1798 law, was paid $1,000 by the Treasurer of the Western Shore for his efforts. No mention is given for the reason the Eastern Shore did not contribute. The Governor's Commission of 1965-1969 was not compensated.

In addition to testamentary law revision, the legislatures of 1798 and 1969 had one other common predilection — the law of animals. *Compare* Ch. 22, [1798] Md. Laws (providing a bounty for wolves in Frederick County) *with* Ch. 30, [1969] Md. Laws 167 (repealing the section of the Baltimore City Code defining a cartload of manure). *See also* 8 OP. ATT'Y GEN. 266 (1923); ch. 54, [1958] Md. Laws 195.

> estate. It is illogical: the artificial distinction between real property and personal property, for example, so important at common law, can no longer be justified in administering an estate. It is sometimes unintelligible: provisions such as Sections 48–51 of Article 93 have not only become atrophied from disuse but cannot even be explained in rational terms.[6]

H. L. Mencken could well have been aiming at the jumble of this subject in the Annotated Code of Maryland when he remarked that if doctors were as progressive as lawyers, we would still be bleeding patients, as in the fifteenth century.

In 1965, the Registers of Wills Association of Maryland sponsored House Joint Resolution No. 6 which requested the appointment of a gubernatorial commission to study and revise the Maryland laws relating to testamentary matters and death taxes. This proposal was enacted as Joint Resolution No. 23 of 1965, and the Commission was appointed by Governor Tawes under the Chairmanship of William L. Henderson, former Chief Judge of the Maryland Court of Appeals. The Commission membership represented a fair cross-section of those experienced in matters dealing with the administration of estates and related tax matters and included registers of wills and members of the General Assembly as well as lawyers, several of whom were former assistant attorneys general who had represented the registers.[7]

The Second Report of the Commission, dated December 5, 1968, proposed a comprehensive recodification and revision of the testamentary laws.[8] This Report was sent to a large number of lawyers and other interested parties,[9] and the Commission received extensive comment on the Report, both oral and written. It conducted an all-day hearing on January 8, 1969, and presented the proposals to the Maryland State Bar Association during its Winter meeting later in the month. As a result of the comments received, the Commission made

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6. SECOND REPORT OF GOVERNOR'S COMMISSION TO REVIEW AND REVISE THE TESTAMENTARY LAWS OF MARYLAND ii (1968).

7. The other members of the Commission who served from the very beginning were Robert L. Karwacki, Joshua W. Miles, Roger D. Redden, John G. Rouse, Jr., Ruth R. Startt, Shale D. Stiller and G. Van Velsor Wolf. Those appointed after the Commission began its work who are still on the Commission are Senator Thomas M. Anderson, Jr., Speaker of the House Thomas Hunter Lowe, Registers of Wills James M. Roby and Gertrude C. Wright, and C. M. Zacharski, Jr. Members of the original Commission who, for various reasons, were unable to continue to serve, are Judge C. Warren Colgan, Jr., Senator J. Albert Roney, Judge John P. Moore, and Walter Addison. The Commission also had the invaluable assistance of Melvin J. Sykes, the present editor of P. SYKES, PROBATE LAW AND PRACTICE (1956).

8. The First Report, published in December, 1966, dealt solely with recommendations for simplifying the death tax structure in Maryland. The statute recommended by the First Report was given an unfavorable report by the House Ways and Means Committee. The Commission was advised that this was due solely to concern that the new estate tax would not have generated enough revenue. It is anticipated that the Commission will submit another recommendation on this subject to the 1970 Session of the General Assembly.

9. The Report was sent not only to the Governor and all members of the General Assembly, but to every lawyer in good standing as a practitioner on the rolls of the Clients' Security Trust Fund, to every Register of Wills, to every judge, to every trust company, and to numerous other interested individuals.

a substantial number of changes in its proposed legislation prior to its introduction as an Administration measure, in the form of Senate Bill No. 316 by the President and House Bill No. 499 by the Speaker.[10] The Senate Bill moved first. The Senate Judicial Proceedings Committee held hearings and reported the Bill favorably, with amendments. On the Senate floor, the Bill passed second and third readings unanimously. From there it went to the House, was referred to the Judiciary Committee, which also held hearings, was favorably reported without further amendment and was enacted without dissent on March 17, 1969. The Bill, as enacted, did not receive a single negative vote in committee or on the floor in either house.

The laws dealing with guardianships and committees were just as archaic, illogical and inconsistent as the testamentary law. In one sense the situation was even worse, because in the entire history of the Maryland Bar, no one seems to have had sufficient interest or practice in guardianship and committee law to make any specific proposal for the cleansing of this Augean stable.

The Governor's Commission recommended an entirely new Article 93 in its Second Report. However, part of old Article 93 consisted of some forty sections dealing with "guardians and wards." Since the Governor's Commission was not charged with the responsibility of rewriting the laws on guardians, it felt constrained only to collect all these sections from Article 93 and re-enact them as part of a new Article 93A.[11] A committee of the Maryland State Bar Association's Section on Estates and Trusts[12] was then studying the Maryland laws relating not only to guardianships but also to all devices for protecting the property of minors, incompetents, and other disabled persons. This committee made its report in December, 1968, almost concurrent with that of the Governor's Commission. This report, taking into account the recommendations of the Governor's Commission, recommended the enactment of a wholly new Article 93A. This proposal received the unanimous support of the Council of the Section of Estates and Trusts and of the Board of Governors of the State Bar Association. The Report was mailed to every Register of Wills and Circuit Court Clerk, from whom no comments were received. In the form of House Bill

10. These changes were explained in a document called "Summary of Changes Made in Second Report of Governor's Commission to Review and Revise the Testamentary Law of Maryland and Incorporated into Proposed Article 93, Decedents' Estates, S.B. No. 316 and H.B. 499." This document bears the date January 31, 1969.

11. When Senate Bill 316 was introduced, obviously no one could know whether House Bill 558 — whose provisions were entirely inconsistent with that part of Senate Bill 316 which created a new Article 93A out of the "guardian and ward" materials in Article 93 — would pass. Therefore, § 8 of Senate Bill 316 (Ch. 3, § 8, [1969] Md. Laws 105) provides that if any Act passed at the 1969 session changes the substance and wording of the Article 93A set forth in Chapter 3, the other Act "shall be deemed to supersede the provisions of said . . . Article 93A." Even if this provision had not been included in Senate Bill 316, because House Bill 558 was signed after Senate Bill 316, the provisions of Senate Bill 316 which are inconsistent with House Bill 558 are automatically prevented from becoming law. *See* MD. ANN. CODE art. 1, § 17 (1968).

12. The Chairman of the Section on Estates and Trusts was J. Nicholas Shriver, Jr. The special committee consisted of Winston T. Brundige, Chairman, Shale D. Stiller, Robert M. Thomas, and C. M. Zacharski, Jr.

No. 558, sponsored by Delegate Martin A. Kircher, the committee's proposal, with very minor amendments, passed both houses without a dissenting vote.

GENERAL MATTERS IN NEW ARTICLE 93

Real Property in the Probate Estate

Real property has been made a part of the probate estate[13] and, with one exception,[14] there is now no distinction between real property and personal property in the administration of estates. This change will give the personal representative complete authority over and responsibility for real property and will require him to pay the taxes on the property, to insure it, and to collect its rents.[15] The devolution of title to real property will necessarily become less complicated. Title will automatically pass to the personal representative. If he does not sell the real property during the course of administration, he will, in order to distribute the property to the appropriate beneficiary or beneficiaries, execute a deed as evidence of the distributee's title. In addition to any other indexing, the deed must be indexed in the grantor index under the decedent's name.[16]

Abolition of Dower

The ancient estate of dower, so rarely used, has been completely abolished.[17] The modern provisions for statutory shares consisting of outright interests in a deceased spouse's property have generally replaced the ancient concepts of dower and curtesy, which consisted only of a life estate in one-third of the decedent's fee simple real estate.[18] In addition, the intended protection of the estate of dower has often been nullified as a practical matter if a husband takes title in the form of a life estate with unrestricted powers of disposition, or if he causes a one cent ground rent to be placed on the property before he takes title, or if he forms a corporation to take title to any real estate he may contract to buy. The major effect of the abolition of dower will not,

13. § 1-301.

14. The one exception is the computation of commissions for the personal representative. Since the commission structure was not changed by the new statute, it was necessary to exclude the value of real estate from the value of the probate estate in determining commissions. *See* § 7-602(b) and discussion in text at note 128 *infra.*

15. These provisions are, of course, completely inapplicable to real property held as tenants by the entireties or as joint tenants.

16. § 9-105. This section, which also applies to distribution of leasehold estates, will, along with § 7-401 (v), abolish the necessity of an "order to convey," which is presently required by MD. ANN. CODE art. 93, § 156 (1964).

17. § 3-202. There would seem to be no doubt that the abolition of the inchoate right of dower is constitutional. Thus, where the husband dies on or after January 1, 1970, the wife cannot save any claim to dower on the basis that the inchoate right has been unconstitutionally abridged. *See* 1 AMERICAN LAW OF PROPERTY § 5.31 (A. J. Casner ed. 1952); Annot., 20 A.L.R. 1330 (1922).

18. Assuming the widow has signed all deeds to property in her husband's name while he was alive, there could still have been a valid reason for electing dower instead of an outright interest in the property. If the estate were insolvent, her dower interest in the fee simple realty took priority over creditors' claims, whereas the statutory share was, and is, computed on the net estate after deducting claims.

of course, be in the administration of estates, but will be in the elimination of the necessity of requiring a spouse to sign deeds to fee simple real estate owned by the other spouse.

Verifications Replace Affidavits

In recent years the General Assembly has done away with the requirement of taking an oath or affirmation before a notary as to the contents of various formal documents. For example, the requirement of affidavits on corporate papers filed with the State Department of Assessments and Taxation and in documents perfecting a security interest in personal property has been eliminated. Similarly, with respect to any paper required by new Article 93 to be verified, the following representation will be sufficient:

> I do solemnly declare and affirm under the penalties of perjury that the contents of the foregoing document are true and correct to the best of my knowledge, information and belief.[19]

Orphans' Courts and Registers of Wills

No major changes have been made in the present statutory procedures and powers of the Orphans' Courts and the Registers of Wills.[20] Thus, new Article 93 continues the system of utilizing the three judge court (the members of which need not be and, with the exception of Baltimore City, usually are not members of the Bar), the varied methods of compensating the judges in different counties, the operation of the offices of the Registers of Wills on a fee basis, the fixing of the salaries of the Registers of Wills by the Board of Public Works, the provision for mandatory approval by the Comptroller of the employment and compensation of all employees in the offices of the Registers of Wills, and the like. The Report of the Governor's Commission specifically states that the continuation of these rules does not represent either approval or disapproval by the Commission.

Perhaps the major change from the viewpoint of the practicing lawyer is the provision for maintenance of permanent records in the Register's office. Wills, inventories, accounts, and reports of sale are generally recorded in separate books. Often, in trying to determine the facts concerning an estate, it is necessary to examine several separate books. Under Section 2–210, the Registers will record wills

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19. § 1–102. *See also* MD. ANN. CODE art. 23, § 127B (Supp. 1968); MD. ANN. CODE art. 95B, § 9–401 (1964) with respect to similar problems relating to corporate papers and security interests.

20. A good description of American probate court systems may be found in Simes & Basye, *The Organization of the Probate Court in America* (pts. 1–2), 42 MICH. L. REV. 965, 43 *id.* 113 (1944); Atkinson, *Organization of Probate Courts and Qualifications of Probate Judges* (pts. 1–3), 23 J. AM. JUD. SOC'Y 93, 137, 183 (1939–1940). *See also* P. Basye, *The Venue of Probate and Administrative Proceedings*, 43 MICH. L. REV. 471 (1944). Those interested in pursuing further reform in this area should consult Clark & Clark, *Court Integration in Connecticut: A Case Study of Steps in Judicial Reform*, 59 YALE L.J. 1395, 1409–13 (1950).

promptly after the probate. The other papers filed by the personal representative will be held in a file in the Register's office and will not be recorded until the estate has been closed. When the estate is closed, all the papers will be recorded in chronological order in an "Administration Proceedings" record book. This will greatly simplify the searching of estate records.

Intestate Distribution, Family Allowances, and Widow's Election

The order of intestate succession is substantially the same as the present law.[21] Degrees of relationship will be computed in accordance with the civil law method instead of the common law method.[22] Children conceived by artificial insemination with the consent of the husband shall be treated as the child of both the husband and wife.[23] Rules relating to illegitimate children,[24] adopted children,[25] and half-bloods[26] have also been included. A statutory definition of *per stirpes*,[27] consistent with the rule of *Ballenger v. McMillan*,[28] has been provided. The statute contains a provision dealing with advancements.[29] Family allowances have been increased to the more realistic sums of $1,000.00 for the surviving spouse and $500.00 for each unmarried minor child.[30]

The right of a surviving spouse to elect his or her statutory share must normally be exercised not later than thirty days after the expiration of the time for filing creditors' claims, which is six months after the date of first publication of notice to creditors, although the court does have the power to extend the time.[31] If the election is made, all property or other benefits which would have passed to the surviving spouse under the will shall be treated as if the surviving spouse had died before the execution of the will. Section 3–208(b) contains a specific arrangement for the manner of contribution, on behalf of all other legatees, to

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21. §§ 3–102 to 3–105.

22. § 1–203. Present Article 93 prescribes the common law method for certain purposes and the civil law method for other purposes. MD. ANN. CODE art. 93, §§ 145, 152 (1964).

23. § 1–206(b). For those interested in pursuing the subject, see Hager, *Artificial Insemination: Some Practical Considerations for Effective Counseling*, 39 N.C.L. REV. 217 (1961); Note, *Artificial Insemination*, 30 BROOKLYN L. REV. 302 (1964).

24. §§ 1–206, 1–208. *See also* Note, *Illegitimacy*, 26 BROOKLYN L. REV. 45 (1959); Note, *The Rights of Illegitimates under Federal Statutes*, 76 HARV. L. REV. 337 (1962).

25. § 1–207. *See also* Binavince, *Adoption and the Law of Descent and Distribution: A Comparative Study and a Proposal for Model Legislation*, 51 CORNELL L.Q. 152 (1966); *Adopted Children as Members of a Class*, SECOND REPORT OF NEW YORK TEMPORARY COMMISSION ON ESTATES, app. F. 221 (1963).

26. § 1–204. *See also* Comment, *Statutory Treatment of Ancestral Estate and the Half Blood in Intestate Succession*, 42 YALE L.J. 101 (1932); Annot., 141 A.L.R. 976 (1942).

27. § 1–210. *See* Annot., 19 A.L.R.2d 191 (1951); Page, *Descent Per Stirpes and Per Capita*, 1964 WIS. L. REV. 3; White, *Per Stirpes or Per Capita*, 13 U. CIN. L. REV. 298 (1939).

28. 205 Md. 94, 106 A.2d 109 (1954).

29. § 3–106. *See also* Elbert, *Advancements* (pts. 2–3), 52 MICH. L. REV. 231, 535 (1953–1954).

30. § 3–201.

31. § 3–206.

the share of the surviving spouse.[32] One change from the prior law on this subject is that the spouse will no longer be entitled to a proportionate interest, in kind, of each item of property in the estate.[33] The section now provides:

> In lieu of contributing . . . an interest in specific property to such intestate share a legatee may pay to the surviving spouse, in cash, or other property acceptable to such spouse, an amount equal to the fair market value of such interest in specific property on the date the election to take an intestate share was made by the spouse.

No attempt has been made in the statute to change the judicially developed rules which protect a widow against inter vivos transfers made in fraud of her marital rights.[34]

WILLS

In General

Few changes were made in the formal requirements for the execution of wills.[35] There are no changes in the standard procedures for execution.[36] Two witnesses, with the same qualifications, are still required.[37] Any credible witness, not excluding a beneficiary of the will, may serve. Holographic wills are still permitted where the testator is serving in the armed forces, but the permissible extent of holographic wills has been somewhat limited.[38]

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32. *See* Note, *Salvaging a Will after the Widow Renounces,* 61 HARV. L. REV. 850 (1948).

33. The former rule was enunciated in Hall v. Elliott, 236 Md. 196, 202 A.2d 726 (1964).

34. *See* Sykes, *Inter Vivos Transfers in Violation of the Rights of Surviving Spouses,* 10 MD. L. REV. 1 (1949); W. MACDONALD, FRAUD IN THE WIDOW'S SHARE (1960).

35. The rules for execution of wills are contained in § 4–102. *Cf.* Mechem, *Why Not a Modern Wills Act?,* 33 IOWA L. REV. 501, 502–03 (1948):

> [The statute for execution of wills] is likewise obvious and familiar. It assumes that the more "safeguards against fraud" the better. It is likewise big-law-office philosophy: every testator must be forced to execute his will just as it would be done if the matter were being handled by a high-powered law firm. This overlooks one very important fact, namely, that the only persons the execution of whose wills are likely to come into question are precisely those persons who do not have the job supervised by a high-powered law firm, but which instead have the matter looked into by some very bad lawyer or by the local J.P. or the local banker or the local real estate man or on the advice of those who happen to be gathered at some lonely deathbed. These persons have the same right to make wills as their more prosperous or sophisticated brothers and sisters who employ good lawyers; the governing philosophy should be to design a wills act that as far as is consistent with safety adapts itself to the knowledge (or ignorance), psychology, and habits of such people so as to create the minimum risk that their testamentary attempts will be frustrated by failure to have the witnesses attest in the presence of the testator, or the like.

36. The rules for revocation of wills are substantially the same as in present Article 93. *See also* Hoffman, *Revocation of Wills and Related Subjects,* 31 BROOKLYN L. REV. 220 (1965); Note, *Wills: Revocation by Subsequent Instrument,* 17 OKLA. L. REV. 361 (1964).

37. A significant procedural change is that under most circumstances the witness will not have to appear at the probate. § 5–303. *See* text discussion at note 82 *infra.*

38. *See* § 4–103.

Nuncupative wills, on the other hand, have been abolished. Under prior law, nuncupative wills by soldiers in the military service or "any mariner being at sea" were permitted. Whatever need for such wills may have been formerly perceived, it has surely disappeared with the development of the military practice under which inductees are encouraged to execute wills on forms provided by the Department of Defense and with the technical advance and numerical decline of the American merchant marine.

During the course of the deliberations of the Commission, it was suggested that three witnesses should be required on wills. The theory behind the suggestion was that because some states require three witnesses, if a Maryland resident wants to dispose of real estate located in one of those states, the disposition might be invalid unless three witnesses were used. The Commission's research disclosed, however, that the six states which do require three witnesses also have statutes which expressly sanction the validity of a will validly made in another state.[39] Therefore, if a will with two witnesses is valid in Maryland, it will be valid to dispose of real estate located in any other state even though that other state normally requires three witnesses. The similar Maryland statute, permitting a will executed out of Maryland to be valid in Maryland if executed in conformity with the law of the testator's domicile, or the place where the will is executed, has been retained in the new law.[40]

Age

The age for making a testamentary disposition of personal property was changed to eighteen, to make it the same as the age for testamentary dispositions of real property.[41] Maryland had always followed the common law rule that twelve year old females and fourteen year old males may dispose of personal property by will, whereas the age requirement for real estate had been eighteen, regardless of sex. The ages for testamentary disposition of personal property were among the lowest in the United States. On the basis that there was little justification for continuing the distinctions between males and females and between real and personal property, a uniform age was provided.

