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Uniformity in State Inheritance Laws: How UPC Article II Has Fared in Nine Enactments

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The Uniform Probate Code was drafted to facilitate modernization, simplification, and uniformity of state inheritance laws. Since its approval by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in August 1969, the Code has been enacted in various forms by 11 states. In this article, Messrs. Wellman and Gordon analyze significant deviations from the recommended version of article II in the first nine enactments of the UPC. The authors argue that all but exceptionally meritorious changes in enacted versions of the UPC should give way to the goal of state uniformity in inheritance laws, and find the majority of the changes to be unjustifiable. In evaluating the merits of the changes, the authors consider UPC policies behind individual sections of the Code as well as state reasons for deviations.

Article II of the Uniform Probate Code deals with the substantive rules of intestate succession, family protection, and wills.[1] This article identifies and analyzes the substantial devia-

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1. UNIFORM PROBATE CODE [hereinafter cited as UPC].

Article II of the Code contains nine parts: Intestate Succession, Elective Share of Surviving Spouse, Spouse and Children Unprovided For in Wills, Exempt Property and Allowances, Wills, Rules of Construction, Contractual Arrangements Relating to Death, General Provisions, and Custody and Deposit of Wills. This article does not examine state adaptations of Part 2 of art. II dealing with the elective share of the surviving spouse since deviations from this part of the Code were anticipated, if not encouraged. In fact, the Code's recommendations on this aspect of inheritance law appear to have stimulated an increase in the variety of extant and proposed solutions to problems respecting disinheritance of spouses, demonstrating that it will be many more years before anything resembling a dominant or uniform pattern of American law can be expected to emerge. Even Idaho and Arizona, the first two community property states to accept the Code, followed somewhat different courses in relation to the elective share problem.

Alterations in § 2-801 dealing with the doctrine of renunciation also receive no treat-

tions from the provisions of article II that have occurred in the first nine UPC enactments: Alaska,[2] Arizona,[3] Colorado,[4] Idaho,[5] Montana,[6] Nebraska,[7] North Dakota,[8] South Dakota,[9] and Utah.[10] Part I of the article discusses general policies underlying UPC article II. Part II treats the various state adaptations by code section, considering principles behind the individual sections and analyzing deviations from the UPC provisions that were not adopted as recommended.[11]

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ment in this article. This section, as approved in the 1969 draft of the UPC, represented a modification of recommendations made by a study and drafting committee of the American Bar Association's Real Property, Probate and Trust Law Section. *See* Special Comm. on Disclaimer Legislation, *Disclaimer of Testamentary and Nontestamentary Dispositions—Suggestions for a Model Act*, 3 REAL PROP. PROB. & TRUST J. 131 (1968). This ABA study later formed the basis of a separate drafting effort by the National Conference of Commissioners on Uniform State Laws which resulted, in 1973, in new proposals for uniform state laws regarding renunciation of transfers and successions. UNIFORM DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT; UNIFORM DISCLAIMER OF TRANSFERS UNDER NONTESTAMENTARY INSTRUMENTS ACT; UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT [*in* 1973 HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS 204, 212, 217]. Recently, the groups that have continued to be concerned with the shape and fate of the Uniform Probate Code adapted UPC § 2-801, a section proposed by the National Conference dealing with renunciation, to the 1973 uniform law. AMENDMENTS TO THE UNIFORM PROBATE CODE [*in* 1975 NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS]. These amendments appear in the 1975 edition of the UPC, recently published by West Publishing Company. In the meantime, several states, including those enacting the Uniform Probate Code, have enacted legislation reflecting various stages of these continuing national drafting efforts. The resulting statutory variants merit comparison, but the topic is essentially unrelated to the theme of deviations from the UPC.

Finally, this article does not consider the matters covered in § 2-803, dealing with the effect of homicide on inheritance. The National Conference of Commissioners placed this section in brackets to indicate they did not attach to it the usual recommendation for uniform enactment. The Commissioners expected the deviations that have occurred in all but two enactments of this section.

2. ALASKA STAT. § 13 (1972).

3. ARIZ. REV. STAT. ANN. § 14 (Spec. Pamphlet 1974).

4. COLO. REV. STAT. ANN. § 15-10 to -17 (1973).

5. IDAHO CODE tit. 15 (Supp. 1975).

6. MONT. REV. CODES ANN. § 91A (Spec. Uniform Prob. Code Pamphlet 1975).

7. NEB. REV. STAT. §§ 30-2201 to -2902 (Cum. Supp. 1974).

8. N.D. CENT. CODE § 30.1 (Spec. Uniform Prob. Code Supp. 1975).

9. S.D. UNIFORM PROB. CODE §§ 1-101 *et seq.* (1975). On February 27, 1976, however, the South Dakota legislature voted in favor of HB 712 to repeal this statute, effective later this year. Despite the repeal of the statute, a discussion of its provisions in this article is merited in view of the overall purpose of the article, which is to weigh reasons for various state changes against the UPC policies behind recommended Code provisions.

10. UTAH CODE ANN. § 75 (Spec. Supp. 1975).

11. Many of the sections in art. II have been adopted in all of the UPC states studied either without modification or with such minor change that the sense of the Code language is preserved. In none of the states were more than a handful of major changes made. Presumably, the unaltered and insignificantly altered sections represent rules of inheri-

I. UPC Policy Goals

A. *In General*

Analysis of state adaptations of the UPC requires consideration of the policy goals the UPC drafters sought to implement. Those goals include the following: (1) to provide, by law, an acceptable estate plan for those of modest means who, through reliance or default, leave their estates to be disposed of in accordance with laws governing intestacies;[12] (2) to bring probate law into the 20th century by making it responsive to modern attitudes;[13] (3) to enable the will to become a more popular instrument for disposition of wealth at death;[14] (4) to facilitate inter vivos and post mortem estate planning by providing clear guidelines for draftsmen and maximum flexibility for estate planners;[15] (5) to provide substantive rules that facilitate efficient estate administration;[16] and (6) to encourage uniformity of law in an area where a substantial segment of our population is inconvenienced by various parochial rules that serve no significant local purpose.[17]

Attainment of the first goal, improvement of the law's estate plan, should benefit both the average estate owner and the professional estate planner. The average estate owner should benefit from Code rules governing intestacy and related procedures that are designed to more accurately reflect the desires of most persons. Estate planners should benefit from the decreased necessity of drawing wills for and administering small estates, where adequate compensation is more the exception than the rule. They also may benefit from new, more precise, inheritance concepts which can be incorporated into custom plans.