A major objection to increasing the age to eighteen is the reduction in opportunity for sophisticated estate planning for twelve year old females and fourteen year old males with substantial amounts of property.[42] Because the intestate death of a twelve year old female will

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39. The states are Connecticut, Maine, Massachusetts, New Hampshire, South Carolina, and Vermont. The statutes are CONN. GEN. STAT. ANN. § 45–161 (1960); ME. REV. STAT. ANN. tit. 18, § 151 (1964); MASS. ANN. LAWS ch. 191, § 5 (1955); N.H. REV. STAT. ANN. § 551:5 (1955); S.C. CODE ANN. § 19–207 (1962); VT. STAT. ANN. tit. 14, § 112 (1958). *See also* R. LEFLAR, AMERICAN CONFLICTS LAW § 196 (1968); Rees, *American Wills Statutes: II*, 46 VA. L. REV. 856, 905–07 (1960); Ester & Scoles, *Estate Planning and Conflict of Laws*, 24 OHIO ST. L.J. 270 (1963).

40. *See* § 4–104; MD. ANN. CODE art. 93, § 368 (1964).

41. *See* § 4–101.

42. The authors are grateful to George E. Thomsen, Esquire, of the Baltimore Bar, a specialist on this subject, for his views on the matter.

automatically result in all of her property passing to her parents,[43] if they survive her, thereby increasing the size of the parents' estates, it has, in the past, occasionally been useful to permit some twelve year old females to execute wills leaving their property to brothers and sisters rather than to parents.

Article 93 will now permit a post-mortem solution of this estate planning problem. Under prior Maryland law, if the parents of an intestate minor would succeed to the minor's property, the parents probably could not, without making a taxable gift, renounce the testamentary disposition in order to cause the property to go automatically to the decedent's brothers and sisters. Section 9–101 specifically provides that any heir or legatee[44] may renounce his share of a testate or intestate estate, whether realty or personalty, before title passes to the heir or legatee. The renunciation may be partial or total. In this way, the parents could renounce the legacy and do so without making a gift for federal gift tax purposes.[45] Under Section 4–404, the renounced legacy would automatically pass to the other remaining intestate successors of the decedent. If the decedent had brothers and sisters, the estate would automatically pass to them. Thus, notwithstanding the increase in the age requirement for executing wills, the premature death of a wealthy minor will not necessarily increase the gross estate of either parent if they have other children and are willing to renounce the minor's estate in favor of their surviving children.[46] The statute makes no attempt to set forth the time within which the parents must renounce. Since the renunciation will almost necessarily be motivated by tax considerations, the renouncing parents will be forced to comply with the standards set forth in the Treasury Regulations: "[Renunciation] . . . does not constitute the making of a gift if the refusal is made within a reasonable time after the transfer."[47]

The new legislation also eliminates one other problem in the situation of an intestate minor's death. Where the minor's property would

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43. This order of intestate distribution is set forth in § 3–104 and is the same as the prior law.

44. "Heir" is defined in § 1–101(e) as a person entitled to the property of an intestate decedent. "Legatee" is defined in § 1–101(j) as a person entitled to any real or personal property under the terms of a will.

45. Where title passes directly to the person attempting to renounce, a taxable gift results. Hardenbergh v. Commissioner, 198 F.2d 63 (8th Cir.), *cert. denied*, 344 U.S. 836 (1952). § 1–301 provides that title to all property, whether real or personal, in testacy or intestacy, passes directly to the personal representative; it does not pass to the heir or legatee until a distribution is made.

46. *See* Brown v. Routzhan, 63 F.2d 914, 917 (6th Cir.), *cert. denied*, 290 U.S. 641 (1933). *See also* Kay, *Renunciations, Disclaimers and Releases*, 35 TAXES 767 (1957); Lauritzen, *Only God Can Make an Heir*, 48 NW. U.L. REV. 568 (1953); Note, *Disclaimer in Federal Taxation*, 63 HARV. L. REV. 1047 (1950); *Disclaimer of Testamentary and Nontestamentary Dispositions — Suggestions for a Model Act*, 3 REAL PROP., PROB. & TRUST J. 131 (1968).

Renunciation is also important because of the amendments recently made to INT. REV. CODE of 1954, § 2056(d), which now permits beneficiaries to alter the application of the estate tax marital deduction by certain disclaimers.

47. Treas. Reg. 25.2511-1(c) (1961). *See also* Rev. Proc. 69-6, 1969 INT. REV. BULL. No. 1, at 29, which states that the Internal Revenue Service will not issue rulings as to whether a proposed renunciation is unequivocal and made within a reasonable time.

devolve upon his brothers or sisters, the appointment of a guardian would have been required under prior law if the brothers or sisters were also minors. Under new Article 93, the personal representative has the power, with the approval of the court, to designate a custodian under the Uniform Gifts to Minors Act and to transfer to the custodian any property distributable to a minor. Although the Uniform Gifts to Minors Act was amended in 1967 to provide for testamentary dispositions to minors by use of the Act,[48] the 1967 amendments required specific reference in the will to the Uniform Gifts to Minors Act for the custodial arrangement to be available. Section 9–109(c) affords the personal representative the opportunity to use the custodial arrangement of the Uniform Gifts to Minors Act even though the will does not mention that Act, if such an arrangement is appropriate under the circumstances, which it would normally be, and the court, accordingly, approves.[49]

Incorporation by Reference

A major procedural innovation, which should appeal to many lawyers and laymen, is Section 4–107 of new Article 93. This section codifies the common law rule permitting wills or trust instruments to incorporate the terms of any writing which is in existence when the will or trust instrument is executed. As an example of such an incorporated writing, the statute refers to a statement of administrative provisions or fiduciary powers which may be recorded in any record office. The intent of the legislation is to afford lawyers the opportunity to eliminate long recitations of administrative provisions and fiduciary powers in wills, particularly those establishing trusts, and in inter vivos trust instruments. Under this provision, a lawyer with a standard set of administrative provisions and fiduciary powers may record those powers in any record office in Maryland and then simply insert in his wills and trust instruments the statement that the testator or grantor "gives to his executors and trustees all the powers set forth in the declaration of powers recorded among the Land Records of Caroline County, Maryland, in Liber JWS 1969, folio 1798." It would be appropriate for the lawyer to duplicate these powers so that copies can be delivered to the client when he reviews his proposed will or trust. Use of this system will avoid the necessity to retype "boiler-plate" clauses in each instance with the concomitant worries of proofreading, bulging files, and client irritation at the length of a will sometimes thought to have been padded to increase the size of the fee.[50]

48. MD. ANN. CODE art. 16, § 214(a) (Supp. 1968), superseded by ch. 4, § 1, [1969] Md. Laws 122 (§ 302(a) of new Article 93A).

49. Even if this latest amendment had not been made, and a guardian were required to be appointed, the guardianship procedure set forth in new Article 93A will, as pointed out later in this article, be simpler than that under prior law and will not involve the peculiar technicalities and expense that have customarily been associated with guardianships.

50. *See also Administrative Clauses: Incorporation by Reference,* 2 REAL PROP., PROB. & TRUST J. 524 (1967); *"Automated" Drafting Techniques,* 3 REAL PROP., PROB. & TRUST J. 475 (1968); Evans, *Non-Testamentary Acts and Incorporation by Reference,* 16 U. CHI. L. REV. 635 (1949).

With the ease of this device goes the added and quite serious responsibility of being certain that the incorporated powers fit the particular situation. This will be especially true where trusts require under federal tax law the availability of the marital deduction, the deductibility of a charitable remainder, or a gift of a present interest for the purposes of the annual gift tax exclusion. In these instances, it will be necessary to limit the scope of certain powers in the "boilerplate" and to substitute other powers.[51]

Exercise of Power of Appointment

Section 359 of old Article 93 contains a presumption that a general power of appointment held by a testate decedent is exercised by the residuary clause of his will. The statute is limited to "general" powers of appointment. Section 4–407 changes the rule. It eliminates any reference to "general" power of appointment — a term which has been productive of an immense amount of controversy and litigation in Maryland.[52] It also provides that a residuary clause will automatically exercise any power of appointment if an intent to exercise the power is expressly indicated in the will, or if the instrument creating the power fails to provide for the disposition of the property subject to the power if the power is not exercised. A residuary clause will be deemed "expressly" to exercise the power if it contains language such as "all the rest of my estate and property, *including all property over which I may have any power of appointment,* I give to. . . ." It will not be necessary to mention the specific instrument which granted the power unless, of course, the donor of the power requires specific reference to that instrument.

In Terrorem Clause

New Article 93 contains the first Maryland statutory rule with respect to an in terrorem clause.[53] The section reflects the common law rule of the old Maryland cases.[54] It provides that "A provision in the will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is void if probable cause exists for instituting proceedings."[55] The concept of probable cause in this type of proceeding is reflected in a substantial body of case law which has grown up throughout the country.

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51. *See Tax Traps in Administrative Powers of Trustees,* 3 REAL PROP., PROB. & TRUST J. 305 (1968).

52. The most recent cases dealing with "general" powers are Guiney v. United States, 295 F. Supp. 789 (D. Md. 1969) and Frank v. Frank, No. 219, Sept. Term 1968 (Md. Ct. App., filed May 7, 1969). In the *Guiney* case "general" power of appointment is defined from a tax point of view, a definition not determinative of the relevance of the present MD. ANN. CODE art. 93, § 359 (1964).

53. § 4–413. *See* Jack, *No-Contest or In Terrorem Clauses in Wills — Construction and Enforcement,* 19 SW. L.J. 722 (1965); Selvin, *Comment: Terror in Probate,* 16 STAN. L. REV. 355 (1963).

54. *See* E. MILLER, THE CONSTRUCTION OF WILLS IN MARYLAND § 310 (1927).

55. § 3–104.

Lapsed Legacies

An anti-lapse statute is contained in Section 4–403. The only change from the prior anti-lapse statute is that under the former statute, a lapsed legacy passed directly to the heirs of the deceased legatee, even though the legatee might himself have left a will. Thus, if *A*, a legatee under the will of *B*, died before *B* but after the execution of *B*'s will, the property passed outright to *A*'s heirs at law. This was true even though *A*'s will left his estate in trust for the benefit of his heirs, or to his heirs but in different proportions than the statute of intestate succession provides, or even to other persons.

Section 4–403 expressly provides that the lapsed legacy shall pass directly to those persons who would have taken the property if the legatee had died owning the property. If the legatee dies testate, the legacy will pass under his will. As under prior law, the lapsed legacy will not be subject to administration in the estate of the deceased legatee.

Void, Inoperative, or Renounced Legacies

Section 4–404 contains the first Maryland statutory provision for the disposition of void, inoperative, and renounced legacies. Assume that *A* executes a will providing: "I give $10,000 to *B*." If *B* is dead when the will is executed, the legacy is considered to be void. If *B* is alive when the will is executed but dies before the testator, the legacy would be a lapsed legacy, to be saved by the anti-lapse statute. Assume, however, that *A*'s will provides: "I give $10,000 to *B*, if *B* survives me." If *B* dies after the execution of the will but before the testator, the legacy would be an inoperative legacy and would not be saved under the anti-lapse statute because the testator expressly provided that the legacy would take effect only if *B* survived *A*.

The common law rule in Maryland was that real estate which was the subject of a void or inoperative legacy passed directly to the heirs of the testator, unless the will otherwise provided.[56] On the other hand, personal property which was the subject of a void or inoperative legacy passed under the residuary clause in the will.[57] This distinction, as artificial as most of the common law distinctions between real and personal property, has now been dropped. Under Section 4–404 any property which is the subject of a void or inoperative gift will automatically pass as part of the residue of the estate. The same rule is set forth in Section 4–404 with respect to the disposition of renounced gifts.

Requirement that Heirs and Legatees Survive for Thirty Days

Sections 3–110 and 4–401 of new Article 93 contain a presumption that certain heirs or legatees who fail to survive the testator by thirty days shall be deemed to have predeceased the testator, unless the will provides otherwise. In intestacy, the statutory provision

56. *See* E. MILLER, THE CONSTRUCTION OF WILLS IN MARYLAND § 159 (1927).
57. *Id.* at § 160.

relates only to descendants, ancestors, brothers, sisters, or descendants of brothers or sisters. If any person in any of these categories fails to survive, his descendants will automatically take the share of the person who is presumed to have predeceased the intestate decedent.[58] The effect of both of these provisions will be to eliminate double administration of the same property where the second decedent dies within thirty days of the first decedent.

Section 4–401, dealing with testate administration, is not applicable to a surviving spouse because of the possible loss of the federal estate tax marital deduction which might result if the statute presumed that a widow who did not survive for thirty days predeceased her husband. The Report of the Governor's Commission gives several examples of the operation of Section 4–401 on typical legacies contained in a will:

1. "To *A*, if *A* survives the testator." Under this type of bequest, *A* will have to survive the testator by at least thirty full days in order to take the legacy. If *A* fails to survive by at least thirty days he is presumed to have predeceased the testator, the condition of the legacy has not been met, the legacy becomes completely inoperative, and the anti-lapse statute does not apply.

2. "To *A*, if *A* survives the testator by five days or more." Under this type of provision, if *A* survives the testator by five days or more but not by thirty days, *A* will be entitled to the legacy.

3. "To *A*, if *A* survives the testator, but if it cannot be determined whether *A* survives the testator, *A* shall be presumed to have survived the testator." Under this provision, *A* would take the legacy if he survives the testator.

4. "To *A*." Under this provision, if *A* survives the testator by less than thirty days, *A* will be deemed to have predeceased the testator, but the provisions of the anti-lapse statute will save the legacy.

New Article 93 limits the applicability of the Uniform Simultaneous Death Act as it relates to the distribution of estates. The Uniform Act, which provides that in case of simultaneous deaths the legatee shall be presumed to have predeceased the testator unless the will contains a provision to the contrary,[59] will continue to be important in the case of distributions to a decedent's spouse, to which the thirty day rule of Section 4–401 is not applicable. With this exception, if the will contains no contrary provision, the results in Examples 1 and 4 will apply.

Miscellaneous Rules Involving Wills, Trusts and Future Interests

Many familiar rules are continued in new Article 93: provisions with respect to depositing wills for safekeeping in the Registers' offices

58. § 3-104(b).

59. *See* MD. ANN. CODE art. 35, §§ 83-90 (1965).

during the testator's lifetime,[60] the rule against perpetuities,[61] the construction of phrases such as "die without issue,"[62] statutory sanction for pour-overs to inter vivos trusts[63] and testamentary trusts,[64] the indestructibility of contingent remainders,[65] the abolition of the Rule in Shelley's Case,[66] the 1964 statute authorizing payment of death benefits (such as insurance proceeds) to inter vivos and testamentary trusts,[67] the 1967 statute with respect to the non-tax effect of elections to deduct administration expenses on the fiduciary income tax return instead of on the estate tax return,[68] a procedure, which has been simplified, for releasing powers of appointment,[69] and the Uniform Estate Tax Apportionment Act.[70]

One change in the rules for construction of wills which has not already been mentioned is contained in Section 11–107.[71] Revenue Procedure 64–19[72] authorized one of two procedures acceptable to the Internal Revenue Service for use in satisfying a pecuniary marital deduction bequest where the personal representative could make distribution by valuing assets at their federal estate tax values. In 1965, the General Assembly enacted Section 392 of Article 93,[73] which prescribed that one of the two permitted procedures would be applicable unless the will directed the use of the other procedure. Section 11–107 in new Article 93 adopts the other procedure as the norm. The report

60. § 4–201.

61. §§ 4–409, 11–102, 11–103. The statute does not deal with Professor Leach's musings on the suggestions for a sperm bank to recreate mankind after the atomic holocaust. Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent,* 48 A.B.A.J. 942 (1962). Nor does the statute deal with ectogenesis (test tube birth and the artificial womb) and other medical insights. *See* Rorvik, *Making Man and Woman Without Men and Women,* ESQUIRE, April, 1969, at 108.

§ 11–102(b) repeals the present statutory exception in MD. ANN. CODE art. 93, § 348 (1964) to the Maryland rule against perpetuities, which permitted shifting executory legacies from a charity to an individual. Maryland was apparently unique in permitting such a shifting legacy. *See* 6 AMERICAN LAW OF PROPERTY § 24.39 (A. J. Casner ed. 1952).

The elimination of this exception was part of a consistent philosophy of the 1969 General Assembly which also seriously curtailed the exemption from the Rule Against Perpetuities which has always been enjoyed by possibilities of reverter and rights of entry. *See* Ch. 5, [1969] Md. Laws 135, which adds §§ 143–146 to Article 21 of the Maryland Code, and was the product of a special Legislative Council Committee on Possibilities of Reverter and Rights of Entry. *See* 2 LEGISLATIVE COUNCIL OF MARYLAND, REPORT TO THE GENERAL ASSEMBLY OF 1969, SPECIAL COMMITTEE REPORTS 481.

62. § 4–410.

63. § 4–411. *See also* Flickinger, *The "Pour-Over" Trust and the Wills Statutes: Uneasy Bedfellows,* 52 KY. L.J. 731 (1964).

64. § 4–412.

65. § 11–101.

66. § 11–104.

67. § 11–105.

68. § 11–106.

69. § 11–108.

70. § 11–109.

71. An error of oversight may be observed in the effective date provision governing § 11–107, which is set forth in § 12–102(i), and which provides that it shall apply to the estates of all decedents dying on or after July 1, 1969. When the effective date of the entire statute was changed by Senate amendment to January 1, 1970, § 12–102(i) was inadvertently missed.

72. 1964–1 CUM. BULL. 682.

73. MD. ANN. CODE art. 93, § 392 (Supp. 1968).

of the Governor's Commission states that the newly adopted procedure is much less complicated. Basically, the distinction between the two procedures is this: under the former procedure, the executor was required to distribute in satisfaction of the marital bequest assets fairly representative of appreciation or depreciation in the value of all property available for distribution; under the new procedure, the executor must distribute assets having an aggregate fair market value at the date or dates of distribution amounting to no less than the amount of the marital bequest as finally determined in the federal estate tax proceedings.

The former method was not only more difficult to administer, but in the situation where the value of the estate did increase during administration, its effect was to give the surviving spouse a share of the appreciation and thereby to increase her gross estate. Under the new procedure, the surviving spouse will not share in any such appreciation. If the estate had decreased in value, the former procedure would have been more satisfactory. Mr. Richard B. Covey, who has written the leading exposition of Revenue Procedure 64–19, concludes:

> Obviously, there is no way of knowing with certainty what will happen to the value of a decedent's estate during the period of administration. However, this is not to say that it is impossible to form a judgment as to which provision best achieves the desired result in the "average" case. . . . Thus, on balance, the [new] provision is preferable in attempting to minimize the estate taxes upon the widow's death.[74]

OPENING THE ESTATE

Subtitle V of the new Article 93 sets forth the procedures for opening an estate. Two new terms are used in this Subtitle, but the terms reflect traditional Maryland practices. The terms are "administrative probate"[75] and "judicial probate."[76] In a general way, administrative probate refers to the granting of probate and the appointment of a personal representative by the Register of Wills, without the necessity of formal application to the Orphans' Court. "Judicial probate" refers to a court action in probating the will or appointing the personal representative.

The Maryland probate procedure has not been consistent. In most of the jurisdictions, the Register admits the will to probate and causes the personal representative to be appointed without the necessity of any appearance before the Orphans' Court, if the court is not then in session. This has led to a widespread practice of purposely offering wills for probate during those hours when the Orphans' Courts are not in session. On the other hand, some Registers have refused to accept wills for probate except upon presentation to the Orphans' Court whenever it goes into session.

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74. R. COVEY, THE MARITAL DEDUCTION AND THE USE OF FORMULA PROVISIONS 53–59 (1966).

75. § 5–301.

76. § 5–401.

The theory of the new legislation is that in most situations the Register should be responsible enough to admit wills to probate and to appoint personal representatives whether or not the Orphans' Court is in session. Nevertheless, there are several situations in which the court must assume jurisdiction: (a) at the request of any "interested person,"[77] (b) at the request of a creditor in the event no one has applied for probate, (c) if it appears to the court or the Register that the petition for administrative probate is materially incomplete or incorrect in any respect, (d) if the will has been torn, mutilated, burned in part, or marked in any way so as to make a significant change in the meaning of the will, or (e) if it is alleged that the will is lost or destroyed.[78]

If administrative probate has been commenced, and the Register has granted probate and appointed the personal representative, any "interested person" may, within four months, insist on judicial probate.[79] All actions taken pursuant to the administrative probate are valid until the determinations at the hearing for judicial probate have been made.[80] The only exceptions to the four month rule deal with special circumstances. For example, if the proponent of a later offered will, in spite of the exercise of reasonable diligence and efforts to locate the will, was actually unaware of the will's existence at the time of the administrative probate, or if the notices to be sent by the Register of Wills to all interested persons were not given, or if there was fraud, a material mistake, or substantial irregularity in the administrative probate proceeding, any "interested person" may, within eighteen months of the decedent's death, institute a proceeding for judicial probate.[81] In the ordinary situation, however, whether the Orphans' Court is in session or not, the Register will be able to handle the entire situation without judicial blessing.

Elimination of Examination of Witnesses to the Will

One procedural innovation relates to the examination of witnesses in administrative probate. It will no longer be necessary to bring witnesses to the Register's office, (1) if the will appears to have been duly executed and contains a recital by attesting witnesses of facts constituting due execution, or (2) upon the filing of a statement executed under penalty of perjury by a person with personal knowledge of the circumstances of execution, stating that the persons whose names appear on the will were, in fact, the attesting witnesses.[82]

However, if any "interested person" wants to have the witnesses produced and examined, he has the right, within four months after

77. § 5-402. The concept of "interested person" is discussed in the text at note 84 *infra*.

78. On the subject of lost or destroyed wills, see Note, *Rebutting The Presumption of Revocation of Lost or Destroyed Wills*, 24 WASH. U.L.Q. 105 (1938); Evans, *The Probate of Lost Wills*, 24 NEB. L. REV. 283 (1945); Annot., 3 A.L.R.2d 949 (1949).

79. § 5-304(a).

80. § 6-307.

81. § 5-304(b).

82. § 5-303.

the grant of administrative probate, to insist upon judicial probate, in which event the court will summon the witnesses. All "interested persons" must necessarily receive notice of the administrative probate and be afforded those constitutionally required procedures enabling them to challenge the asserted execution of the will.

This provision is grounded on the assumption that often no controversy exists concerning the proper execution of the will and it is unfair to impose the frequently onerous burden of finding the witnesses and dragging them to the Register of Wills' office for an essentially perfunctory undertaking. Where there is going to be a controversy, one need only ask for examination of the witnesses and the request must be granted.

Petition for Probate

New Article 93 contains a statutory form of "Petition for Probate."[83] The petition combines most of the information presently contained in the various petitions for letters testamentary and for letters of administration commonly used or deemed "official" in the different counties, and in the list of names and addresses of legatees under the will. The major changes are: (i) the names and addresses of all "interested persons" must now be set forth directly in the petition, and (ii) the petition need not contain any recitation of the approximate value of the estate or the debts of the estate.

"Interested person" is defined in Section 1–101(f) to include not only the beneficiaries named in a will, referred to in the statute as "legatees,"[84] but also the heirs of the decedent even if he died testate. The statute recognizes that the intestate successors, whether or not they are named in the will, should be given notice of all of the proceedings so that they can be afforded an opportunity to attack the validity of the will. Under current Maryland practice, there is no procedure for giving notice to disinherited heirs, and there is a distinct possibility that an heir who, under current practice, receives no notice may be entitled to attack for want of constitutional due process the validity of all proceedings taken without his knowledge.

The old requirement of stating in a petition for letters the approximate value of the estate presumably was initiated in order to enable the Registers to set the amount of the bond.[85] As a practical

83. § 5–206. This is one of seven statutory forms, the use of which is intended to make probate procedure uniform throughout the state. The others are: Notice of Request for Judicial Probate [§ 5–403(b)]; Bond [§ 6–102(f)]; Letters of Administration [§ 6–104] — which is to be used for both testate and intestate administrations; Notice of Appointment of Personal Representative [§ 7–103] — which is a combined notice to creditors warning them to file their claims and a notice to those otherwise interested in the administration who have any objection to the probate or appointment proceeding to file their objections; Spouse's Election to Take Against Will [§ 3–207]; and Creditor's Claim against Decedent's Estates [§ 8–104(b)].

84. If there is a trust created under the will, the term "legatee" refers only to the trustees of the trust and not to the beneficiaries.

85. Bonds will continue to be required even where the will excuses bond. § 6–102(a). In this situation, the penal sum will only be an amount sufficient to secure the payment of debts, Maryland inheritance taxes payable by the personal representative, and taxes on commission. *Id.* Even where the will does not excuse bond, if all interested persons consent, the amount of the bond can be limited to the

matter, reliance on this figure has proved to most Registers to be no better placed than reliance on oral representations made by the personal representative as to the approximate value of the estate. In any event the Registers set bond based at best on an estimate and check its accuracy and adequacy when the inventories are filed, calling for an increase in the penalty if the original estimate was low. The new form, therefore, reflects the fact that the person applying for letters is often unable to value the estate at the commencement of the proceeding.

Since, even under the present law, petitions are filed under penalty of perjury, many personal representatives have been reluctant to set any meaningful value in the petition, resorting to a statement such as "over $50,000," even where it could reasonably be anticipated that the amount of the estate would reach $250,000. As is presently the case, when the inventory is filed, within ninety days after the appointment of the personal representative, the bond may be increased to reflect the inventoried values.

Notice to Legatees and Heirs

Although a major accomplishment of new Article 93 is the elimination of much unnecessary paperwork, particularly in uncomplicated and uncontested administrations, an important additional requirement which has been imposed is the strict procedure for notifying interested persons of various events during the course of administration.

At the outset of administration, the petitioner for letters must list in his petition the names and addresses of everyone he thinks may be an "interested person."[86] As has been previously indicated, this requirement includes not only everyone named in the will then being offered for probate, but also any heirs not named in the will.

Then, as the first step after the grant of letters and probate of the will, if any, the personal representative must prepare and have published in a local newspaper a notice of his appointment.[87] The publication of this notice is now mandatory, rather than discretionary, but the new statute requires only three insertions instead of four. This notice, the form of which is set forth in Section 7–103, combines both the traditional notice to creditors with notice to anyone who may object to the personal representative's appointment or to the probate of the will that he must make his objection within six months of the first insertion.[88]

The next step in the giving of formal notice of the proceedings must be taken within fifteen days after the appointment of the personal representative, when he must deliver two things to the Register

same amount that would have been required if the will had excused bond. The latter procedure is new and will save bond premiums chiefly in intestate estates where all interested parties desire to reduce the bond as much as possible. Most wills excuse bond.

86. §§ 5–201(f), 5–206.

87. § 7–103.

88. It should be noted that the limitations period of 6 months from the date of first publication stated in the notice, within which objections to the personal representative's appointment or to the probate of the decedent's will must be filed, does not relate to a mere request for judicial probate, as to which the period of limitations is 4 months from the date of administrative probate. § 5–304(a).

of Wills: (1) the *text* of the first published newspaper notice, which may be in the form of a reproduction of the printed newspaper item, the better choice, or may be in the form of a copy of the typewritten notice delivered to the paper for publication; and (2) a separate list containing the names and addresses of the legatees, and heirs who may not be legatees, which list must be furnished even though some or all of the names previously appeared as a part of the petition for probate.[89]

When the Register receives the text of the newspaper notice and the list of heirs and legatees, he is required, within five days, to forward to each person on the list, by delivery or by certified mail, a copy of the text of the newspaper notice.[90] It is the personal representative's duty to supply the Register with enough copies of the text of the notice so that there is one copy for each person named on the list. Finally, after the notice has been published three times, the personal representative must file a certificate of publication.[91]

The Governor's Commission concluded that these procedures were necessary to assure compliance with the due process requirements of the fourteenth amendment of the federal Constitution, as set forth in the Supreme Court decision in *Mullane v. Central Hanover Bank & Trust Co.*[92] When judicial probate has been requested, there are further requirements of publication and other notice.[93]

Ancillary Administration

The requirement that a foreign personal representative take out ancillary letters has been eliminated.[94] The Maryland law has never been particularly clear with respect to the circumstances under which ancillary letters were required to be obtained. The requirement that a foreign personal representative take out letters in Maryland was generally based on four theories: (1) foreign personal representatives have no power to sue or otherwise to act in Maryland without first obtaining authority from a Maryland court; (2) local creditors will be protected by being afforded an opportunity to file claims against the Maryland estate when the Maryland letters are obtained; (3) letters should be obtained to enable the foreign personal representative to deal with Maryland real estate, and (4) letters should be obtained to afford the Maryland taxing authorities a better opportunity to collect Maryland death taxes due with respect to Maryland assets.[95]

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89. § 7-104.

90. § 2-209.

91. § 7-103.

92. 339 U.S. 306 (1950). The *Mullane* test for the reasonableness of notice is that the form of notice used must not be substantially less likely to give actual notice than other available practicable methods. For an analysis of *Mullane* see Note, *Class Actions Under Rule 23(b)(3) — The Notice Requirement*, 29 MD. L. REV. 139, 143-45 (1969). *See also* Levy, *Probate in Common Form in the United States: The Problem of Notice in Probate Proceedings*, 1952 WIS. L. REV. 420.

93. § 5-403.

94. § 5-501.

95. *See* discussion in *Foreign Executors and the Need for Ancillary Administration*, 1 MD. BAR J., April, 1969, at 24. *See also* Currie, *The Multiple Personality of the Dead: Executors, Administrators, and the Conflict of Laws*, 33 U. CHI. L. REV. 429 (1966); Alford, *Collecting a Decedent's Assets Without Ancillary Administra-*

As the report of the Governor's Commission points out, the Maryland practice has not been notably successful in providing the protection these theories were originally supposed to afford. The rule prohibiting a foreign personal representative from instituting suit in Maryland has easily been avoided by equitable assignments of claims. The protection of local creditors worked imperfectly because local creditors were often unaware of an ancillary administration in Maryland or else the rules requiring ancillary administration in Maryland were so ambiguous that foreign personal representatives simply did not bother to take out letters, absent some compelling reason. The so-called "protection" for creditors also involved a hardship on Maryland debtors. Under the doctrine of *Citizens National Bank v. Sharp*,[96] a Maryland debtor who paid the foreign personal representative of his deceased creditor did so at his peril because, if an ancillary administrator had been appointed in Maryland, the Maryland debtor might also be liable to pay the Maryland administrator. The sanctity of real estate titles was, in many instances, perverted because Article 21, Section 95[97] permitted foreign personal representatives to sell Maryland realty without obtaining Maryland letters. The tax situation was anomalous because the Maryland Code set forth no rules for determining whether the foreign personal representative was required to take out letters in Maryland.

The Governor's Commission felt that the most desirable method of handling these problems would be the establishment of a simple statutory pattern duly protective of (1) Maryland creditors, including the tax authorities, if the decedent owned real or leasehold property in Maryland, and (2) Maryland debtors of non-resident decedents, and which would at the same time insure full disclosure in the land records. Section 5–501 of new Article 93 states that "a foreign personal representative shall not be required to take out letters in Maryland for any purpose." Section 5–502 sets forth the rule that: "Any foreign personal representative may exercise in Maryland all powers of his office, and may sue and be sued in Maryland, subject to any statute or rule relating to non-residents." Section 5–503 provides that a foreign personal representative owning real or leasehold property *must* publish a newspaper notice in every county in which the property is located setting forth certain information with respect to the estate, including the name of a Maryland agent for service of process on file with the Register and the location of the property. The creditors in Maryland may, within six months, file claims against the Maryland property in a special record book for claims against non-resident decedents.

Because there is no formal administration in Maryland, a procedure has been included in Section 5–504 for fixing the Maryland inheritance tax. If the inheritance tax is not paid in accordance with this procedure, the unpaid tax obligation constitutes a lien against the property. Similarly, an unpaid claim, evidence of which has been filed

tion, 18 SW. L.J. 329 (1964); B. MCDOWELL, FOREIGN PERSONAL REPRESENTATIVES (1957).

96. 53 Md. 521 (1880).

97. MD. ANN. CODE art. 21, § 95 (1966).

by the creditor, will also constitute a lien. If the property is sold, the lien of the creditor is transferred to the property even if it is sold, unless the taxes have been paid. The clarity of the lien provisions should force foreign personal representatives to pay Maryland taxes at the peril of being unable to pass clear title to property.

Persons Entitled to Be Personal Representatives

There are only two significant changes in this area. First, no judge of any state court or federal court and no Register of Wills or clerk of court may serve as a personal representative unless he is a surviving spouse or is related to the decedent within the third degree.[98] A similar provision has been added to Article 16 with respect to judges, clerks ,and registers serving as trustees.[99] Second, non-residents of Maryland can serve as personal representatives whether or not the domiciliary state of the non-resident has a statute providing for reciprocity with Maryland, so long as the non-resident files with the Register an irrevocable designation of a Maryland agent on whom service of process can be made.[100] The present law generally thwarts a testator's intentions. It does so with particular unfairness if his will was executed when the personal representative was eligible to serve but the personal representative later moved to another state before the testator's death. Even though the personal representative might have been the only child of the decedent, he could not qualify if he lived in West Virginia or some other non-reciprocal state.

Miscellaneous Statutory Provisions with Respect to Personal Representatives

New Article 93 sets forth the rule that successor personal representatives and surviving co-personal representatives shall, unless otherwise provided in the will, have all the powers that the original personal representatives possessed.[101] Section 6–203 states that where there are two or more personal representatives, the vote taken on any act must be unanimous except (i) where the act involved is receiving or receipting for property due the estate, (ii) where all personal representatives cannot readily be consulted in the time reasonably available for emergency action, (iii) where there has been a valid delegation to a co-personal representative, or (iv) where the will or any statute provides otherwise. An example of a statute that contains a contrary specific rule is Section 44 of Article 23 of the Maryland Code[102] which provides for majority vote by fiduciary holders of stock in a Maryland corporation.

Subtitle VI of the new statute also sets forth detailed requirements for suspending the powers of a personal representative on the application of any interested person and for the termination of the

98. § 5–104(b)(5).
99. § 199A of Article 16, enacted in ch. 3, § 5, [1969] Md. Laws 103.
100. § 5–104(b)(6).
101. §§ 6–202, 6–204.
102. MD. ANN. CODE art. 23, § 44 (1966).

rights of a personal representative by death, disability, resignation or removal.[103] Finally, Subtitle VI eliminates the need for the miscellany of the ecclesiastical latin special administrations that abound in Article 93, such as letters *ad colligendum,* letters *durante minoritate,* letters *de bonis non,* and letters *pendente lite.* Wherever there is a special circumstance that requires a special administrator, such as during an interim period when a personal representative has died, the court may appoint "a special administrator" to act until a new personal representative has been appointed.[104]

Administration of the Estate

Subtitle VII of new Article 93 deals with the procedures which the personal representative must follow in administering the estate. One of the most important provisions, not only in Subtitle VII but in the entire statute, is contained in Section 7–401. The first sentence of this Section reads as follows: "The personal representative, in the performance of his duties pursuant to Section 7–101, may exercise any power or authority conferred upon him in the will, without application to, the approval of, or ratification by the Court." Thus, if the will confers sufficiently broad authority on the personal representative, he may go about the business of administering the estate without obtaining orders from the court. This eliminates the archaic law and practice of taking up the Orphans' Court's time with petitions and orders that do no more than recite and seek approval for actions which an executor has authority to do anyway — actions which even the court's approval cannot shield against subsequent attack by a beneficiary if the executor took them in violation of his basic fiduciary duties.

The theory of Section 7–401 is that so long as the will confers broad authority on the personal representative, he should be permitted to act in the same manner and with the same responsibility as the trustee of a Maryland trust — without application to, approval of, or ratification by any court, unless, of course, he or any interested person requests judicial review or sanction. The procedural rigmarole can presently be avoided by creating a revocable inter vivos trust, but such a trust is generally thought to be beyond the means or the understanding of persons of moderate or limited means. The new law gives to everyone the advantages of the revocable inter vivos trust without the necessity of creating such a trust.

Under the new law, if the personal representative is given the power of sale in the will, as he generally is, he may sell real estate or any other type of property without giving notice by publication and without obtaining any order of court or formal ratification of the sale.[105] If the exercise of the power was in any way improper, the personal representative, pursuant to Section 7–403, will be liable for breach of his duty to interested persons in the amount of any resulting damage.

103. §§ 6–301, 6–304 to 6–306.

104. §§ 6–401 to 6–404.

105. *See* § 7–401.

Section 7–404 gives full protection to persons dealing with the personal representative, such as a purchaser of real estate. It provides:

> In the absence of actual knowledge or of reasonable cause to inquire as to whether the personal representative is improperly exercising his power, a person dealing with the personal representative is not bound to inquire whether the personal representative is properly exercising his power, and is protected as if the personal representative properly exercised the power. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative.

This rule is substantially the same as the rule with respect to purchasers from a private trustee, and should cause no problems with respect to rights of purchasers, title insurance, and the other accoutrement of real estate transactions.