The second goal, modernizing inheritance rules, reflects the state of present probate law in the United States that perpetuates many historical rules that long ago ceased to make sense. Despite

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tance that lend themselves more readily to uniform acceptance than those rules expressed in the altered sections.

12. UPC art. II, pt. 1, General Comment.

13. *Id.*

14. *Id.* art. II, pt. 5, General Comment.

15. *See, e.g.*, Moore, *Estate Planning Opportunities Which May Be Possible Under the Uniform Probate Code*, 1 Estate Planning 83 (1974); Wellman, *Some Effects of the Uniform Probate Code on Estate Planning*, 4 Inst. Estate Planning ch. 70-19 (1970).

16. The procedure provided in § 2-404 for establishing and satisfying the family allowance and the elimination of remote relatives as heirs in § 2-103 provide an illustration.

17. *See* notes 30-36 and accompanying text *infra*.

the efficacy of most law, community respect for legal rules suffers when, as is true of many points of inheritance law, today's case results are explainable only by reference to notions that clash with current mores. To help alleviate this anomaly, the Code eliminates discrimination in inheritance laws against "half-bloods," illegitimates, aliens, and females.[18] The Code also redefines the status of adopted children to reflect modern perceptions of the family,[19] abolishes the difference for probate purposes between realty and personalty,[20] and eliminates the so-called "laughing heir" by limiting succession to those relatives descended from a grandparent of the decedent.[21]

The third goal, making the will a more popular tool for disposition of wealth at death, is attractive to all who oppose the drift to more complexity in simple matters. Its achievement will enable the wishes of more decedents to be realized. To further this goal, the Code minimizes the formalities required for execution of a will,[22] validates holographs,[23] eliminates penalties on beneficiary witnesses,[24] and allows extrinsic writings to be incorporated into wills by reference or to be utilized without incorporation to pass certain tangible personal property.[25] Moreover, the UPC lowers the age of competency to make a will to 18[26] and gives a testator broader ability to choose the law that will govern the provisions of his will.[27] Most importantly, it offers executors and their counselors approximately the same flexibility and freedom from judicial supervision of estates as that presently available to trustees under inter vivos instruments.[28]

Facilitation of inter vivos and post mortem estate planning, the fourth goal, is accomplished principally by provisions sprinkled throughout the Code that are designed to free fiduciary administration of trusts and estates from unnecessary court control. Article II's chief contributions to estate planners are found in its provisions that liberate the will from needless formalities and

18. UPC §§ 2-107, -109, -112. The Code is consistently impartial with regard to sex.
19. *Id.* §§ 2-109, -611.
20. *Id.* §§ 1-201(11) & (33), 2-101, 3-101.
21. *Id.* § 2-103.
22. *Id.* § 2-502.
23. *Id.* § 2-503.
24. *Id.* § 2-505.
25. *Id.* §§ 2-510, -513. The Code also gives effect to events of independent significance. *Id.* § 2-512.
26. *Id.* § 2-501.
27. *Id.* §§ 2-506, -602.
28. *See id.* art. III, General Comment.

improve renunciation as a means of post mortem estate planning.[29]

Article II contributes to the fifth goal, simplifying estate administration, principally by its family protection provisions that are designed to function without the necessity of court orders for support of dependents.

The final goal, uniformity of state laws, has been somewhat controversial. The debate over this goal is sufficiently intense to justify an extended analysis.

B. The Goal of Uniformity

The pros and cons regarding uniformity can be reduced to a conflict between the interests of probate specialists and the interests of estate owners. Legally trained people who tend to equate legal tradition with common sense and who have a vested interest in maintaining complexity and diversity in the law are likely to view uniformity of inheritance law as unnecessary, unwise, and politically unattainable.[30] On the other hand, lay persons are apt to view inheritance laws as unnecessarily complex and conclude that elimination of differences between state rules of inheritance is an obvious and desirable way of simplifying matters.[31] The problems inherent in the present diversity of inheritance laws are particularly burdensome to elderly persons who are under the most immediate pressure to plan their estates around the variations of rules in the states with which they have, or may later have, contacts.[32]

Despite the furor, however, states are in basic agreement that, subject only to the rights of creditors and taxing authorities, owners may dispose of their estates by will as they see fit. The points where state laws restrict freedom of testation are relatively few and unimportant;[33] the bulk of our diverse probate rules exist

29. *See* authorities cited note 15 *supra*. Provisions in arts. III, V, VI, and VII also aid in facilitating inter vivos and post mortem estate planning.

30. *See generally* Zartman, *An Illinois Critique of the Uniform Probate Code*, 1970 U. ILL. L.F. 413.

31. *See, e.g., Settling An Estate*, CHANGING TIMES, THE KIPLINGER MAGAZINE, Nov. 1972, at 6.

32. The National Retired Teachers Association and the American Association of Retired Persons (NRTA-AARP) have endorsed the Code since 1972. Brickfield, *AARP Comes to Your Legislature*, MODERN MATURITY, April-May 1974, at 26.