However, a personal representative may petition the court for permission to act in any manner relating to the administration of the estate.[106] This provision is simply intended to allow the personal representative to initiate a proceeding whenever he deems it necessary to secure some formal resolution of a question relating to the administration. Likewise, any other interested person may petition the court with respect to any such question.[107]

As has been previously indicated, obtaining a court order will not exculpate the personal representative from all liability for the action taken pursuant to that order. The order is not a professional liability insurance policy. An imprudent fiduciary investment, although authorized by the court, may still be subject to surcharge. Although this may surprise some lawyers, and, indeed, some judges, it has been the Maryland law for a long time and has not been changed by the new statute.[108]

Even if a personal representative has obtained an order authorizing a particular action, that order will not insulate him from liability if he was negligent in choosing the course of action authorized by the order, or if he acted in bad faith in obtaining it. The key determination is whether such action was prudent at the time it was taken, and the fact that an executor has obtained an order from the Orphans' Court has *no legal bearing* on that determination. The fail-safe course for any executor to follow where, for example, he is selling property the value of which is seriously debatable, would be to notify all of the interested persons that he proposes to take such action and to get their consent to the price at which he is selling the property. In that way, he should be able to insulate himself from liability to those interested persons, as long as he has not withheld material information from them. Of course, regardless of whether or not the beneficiaries suc-

106. § 7–402.

107. § 2–102. *See also* MD. ANN. CODE art 31A, § 4 (1967), the uniform declaratory judgment proceedings in the Orphans' Courts and other courts of record.

108. *See Executor Not Always Protected,* 1 MD. BAR J., Jan., 1969, at 24; Goldsborough v. DeWitt, 171 Md. 225, 189 A. 226 (1937); Zimmerman v. Coblentz, 170 Md. 468, 185 A. 342 (1936).

ceed in an action against the personal representative for selling the property at an inadequate price, a good faith purchaser of the property is protected under Section 7–404.[109]

While the bill containing new Article 93 was before the Senate Judicial Proceedings Committee, many Registers of Wills and some members of the Bar expressed great concern over the provisions of the proposed Section 7–402, relating to "extended powers."[110] This provision was deleted; the deletion will impose additional duties on personal representatives of intestate decedents or decedents whose wills do not include certain broad powers of administration. Unfortunately, it is the small-to-medium-sized estates that are most likely to be affected by this move. The heart of the concept of "extended powers" was to enable the testator by his will, or all persons interested in the estate, regardless of the will, to agree in writing, after the decedent's death, to permit the personal representative to sell property or invest in property or do anything else necessary or appropriate to administer the estate without application to, approval of, or ratification by the court. Thus, if a man died intestate, survived by his wife and two children, the three of them could execute and file with the Register a written document authorizing the personal representative to buy or sell estate assets or do anything else without getting court approval. So too, if a decedent's will contained no express prohibition but contained an abbreviated set of powers, all the beneficiaries could similarly agree. Since all interested persons would have to agree to this procedure, it is difficult to rationalize the elimination of this aspect of "extended powers" on any basis other than its novelty.

One other aspect of "extended powers" would have enabled inventories and accounts to be delivered by the personal representative to all interested persons in lieu of filing them with the court. If this procedure were adopted, the personal representative could, instead, file with the court a verified certificate stating that a copy of accounts and inventories had been mailed to each interested person. This provision was intended to enable a man's financial affairs to be maintained in family privacy rather than spread upon the public records. All other financial affairs are private: income tax returns and estate tax returns must be kept confidential by both federal and state authorities. It seems anomalous that this one aspect of his affairs — the content and value of his probate property — must be laid out for the curious public to observe. The procedure suggested by the Governor's Commission would, at the election of the decedent by will while he was alive, or, after his death at the election of all interested persons, have enabled these affairs to retain the confidential status previously allowed to other financial records.

If a will does not contain a long recital of authorized powers, or if there is an intestacy, Section 7–401 contains a general grant of powers which can be exercised without application to, approval of, or

109. *See* A. SCOTT, THE LAW OF TRUSTS §§ 297, 298.4 (3d ed. 1967).

110. The Governor's Commission acceded to the request that these provisions, because of their novelty vis-à-vis the Maryland tradition, be given further study by the Legislative Council during 1969.

ratification by the court. This general grant includes the power to retain assets, perform the decedent's contracts, satisfy written charitable pledges of the decedent, deposit funds in interest-bearing accounts or short-term loan arrangements, vote stocks, hold securities in the name of a nominee, insure property of the estate, effect compromises with creditors, pay taxes, sell or exercise stock subscriptions or options, consent to reorganizations, dissolutions or liquidations, pay funeral expenses under certain circumstances, including the cost of burial space and a suitable tombstone or marker and the cost of perpetual care,[111] employ auditors and investment advisors or other persons, prosecute, defend or submit to arbitration actions involving the estate, continue unincorporated businesses for stated periods of time, incorporate valid claims, discharge security interests, convey redeemable reversions to the owners of leasehold estates, and make partial distributions. This grant of powers will eliminate a substantial amount of meaningless paper-shuffling in the administration of estates.

Where a particular power is not contained in the will or enumerated in Section 7–401, an order of court must be obtained. Thus, in intestate administrations, a court order must be obtained before any property can be sold; the procedure should not be cumbersome, however, because all statutory requirements of orders *nisi* and published notices of orders have been repealed.

Inventories and Accounts

The basic requirement that the assets of the estate be inventoried and that the inventory be filed within three months after the appointment of the personal representative has not been changed.[112] The new law has done away with a number of separate documents, the contents of which can now be included in one inventory. For example, since real property will be part of the probate estate, there will be no separate real inventory. The list of debts owed to the decedent, with requirements that they be categorized as sperate or desperate, has been eliminated. The new, general inventory must include all debts owed to the decedent and the valuation on the inventory will necessarily reflect whether they are sperate or desperate. The list of debts due from the decedent, which is required under Sections 13 and 14 of present Article 93,[113] has also been eliminated. If a creditor has a claim, he should file it.

A significant procedural change has been made with respect to the appraisal of corporate stocks listed on any national or regional exchange, debts owed to the decedent, including bonds and notes, bank accounts, building, savings, and loan association shares, and money.[114] The personal representative will be able to value these items himself, without obtaining any independent appraisal.[115] It will therefore no

111. *See also* § 8–106 dealing with payment of funeral expenses without any order of court, and discussion in the text at note 138 *infra*.

112. § 7–201.

113. MD. ANN. CODE art. 93, §§ 13, 14 (1964).

114. §§ 7–201(a)(4) to 7–201(a)(5).

115. § 7–202.

longer be necessary to pay a fee to a court-appointed or other "official" appraiser to appraise cash items, a fee that has been especially difficult to justify to members of a decedent's family.

With respect to all other types of property, the personal representative must secure an independent appraisal. However, with respect to one or more assets the value of which he deems fairly debatable, he may request an appraisal by appraisers appointed by the Register[116] or he may engage other independent appraisers to assist him in ascertaining the fair market value of these other assets.[117] With respect to stock of closely held corporations, real estate, or other similar assets, especially where a federal estate tax return will be required and the services of experts specially qualified in appraising such items must be obtained, the personal representative will undoubtedly wish to rely solely upon their valuation and not wish to pay an additional fee to appraisers appointed by the Register of Wills. If he retains special appraisers, he need not use appraisers designated by the Register. If the personal representative uses a charlatan for an appraiser and the inventoried values are unreasonably low, there is no requirement that the Register accept them for accounting and inheritance tax purposes; he then has the opportunity to challenge them and, if the situation is aggravated enough, to force a reappraisal.

Since the state is interested in correct valuations primarily for inheritance tax purposes, when the personal representative presents an account showing distributions on which inheritance taxes are payable, and the Register has reason to believe that the original, inventoried value, on which the inheritance tax is then to be calculated, is too low in relation to fair market values at the date of distribution, he may request the court to increase the inventory values.[118] Similarly, if the values have decreased, the personal representative or any other interested person may petition the court for a downward revision of values. The time limitation on reappraisals for inheritance tax purposes, contained in Sections 153 and 154 of Article 81,[119] has been repealed; the only time limit under the new law is that the revision must be accomplished before the estate is closed.[120]

Another procedural change regarding inventories is the requirement that when the inventory is filed, the personal representative must also file a certificate stating that, within the preceding fifteen days, he has mailed or delivered to all interested persons a notice that the inventory is being filed.[121] This will insure, for the first time, that the

116. § 7-202(a). § 2-301 gives all Registers the power to appoint standing appraisers. This is presently the system in Baltimore City and would appear to be a desirable state-wide option, depending upon the volume in the office, the availability of qualified personnel and other considerations. The "standing" appraisers need not stand on a full-time basis. They may stand "on call." In some counties this may be a better arrangement than the present system under which the personal representative picks his appraisers. In some jurisdictions, the Orphans' Court is the current appointing authority. This is completely inappropriate since it is the Register, not the court, who is charged with the duty of collecting taxes on appraised values.

117. § 7-202(b).

118. § 7-204.

119. MD. ANN. CODE art. 81, §§ 153-54 (1965).

120. § 7-204.

121. §§ 7-201(b), 7-501.

interested persons will receive either a copy of the inventory or a notice that it is being filed. Such persons will no longer be subject to the practical tyranny of "record notice" which, under the old law, bound them to know whatever was filed during administration whenever it was filed.

With respect to accounts, the substance of the Maryland practice has been continued.[122] However, the time for filing the first account has been accelerated to eight months after the first publication of the notice of appointment and notice to creditors.[123] The account will contain not only the information customarily contained in accounts, but also information with respect to purchases, sales and other transactions involving assets in the estate which have changed since the filing of inventory or the last previous account.[124] Since the necessity for separate reports of sale has been eliminated, the account must provide this information, as it now does with respect to stock splits and similar non-sale changes in asset composition. Accounts, like inventories, when filed, must be accompanied by a certificate indicating that the personal representative has mailed or delivered a notice of the filing of the account to all interested persons within the preceding fifteen days.[125]

The new requirement that the first account be filed within eight months after publication of the notice to creditors is part of the statutory policy of encouraging the prompt administration of estates.[126] Section 7–101(b) provides that "unless the time of distribution shall be extended by order of Court for good cause shown, the personal representative shall distribute all the assets of the estate . . . within the time . . . for rendering his first account." Of course, extensions may be obtained for filing an account for good cause shown, but, in the absence of federal estate tax or other significant tax problems, open claims, unresolved questions which make distribution impossible, or other reasons for perpetuating the estate beyond the eight month period, the personal representative should complete the administration of the estate within that time. Only in very unusual circumstances should distribution of specific legacies be deferred to a later date.

A good deal of the criticism of probate practice here and in other states has been directed to the administration of relatively small estates where, even though there are no appreciable tax problems, the personal representative keeps the estate open for over a year for no particular reason. As the report of the Governor's Commission states, it is expected that the court will grant extensions as a matter of course when there are federal tax problems, but in the absence of other problems which present a valid reason for withholding distribution, this should not provide any excuse for delaying distribution of specific legacies.

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122. § 7–301.

123. § 7–305(a)(1).

124. § 7–203.

125. §§ 7–301, 7–501.

126. "Eight" months was selected to give one month after the surviving spouse had decided whether to elect her statutory share, which she must do within seven months. § 3–206.

One other way in which prompt administration of estates has been encouraged is that the definition of "interested person" does not include anyone whose legacy has been satisfied in full. Thus, a notice that the account has been filed must be given to all "interested persons" within fifteen days before the filing of the account. If there are forty pecuniary legatees, this notice must be sent to each of the forty who has not been paid in full. Those legatees who have been paid in full are no longer "interested persons" and will not be entitled to receive this notice. Therefore, the personal representative can eliminate some of his paper work by making prompt distributions.[127]

Commissions and Attorneys' Fees

Unfortunate as some may view it, the new statute continues the present law governing compensation of personal representatives. The commissions have not been changed. Although real property has been included in the probate estate, real property, the income therefrom, and the expenses attributable thereto, will be excluded in computing the size of the estate for purposes of determining commissions.[128] This will necessarily be somewhat awkward because a separate calculation will have to be made on the administration account in order to enable the computation of the personal representative's commissions. Also perpetuated is the ten per cent commission on the sale of real property by the personal representative.[129]

With respect to attorneys' fees, it is expressly stated that the court, in setting a counsel fee for attorneys, must also take into consideration the aggregate commissions allowed to personal representatives so that the overall charge for administering the estate will not be unfair or unreasonable.[130]

Section 7–502 also provides that the personal representative must give written notice to each unpaid creditor and to all interested persons of the amount to be requested by the personal representative for commissions or by the attorney for the estate for counsel fees, along with the basis in arriving at the requested amount. The court action with respect to the petition for commissions and attorneys' fees will be final unless any person who receives the notice requests a hearing within twenty days of the sending of the notice.[131] This will insure the beneficiaries of the estate and any unpaid creditors the opportunity to present their views with respect to the allowances for commissions and attorneys' fees. Unfortunately, too often in the past the beneficiaries of the estate have not learned about the commissions or attorneys' fees until long after it is too late for them to voice any objection.

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127. Other notices to "interested persons" which can be reduced are the notices that an inventory is being filed (§§ 7–201, 7–501) and that the personal representative or attorney for the estate is seeking compensation (§ 7–502).

128. § 7–601(b).

129. § 7–601(c).

130. § 7–602(c).

131. § 7–502.

Creditors' Claims

Claims may be filed either with the personal representative or with the Register.[132] The personal representative may pay any just claim even if the claim has not been formally filed.[133] The new statute includes specific provisions with respect to secured claims,[134] contingent claims,[135] the order of priority of claims where an estate is insolvent,[136] the form in which a claim should be filed,[137] and similar procedural matters. Although in general the amount of funeral expenses to be allowed is fixed by the court, Section 8–106 specifically provides that if the estate is solvent and if the will expressly authorizes the personal representative to pay funeral expenses without an order of court, no such order is required.[138]

There is one major change with respect to the rules of creditors' claims, in addition to simplification and clarification. The doctrine of *Zollickoffer v. Seth,*[139] that a creditor may proceed against the heirs or legatees even if he has not filed his claim against the estate, has been substantially abolished by Section 8–103(a). In many instances, the assertion of a claim against the heirs or legatees, after the final distribution of the estate, has resulted in considerable and quite unexpected hardship. The theory of the new legislation is that at some point after decedent has died, the heirs and legatees ought to be able to receive the property with the assurance that no further claims can be made against them. Creditors must now either commence suit or file a claim within six months.[140] The six months' filing period allowed for creditors' claims will give creditors sufficient time to file their claims; if they fail to do so, they should not be entitled to proceed against the distributees of the estate.[141] Unless a claim is filed within six months, it will also be barred against the personal representative even if the personal representative has not made distribution.

The present statutory exception from the six month limitations period with respect to any action covered by an insurance policy or claims made against the Unsatisfied Claim and Judgment Fund has been retained in Section 8–104(c).

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132. § 8–104.
133. § 8–108.
134. § 8–111.
135. § 8–112.
136. § 8–105.
137. § 8–104(b).
138. *See also* § 7–401(*l*).
139. 44 Md. 359 (1876).
140. §§ 8–103(a), 8–104(c).
141. There is one question with respect to creditors' claims not explicitly answered in the statute or the Commission's report. If the decedent's obligation was expressly made binding not only on the decedent and his personal representative, but also on his heirs and legatees, does the reversal of *Zollickoffer v. Seth* still apply? Thus if the creditor fails to file his claim within six months, can he still present his claim against the heirs and legatees if the decedent's contractual obligation expressly mentioned heirs and legatees? *See* Comment, *Right of Creditors of a Decedent to Recover from Distributees after the Estate is Closed,* 41 MICH. L. REV. 920 (1943).

Distribution

A number of new statutory provisions have been included with respect to distribution. For example, Section 9–103 deals specifically with the order of abatement. The manner of valuing and distributing assets in kind has been set forth in Section 9–104.

Perhaps the most important sections in Subtitle IX, which deals generally with distribution, are Sections 9–109 and 9–111. Section 9–109 affords the personal representative a galaxy of options with respect to distributions to a minor. If money is distributable to a minor and there is no guardian, the cash may be deposited in any financial institution, subject to the further order of court.[142] The account book must be delivered to such person as the personal representative deems responsible and appropriate. There has been retained in the law the provision that if the amount is $300.00 or less the personal representative may, with the approval of the court, pay the amount to anyone the personal representative deems responsible and appropriate, for the minor's support.[143]

Alternatively, with the approval of the court, the personal representative may, even without specific authorization in the will, appoint a custodian under the Uniform Gifts to Minors Act to hold the property pursuant to the provisions of that Act.[144] With respect to tangible personal property, the personal representative is given the additional option to make distributions to anyone the court deems responsible and appropriate.[145] If a guardian has been appointed the personal representative may distribute any property to the guardian.[146]

Section 9–111 eliminates the necessity of obtaining releases from each distributee. If the personal representative desires a release, he may get one, but he is not obligated to do so.

CLOSING THE ESTATE

For the first time in Maryland there will be a procedure that will enable the personal representative formally to close an estate and terminate his appointment.[147] After the expiration of six months from the date of the published notice required under Section 7–103, the personal representative may petition the court for an order to close the estate and terminate his appointment.[148] After twenty days notice to all interested persons and a hearing, if requested, the court may enter an appropriate order.[149] If no action or proceeding is pending against him one year after the date of the order closing the estate and termi-

142. § 9–109(a).
143. § 9–109(b).
144. § 9–109(c). *See also* text at note 48 *supra* for additional discussion of this provision, and text at notes 176–78 *infra* for discussion of amendments to the Uniform Gifts to Minors Act made by ch. 4, § 1, [1969] Md. Laws 119–27.
145. § 9–109(d).
146. § 9–109(e).
147. §§ 10–101 to 10–105.
148. § 10–101.
149. Since "interested person" does not include anyone who has received his full distributive share of the estate, the only possible meaning of "interested person" in this context would be the residuary legatees.

nating his appointment, the personal representative is automatically discharged from ordinary liability to interested persons.[150]

A creditor who has filed a claim and not been paid or an heir or legatee who has not received his proper share may also have a claim against the distributees of the estate. Subtitle X of new Article 93 sets alternative statutes of limitations with respect to such claims against the heirs or legatees.[151] Even though the personal representative has been discharged and the estate closed, the statute provides that if property is later discovered, the court, upon petition of an interested person, may appoint the same personal representative or name a successor.[152] If the only act which needs to be performed after the estate has been closed is a ministerial act, such as executing a release to a mortgage which has already been discharged in full, the personal representative whose authority has been terminated still has the authority to perform such ministerial or confirmatory acts.[153]

ARTICLE 93A

Article 93A contains a comprehensive revision of the Maryland law relating to guardianships and other devices, such as committees and conservatorships, for the protection of the property of persons under disability. It collects into one article all the diverse Maryland rules with respect to the protection of property of minors and other disabled persons. It also contains a significant revision of the common law rule with respect to the disability of a principal who has executed a power of attorney.

The adoption of Article 93A reflects the displeasure and dissatisfaction of both the bar and the public with the current law and practice dealing with guardianships and committees. The appointment of a guardian for a minor, or a committee for an incompetent, has generally been looked upon with extreme displeasure because of the archaic and unnecessarily expensive procedures which the appointment inevitably sets in motion. For the past twelve years, the General Assembly has reacted to this situation by creating many new techniques for avoiding the appointment of a guardian or a committee. In 1957, for example, the Uniform Gifts to Minors Act authorized inter vivos gifts to a custodian for the benefit of a minor.[154] The custodianship proved to be such a sensible device for avoiding the expense of unnecessary guardianships that the General Assembly, on three subsequent occasions,[155] broadened the scope of the Act beyond inter vivos gifts of securities and cash to include gifts of life insurance policies, testamentary bequests to a custodian, and transfers to a custodian upon the termination of trusts, either inter vivos or testamentary.

150. § 10-103(a).
151. § 10-103(b).
152. § 10-104.
153. § 10-105.
154. Ch. 137, [1957] Md. Laws 171, now codified as MD. ANN. CODE art. 16, §§ 213-22 (1966 & Supp. 1968).
155. Ch. 113, [1962] Md. Laws 374; ch. 502, [1965] Md. Laws 708; ch. 235, [1967] Md. Laws 556.

In 1963, the General Assembly passed a statute authorizing a minor's recovery in tort to be paid to a statutory trustee, who need not be bonded and need not file annual reports.[156] The purpose of this procedure was simply to avoid the cumbersome and expensive guardianship proceeding in those situations.

A reaction to the procedures for committees for incompetents was the 1957 statute authorizing the appointment of "conservators" for persons who were not mentally incompetent but who needed a statutory agent to handle their property.[157] The Maryland Rules have also reflected the disenchantment with the existing law respecting guardians and committees. For example, although the ancient practice had been to require every guardian and committee to be bonded, the Rules have been amended to exempt estates having a value of less than $10,000.[158]

Notwithstanding the excellence of these recent amendments to the statutes and rules, no frontal attack had been made on the main body of law relating to guardians and committees until the introduction of House Bill No. 558, which proposed new Article 93A.[159]

Subtitle I of the new law contains general provisions, such as definitions, requirements for verification of documents[160] which eliminate the necessity of taking an oath before a notary, jurisdictional provisions,[161] and other details relating to the powers of the courts and Registers of Wills.[162]

The term "guardian"[163] is a generic term used to describe anyone appointed by a court to manage the property of a minor or "disabled person." It will replace terms such as "committee," which always had

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156. MD. ANN. CODE art. 16, §§ 223–30 (1966 & Supp. 1968).

157. MD. ANN. CODE art. 16, §§ 149–51 (1966 & Supp. 1968); MD. R.P. subtit. L.

158. MD. R.P. V73.

159. Ch. 4, [1969] Md. Laws 105. Most of these laws were enacted in the eighteenth century. Guardians and committees were given no authority to perform even mere ministerial acts without the formal approval of a court. A partial explanation of the desire to straight-jacket guardians and committees may lie in the fact that in the eighteenth century, doctrines of fiduciary responsibility which are now familiar were practically unknown. Today, in Maryland, there are thousands of trusts, both inter vivos and testamentary for minors as well as adults, by the terms of which the trustees may exercise quite broad powers without judicial approval. The trustees are not bonded, and the trustees need not file any accountings in court. A guardian or committee is nothing more than a trustee. The purpose of Article 93A is to enable the guardian or committee to perform his acts in much the same manner that the trustee of a private trust performs his duties, unless court supervision is, because of special circumstances, equitable. Under present Maryland practice, both guardianships and committees can be avoided through the use of trusts and custodianships, which are simple and inexpensive to administer. Those persons who are knowledgeable enough to avoid guardianships and committees, by means of a properly drawn trust instrument or custodial designation, can save the expense of these proceedings. To impose these expenses on those who did not plan for the contingencies of a minor's ownership of property or of incompetency is an unfair result. New Article 93A, entitled "Protection of Persons under Disability and their Property" is therefore intended to simplify and standardize the laws of Maryland on that subject.

160. Ch. 4, § 1, [1969] Md. Laws 107 (§ 102 of new Article 93A) [hereinafter cited as Art. 93A, § ___].

161. Art. 93A, § 105.

162. Art. 93A, §§ 106–09.

163. Art. 93A, § 101(d).

an unpleasant connotation, and "conservator." "Disabled person"[164] is a generic term used to describe a person who, for reasons other than minority, cannot manage his property effectively. The reasons include physical and mental disability, senility, habitual drunkenness, addiction to drugs, imprisonment, and detention by a foreign power.[165] Basically, the jurisdiction of the courts has not been changed. The Orphans' Courts and the Circuit Courts will continue to have concurrent jurisdiction over proceedings involving the property of minors and over the guardians of the person of any minor. The Circuit Courts will have exclusive jurisdiction over proceedings involving disabled persons other than minors, such as incompetents.

Subtitle II of new Article 93A contains the heart of the new statutory scheme. Section 213 provides a broad spectrum of powers which may be exercised by the guardian without application to, approval of, or ratification by the court, except as may be otherwise provided in the instrument which appointed the guardian or as may be limited by court order. Thus, a guardian may now invest in, sell, mortgage, exchange or lease any property, borrow money, enter compromises, and perform all of the acts which are set forth in Section 7–401 of new Article 93 with respect to the automatic powers of personal representatives of estates of decedents.[166]

A guardian may sell any type of property, including real estate, without getting a court order, and purchasers from the guardian or other persons dealing with the guardian are protected in much the same way as a purchaser from a trustee of a private trust is protected in dealing with the trustee.[167] Section 214 gives the guardian the power to disburse property for the support, care, protection, welfare, education and clothing of a minor without court authorization or confirmation. With respect to other disabled persons, the guardian may, again without court authorization or confirmation, apply sums from the income and principal of the estate for the clothing, care, protection, welfare, and rehabilitation of the disabled person. The present practice of permitting income and principal to be applied for the benefit of persons legally dependent upon the minor or disabled person or whom the disabled person had been maintaining or supporting before the appointment of the guardian has been continued.

The statute sets forth procedures for appointing the guardian[168] and for terminating his appointment,[169] including termination by death, disability, resignation, or removal. It permits a foreign guardian to act in Maryland without filing any formal documents or being appointed by a Maryland court.[170]

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164. Art. 93A, § 101(a). The term "disability" is broader than the terms "mental disorder", "mental illness," and "mental retardation," contained in § 3 of new Article 59. *See* note 184 *infra*.

165. Art. 93A, § 201(b).

166. *See* pp. 109–10 *supra* for a brief listing of these powers.

167. *See* Art. 93A, § 219 and p. 108 *supra* with respect to identical protection for purchasers from personal representatives.

168. Art. 93A, § 201.

169. Art. 93A, § 220.

170. Art. 93A, § 222. This provision is not unlike the procedures of §§ 5–501 to 5–506 of new Article 93, which abolish ancillary administration. Art. 93A, § 222,

One of the major criticisms of all the procedures relating to guardians and committes relates to the bonding requirements. Section 208(a) specifically states that: "No bond or other security shall be required of (i) a corporate guardian, (ii) a guardian named in a will or inter vivos instrument where the instrument excuses the guardian from giving bond, (iii) a guardian where the estate is less than $10,000, or (iv) in any other case which the court deems appropriate." Section 208(b) also states that even if a bond is not excused pursuant to 208(a), the amount of the estate upon which the penal sum of a bond is computed may be reduced if securities or money held by the guardian are deposited with a financial institution under arrangements requiring an order of court for their removal. The fee of the financial institution for this service should be less than the corresponding bond premium.

An inventory must be filed within sixty days after the appointment of a guardian,[171] and accounts must be prepared annually.[172] The accounts must be filed either with the court or with every interested person. If the account is not filed with the court, the guardian must file with the court a written verification that the account has been sent to every interested person. If it is not filed with the court, the guardian gets no protection with respect to matters disclosed in the account.[173] If, on the other hand, the guardian does file his accounts annually, after notice and hearing, the allowance by the court of the account will be conclusive as to the guardian's liabilities concerning any matters disclosed in the account. Because the term "guardian" is used as a generic term to replace all separate forms of arrangements under court order, such as committees and conservators, all of these procedures will be the same whether the person whose estate is being administered is under twenty-one, incompetent, senile, or suffering from other mental weakness, from addiction to drugs or from alcoholism.

Section 207, which sets forth the priority for the appointment of guardians, states the first priority, in the event no guardian has been appointed by a court in a foreign jurisdiction: "a person or corporation nominated by the minor or disabled person if such designation was signed by the minor or disabled person after his sixteenth (16th) birthday and, in the opinion of the court, he had sufficient mental capacity to make an intelligent choice at the time he executed such designation."[174] This will enable competent persons to execute an instrument designating the person whom they desire to be their guardian if they do become incompetent. The same instrument can excuse the guardian, when appointed, from giving bond.[175]

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would appear to make unnecessary the more cumbersome procedure of § 9-110 of new Article 93, which is a recodification of the present procedures for distributing the assets from a Maryland decedent's estate to the guardian of a foreign incompetent.

171. Art. 93A, § 209(a).

172. Art. 93A, § 209(b).

173. Art. 93A, § 209(c).

174. Art. 93A, § 207(b).

175. Art. 93A, § 208(a)(ii).

Gifts to Minors Act

Subtitle III of Article 93A contains the Uniform Gifts to Minors Act as revised in Maryland. The major changes are these:

1. Any type of property may be the subject of a custodial gift, including real property, tangible personal property, and interests in partnerships.[176]

2. A custodian may be designated as the beneficiary of a life insurance policy or an annuity contract.[177] Although the Uniform Act had previously permitted custodians to own life insurance policies, it contained no specific authorization for a custodian to be designated as a beneficiary. This omission has been corrected.

3. The choice of successor custodians has been broadened.[178] Any adult or trust company eligible to become an original custodian is also eligible under the new law to become a successor custodian.

Miscellaneous Provisions Relating to Minors

Subtitle IV simply recodifies the provisions relating to the payment of minor's recoveries in tort to a trustee who need not be bonded or file accounts.

Subtitle V contains a number of other miscellaneous provisions relating to minors which had been strewn throughout the Maryland Code. Section 501 permits, without the appointment of a guardian, limited amounts of money to be paid directly to minors who have attained the age of eighteen. This provision was derived from Section 383 of Article 48A,[179] which had authorized insurance companies to make payments not in excess of $3,000 per year directly to a minor who had attained the age of fifteen. In the new law, the amount has been increased to $5,000 per year, the age has been increased to eighteen, and the identity of the payor has been broadened to include "any person," not just insurance companies. If the minor is under eighteen, and there is no guardian, or the payor has no actual knowledge that there is a guardian, the sums so paid, again not in excess of $5,000 per year, may be paid to the parent or grandparent of the minor with whom the minor resides, and if there be none, to a financial institution which will hold the funds pursuant to further court order. Section 501(b) authorizes the Circuit Court to order any money distributable to a minor from any trust or estate or any other source to be deposited in a financial institution subject to the further order of court.

Section 502(a) recodifies the provision of Article 21, which enabled married females over the age of sixteen who hold title to property with their husbands as tenants by the entireties to execute deeds or mortgages. Section 502(b) continues the provision enabling any

176. Art. 93A, § 301(e)(1).
177. Art. 93A, § 302(d).
178. Art. 93A, § 307(a).
179. MD. ANN. CODE art. 48A, § 383 (1968).

veteran or member of the armed forces who is a minor to buy, sell, and mortgage real estate. Section 502(c) continues certain provisions heretofore found in Article 48A with respect to the purchase of insurance by minors. Section 503 contains provisions relating to shares in building and loan associations held by minors or minors and adults jointly.[180]

Powers of Attorney

Subtitle VI contains an important modification of common law rules relating to powers of attorney. At common law a power of attorney was automatically terminated upon the disability of the principal. Section 601 now provides that if the power of attorney specifically states that the power shall not be affected by the disability of the principal, or that the power of attorney shall become effective only upon the disability of the principal, the authority of the attorney or agent shall be exercisable notwithstanding the later disability or incapacity of the principal.

The general impression among laymen is that a power of attorney should be executed, whenever a person is becoming ill or thinks he is, so as to enable someone else to handle his affairs when he does become seriously ill. Unfortunately, the common law rules prevent the power from becoming operative when the illness renders the principal incapacitated. This new statutory provision will enable the attorney-in-fact to act notwithstanding the disability. When the provision is combined with the provisions of Section 207(b) of Article 93A, it is expected that many people will execute documents which will: (1) appoint an attorney-in-fact to act for the principal if the principal becomes disabled, and (2) appoint a guardian if the principal becomes disabled and any interested person wants formal guardianship proceedings instituted.

As a practical matter there will, in most instances, be no guardianship proceeding where there is a power of attorney which survives disability. Only in the event of a family controversy, where some interested person wants a guardian formally appointed, will there be any necessity for a guardianship proceeding where a power of attorney that would survive disability is already in existence. If a guardianship proceeding is commenced, however, a guardian designated by the disabled person when he was still competent will be entitled to be appointed by the court. If the same instrument excused him from giving bond, he will not be required to post a bond. If the person appointed guardian is not the same person designated in the power of attorney, the guardian will have the power to revoke, suspend or terminate the power of attorney. Section 602 gives protection to any person who acts without actual knowledge of the termination of a power of attorney.[181]

180. This provision was included in the statute by mistake. It was derived from MD. ANN. CODE art. 23, § 148 (1966), which was repealed by ch. 422, [1968] Md. Laws 611, and supplanted by another provision dealing with minors' accounts in building and loan associations.

181. Similar, though not as comprehensive, provisions had been included in MD. ANN. CODE art. 10, § 42 (1968).

Guardian of the Person

Subtitle VII of Article 93A deals with guardians of the person. Section 701 continues the Maryland law whereby the surviving parent of a minor may, by will, appoint one or more guardians and successor guardians of the person of an unmarried minor.[182] This type of guardian need not be approved by, or qualify in, any court. If there is no testamentary appointment, any person interested in the welfare of the minor may petition the court to appoint a guardian of the person.[183] The minor, if he is fourteen or older, has the power to designate a guardian of the person unless this decision is not in his best interests. The statute specifically provides, however, that it is not to be construed to require court appointment of a guardian of the person for a minor where there is no good reason, such as a dispute, for a court appointment. In many instances there will be immediate agreement among the members of the family as to who the guardian of the person should be, and there will be no necessity for court proceedings. In addition, the guardian of the person need not post any bond or file any accounts.

Section 704 gives the court the power to superintend and direct the care of the person of a disabled person who is suffering from a disability other than minority. This provision is not intended to abrogate or affect in any way the extensive procedures set forth in Article 59 for commitment to mental institutions.[184]

CONCLUSION

The major significance of Chapters 3 and 4 of the Laws of 1969 is not the overdue substantive revisions of the Maryland laws relating to the estates of decedents, minors, and incompetents. Rather, it is the apparent recognition by the General Assembly that the entire Maryland Code needs a complete reorganization and recodification. Chapters 3 and 4 represent the first step.

Such a comprehensive reorganization of the Code should accomplish several things:

1. *The collection into one Article of material on the same subject which is presently scattered throughout the Code.* This aim has been accomplished by new Articles 93 and 93A with respect to the subjects of the estates of decedents, minors, and disabled persons. The bench, the bar, and the General Assembly would all benefit from the destruction of the jig-saw pattern of Maryland statutes presently in force. The juxtaposition of all the statutes dealing with one subject would automatically reveal the inconsistencies and the

182. *See also* Note, *Appointment of a Guardian by Will*, 34 ROCKY MT. L. REV. 200 (1961). The old Maryland law was contained in MD. ANN. CODE art. 72A, § 4 (1967), and MD. ANN. CODE art. 93, § 164 (1964). By oversight only § 164 of Article 93 was repealed. The Report of the Committee of the State Bar Association that drafted Article 93A also recommended the repeal of § 4 of Article 72A. The omission of the additional repealer was solely a drafting error and was not intentional.

183. Art. 93A, § 702(a).

184. *E.g.*, MD. ANN. CODE art. 59, §§ 1, 22, 32, 33 (1964).

overlappings of our present laws and may be expected to result in many improvements.

For example, there should be one Article dealing with Procedure and the Courts which could serve as a convenient companion volume to the Maryland Rules. It could include such matters as Appeals (Article 5), Arbitration (Article 7), Attachment (Article 9), Execution (Article 83, Sections 1–14), Mandamus (Article 60), the Administrative Procedure Act (Article 41, Sections 244–256), Abatement and Revivor (Article 16, Section 1 and Article 75, Sections 15, 15A, and 15B), Pleadings, Practice and Process at Law (Article 75), Equity practice, including auditors, injunctions, general jurisdiction, and specific performance (Article 16, Sections 6–10, 91, 93, 96, 99, 107, 114–118, 131, and 169), Prohibited Actions (Article 75C), Slander of Females (Article 88), Limitations of Actions (Article 57), Uniform Declaratory Judgment Act (Article 31A), Uniform Absent Persons Act (Article 16, Sections 200–212), Evidence (Article 35), Notaries Public (Article 68), Acknowledgments (Article 18), Juries (Article 51), Costs (Article 24), Fines and Forfeitures (Article 38), Fees of Officers (Article 36), Justices of the Peace (Article 52), Clerks of Court (Article 11), Constables (Article 20), and Sheriffs (Article 87).

In the Commercial Law area, a single Article could include not only the Uniform Commercial Code (Article 95B), but also such matters as Bills of Exchange and Protest (Article 13), Bills of Lading (Article 14), Warehouse Receipts (Article 14A), the Uniform Fiduciaries Act (Article 37A, Sections 1–15), the Uniform Act for the Simplification of Fiduciary Security Transfers (Article 37, Sections 16–25), the Fair Trade Act, Unfair Sales Act, Unfair Cigarette Sales Act, Consumer Protection Act, Retail Installment Sales Act, the Retail Credit Accounts Law, and Finance Company laws (all in Article 83), Consumer Loans (Article 58A), Interest and Usury (Article 49), Currency (Article 29), Agents and Factors (Article 2), and Assignments of Choses in Action (Article 8).

An Article on Family Law would include not only the material on alimony, divorce, annulment, paternity, adoption, and changes of name found in Article 16, but also Husband and Wife (Article 45), Marriages (Article 62), Parent and Child (Article 72A), and Support of Dependents (Article 89C).

A Property Article would include Conveyancing, Land Installment Sales Contracts, and the Horizontal Property Act (Article 21), Landlord-Tenant (Article 53), Mechanics' Liens (Article 63), Mortgages (Article 66), Zoning and Planning (Article 66B), Regional Planning Council (Article 78D), Eminent Domain (Article 33A), Land Patents (Article 54, Sections 12–53), Bounding Lands (Article 15), miscellaneous provisions dealing with deeds, burial grounds, quiet title proceedings, partition, judicial sales, and ground rents contained in Article 16, Merger (Article 64), Aliens (Article 3), and Estrays, Vessels Adrift, and Drift Logs (Article 34).

An article on State Government would deal with the General Assembly (Article 40), Governor-Executive and Administrative De-

partments (Article 41), Comptroller (Article 19), Public Debt (Article 31), Treasurer (Article 95), Budget Procurement (Article 15A), Public Works (Article 78A), Merit System (Article 64A), Pensions (Article 73B), Department of Law (Article 32A), Officers (Article 69), Official Oaths (Article 70), Publication of Laws (Article 76), State Reporter (Article 80), Hall of Records (Article 54), Militia (Article 65), State Police (Article 88B), Civil Defense (Article 16A), State Roads (Article 88C), and Elections (Article 33).