33. These include the protection of spouses in one another's estate, protection of children against parental disinheritance, the proper categorization of unworthy heirs, the propriety of legal restraints on gifts by will to aliens and charities, and differences regarding the capacity of minors and felons to make wills. *See* G. PALMER, TRUSTS AND SUCCESSION

merely to support and protect testamentary intention, including, for purposes of this discussion, the presumed intentions of intestates that provide the principal rationale for statutes covering descent and distribution. Since any general state interest in supporting owners' intentions would be best served by keeping the rules that guide owners as clear and as simple as possible, it would seem that a state would serve its own interests best by aligning with widely recognized national standards on all rules that do not reflect conceded, parochial restraints on testamentary freedom. For example, it should not matter, as a point of state policy, what words in a will are sufficient to disinherit afterborn children, so long as the principle of testator control is conceded. Therefore, for the sake of clarity and simplicity, a state should align its rule on this point to nationally recommended formulae that are most likely to be known and heeded. Similarly, it should not matter to a particular state whether an intestate's descendants take per stirpes or per capita; the point is to have a clear rule that is likely to be widely understood. So viewed, the public interest in unifying and thus simplifying inheritance matters for our mobile population should predominate over any parochial view about how testamentary intention may be served best.[34]

A serious move toward uniformity of inheritance rules also provides the benefit of creating an opportunity to review old policies that have remained unquestioned, possibly for generations. Some points of policy difference between the states regarding restrictions on testamentary freedom should disappear as legislators take a fresh look at such questions as whether it makes sense to restrain charitable testamentary gifts,[35] whether to continue

189-213 (2d ed. 1968); T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 100-158 (2d ed. 1953) [hereinafter cited as ATKINSON].

34. As suggested in note 33 *supra*, there are substantive points on which states differ, and will continue to differ, even with the UPC in effect. However, it does not follow from the concession that states may continue to differ in their laws regarding the protection of spouses and children from disinheritance and regarding devises to aliens, charities, and certain others that all other rules of inheritance must likewise remain diverse. As indicated earlier, no problems touching the areas of substantive policy difference arise in the vast majority of estates. *See* M. SUSSMAN, J. CATES & D. SMITH, THE FAMILY AND INHERITANCE (1970) [hereinafter cited as SUSSMAN]. Further, the most familiar form of legal protection against prohibited disinheritance of spouses and children is structured so that the interests to be protected, like the spouse's interest in community property, are simply placed beyond the reach of the decedent's will. ATKINSON 123. Even variations among states concerning the amount of a decedent's estate that will be protected for the spouse and children from creditors' claims do not detract from the desirability of uniform rules for whatever property remains for distribution.

35. *Cf. In re* Cavill's Estate, 329 A.2d 503 (Pa. 1974) (holding invalid Pennsylvania's

ancient disabilities regarding inheritances of aliens and felons, and whether to maintain probate exemption levels established generations ago.

A possible objection to achieving uniformity in any area of the law is that local reliance on established rules makes a major revision of existing law untenable. However, no pattern of community reliance or individual expectation, other than the interests of the professionals in keeping the rules parochial, can be pointed to that would justify retention of existing, variant inheritance laws. There are data indicating that most decedents' estates are controlled by wills that reject statutory rules.[36] This suggests the antithesis of reliance on existing rules and demonstrates that current statutory rules do not conform to most people's desires concerning distribution of their estates. Also, the familiar concept that the law does not protect expectancies is completely congenial to the idea that legislation may change ancient rules of inheritance to align with national norms. In any event, since such unifying legislation would only apply to estates of persons dying after it becomes effective, rights existing under former rules would not be disrupted.

In short, it seems clear that the general public, as opposed to governmental and legal specialists who have vested interests in existing inheritance laws, would benefit significantly from simplified and uniform inheritance rules. This article, therefore, will focus on whether enacted deviations from article II can be justified in light of the public policy favoring uniformity and simplicity over a state legislature's interest in adopting deviant rules.

II. Article II Sections and State Changes

With a single minor exception, none of the enacted changes in UPC article II warrant deviation from the goal of uniformity. Their appearance in enactments that otherwise embrace the goal of interstate uniformity may be attributed to the failure of enacting legislatures to understand some UPC provisions. Hence, state reasons for each change will be analyzed and weighed against the UPC rationale for the original provisions.

100-year-old statute invalidating certain bequests for charitable or religious purposes as a denial of equal protection of law).

36. *See* Sussman 62-120; Drury, *The Uniform Probate Code and Illinois Probate Practice*, 6 Loyola U.L.J. 303 (1975); Johnson, *The Abolition of Dower in Virginia: The Uniform Probate Code As An Alternative To Proposed Legislation*, 7 U. Rich. L. Rev. 99 (1972).

A. Section 2-102: Share of the Spouse

UPC section 2-102 gives the intestate's spouse all of the estate up to $50,000 and one-half of any balance, as against any common issue or a parent. If, however, the intestate left issue by a prior marriage, the spouse's interest is reduced as against the issue to one-half of the entire estate. If no issue survives, the spouse receives the first $50,000 and divides the excess with the intestate's surviving parent or parents.

Six of the nine adopting states have altered this section substantially.[37] Two major alterations deserve attention: the omission of parents from any determination of the spouse's share, and the modification of the $50,000 threshold figure.

1. Omission of parents from determination of the spouse's share

The Code decision to allow the decedent's surviving parents to share in relatively large (over $50,000) intestate estates where no issue of the decedent survives reflects several competing considerations. On one hand, there is a desire to leave a generous share for the spouse since she likely would depend on the estate for support. On the other hand, some persons who die relatively early in life leave substantial estates derived in part from gifts or other advantages bestowed by parents. Naturally, many of these persons wish to return some of their wealth to their parents. By providing the spouse with at least the first $50,000, the UPC effectuates the decedent's likely intent to provide for her support. Allowing the decedent's parents to share in the balance is a reasonable approach to satisfying the decedent's desire to return excess wealth back to his family rather than eventually to his spouse's family through her estate. If the intestate's parents do not wish to receive the wealth, however, the Code facilitates their renunciation, which could have the effect, without gift tax cost, of leaving the spouse as the sole heir.[38]

Arizona, Colorado, and Montana[39] have found the UPC policy of providing a large share[40] of the intestate estate to the surviv-

37. Those states are Arizona, Colorado, Montana, Nebraska, Utah, and South Dakota.

38. *See* UPC § 2-801.

39. ARIZ. REV. STAT. ANN. § 14-2102 (Spec. Pamphlet 1974); COLO. REV. STAT. ANN. § 15-11-102 (1973); MONT. REV. CODES ANN. § 91A-2-102 (Spec. Uniform Prob. Code Pamphlet 1975).