A Criminal Law Article would include not only the materials presently found in Article 27, but also Habeas Corpus (Article 42), Criminal Injuries Compensation Act (Article 26A), and Defective Delinquents (Article 31B).

A brief Article on Creditors' and Debtors' Proceedings would encompass the Uniform Fraudulent Conveyances Act (Article 39B), Insolvents (Article 47), and various provisions of Article 16 dealing with trusts for the benefit of creditors (Article 16, Sections 175, 177, and 183).

A "Welfare" Article would include the State Department of Social Services (Article 88A), Unemployment Insurance (Article 95A), Commission on the Aging (Article 70B), Almshouses and Trustees of the Poor (Article 4), Deaf, Mute or Blind (Article 30), Mental Health (Article 59), the Interstate Compact on Mental Health (Article 41, Sections 319–338), and Juvenile Services (Article 52A).

The Water Resources Article (96A) could be expanded to include the State Boat Act (Article 14B), Ferries (Article 37), Pilots (Article 74), Seamen (Article 84), and the Maryland Port Authority (Article 62B).

The various rules regulating the professions, law (Article 10), dentistry (Article 32), engineering and land surveying (Article 75½), public accountants (Article 75A), the enormous range of doctors (Article 43), architects (Article 43), and real estate brokers (Article 56), could conveniently be collected in one Article.

2. *The elimination of archaic*[185] *and purely local*[186] *materials from the Code.*

3. *The review by the General Assembly of British Statutes in Force in Maryland.* There should be a statutory codification of those British statutes which are still relevant and an express statutory repeal of all those British statutes which, regardless of their former importance, are no longer relevant. It seems incredible that substantial questions of landlord-tenant relationships and of criminal law often turn on the interpretation of statutes which are sometimes five hundred years old, which are not found in the libraries of most Maryland lawyers, and which, if the opinion of Julian J. Alexander, Esquire,[187] was incorrect, may

185. *See, e.g.,* MD. ANN. CODE art. 46, § 5 (1965), dealing with descent of a naked trust.

186. There can be little justification in a statewide Code for a separate Article on laundries in Baltimore City and Baltimore County. *See* MD. ANN. CODE art. 55 (1964).

187. J. ALEXANDER, A COLLECTION OF THE BRITISH STATUTES IN FORCE IN MARYLAND (1870).

not even be the law of Maryland. There must be more fruitful ways for lawyers to spend their time than speculating on the accuracy of Mr. Alexander's 1870 opinion as to the state of the Maryland law in 1776.

The lack of statutory revision exists at the federal level, as well. Consider the Robinson-Patman Act,[188] "a singularly opaque and elusive statute,"[189] which has not been amended once in thirty-three years notwithstanding the unanimity of scholarly opinion that the Act is very badly drafted.[190] Congressional failure to correct such obviously inadequate statutes as the Limitation of Liability Act or the Copyright Act of 1909 are additional examples. Judge Friendly's brilliant essay, *The Gap in Lawmaking — Judges Who Can't and Legislators Who Won't,*[191] details many other examples.

Judge Friendly concludes that legislators simply do not have the time to deal with the technical legal matters of the kind that necessarily would be involved in a broad-scale revision of the Maryland Code or even a wide-scale revision of several major areas of substantive law. Dean Pound pointed out to the American Bar Association that: "Our legislative organization and legislative methods are devised for appropriations and political legislation, not for legislation on legal matters."[192] Dean Pound and Chief Judge Cardozo both called for a "ministry of justice" to do the work that the legislators generally dislike. Urgings of this kind resulted in the creation of the New York Law Revision Commission.

To be sure this idea is not new even in Maryland. In 1901, Mr. Alexander Armstrong urged the Maryland State Bar Association to create a Permanent Law Reform Commission to be appointed by the Governor.[193] Nothing was done. The suggestion reappeared as a recommendation at the Association's 1968 Annual Meeting.[194]

If a permanent law revision commission is not established in Maryland, perhaps the General Assembly would recommend the appointment of a special commission to reorganize the Maryland Code in the manner suggested. Thus, the spirit which prompted the enactment of Chapters 3 and 4 of the Laws of 1969 would not wane.

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188. 15 U.S.C. § 13(a), (b) (1964).

189. FTC v. Sun Oil Co., 371 U.S. 505, 530 (1963) (Mr. Justice Harlan).

190. *See* Anonymous, *Eine Kleine Juristische Schlummergeschichte,* 79 HARV. L. REV. 921, 922 (1966).

191. 63 COLUM. L. REV. 787, 793 (1963).

192. Pound, *Anachronisms in Law,* 3 J. AM. JUD. SOC'Y 142, 145 (1919). A similar approach is taken in R. KEETON, VENTURING TO DO JUSTICE: PROCESSES AND ISSUES OF PRIVATE LAW REFORM (1968).

193. 6 TRANS. MD. STATE BAR ASS'N 158 (1901).

194. *See Report, Committee on Long Range Planning,* 73 TRANS. MD. STATE BAR ASS'N, No. 2, 189 (1968).

INTERIM REPORT OF THE COMMISSION TO STUDY AND REVISE THE TESTAMENTARY LAWS OF MARYLAND.

December , 1966.

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December , 1966.

To: The Governor and the General Assembly of Maryland:

This Report of the Commission to Study and Revise the Testamentary Laws of Maryland sets forth the recommendations of the Commission concerning death taxes in this State.

The Commission was appointed by Governor Tawes in 1965, and began its work in July of that year. The appointment was made pursuant to House Joint Resolution No. 6, adopted at the 1965 Session of the General Assembly of Maryland, which requested the Commission to submit a proposal for recodifying and revising the Maryland laws concerning testamentary matters and death taxes.

The Commission has concluded its work on Maryland's death tax structure. Revisions of the death tax structure can be accomplished without significant changes in the non-tax aspects of testamentary law. Moreover, it is anticipated that major fiscal reforms will be submitted to the General Assembly at its 1967 Session.

Maryland death taxes have always been regarded as something of a specialty. The major tax revision studies of this State such as the recent Cooper-Hughes Report have, therefore, expressly omitted any consideration of death taxes. A reform of the death tax structure, however, requires a coordinated consideration of the death tax problem with the larger picture of state revenues. It is, therefore, fortunate that this Commission's deliberations on death taxes occur at a time when the entire State tax structure is being subjected to critical review which is likely to produce significant reform. The time has never been riper for ridding Maryland at long last of its complex, irrational, and unworkable system of death taxation.

For these reasons, the Commission has decided to submit now

an interim report on death taxes. The Commission's final report, which will consist of recommendations on those portions of Article 93 of the Maryland Code unrelated to taxation, will, it is hoped, be submitted to the 1968 General Assembly.

The Commission is composed of a cross-section of persons experienced in testamentary law, including a former Chief Judge of the Court of Appeals of Maryland, a Judge of the Orphans' Court of Baltimore City, two members of the Association of Registers of Wills, two members of the General Assembly, and four members of the Probate and Estate Council of the Maryland State Bar Association. Four commissioners were assistants to the Attorney General of Maryland, responsible for interpreting the Maryland death tax laws. In addition, the Commission has received the invaluable assistance of Melvin J. Sykes, Esquire, a recognized authority on testamentary law, who participated as consultant in virtually all of the Commission's meetings.

Respectfully submitted,

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William L. Henderson, Chairman

SUMMARY OF RECOMMENDATIONS

1. The present system of Maryland death taxation should be repealed.

2. The sole death tax in Maryland should be an estate tax.

3. Estates should be required to pay income taxes like any other non-charitable entity which earns income.

4. The amount of the Maryland estate tax should be equal to the maximum federal estate tax credit, and other taxes should be adjusted to assure no net loss in revenue by reason of the change.

5. The commissions of executors and administrators should be reduced in the amount of the tax on commissions which would be repealed.

INTRODUCTION

The Commission is unanimous in its conclusion that the present system of death taxation in Maryland is totally without rational justification. Our system is archaic, unjust, and incredibly complex. It is unique in its shortcomings among all the states. Its relatively insignificant revenue yield (between one and two percent of the State's total receipts) may be more simply and easily derived by the substitution of more rational and flexible revenue sources. There is simply no excuse for the unfair and unnecessary burden and inconvenience which the present patchwork of death taxes has imposed upon the public and those who must administer the system.

Maryland imposes three death taxes: (1) an inheritance tax on legacies under a will or on a distributive share of the next of kin of a decedent, where there is no will; (2) an estate tax, designed to take advantage of certain credits which the federal government allows against federal estate taxes where the amount of such credits is paid to a state; and (3) a tax on commissions of executors and administrators.

The Maryland Estate Tax is necessary for this state to obtain revenue that would have to be paid to the federal government in any event if Maryland did not have the tax. However, every responsible study of Maryland death taxes has stressed the unsoundness, inequity and inconvenience of the inheritance tax and the tax on commissions, and has called for a "thorough overhauling" of the present system.[1]

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1. See Report of the Maryland Tax Revision Commission of 1939 p. 33; Eney, Death and Taxes - Maryland Style, 17 Md.L.Rev. 101 (1957); Page, Maryland Death Taxes, 25 Md.L.Rev. 89 (1965). Walter W. Heller, Former Chairman of the President's Council of Economic Advisers in his article, The Administration of State Death Taxes, 26 Iowa L.Rev. 628 (1941), called Maryland's death tax system "an example of extreme structural rigidity." The exposition of the existing law in Sykes, Maryland Probate Law and Practice (1956) §§ 781-847 is a conclusive demonstration of the incredible and pointless complexity of the present system, particularly the inheritance tax. See also, Sykes, M.L.E., Probate Forms, Chapter 23.

The following discussion is divided into three parts. The first highlights some of the more significant shortcomings of the present inheritance tax and the tax on commissions. The second sets forth and analyzes this Commission's recommendations for the abolition of these taxes in favor of a rational system of death taxation. The third contains a section-by-section analysis of the legislation prepared by the Commission to implement the recommendations herein contained. The proposed bills, and other relevant information, including an analysis of the economic effect of the Commission's recommendations, are set forth in appendices to this report.

I. THE SHORTCOMINGS OF THE PRESENT SYSTEM

A. The Inheritance Tax.

The inheritance tax was originally enacted in 1844. The difficulties with the tax stem essentially from the fact that inheritance taxation is a horse-and-buggy instrument in a jet age. It fails to take sufficient account of the passage of property at death other than through the probate estate, and of the new and highly sophisticated modes of disposition of property by way of trusts and powers of appointment, which have become increasingly widespread due to federal tax considerations.

1. The inheritance tax is unsound in theory and concept. The tax is an ungraduated capital levy which taxes beneficiaries of small amounts at the same rates as distributees of vast fortunes. Only five of the fifty states have such a non-progressive death tax structure. The Comptroller's office has estimated that more than one-half of the revenues produced by the inheritance tax is derived from estates less than $100,000. Although the tax is theoretically on the value of the property received by the beneficiary, the actual tax is based on the appraised value of the assets distributed as of the date of decedent's death, and the law expressly prohibits any reappraisal by a personal representative after 15 months from date of death.[2] The amount of the

2. Code, Article 81, Sections 153-154.

tax may thus be based on values having little relation to the economic benefit actually passing to legatees or distributees. The theory of the tax, which was designed for a time when estates were settled promptly and property values were stable, simply does not work out today.

2. <u>The tax does not apply to all kinds of property equally and may be avoided on the basis of purely formal considerations which have no relation to substance</u>.

First, for example, life insurance, which is a popular metho of transferring property at death, is not subject to the Maryland inheritance tax where the beneficiary is someone other than the estate.[3] Thus, if one of two decedents, both of whose chief asset is insurance, surrenders his policies for their cash value before his death, the cash would be subject to inheritance taxes, whereas the proceeds of the policies of the other decedent, which differ solely in the form of the asset, would escape inheritance taxation completely.

Second, although the holder of a general power of appointment has in fact complete control over the disposition of the property subject to the power, that property escapes inheritance tax when the holder dies.[4]

Third, property passing to a surviving spouse is exempt if it is held in joint tenancy or tenancy by the entireties,[5] but not if it is bequeathed by will.[6] Thus, if a decedent's estate consists of $100,000 in stock held with his wife as tenants by the entireties, the wife takes the entire $100,000 without paying any inheritance tax, whereas if the decedent owned only $50,000 in stock in his own name and bequeathed it outright to his wife, the $50,000 would be subject to inheritance taxes.

Fourth, the tax is payable on the death of a joint tenant of

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3. 21 Op. Atty. Gen. 701 (1936).
4. Connor v. O'Hara, 188 Md. 527, 53 A.2d 33 (1947); 38 Op. Atty. Gen. 301 (1953).
5. Code, Article 81, Section 151.
6. Ibid.

bank account merely because of the form of the tenancy, regardless of the fact that the decedent may have made no contribution to the account, may have had no control over it at all, and may not have even known about it during his lifetime.[7]

3. The administration of the Maryland death tax system is irrational and inequitable.

The Maryland Tax Revision Commission of 1939 had the following comments which are still valid today:

> "The Attorney General is the legal advisor of each Register of Wills and to a certain extent the opinions rendered by him furnish a guide. However, the present system places a wholly unnecessary burden on the Attorney General's office. Many of the questions presented involve no new principle of law but merely the application of general principles to involved questions of fact. * * * Under the present system, inheritance tax questions alone occupy almost the full time of one Assistant Attorney General.
>
> Of course, not all of these questions are presented to the Attorney General. It frequently happens that taxable transfers are picked up by the State Auditor, in going over the accounts of the Registers of Wills and the records of the Orphans' Courts, in some cases long after the particular estate has been settled and the property distributed. The Commission believes that many taxable transfers have escaped taxation in the past, which means that the State has lost revenue and that the law has not been uniformly applied and enforced.
>
> It may be that a Register of Wills would be liable for any inheritance tax which he failed to collect, even though he acted in good faith and under a misapprehension as to the law. In some instances the State Auditor has attempted to surcharge Registers with inheritance taxes which they failed to collect. That imposes an unreasonable burden on the Registers of Wills.
>
> This statement does not imply any criticism of the Registers of Wills but merely a criticism of the system. The Registers are elected officials holding for four year terms, so that their tenure is subject to political vicissitudes, and their selection is not based on their knowledge of tax law."[8]

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7. Mitchell v. Register of Wills for Baltimore City, 227 Md. 305, 176 A.2d 763 (1961).
8. Report of the Maryland Tax Revision Commission of 1939, pp. 24-25.

The following additional comments should be made:

a. Payment of inheritance taxes and taxes on commissions is made to the Registers of Wills, whereas payment of Maryland estate taxes is made to the Comptroller. There is little justification for the dual system of administration.

b. The lack of uniformity in interpretation and application of the inheritance tax has become even more serious in the last 30 years. Attorney General's opinions are more frequently overruled in this field than in perhaps any other, and there have been serious divergencies of interpretation between Registers of Wills.

c. Where the tax on a remainder interest in a trust is not prepaid at the decedent's death, there is no procedure for enforcing the payment of the additional inheritance taxes when discretionary distributions of principal are made or when the trust terminates. Indeed, there is not even a penalty for failure to pay the additional taxes. Particularly where professional trustees are not involved, the payment of additional inheritance taxes when distributions of principal are made is undoubtedly the exception rather than the rule. Whether the omissions are purposeful or inadvertent is not the issue - the problem is that the system is so awkward that compliance is not encouraged and honesty is penalized.

d. The process of collecting and enforcing payments of taxes on property which does not pass through the probate estate is still ineffective. As the Maryland Tax Survey Commission of 1939 pointed out, there is "wide-spread evasion of the tax through inadequate means of discovery of withdrawal of funds by a surviving joint owner without knowledge of the bank . . . on the death of one joint owner." The present lien structure for inheritance taxes is inadequate.

4. <u>The tax presents extremely difficult problems of valuation, interpretation and application</u>.

The inheritance tax law is a particularly inadequate instrument for dealing with the newer and more sophisticated types of trusts.

af/

The following examples are typical:

a. There is often no rational basis for making the required valuation of the interest of a beneficiary in a trust under which the trustee has the sole discretion to pay income to the beneficiary or to accumulate it. The value of the beneficiary's interest, and hence the amount of the tax, depends upon a prediction of how much the trustee will actually pay to the beneficiary over the beneficiary's lifetime. In many instances the prediction must be grasped out of thin air, and the ultimate result depends on horse trading without rational basis on either side. Respect for law is not promoted when the law requires an essentially irrational process.

b. Likewise, it often cannot be determined, when the tax is payable, whether distribution will be made to collaterals or to lineal descendants, or to both, and if to both, in what amounts to each. The resulting tax therefore depends on guesswork and will in fact be at a higher or lower rate than would have been payable on the ultimate distribution. Thus, where a trustee is directed to pay income to the decedent's children and their spouses in such proportions as the trustee deems advisable, there is often no rational basis for predicting in advance how much should be taxed at 7 1/2% as going to the spouses and how much at 1% as going to the children.

5. <u>The existence of the inheritance tax along with the estate tax makes for great difficulty of computation, and consequent public inconvenience</u>.

The credit for state death taxes allowable against the Federal Estate Tax is made up in part of the amount paid to the state in inheritance taxes; only to the extent that inheritance and similar death taxes do not use up the maximum federal credit, does the Maryland estate tax take up the slack.[9] A serious problem arises because of the general practice of prudent executors, who retain a part of the estate for future

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9. Code, Article 62A.

distribution until after the federal estate tax obligation has been finally determined.

The Maryland estate tax is payable at the same time as the federal estate tax, i.e., when the return is filed. The federal tax obligation is not finally determined, however, until after audit and possibly further administrative and even judicial proceedings. When the retained assets are finally distributed, additional inheritance taxes are payable on that distribution. The executor must pay these taxes and file a claim for refund of so much of the Maryland estate tax as amounts to the additional inheritance tax payable on the distribution of the retained assets.[10] The refund itself, however, thereupon becomes distributable to the beneficiaries and is in turn subject to an additional inheritance tax, which again triggers the right to further refund of Maryland estate taxes. The question of just when the dog catches his own tail can be solved only by the use of algebraic equations.

A similar problem arises because inheritance taxes on interests in trusts are more and more often becoming payable when the trust terminates -- often many years after the estate is closed. The payment of these taxes at that time likewise gives rise to a right of refund of Maryland estate taxes, which will set in motion a similar chain of further inheritance tax and estate tax refunds. The postponement of inheritance taxes to the end of the trust may also involve the further practical difficulty that the executor or administrator may have died in the meantime, and a new personal representative, who is often totally unfamiliar with the estate at the time of his appointment, must bear the burden of obtaining the figures and setting up and solving the equations.