40. R. WELLMAN, RESPONSE OF THE JOINT EDITORIAL BOARD FOR THE UNIFORM PROBATE CODE TO THE STATE BAR OF CALIFORNIA'S "THE UNIFORM PROBATE CODE: ANALYSIS AND CRITIQUE" 3 (1974).

ing spouse to be paramount and have thus omitted the decedent's parents from any determination of the surviving spouse's share.[41] Without considering the goal of uniformity, the exclusion of parents from this section by these three states is arguably a progressive change. The Code's compromise approach presents obvious problems. It may be doubted whether the decedent would favor his parents over his spouse, even to the extent of one-half of the excess of his estate over $50,000—particularly where his own energies were responsible for his wealth. It is also unlikely that the average person would want to push his assets back a generation, thereby inflating the estate of his parents upon its later probate.

However, two responses in favor of uniform adoption of section 2-102 should be noted. First, most of the identified problems will arise only rarely since net distributable estates exceeding $50,000 in value usually are not intestate.[42] Second, it is simple to adjust succession laws to the needs of larger estates by means of a will or renunciations. The provision under discussion resulted from a carefully considered compromise in the National Conference, allowing parents some inheritance, first, in partial deference to long tradition, and, second, in order to mesh inheritance rights with the not unfamiliar pattern of children supporting parents in their declining years. The goal of giving more of the estate to the spouse was the principal objective of the drafters and the National Conference. This big step was made more palatable for some Commissioners because it was surrounded by comfortingly familiar features from present inheritance law. These same considerations should have local appeal. In any event, the position of the national Code on the point was reached after careful evaluation of all arguments and, given the importance of achieving uniformity, should prevail over alternative positions.

41. The UPC provided the surviving spouse a larger share of the intestate's estate in order to reflect the desires of most married persons. UPC § 2-102, Comment; SUSSMAN 289-90. Most lawyers would probably agree that in small to moderate estates, a deceased spouse usually leaves his entire estate to the surviving spouse. The inheritance pattern of the UPC reflects this empirical reality. Note that Montana has undermined this policy by reducing the share of the surviving spouse to one-third where there are issue of the decedent surviving who are not also issue of the spouse. MONT. REV. CODES ANN. § 91A-102(2)(a)(b) (Spec. Uniform Prob. Code Pamphlet 1975).

42. *See* SUSSMAN 73-76; Drury, *supra* note 36, at 314-15; Johnson, *supra* note 36, at 113-14.

2. Modification of the $50,000 threshold

Another variance in section 2-102 concerns the $50,000 share for the spouse. The National Conference invited deviations from this provision by bracketing the figure, thus signaling that the amount was merely recommended for uniform enactment rather than mandated. This concession to local judgment aided acceptance of the major change—giving the spouse all of most modest estates. It also reflected recognition by the National Conference that a figure like $50,000 may have different significance in different parts of the country.

Five of the enacting states, Arizona, Colorado, Nebraska, South Dakota, and Utah, changed the $50,000 threshold figure suggested by the National Conference.[43] In cases where there is no surviving issue, Utah and South Dakota give the surviving spouse the first $100,000. The decedent's parents then become entitled to one-half of the excess.[44] In cases where only common issue of the decedent and the spouse survive, Utah adopts the Code's $50,000 threshold;[45] South Dakota, however, continues to use the $100,000 figure.[46] Nebraska allows the spouse $35,000 before requiring her to divide the excess with the next takers, whether they be issue or the decedent's parents.[47] Colorado's threshold is $25,000, the excess to be shared only with issue (parents having been excluded by the statute as noted above).[48] The emerging pattern of enacted figures tends to sustain the judgment of the National Conference that $50,000 is about right.

Arizona, a community property state, gives the surviving spouse the entire estate in both the decedent's separate property and his share of the community, unless there are issue of the decedent surviving who are not also issue of the surviving spouse. In the latter event, the spouse receives one-half of the decedent's separate property and none of the decedent's share of the com-

43. UPC § 2-102; ARIZ. REV. STAT. ANN. § 14-2102 (Spec. Pamphlet 1974); COLO. REV. STAT. ANN. § 15-11-102 (1973); NEB. REV. STAT. § 30-2302 (Cum. Supp. 1974); S.D. UNIFORM PROB. CODE § 2-102 (1975); UTAH CODE ANN. § 75-2-102 (Spec. Supp. 1975).

44. S.D. UNIFORM PROB. CODE § 2-102(2) (1975); UTAH CODE ANN. § 75-2-102(1)(b) (Spec. Supp. 1975).

45. UTAH CODE ANN. § 75-2-102(1)(c) (Spec. Supp. 1975).

46. S.D. UNIFORM PROB. CODE § 2-102(3) (1975).

47. NEB. REV. STAT. § 30-2302(2)(3) (Cum. Supp. 1974).

48. COLO. REV. STAT. ANN. § 15-11-102(1)(b) (1973). The elimination of parents from succession in Colorado whenever there is a surviving spouse reduces the pecuniary share versus fractional interest problem that is implicit in any monetary threshold, but leaves the problem to be faced in cases of estates that are shared by the spouse and issue.

munity.[49] This variation on the Code eliminates all dollar-amount step problems, but it may be difficult to accept in common law states.

B. Section 2-103: Share of Heirs Other Than Surviving Spouse

Section 2-103 deals with inheritance of that portion of the estate not passing to the spouse and, in an effort to eliminate remote relatives as potential heirs, excludes persons who are not descended from the decedent's grandparents. Utah, Colorado, Montana, and Nebraska altered this section in a way that works considerable damage to the Code objective of eliminating remote heirs.[50] These four states have added language that perpetuates inheritance by more remote relations and preserves the concomitant problem of the "laughing heir."[51]

The possibility of inheritance by remote relatives is attributable to English tradition where no escheat would occur as long as some blood relative survived. The principle, possibly sensible in its medieval, agricultural setting, does not serve well in contemporary society. Today's families exhibit little of the cohesiveness of the past, and remote relatives fit only awkwardly in the circle of persons deemed to be preferred as successors by most persons. It follows that the decedent is likely to have disinherited the remote heir in favor of some preferred friend or charity. Indeed, studies show that persons with wealth and no close relatives usually make wills that presumably accomplish this end. Thus, under modern conditions, allowing a remote relative to inherit results in a windfall.