B. The Tax On Commissions

The tax on commissions is a levy which in general works

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10. 39 Op. Atty. Gen. 284 (1954).

out to 10% of the amount of the commissions of an executor or administrator.[11] The tax, which is as ancient in Maryland as the inheritance tax, in unique in the United States. It has no sound basis. It is payable even where commissions are waived; and since the tax is taken into account in fixing the rate of commissions, its ultimate impact is on the estate rather than the personal representative. The tax further burdens the cost of administration because bond is required to cover liability for this tax as well as the inheritance tax even where excused by the testator.

In any case where the commissions are in fact reasonable, or are waived, the tax is clearly unjust. Moreover, commissions are subject to income taxes, and there is no justification for a double tax burden on earned income mereby because it is earned in the administration of an estate.

II. RECOMMENDATIONS

1. The present system of Maryland death taxation should be repealed.

This Commission concurs with the following comment of the Maryland Tax Revision Commission of 1939:

> " . . . There should be a thorough overhauling of the structure of our death taxes . . . There seems no sound reason for having three separate taxes applicable to transfers upon death and unnecessary complications and confusions could be eliminated by a change in this regard."[12]

2. The sole death tax in Maryland should be an estate tax.

As pointed out in Eney, Death and Taxes - Maryland Style, 17 Md.L.Rev. 101, 120 (1957):

> "The basic difficulties with the present system of death duties in Maryland are the inordinate expense of administering the law, the loose administration of the law, and the inequalities of the burden of the tax. I believe these difficulties could be removed by the repeal of the present laws and the enactment of an estate tax law, and it seems to me that rather than try any more to patch up the present

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11. Code, Article 81, Sections 144-148.
12. Report of the Maryland Tax Revision Commission of 1939, p. 33.

law or adapt it to present conditions, a new approach is worthwhile."[13]

The advantages for Maryland of a single estate tax such as recommended by this Commission are many and compelling.

a. Such a tax would provide necessary relief from the inconvenience and economic burden of death taxation in the small and moderate-size estates which now bear the brunt of Maryland death taxation. In the larger estates, taxation would be graduated and the present inordinate red tape would be eliminated. The inequities and troublesome administrative problems involving the taxation of newer forms of essentially testamentary disposition would disappear. The federal estate tax return would suffice for both the federal government and Maryland, and the Maryland tax could be easily computed from the federal return.[14]

b. Such a tax would provide the State with automatic federal auditing and policing assistance. The cost of collection and enforcement would be substantially reduced. Evasion would be curtailed. Honesty would no longer be penalized and respect for government would be promoted.

c. The General Assembly would be freed of the burden of passing each year on many technical bills to amend the inheritance tax laws. These laws, because of their generally unsatisfactory character, have been subject to frequent tinkering which has added to the general confusion in this field.

d. The rights and obligations of persons dealing with or interested in decedents' estates would be much more certain, knowable and predictable. It would no longer be necessary to refer to two

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13. See also Report of the Maryland Tax Revision Commission of 1939 and Page, Maryland Death Taxes, 25 Md.L.Rev. 89 (1965).
14. A table of the amount of tax credit allowable under the federal estate tax law is set forth as Appendix A to this report.

separate and often conflicting bodies of law. The entire tax obligation of an estate would be determinable from the relatively stable and complete body of federal tax interpretation. The State Attorney General's office would be relieved of the pointless and frustrating responsibility of developing a reasonable body of interpretation of laws that are so fundamentally defective that reasonable and consistent interpretation are impossible.

e. The job of the Registers of Wills would be simplified without adversely affecting the Registers' offices in any way. As in the case of inheritance taxes and taxes on commissions today, the Commission recommends that payment of the Maryland estate tax should be made to the Register of Wills in the appropriate county. Copies of the federal estate tax return should be filed simultaneously with the Register and the Comptroller. Documents changing or discharging the federal tax obligation would be similarly filed. The Register would account for payments to the Comptroller, who would have the sole responsibility for verification and audit of amounts due in payment of the Maryland estate tax. This arrangement would place all the auditing and verification functions in a single office, namely, the Comptroller, while preserving to the Register the advantages he presently enjoys as collecting officer. It would also assure that there would be a complete record of the estate, including the federal estate tax return and subsequent changes therein, in the County where administration takes place or the decedent is domiciled when he dies. The centralization of audit, coupled with the relative simplicity of the tax, will promote uniformity, economy and public convenience.

3. Estates should be required to pay income taxes like any other non-charitable entity which earns income.

Under present law, estates are exempt from the state income tax. The theory of the exemption is that since the income of an estate is liable to inheritance taxation to the same extent as corpus, it would be unfair to impose any additional tax on the income.

With the repeal of the inheritance tax, there would be no reason to exempt estates from the payment of income taxes. The proposed exemption of $800 would assure that the income tax would not be an undue burden on relatively small estates.

4. The amount of the Maryland estate tax should be equal to the maximum federal estate tax credit, and other taxes should be adjusted to assure no net loss in revenue by reason of the change.

An analysis of the fiscal effect of the adoption of this proposal is set forth in Appendix B to this report. As that analysis demonstrates, it is impossible to predict with certainty the extent, if any, to which the adoption of the Commission's proposals would reduce the state's revenues from decedents' estates. It is indeed possible, for reasons hereinafter discussed, that adoption of the proposals would actually increase such revenues. The one thing that is abundantly clear is that if there is any reduction in revenue, it will be in an amount which represents an insignificant part of the total state budget. The Commission feels deeply that the advantages to be gained from adopting its recommendations are so overwhelming that the possibility of the loss of a minimal amount of revenue from decedents' estates should not stand in the way.

The Commission has considered and unanimously rejected the alternative of amending the Maryland estate tax structure and rates to impose a tax beyond the maximum federal death tax credit, in order to be sure that no revenue loss could possibly occur. The Commission's conclusion is based on the following considerations:

a. Only if the Maryland estate tax is in the amount of the maximum federal death tax credit will the advantages discussed under Recommendation No. 2 accrue. If the Maryland Estate Tax went any further, additional inconvenience and red tape would be necessary. Most of the proposals for an increased estate tax would require a complicated Federal Estate Tax-type form which would be necessarily different in detail from the federal forms in estates where federal forms

are now required and would have to be required in smaller estates where the federal estate tax return need not now be filed.[15]

If, on the other hand, a Maryland estate tax exempted all estates in which no federal tax is payable, the additional tax falling solely on estates subject to the federal estate tax would not only be unfair, but would tend to drive out wealthy citizens to states with a more favorable death tax system. The Commission is aware of actual instances in which wealthy persons have left Maryland, at least in part for this reason, to make their home in states such as Florida, which have a death tax system such as that proposed by the Commission.

b. The proposals of this Commission are essentially those embodied in the Uniform Death Tax Credit Act sponsored by the National Conference of Commissioners on Uniform Laws and adopted in substance in a number of states, the leading one being Florida.

The adoption of the philosophy of the Uniform Act, which provides for no tax beyond the amount of the credit which would have to be paid to the federal government in any event if Maryland did not impose a tax in that amount, would substantially encourage wealthy people to make their homes in this State, or to retire here, and would thereby enhance not only the total revenues from death taxes but the general economic well being of the state.

c. The truth of the matter is that the Federal government has preempted the estate tax field. The real remedy is for the states to persuade Congress to extend its credit downward to the bracket between $60,000,000 and $100,000,000. It would be manifestly unfair to

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15. For example, Maryland may not constitutionally impose an estate tax on real property or tangible personal property located outside of Maryland. The credit for gift taxes or estate taxes paid to other states or countries would not apply in Maryland. The exemptions and rate structure would be different, and there would undoubtedly be differences in detail in regard to certain deductions such as inter-spousal transfers.

impose an additional tax on persons in the $60,000-$100,000 bracket, when persons in the top bracket obtain a full credit. It would seem manifestly unfair to impose an estate tax on persons in the lowest bracket, who are not even reached by the federal government at all.

d. The maximum revenue loss, if any, which can reasonably be anticipated from the adoption of the Commission's proposals is extremely small. It may be made up relatively easily from other more productive, more flexible and less cumbersome means of taxation, e.g., a slight adjustment in the income tax, which is likely to have to be graduated in any event. The Commission believes its proposals come at a particularly opportune time in view of the impending general overhaul of tax structure and rates in this State, in which the necessary revisions can take account of the recommendations here made.

5. The commissions of executors and administrators should be reduced in the amount of the tax on commissions which would be repealed.

III. AN ANALYSIS OF THE LEGISLATION PROPOSED BY THE COMMISSION

The Commission has prepared three bills embodying the proposals contained in this report. The full text of these bills is set forth in Appendices C, D, and E. A section by section analysis of each of these bills is as follows:

1. The Maryland Death Tax Act.

The first and basic bill recommended by the Commission would repeal the present estate and inheritance taxes and the tax on commissions and would impose a single death tax upon decedents' estates in the amount of the maximum state death credit allowable for federal estate tax purposes. The bill is set forth in Appendix C. The Death Tax Act is the same in theory as the Uniform Death Tax Credit Act recommended by the National Conference of Commissioners of Uniform Laws.

Section 1 of the Bill repeals the present inheritance tax, estate tax, and tax on commissions.

Section 2 of the Bill enacts the Maryland Death Tax, Sections 144-156 inclusive of Article 81 of the Code, and makes a necessary adjustment in the Uniform Estate Tax Apportionment Act, formerly Section 162 of Article 81, which would become Section 157. An analysis of each of these proposed sections of Article 81 is as follows:

Section 144 contains 10 definitions which simplify the balance of the Statute.

Section 145 levies a death tax on the estate of every decedent domiciled in this state in the amount of the federal estate tax credit for state death taxes.

Section 146 provides for a reduction of the death tax by the lesser of: (a) state death taxes imposed by any other state in respect of any property included in the decedent's estate; or (b) a fraction of the federal death tax credit represented by the value of the decedent's non-Maryland estate divided by the value of the entire gross estate. This reduction is necessitated by the federal prohibition against Maryland's taking any part of the federal tax credit allocable to real or tangible personal property outside this state, which is subject to taxation by the state or states in which it is located.

Section 147 levies a death tax upon the estate of every decedent not domiciled in this state. The tax is that fraction of the total federal death tax credit represented by the value of the decedent's Maryland estate to the value of the entire gross estate. This tax is the converse of the reduction provided in the previous section and makes certain that Maryland receives the full portion of the federal death tax credit to which it is entitled in the case of both resident and non-resident decedents.

Section 148 provides for procedure for collecting the tax.

Sub-section (a) imposes the duty of filing upon the person who is required to file a federal estate tax return. Such person must file with the Comptroller and the Register of Wills a verified copy of the federal estate tax return within 15 months after the death of the decedent. Payment of the tax must be made to the Register of Wills when the return is filed. The Register certifies the fact of payment to the Comptroller. The sub-section provides for a simple and automatic procedure for extension of the time for filing if the federal government extends the time for filing the federal estate tax return.

Sub-section (b) provides for the obligation to pay additional Maryland death taxes in the event of an increase in the federal tax beyond the amount shown by the federal estate tax return. The person responsible for the federal return must file with the Comptroller and the Register a copy of the appropriate federal document (i.e., assessment, closing agreement, or final judgment) within 30 days after the receipt thereof and must pay the additional Maryland death tax.

Sub-section (c) vests in the Comptroller the exclusive responsibility for determining the proper amount of the tax.

Section 149 provides for interest at the rate of 6% from the time due on the unpaid tax or any part thereof if the tax is not paid as provided by the Act.

Section 150 provides for refunds and integrates the Maryland death tax into the general refund provisions of the Maryland Tax Laws, Code, Article 81, Sections 215-219.

Section 151 provides that upon failure of the person responsible to file the return or any other required documents within the time prescribed by law or permitted by extension, the Comptroller may impose a penalty of not more than 10% of the tax finally determined.

Section 152 provides for a clear and simple lien to enforce the collection of the tax.

Sub-section (a) provides that the tax shall be a lien for 10 years upon property includable in the Maryland estate of the decedent except to the extent that such property is used for payment of charges against the estate and expense of administration and is allowed as such by any court having jurisdiction of the administration.

Sub-section (b) provides that the lien may be released upon receipt by the Comptroller of the executor's discharge by the federal government from liability for federal estate taxes or by a statement by the executor under penalty of perjury that no Maryland death tax is due.

Sub-section (c) provides that the tax lien shall not be valid against a purchase, lease, security interest or lien acquired for value unless the interest or lien was acquired in bad faith. The terms value and bad faith are specifically defined. The object of this sub-section is to strike a fair balance between the interest of the State Treasury and those engaged in bona fide commercial dealings who have fully and innocently paid for the property subject to the lien.

Sub-section (d) provides for a procedure for discharging part of the property subject to the lien under circumstances where part of the tax is paid or the balance of the property is more than sufficient to cover the lien.

Section 153 provides that a discharge from personal liability from payment of the federal estate tax automatically operates as a discharge for personal liability of the Maryland death tax.

Section 154 in effect incorporates for Maryland the federal estate tax provisions for liability on the part of a transferee.

Section 155 provides that reference in other Maryland laws to the inheritance tax or tax on commissions shall not be deemed to apply to the Maryland death tax except where in the context of the reference such applicability would be reasonable.

Section 156 is a standard severability clause.

Section 157 changes to the "Maryland Death Tax" the reference to the Maryland Estate Tax contained in the Maryland Uniform Estate Tax Apportionment Act.

Section 3 of the Bill provides that the new Act shall take effect and shall be applicable to estates of persons dying on and after June 1, 1967.

2. Amendment of the income tax law.

The second Bill of the Commission, set forth in Appendix D, provides for the taxation of the income of decedents' estates not subject to the inheritance tax. The new death tax and the repeal of the inheritance tax apply to estates of persons dying on and after June 1, 1967. Consequently, the law applicable to estates of persons dying before that time will be the same as in the past. The Bill would amend Section 279 (f) to include a personal representative among the fiduciaries subject to state income taxation. Section 282 (i) would limit the exemption of estates from income taxation only to the estates of decedents dying before June 1, 1967. Section 286 (d) would provide an exemption of $800 for the fiduciary income tax liability of the personal representative of a decedent's estate. Section 294 (b) would relieve a fiduciary whose net income is less than $800 from the obligation of filing.

3. Reduction of commissions

The third Bill recommended by the Commission set forth in Appendix E provides for the reduction of allowable commissions in the amount of the tax on commissions which would be repealed by the enactment of the Maryland Death Tax Act.

Section 6 of Article 93 would be amended to make the range of allowable commissions not less than 1.8% and not more than 9.7% on the first $20,000 of the estate and not more than 3.6% on the balance. Section 72 of Article 93 would amend the commissions allowable to a collector so that they could not exceed 2.7% on the property and debts

collected or 1.8% on the whole inventory. Section 316 of Article 93 would be amended to provide for a minimum commission of 1.8% instead of 2% and a maximum commission of 9% instead of 10% on the sale of realty. In each case, the net amount received by the personal representative would be the same as its present figure.

APPENDIX A

Table of Death Tax Credits

Section 2011 of the Internal Revenue Code permits a credit for State death taxes against the Federal estate tax. The Internal Revenue Code puts a ceiling on the credit, as set forth in the following table. As used in this table "taxable estate" is computed after taking into account the $60,000 exemption to which every estate is entitled under the Federal law.

If the taxable estate is:	The maximum tax credit shall be:
Not over $90,000	8/10ths of 1% of the amount by which the taxable estate exceeds $40,000.
Over $90,000 but not over $140,000	$400 plus 1.6% of the excess over $90,000.
Over $140,000 but not over $240,000	$1,200 plus 2.4% of the excess over $140,000.
Over $240,000 but not over $440,000	$3,600 plus 3.2% of the excess over $240,000.
Over $440,000 but not over $640,000	$10,000 plus 4% of the excess over $440,000.
Over $640,000 but not over $840,000	$18,000 plus 4.8% of the excess over $640,000.
Over $840,000 but not over $1,040,000	$27,600 plus 5.6% of the excess over $840,000.
Over $1,040,000 but not over $1,540,000	$38,800 plus 6.4% of the excess over $1,040,000.
Over $1,540,000 but not over $2,040,000	$70,800 plus 7.2% of the excess over $1,540,000.
Over $2,040,000 but not over $2,540,000	$106,800 plus 8% of the excess over $2,040,000.

If the taxable estate is:	The maximum tax credit shall be:
Over $2,540,000 but not over $3,040,000	$146,800 plus 8.8% of the excess over $2,540,000.
Over $3,040,000 but not over $3,540,000	$190,800 plus 9.6% of the excess over $3,040,000.
Over $3,540,000 but not over $4,040,000	$238,800 plus 10.4% of the excess over $3,540,000.
Over $4,040,000 but not over $5,040,000	$290,800 plus 11.2% of the excess over $4,040,000.
Over $5,040,000 but not over $6,040,000	$402,800 plus 12% of the excess over $5,040,000.
Over $6,040,000 but not over $7,040,000	$522,800 plus 12.8% of the excess over $6,040,000.
Over $7,040,000 but not over $8,040,000	$650,800 plus 13.6% of the excess over $7,040,000.
Over $8,040,000 but not over $9,040,000	$786,800 plus 14.4% of the excess over $8,040,000.
Over $9,040,000 but not over $10,040,000	$930,800 plus 15.2% of the excess over $9,040,000.
Over $10,040,000	$1,082,800 plus 16% of the excess over $10,040,000.

APPENDIX B

ANALYSIS OF FISCAL EFFECT OF RECOMMENDED REVISION OF MARYLAND DEATH TAX

The Comptroller estimates that the maximum revenue loss based on 1966 experience if the proposed recommended revisions of Maryland death taxes is adopted is $7,880,231.58, out of a total budget of approximately a billion dollars. It is clear, however, from the Comptroller's own theories and the assumptions underlying his calculations that the actual loss, if any, will probably be nowhere near that great and in the long run there may probably be even a gain.

The Comptroller's calculations are as follows:

"STUDY OF MARYLAND DEATH TAX STRUCTURE FOR FISCAL YEAR 1966, SHOWING DEATH TAX COLLECTIONS, FEDERAL ESTATE TAX CREDIT, AND LOSS OF REVENUE TO STATE IF INHERITANCE TAXES HAD BEEN ELIMINATED.

DEATH TAX COLLECTIONS - FISCAL YEAR 1966

	Tax Remitted To State	25% Commissions Retained	Total Collections
Collateral	$4,912,278.69	$1,637,426.23	$6,549,704.92
Direct	1,415,740.44	471,913.48	1,887,653.92
Commissions of E & A	948,561.59	316,187.19	1,264,748.78
Interest on Inheritance	35,339.96	--	35,339.96
Estate	2,751,522.83	--	2,751,522.83
Totals	$10,063,443.51	$2,425,526.90	$12,488,970.41

SURVEY OF TOTAL FEDERAL ESTATE TAX CREDIT AS COMPARED TO PORTION OF CREDIT ACTUALLY PAID TO MARYLAND FOR FISCAL YEAR 1966. (rounded to nearest dollar)

	Total Credit Allowed	Portion Paid to Maryland as Estate Tax
Federal Credit	$4,541,265.00	$2,702,844.00
Interest	67,474.00	48,679.00
Total	$4,608,739.00	$2,751,523.00
Less Amount Actually Received	2,751,523.00	
Additional amount if Inheritance Tax were eliminated	$1,857,216.00	

CONCLUSIONS: 59 1/2% of the Federal Credit was collected in the form of Maryland Estate Tax, or for every dollar we collect under the present system we could expect $1.67 1/2 if the inheritance tax is discontinued.