An intestate scheme that allows remote relatives to inherit

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49. ARIZ. REV. STAT. ANN. § 14-2102 (Spec. Pamphlet 1974). This is one of the most constructive changes made by any of the states. By giving the surviving spouse the entire estate (absent issue of the decedent who are not also issue of the surviving spouse) UPC § 2-102 is simplified, the valuation problem is removed, the decedent's probable intent is fulfilled, and the possibility of guardianship for minor or dependent children of the decedent is avoided. The guardianship possibility should be rare in any case since it is unlikely that an estate worth more than $50,000 would pass by intestacy.

50. COLO. REV. STAT. ANN. § 15-11-103 (Cum. Supp. 1975); MONT. REV. CODES ANN. § 91A-2-103 (Spec. Uniform Prob. Code Pamphlet 1975); NEB. REV. STAT. § 30-2303 (Cum. Supp. 1974); UTAH CODE ANN. § 75-2-103 (Spec. Supp. 1975). Montana's change is perhaps the most verbally complicated in the Code. *See* MONT. REV. CODES ANN. § 91A-2-103(2) (Spec. Uniform Prob. Code Pamphlet 1975).

51. For a full discussion of the "laughing heir" problem see ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH 421-22 (1914); Cavers, *Change in the American Family and the "Laughing Heir"*, 20 IOWA L. REV. 203 (1935).

produces undesirable results even when a person dies testate. If the will is to be probated formally rather than informally, obscure heirs in far away places must be located and given notice. This expensive process is required merely to satisfy the court that a due search for heirs has occurred. Furthermore, sending notice to remote relatives invites will contests;[52] remote relatives may lack restraint about challenging the decedent's will, whereas closer relatives are likely to respect the decedent's dispositive plan. Thus, a state's failure to follow the Code pattern on this point, even when a person dies testate, is likely to produce windfalls, expensive pedigree searches, attempts to locate and give notice to remote heirs, will contests, and losses to charities to the extent that remote heirs prevail in those contests.

C. Section 2-106: Representation

Section 2-106 describes the Code system of representation by descendants, which calls for a distribution that is a mixture of the familiar patterns of per stirpes and per capita.[53] The section provides for an initial division of the portion of an estate passing to "issue" of the intestate, his parents, or his grandparents, at the generation nearest to the ancestor where there is at least one living taker. The estate is divided into as many shares as there are, of this generation, living heirs and deceased relatives who left issue. Living heirs receive full shares. Surviving issue take as representatives of the deceased, dividing equally the decedent's share; the representation process is repeated if a group of representatives includes living descendants and surviving issue of deceased descendants. The approach permits equal treatment of descendants who are closest to the ancestor and preserves the traditional pattern of representation where one or more, but not all, of the nearest generation have died leaving issue.[54]

All of the UPC states have followed the Code pattern with the exception of Utah, which adhered to a pure per stirpes formula so that grandchildren of the decedent take the shares their

52. UPC § 3-302. Probating the will informally is attended by a risk of a will contest that lasts for at least 3 years after death. *Id.* § 3-108.

53. *See id.* § 2-106, Comment.

54. *See* Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants*, 66 NW. U.L. REV. 626 (1971). *See generally* Wormser, *Per Stirpes or Per Capita*, 105 TRUSTS & ESTATES 91, 92 (1966). For an excellent discussion of some relevant aspects of inheritance by collaterals see Atkinson, *Succession Among Collaterals*, 20 IOWA L. REV. 185 (1935).

parents would have taken even if all the decedent's children are dead.[55]

D. Section 2-109: Meaning of Child and Related Terms

Section 2-109 sets out the meaning of "child" and related terms in order to eliminate ancient discrimination against illegitimate children and to transplant adopted children entirely into a relationship with the adoptive parents and their kin. Of the enacting states, only Montana and Colorado altered this section of the Code.[56]

Montana adhered to its traditional policy of allowing adopted children to inherit through natural parents[57] by omitting the Code language of section 2-109 (1) that denies this right. Many, perhaps most, non-UPC states permit adopted children to inherit from both their natural and adoptive families. The Code theory, however, reflects more recent statutory patterns that permit adoption to accomplish its purpose of making the adopted child solely and completely the child of his new parents. Vestigial connections with natural relatives contradict this policy.[58] The Montana position means, *inter alia*, that the adopted child is entitled, along with other heirs, to receive notice when a will of a close natural relative is formally probated. If the other survivors have enough information to give such notice to adopted children,

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55. UTAH CODE ANN. § 75-2-106 (Spec. Supp. 1975).

The original enactment in Colorado included a uniquely obscure formulation for inheritance by descendants from ancestors more remote from the intestate than grandparents. Its version of § 2-103 rejected the Code effort to avoid inheritance by very remote relatives. COLO. REV. STAT. ANN. § 15-11-103(e) (1973), until amended in 1975, provided:

> If none of the relatives above enumerated [*e.g.*, those related to the intestate as his descendants or those of his parents or grandparents] be living, then to the nearest lineal ancestors and their descendants, the descendants collectively taking the share of their immediate ancestors, in equal parts.

In 1975, the language following "then to" was changed to read "the nearest lineal ancestor and their issue, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree, then those of more remote degree take by representation." Although this formulation is not free of difficulty, it avoids the problems of the original enactment. Unfortunately, however, the grotesque language of the original Colorado provision has been reborn in the New Mexico enactment. *See* N.M. STAT. ANN. § 32A-2-103E (Spec. Uniform Prob. Code Pamphlet 1975).

56. COLO. REV. STAT. ANN. § 15-11-109 (1973); MONT. REV. CODES ANN. § 91A-2-109 (Spec. Uniform Prob. Code Pamphlet 1975).

57. *See In re* Kay's Estate, 127 Mont. 172, 180-81, 260 P.2d 391, 395 (1953).

58. For an interesting if, in parts, somewhat dated discussion of the status of adopted children under the traditional laws of intestate succession see Kuhlmann, *Intestate Succession By and From the Adopted Child*, 28 WASH. U.L.Q. 221 (1943); Fairley, *Inheritance Rights Consequent to Adoptions*, 29 N.C.L. REV. 227 (1951).

the resulting revelations may have painful and unpredictable effects. Apart from emotional shock, the adopted child stands to gain little from being associated with an estate of his natural parents or kindred since it is probable that he will be disinherited unless he successfully contests the will.

Colorado's change in section 2-109 anticipated an amendment made to the Code in 1975. When an illegitimate seeks to establish paternity after the death of the alleged father, Colorado requires merely that such paternity be established by a "preponderance of evidence."[59] This standard of proof is substantially lower than the pre-1975 UPC requirement of "clear and convincing proof."[60] Arguably, this modification will increase the possibility of spurious suits and reduce the protection offered to the acknowledged devisees of the decedent. The Colorado deviation is understandable, however, in light of the concern expressed in the late 60's and early 70's for the rights of illegitimates.[61] Both the Colorado statute and the modification of UPC section 2-109 are in alignment with the National Conference's current position,[62] which reflects increasing recognition of illegitimates' rights.

E. Section 2-112: Alienage

Section 2-112 rejects the ancient rule that an alien may not inherit or transmit realty by descent.[63] In fundamental opposition, Nebraska and Montana have modified the language of this section to limit the right of aliens to receive realty by devise.[64] Nebraska places various restrictions on alien land ownership.[65] Montana, before permitting an alien to inherit realty, requires

59. COLO. REV. STAT. ANN. § 15-11-109(i)(b)(II) (1973).

60. UPC § 2-109(2)(ii).

61. *See* H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971); Krause, *Bringing the Bastard Into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829, 854-56 (1966). One product of the concern for illegitimates was the Uniform Parentage Act, which recommended elimination of statutory discrimination that works to the disadvantage of persons born out of wedlock. 1973 HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS 335.

62. AMENDMENTS TO THE UNIFORM PROBATE CODE [*in* 1975 NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS 2].

63. *See* ATKINSON 53-54, 93-95. The disability never was applied to personalty in the United States. UPC § 2-112, Comment; ATKINSON 93. Most states, before the UPC, had removed this restriction as to land as well. *Id.*

64. NEB. REV. STAT. § 30-2312 (Cum. Supp. 1974); MONT. REV. CODES ANN. § 91A-2-111 (Spec. Uniform Prob. Code Pamphlet 1975).

65. NEB. REV. STAT. § 30-2312 (Cum. Supp. 1974); *id.* §§ 76-401 *et seq.* (1971).

that the alien's homeland reciprocate in providing for land inheritance by aliens.[66]

Although the point involves a matter of state policy that overrides testamentary intention, there are two reasons why the Code position regarding alienage is preferable to that taken by Nebraska and Montana. First, the policy underlying the restriction of land ownership by aliens is no longer relevant. This disability, which arose in medieval England, where land was burdened with feudal obligations and duties that were incompatible with foreign ownership,[67] has since been abandoned in modern Britain.[68]

Second, the Nebraska-Montana provisions are arguably unconstitutional in light of *Zschernig v. Miller*.[69] In that case, the United States Supreme Court struck down an Oregon statute that provided for escheat when a nonresident alien heir failed to show that his nation afforded Americans reciprocal inheritance rights. The Court reasoned that the statute marked an unconstitutional intrusion by the state into matters involving United States foreign policy, a realm reserved exclusively to the federal government.

F. Section 2-301: Omitted Spouse

Section 2-301 deals with the spouse who is omitted through oversight from the decedent's will. Complementing the elective share remedy described in section 2-201, *et seq.*, the statutory provision for a pretermitted spouse is available only in cases where the decedent has not demonstrated that the omission was deliberate. The Code allows use of statements from the decedent's will and evidence concerning nonprobate transfers to demonstrate an intention to omit the spouse from the will.[70] It reflects the position that a flat prohibition against the admission of extrinsic evidence is unnecessary and undesirable when weighed against the policy of giving effect to the plan of a decedent who may have had good reason to omit the spouse, including, possibly, that ample provision had already been made for her.

Only Nebraska has substantially altered the language of sec-

66. MONT. REV. CODES ANN. § 91A-2-111 (Spec. Uniform Prob. Code Pamphlet 1975).

67. O'Connell & Effland, *Intestate Succession and Wills: A Comparative Analysis of the Law of Arizona and the Uniform Probate Code*, 14 ARIZ. L. REV. 205, 221 (1972).

68. British Nationality and Status of Aliens Act of 1914, 4 & 5 Geo. 5, c. 17, § 17.

69. 389 U.S. 429 (1968).

70. UPC § 2-301(a).

tion 2-301. Its statute gives the omitted spouse a normal intestate share regardless of the testator's intention, unless the spouse waives this right by written statement.[71] The Nebraska provision, less flexible than the more comprehensive Code language, admittedly achieves definiteness. But although the Code risks some uncertainty, it is preferable to a rule that results in unintended benefits for the spouse and unnecessary contradiction of the will. The practical effect of the Nebraska version of the section, like that of the old rule that marriage revokes a will,[72] is to force testators to re-execute their wills after marriage without regard for whether the marriage was anticipated in the will, or whether ample provision from nonprobate assets was made for the prospective spouse.[73] It is submitted that this position is overly mechanical, unnecessary, and likely to cause hardships for the families of persons who remarry late in life.

G. Section 2-302: Pretermitted Children

Section 2-302 basically protects pretermitted children by giving them a share of the estate equal to what they would have taken had the decedent died intestate. This section was designed to improve on existing pretermission patterns that create significant advantages for a child born after execution of a will not providing for then living children, and exclude consideration of nonprobate gifts to the afterborn child.[74] Section 2-302 also permits relief in cases where a living child is omitted from a will solely because testator mistakenly believes the child is dead.

Two adopting states, Nebraska and Utah, have modified the language of this section.[75] In place of the language of section 2-

71. NEB. REV. STAT. § 30-2320 (Cum. Supp. 1974). *See id.* § 30-2320; UPC § 2-204.

72. Revocations of this type are provided for today in many jurisdictions. ATKINSON 424-27.

73. The Nebraska legislature apparently prefers the surviving spouse over pretermitted children. NEB. REV. STAT. § 30-2321 (Cum. Supp. 1974) provides that the share of a pretermitted child is defeated when "it appears from the will that the omission was intentional." This is part of the language that was dropped from § 30-2320 dealing with the omitted spouse.