COMPUTATION OF LOSS TO STATE IF INHERITANCE TAX HAD BEEN ELIMINATED.

Tax actually remitted to State	$10,063,443.51
Less Maryland Estate Tax actually received	2,751,522.83
	7,311,920.68
Add Excess Fees of Office received from Registers of Wills	1,816,551.29
	9,128,471,97
Additional amount required to operate Registers of Wills' offices if no commission received on Inheritance Taxes	608,975.61
	9,737,447.58
Less additional amount of Federal Credit	1,857,216.00
Net loss of Revenue to State	$ 7,880,231.58"

The foregoing calculation takes no account of the following factors:

a. The yield from the income tax on estates which would be imposed when the inheritance tax is repealed.

b. The estate tax credit which would be paid in estates where the Maryland estate tax is not now payable because inheritance taxes exceed the federal estate tax credit and therefore no Maryland estate tax return is currently filed at all.

c. The savings in the cost of administration and general public convenience resulting from rationalization of the death tax structure.

d. The increased revenues which would result from the repeal of a death tax system which discourages wealthy citizens from making their homes in this state.

APPENDIX C

A BILL

ENTITLED

AN ACT to repeal in its entirety Article 62A of the Annotated Code of Maryland (1964 Replacement Volume and 1966 Cumulative Supplement), title "Maryland Estate Tax", to repeal Sections 144 to 148, inclusive, of Article 81 of the Annotated Code of Maryland (1955 Replacement Volume and 1966 Cumulative Supplement), title "Revenue and Taxes", subtitle "Tax on Commissions of Executors and Administrators", to repeal Sections 149 to 161, inclusive, and Sections 163 to 176, inclusive, of said Article 81, sub-title "Inheritance Tax", subheading "In General", and to enact in lieu of the tax provisions so repealed new Sections 144 to 156 of said Article 81, under the new sub-title "Maryland Death Tax", and to renumber as Section 157 and repeal and re-enact, with amendments, Section 162 (1) of said Article 81, being the "Uniform Estate Tax Apportionment Act", providing generally for repeal of the existing Maryland estate and inheritance taxes and tax on commissions and for the imposition of a single death tax upon decedents' estates in the amount only of the maximum state death tax credit allowable for federal estate tax purposes.

WHEREAS, pursuant to recommendations made by the Commission to Study a Revision of the Testamentary Laws of the State of Maryland, appointed pursuant to Joint Resolution No. 23 of the Laws of Maryland of 1965, the General Assembly of Maryland is desirous of repealing all taxes presently applicable to the administration of estates, namely, the collateral inheritance tax, the direct inheritance tax, the tax on commissions of executors and administrators and the Maryland estate tax, and of enacting a single Maryland death tax equal to the maximum federal credit for state death taxes; now, therefore

Section 1. Be it enacted by the General Assembly of Maryland, That Article 62A of the Annotated Code of Maryland (1964 Replacement Volume and 1966 Cumulative Supplement), title "Maryland Estate Tax", be and it is hereby repealed; that Sections 144 to 148, inclusive, of Article 81 of the Annotated Code of Maryland (1965 Replacement Volume and 1966 Cumulative Supplement), title "Revenue and Taxes", subtitle "Tax on Commissions of Executors and Administrators", be and they are hereby repealed; that Sections 149 to 161, inclusive, and Sections 163 to 176, inclusive, of Article 81 of the Annotated Code of Maryland (1965 Replacement Volume and 1966 Cumulative Supplement), title "Revenue and Taxes", subtitle "Inheritance Tax", subheading "In General", be and they are hereby repealed.

Section 2. And be it further enacted, That Section 162 (1) of Article 81 of the Annotated Code of Maryland (1965 Replacement Volume and 1966 Cumulative Supplement), title "Revenue and Taxes", subtitle, "Inheritance Tax", subheading "In General", be and it is hereby renumbered and repealed and re-enacted, with amendments; and that new Sections 144 to 156, inclusive, be added to said Article 81 under the new subtitle "Maryland Death Tax", subheading "In General", all to read as follows:

MARYLAND DEATH TAX

In General

All new material; italicize

144. Definitions.

As used in this Subtitle:

(1) "death tax credit" means the credit against the federal estate tax for state death taxes;

(2) "decedent" means the decedent in relation to whose estate a tax is imposed by this subtitle;

(3) "executor" means the person required to file a return;

(4) "federal tax" means the tax imposed on the transfer of the taxable estate of decedents by the Internal Revenue Code;

(5) "gross estate" means the gross estate as finally deter-

mined and valued for federal estate tax purposes;

(6) "Internal Revenue Code" means the Internal Revenue Code of 1954, Public Law 591--Chapter 736, 2nd Session of the Eighty-third Congress of the United States, approved August 16, 1954, as the same is in force as of the effective date of this Act;

(7) "return" means the estate tax return required to be filed by the Internal Revenue Code;

(8) "state" means any state, the District of Columbia, the Commonwealth of Puerto Rico, and any possession of the United States;

(9) "state death taxes" means any estate, inheritance, legacy, or succession taxes actually paid to any state for which credit against the federal tax is allowable under the Internal Revenue Code;

(10) "Maryland estate" means that part of the gross estate the transfer of which Maryland has the power to tax.

145.

Imposition of Tax in Relation to the Estate of a Domiciled Decedent.

A tax is levied against the estate of every decedent domiciled in this State upon the transfer of the estate in an amount which equals the amount of the death tax credit.

146.

Credit Against the Tax.

The tax levied by Section 145 shall be reduced by the lesser of (a) any state death taxes imposed by any other state in respect of any property included in the decedent's gross estate, or (b) an amount which bears the same ratio to the death tax credit as the value of the decedent's non-Maryland estate bears to the value of the decedent's entire gross estate.

147.

Imposition of Tax in Relation to Property of Nondomiciled Decedent.

A tax is levied against the estate of every decedent not domiciled in this State upon the transfer of the decedent's Maryland estate in an amount which bears the same ratio to the death tax credit as the value of the decedent's Maryland estate bears to the value of decedent's entire gross estate.

148.

Filing Copies of Return and Payment of Tax.

(a) Every executor of a decedent dying domiciled in this State or of a non-domiciled decedent who died owning property in respect of which the tax is imposed by this State, shall file with the Comptroller and the Register of Wills within fifteen (15) months after the death of the decedent a copy of the return, duly verified. If the time for filing of the return is extended without penalty by the Internal Revenue Service, and a copy of the document of extension, duly certified by the person filing it, is filed with the Comptroller and the Register of Wills, the time for filing a copy of the return is extended for a period ending thirty days after the period of extension granted by the Internal Revenue Service. At the time of the filing of the return, payment of the tax shall be made to the Register of Wills who shall certify the fact of such payment to the Comptroller.

(b) Within thirty (30) days after the receipt of a final judgment of any court of competent jurisdiction, a closing agreement made under section 7121 of the Internal Revenue Code, or an assessment made by the Internal Revenue Service pursuant to a waiver of restrictions on assessment, the executor shall file with the Comptroller and the Register of Wills a copy of the appropriate document and shall pay to the Register any additional Maryland death tax thereby caused to be due.

(c) The exclusive responsibility for determination of the proper amount of tax shall be in the Comptroller.

149.

Interest.

If the tax or any part thereof is not paid as provided in this subtitle, the unpaid tax or part thereof shall bear interest at the rate of six per centum (6%) per annum from the due date.

150.

Refunds.

(a) Claims for refund, or interest or penalties thereon, shall be governed by the provisions of sections 215 to 219, inclusive, of this Article.

(b) Any refund finally determined to be due shall bear interest at the rate of six per centum (6%) per annum from the date the tax was paid.

151.

Penalties.

If the return or any other document is not filed within the time prescribed by law or permitted by extension, the Comptroller may impose a penalty of not more than 10% of the tax finally determined, to be collected as part of the tax.

152.

Lien.

(a) Unless the estate tax imposed by this subtitle is sooner paid in full, or sooner becomes non-assessable or uncollectible by reason of lapse of time, it shall (except as otherwise hereinafter provided) be a lien for 10 years upon the property includible in the Maryland estate of the decedent, except that such part of the Maryland estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

(b) The death tax lien shall be divested upon receipt by the Comptroller of a copy of the executor's discharge from personal liability for federal estate tax. A copy of such discharge may be filed with the Register of Wills for the jurisdiction in Maryland in which the estate is being administered, and if there be no such jurisdiction, with the Register of Wills for any jurisdiction in Maryland in which is located any property includible in the decedent's gross estate. If no Maryland death tax is due, the executor's statement to that effect signed under the penalties of perjury and of sections 220 and 221 of this Article, shall be filed with such Register of Wills and shall operate as a divestiture of any Maryland death tax lien.

(c) The death tax lien shall not be valid against any purchase, lease, security interest or lien, acquired for value, unless such interest or lien was acquired in bad faith. "Value" means an adequate and full consideration in money or money's worth, given or to be given and shall include an antecedent consideration unless the acquiring person had actual notice or knowledge of the existence of the Maryland death tax lien at the time of acquisition. An act shall be deemed to have been done in "bad faith" if a purpose of the act is to hinder, evade or defeat the collection of the Maryland death tax and such purpose, at the time of the act, was held by or known to the person charged with bad faith; but an act shall not be deemed to have been in bad faith merely because the existence of the Maryland death tax lien was known to such person.

(d) The Comptroller may issue a certificate of discharge of any property subject to the lien if he finds that (i) the fair market value of that part of the property remaining subject to the lien is at least double the amount of the unsatisfied tax liability secured by such lien and all prior liens or (ii) there is paid to the Comptroller in partial satisfaction of the liability secured

by the lien an amount determined to be not less than the state's tax interest in part to be discharged.

153.

Discharge of Executor from Personal Liability.

Discharge from personal liability for payment of federal estate tax shall automatically discharge the executor from personal liability of payment of Maryland death tax.

154.

Liability of Transferees and Others.

If the Maryland death tax is not paid when due, then the spouse, transferee, trustee (except the trustee of an employer's trust which meets the requirements of section 401 (a) of the Internal Revenue Code, as from time to time amended), surviving tenant, person in possession of the property by reason of the exercise, non-exercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate, shall be personally liable for such tax to the extent of the value, at the time of the decedent's death, of such property.

155.

Effect of References to Repealed Taxes.

On and after the effective date of this subtitle, any provision of law relating to the Maryland estate tax, inheritance tax or tax on commissions of executors and administrators shall not be applicable with respect to Maryland death tax, except where in the context of the reference such applicability would be reasonable.

156.

Severability.

If any portion, part or provision of this subtitle, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect the remainder or any other

End new material; end italics

application of this subtitle which can be given effect without the portion, part or provision or application so held to be invalid, and, to this end, the parts, portions, provisions and applications of this subtitle are severable.

[162] 157.

Uniform Estate Tax Apportionment Act.

(1) Definitions.--When used in this section only.

(a) "Estate" means the gross estate of a decedent as determined for the purpose of the federal estate tax and the Maryland [estate] death tax.

(b) "Fiduciary" means executor, administrator of any description, and trustee.

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

(d) "Person interested in the estate" means any person, including a personal representative, guardian, or trustee, entitled to receive, or who has received, from a decedent while alive or by reason of the death of a decedent, any property or interest therein included in the decedent's taxable estate.

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

(f) "Tax" means the federal estate tax and the Maryland [estate] death tax and interest and penalties imposed in addition to the tax.

Section 3. And be it further enacted, That this Act shall take effect, and shall be applicable to estates of persons dying, on or after June 1, 1967.

APPENDIX D

A BILL

ENTITLED

AN ACT to repeal and re-enact, with amendments, Sections 279 (f), 280 (i), 286 (d), 294 (b) of Article 81 of the Annotated Code of Maryland (1965 Replacement Volume), title "Revenue and Taxes," subtitle "Income Tax," to provide for the taxation of income of decedents' estates not subject to inheritance tax.

SEC. 1. Be it enacted by the General Assembly of Maryland, That Sections 279 (f), 280 (i), 286 (d) and 294 (b) of Article 81 of the Annotated Code of Maryland (1965 Replacement Volume), title "Revenue and Taxes," subtitle "Income Tax," be and they are hereby repealed and re-enacted, with amendments, to read as follows:

279.

(f)

"Fiduciary" means any person by whom the legal title to real or personal property is held for the use and benefit of another, and shall include a trustee and a personal representative, but shall not include an agent holding custody or possession of property owned by his principal, a guardian, a committee or trustee for an incompetent, a receiver or trustee liquidating the business of an individual, partnership or corporation, [[or an executor or administrator of the estate of a decedent when the estate is subject to the inheritance or succession tax laws of this State,]] or an individual, firm or corporation acting individually or collectively as manager or trustees of an employees pension trust exempt hereunder.

280.

(i) Income received during administration of estate.--Income received by an executor, administrator or personal representative of a deceased person during the period of administration of the deceased person's estate, which is subject to [[estate,]] inheritance

[[or succession]] taxes payable to the State of Maryland. This exemption shall not be applicable to any estate as to which the provisions of the Maryland Death Tax are applicable.

286.

(d) Fiduciary.--In the case of a fiduciary who is the personal representative of a decedent's estate, eight hundred dollars ($800), and in the case of any other fiduciary, two hundred dollars ($200).

294.

(b) Fiduciaries.--Every fiduciary receiving income taxable under this subtitle shall file with the Comptroller a return stating specifically the items of his gross income and the items which he claims as deductions, exemptions and credits under this subtitle when his net income for the taxable year 1944 and any year thereafter exceeds $200 (or $800 in the case of a personal representative of a decedent's estate), or his gross income for the taxable year exceeds $5,000.

SEC. 2. And be it further enacted, That this Act shall take effect, and be applicable with respect to persons dying on or after, June 1, 1967.

APPENDIX E

A BILL

ENTITLED

AN ACT to repeal and re-enact, with amendments, Sections 6, 72 and 316 of Article 93 of the Annotated Code of Maryland (1964 Replacement Volume and 1966 Supplement), title "Testamentary Law", subtitles, respectively, "Account," "Administration by Collector," and "Sales," providing, as a companion measure to the enactment of Maryland Death Tax, for the reduction of allowable commissions in the amount of the tax on commissions repealed by the enactment of such Maryland Death Tax.

SECTION 1. Be it enacted by the General Assembly of Maryland, That Sections 6, 72, and 316 of Article 93 of the Annctated Code of Maryland (1964 Replacement Volume and 1966 Supplement), title "Testamentary Law", subtitles, respectively, "Account", "Administration by Collector", and "Sales" be and they are hereby repealed and re-enacted with amendments to read as follows:

6.

Statement of disbursements in account; when assets insufficient to discharge.

On the other side shall be stated the disbursements by him made, and which are to be made in the following order and priority: First, such fees as may be due under § 24 of Article 36 of this Code; second, funeral expenses, to be allowed at the discretion of the court according to the condition and circumstances of the deceased, not to exceed five hundred dollars ($500.00) except by special order of the court, and provided the estate of the decedent be solvent; third, his allowance for costs and extraordinary expenses (not personal) which the court may think proper to allow, laid out in the administration or distribution of the estate or in the recovery or security of any part thereof, costs to include reasonable fees for legal services rendered upon any matter in connection

with the administration or distribution of the estate in respect to which the court may believe legal services proper, and in addition to include commissions, which shall be at the discretion of the court not under [[two percent]] one and eight-tenths percent (1.8%) nor exceeding [[ten percent]] nine percent (9%) on the first twenty thousand dollars ($20,000.00) of the estate, and on the balance of the estate not more than [[four percent]] three and six-tenths percent (3.6%); fourth, the widow's allowance as in this article directed to be paid; fifth, all taxes due by his decedent; sixth, charges for medical attendance, including nursing attendance in last illness, to be allowed at the discretion of the court according to the conditions and circumstances of the deceased, not to exceed one hundred dollars ($100.00), not more than fifty dollars ($50.00) of which shall be paid to the physician or physicians furnishing said medical attendance and not more than fifty dollars ($50.00) of which shall be paid to the nurse or nurses furnishing said nursing attendance; seventh, the allowance for things lost or which have perished without the party's fault, which allowance shall be according to the appraisement; eighth, debts of the deceased proved or passed in the following order, (a) claims for rent in arrears against deceased persons, for which a distress might be levied by law, but not for a period of more than three months; (b) claims for wages, salaries or commissions to clerks, servants, salesmen or employees contracted not more than three months prior to decedent's death, and claims founded on judgments and decrees, (c) all other just claims. If there be not sufficient to discharge all such judgments and decrees, a proportionate dividend shall be made between the judgment and decree creditors.

72.

Commission of collector.

The orphans' court may allow a collector a commission on the property and debts actually collected and afterwards delivered to the executor or

administrator, not exceeding [[three per cent.,]] two and seven-tenths percent (2.7%), or on the whole inventory not exceeding [[two per cent]] one and eight-tenths percent (1.8%).

316.

Sale of real estate by executor authorized to sell--In general.

In all cases where an executor may be authorized and directed to sell the real estate of a testator, such executor may sell and convey the same, and shall account therefor to the orphans' court of the county where he obtained letters, in the same manner that an executor is bound to account for the sales of personal estate; and the orphans' court may allow such executor a commission on the proceeds of such sale, not less than [[two percent]] one and eight-tenths percent (1.8%), nor more than [[ten per cent]] nine percent (9%); but such sale shall not be valid or effectual unless ratified and confirmed by the orphans' court, after notice by publication given in the same manner as practiced in cases of sales of lands under decrees in equity; and the bond of such executor shall be answerable for the proceeds of sales of the real estate which may come into his possession, to the same extent as if it were personal estate in his hands; in case the purchaser of any such real estate has transferred, or shall transfer his said purchase to another person, it shall be lawful for the orphans' court, upon petition in writing by the original purchaser and such assignee and upon being satisfied that such substitution or transfer may be made without injury to the estate, to pass an order substituting such assignee as purchaser of the said real estate, upon such terms as may be deemed expedient, regard being had to the interests of the estate, and directing the executor to convey the said real estate to the said assignee, his heirs and assigns; provided, however, that it shall not be necessary to the validity of the sale of any such real estate by the executor that the same be ratified by the orphans' court, as aforesaid, in any case where a court of equity of

competent jurisdiction has assumed jurisdiction in relation to the sale of any such real estate. Provided, that an executor having full power to sell under the will may transfer and convey all redeemable rents reserved by leases or subleases of land, otherwise known as redeemable ground rents, after due notice from the tenant of an intention to redeem the same, without complying with the requirements of this section as to reporting such conveyance to the orphans' court and securing its ratification thereof.

SEC. 2. And be it further enacted, That this Act shall take effect, and be applicable with respect to estates of persons dying on or after, June 1, 1967, or the effective date of the Maryland Death Tax, if that be a later date.