74. These advantages exist since pretermitted children who were born after execution of the will are generally given statutory protection without examining the testator's possible intentional omission—either because of a desire to disinherit the children or because substantially all of the estate was devised to the other parent—or considering nonprobate gifts to the afterborn child. In contrast, while UPC § 2-302 protects pretermitted children, it also allows inquiry into whether the testator intentionally omitted the child and takes into consideration nonprobate transfers by the decedent to the child with the intent that they be in lieu of a testamentary transfer.

75. NEB. REV. STAT. § 30-2321 (Cum. Supp. 1974); UTAH CODE ANN. § 75-2-302 (Spec. Supp. 1975).

302(3) that permits parole evidence to determine the testator's intent to omit a child, Nebraska has substituted a mechanical test by which any nonprobate transfer to an afterborn child "in any amount equal to or greater than that child's share had the testator died intestate" defeats that child's right to an intestate share.[76] This change reflects the same suspicion toward the use of parole evidence in testamentary matters that underlies Nebraska's changes in section 2-301;[77] hence, the testator's intention under section 2-302 becomes irrelevant.

Besides ignoring the decedent's intention, the Nebraska provision creates numerous additional problems and uncertainties. For example, the provision fails to indicate whether the approximation in value to an heir's share in intestacy is to be made at the time of the inter vivos transfer or at death. In addition, it seems anomalous for the afterborn child's rights to depend in part on whether he has received nonprobate gifts when the pre-born child's rights are determined without regard to nonprobate gifts. Finally, the relationship of the provision to section 2-612, dealing with ademption by satisfaction, is not clear. The Nebraska draftsmen seem to have rejected consideration of the decedent's intention in preference for a legal nightmare.

The Utah deviation, on the other hand, although it permits use of extrinsic evidence to show that the omission of a child from a will was intentional, includes "any of [the testator's] children" as takers where omitted through oversight.[78] It does not limit the protection to children "born or adopted after the execution of the will," as does the Code. Utah's change ignores the entire context of the pretermission problem and moves toward contradiction of the premise that a testator's intention to disinherit his children is legally effective. Pretermission is basically a "time gap" problem, created because a will, although executed perhaps years before the event, speaks only at the testator's death. Section 2-302 is designed, as is section 2-301, to support testamentary intention by mitigating the effects of unintentional disinheritance. When a living child is omitted from a will, however, it is probable that the omission was intentional. By forcing the testator to explain what may be perfectly obvious when his words are read in the context of surrounding circumstances, the Utah deviation transforms section 2-301 into a provision that tends to prevent

76. NEB. REV. STAT. § 30-2321 (Cum. Supp. 1974).
77. *See* text accompanying note 71 *supra*.
78. UTAH CODE ANN. § 75-2-302 (Spec. Supp. 1975).

intentional disinheritance.

Even worse, Utah extends the protection of the section to cases where the mention of issue of any deceased child is omitted from a will. This extension increases the section's potential for causing mischief, since testators may have many good reasons for declining to provide for grandchildren by a deceased child. It is odd and therefore legislatively unreasonable to expect that these reasons will appear from the language of the will.

Utah's deviations from section 2-301 reflect prior Utah law,[79] under which there was a rebuttable presumption that failure to provide for children or a deceased child's issue was unintentional.[80] Utah's prior rule, however, called for an examination of the testator's intention respecting these omissions independently of the presumption.[81] Unfortunately, under the new UPC language retained in the Utah enactment, proof of intentional omission may be more limited than previously, since the UPC tests were designed to placate lawyers who are squeamish about use of extrinsic evidence regarding a decedent's intention.

H. Section 2-401: Homestead Allowance

Many states exempt homestead land from the claims of unsecured creditors of either the husband or wife in order to provide some assurance that the family home will not be lost in times of economic distress. Also, upon a landowner's death, the typical homestead exemption is available to his surviving spouse and minor and dependent children. The statutes that create this exemption vary greatly in the amount, kind, and value of land described.[82] To avoid the somewhat capricious results that can occur under traditional provisions, since many modern families, probably including the most necessitous, do not own land, the UPC draftsmen substituted a suggested $5,000 allowance that may be satisfied in kind for traditional homestead patterns.[83] In keeping with its antecedents, this amount is exempted for the benefit of a spouse or minor children of the decedent from unsecured claims against the estate and takes precedence over the terms of any will. Utah, Colorado, North Dakota, Montana, Ari-

79. UTAH CODE ANN. § 74-1-32 (1953).
80. *In re* Atwood's Estate, 14 Utah 1, 45 P. 1036 (1896).
81. *In re* Newell's Estate, 78 Utah 463, 483-92, 5 P.2d 230, 237-41 (1931).
82. *See* ATKINSON 126-28.
83. UPC § 2-401.

zona, and South Dakota did not accept section 2-401 as recommended.

Utah did not enact UPC section 2-401 at all. Instead, its statute incorporates a limited exemption along traditional lines.[84] Coupled with a distressing Utah change regarding the family support allowance, discussed later,[85] the exemption package in Utah falls seriously short, in values and ease of payment, of the Code recommendations. Inasmuch as the exemption package is of critical importance in speeding the administration of small estates involving a surviving spouse or dependent children, the deviations seriously jeopardize the chances that Utah citizens will derive any noticeable benefit from the new code.

Colorado's version of the Code simply omits any mention of homestead or homestead allowance.[86] The North Dakota[87] and Montana[88] versions also reject the Code homestead concept in favor of retaining the conventional landowner's homestead exemption. The Montana provision is singularly unsatisfactory since it includes a new provision that purports to require every personal representative of a married decedent, upon his appointment, to file a homestead declaration for the decedent.[89] Thus, the Montana statutory system appears to require the personal representative to destroy the decedent's plan by claiming a homestead exemption without regard to the amount of the decedent's debts or the terms of the will. Some answer to this nonsense surely will be worked out in practice if not by amendment.

In their respective versions of UPC section 2-401, Arizona[90]

84. UTAH CODE ANN. § 75-2-401 (Spec. Supp. 1975) (providing the same homestead allowance as § 28-1-1).

85. Note 106 and accompanying text *infra*.

86. COLO. REV. STAT. ANN. § 38-41-211 (1973) describes a homestead exemption of $15,000 which is explicitly made available to a surviving spouse and minor children so long as occupancy of the homestead continues. This exemption is in addition to exemptions and allowances provided in the probate code.

87. N.D. CENT. CODE § 30.1-07-01 (Spec. Uniform Prob. Code Supp. 1975) (refers to N.D. CENT. CODE § 47-18-01 (1960) for definition of homestead).

88. MONT. REV. CODES ANN. § 91A-2-401 (Spec. Uniform Prob. Code Pamphlet 1975). Montana's traditional homestead exemption is established and defined in MONT. REV. CODES ANN. §§ 33-101 to -129 (1961). Section 33-129 would have been especially damaging to the UPC goal of providing adequate funds for the surviving spouse since it provided only for a life estate to the spouse with the remainder going to the children. Fortunately, the legislature recognized this problem and repealed § 33-129 in An Act to Generally Revise and Repeal Statutes on Wills, Succession, Probate and Guardianship to Conform Montana Law to the Uniform Probate Code ch. 263, § 15, [1975] Mont. Laws 510.

89. MONT. REV. CODES ANN. § 91A-2-401(2) (Spec. Uniform Prob. Code Pamphlet 1975).

90. ARIZ. REV. STAT. ANN. § 14-2401 (Spec. Pamphlet 1974).

and South Dakota[91] narrowed the homestead exemption with regard to children. Under the Code, if there is no surviving spouse, each minor and each dependent child is entitled to a share of the homestead allowance. In Arizona and South Dakota, however, the legislation omits the language relating to minority, leaving the right to the exemption to be determined solely on the basis of dependency. Somewhat more regrettably, both enactments give expenses of administration precedence over the homestead exemption.[92] Lawyers who normally will be engaged by beneficiaries of exemptions can protect themselves vis-a-vis fees; there is no sound reason why attorneys' fees should receive priority over family rights.

I. Section 2-402: Exempt Property

Section 2-402 was drafted for the purpose, *inter alia*, of removing certain chattel property from the reach of creditors so that family members may retain items of sentimental or personal value that would bring little cash if sold to satisfy creditors' claims. The surviving spouse and children (without regard to dependency where no spouse survives) are entitled to an exemption in such property, in addition to the homestead allowance, of up to $3,500. The section also provides that if chattels of the designated value are not available, cash or any other asset may be exempted up to the maximum value of $3,500. This exemption is justified by a combination of factors, including the good sense of exempting small estates passing to close family survivors from creditors' claims and the delays of administration. Also, to the extent the provision serves to relieve fiduciaries of the necessity to administer household goods, automobiles, and other assets that are probably best left for disposal by family members, the exempt chattel provision makes the estate plan provided by law align with the pattern of well-drafted wills that include specific gifts of household effects.

The UPC extension of the section 2-402 exemption to nondependent adult children is vulnerable to attack if the state, as a matter of policy, favors creditor protection over family convenience. Arizona balked at this point, changing the exemption so that it is restricted to the spouse and dependent children.[93]

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91. S.D. UNIFORM PROB. CODE § 2-401 (1975).

92. ARIZ. REV. STAT. ANN. § 14-2401 (Spec. Pamphlet 1974); S.D. UNIFORM PROB. CODE § 2-401 (1975). UPC § 2-401 exempts the homestead allowance from all claims against the estate and gives the allowance priority over all claims.

93. ARIZ. REV. STAT. ANN. § 14-2402 (Spec. Pamphlet 1974).

Colorado has increased the amount of the exempt property allowance to $7,500, converted it into a straight money allowance, and restricted it to the spouse, children under 21, and dependent children[94] of the decedent.

The Utah change in section 2-402 is unfortunate and unnecessary. It provides that reasonable funeral expenses have priority over the allowance provided by this section.[95] Perhaps the provision is attributable to lobbyists; more probably, it is the result of unconsidered and unfortunate attachment to former Utah law.[96] When probate was a formal, lengthy process, it was necessary to allow payment of the burial expenses as a priority item so that the funeral home would not have to wait through the slow probate process before being paid. The UPC, however, facilitates prompt payment of claims, particularly those like the funeral bill that have priority over the decedent's unsecured general creditors. The most obvious effect of a provision like Utah's that puts funeral expenses ahead of beneficiaries of family exemptions is to delay and possibly jeopardize quick distribution of needed funds to the surviving spouse.

The spouse would be at least as likely a source of quick payment of the funeral bill as an estate fiduciary, who might feel restricted by concern about his ability to prove the propriety of every estate act. Since it is the spouse who normally will make funeral arrangements, a clear understanding with the funeral director that the bill will be paid as soon as the spouse receives estate assets might better serve to facilitate prompt payment. Once Utah funeral directors realize that under the UPC the probate judge is no longer a sort of general supervisor of estates who can aid them in bill collection problems, they may agree to new legislation that would give family exemptions the full priority intended by the UPC.

J. Section 2-403: Family Allowance

Section 2-403 provides for the payment of a reasonable allowance for the maintenance of the decedent's immediate family during administration of his estate. It is primarily the need for immediate income by the family that justifies taking the amount

94. COLO. REV. STAT. ANN. § 15-11-402 (Cum. Supp. 1975).

95. UTAH CODE ANN. § 75-2-402 (Spec. Supp. 1975).

96. *Id.* § 75-9-21 (1953); Columbia Trust Co. v. Anglum, 63 Utah 353, 225 P. 1089 (1924).

of this allowance away from the creditors and the control of any will.

After debate, the draftsmen determined that this allowance should be made a terminable interest even though it would not qualify for inclusion in the federal estate tax marital deduction share of the surviving spouse. Their first concern was to make this characteristic clear so that executors would not face unnecessary complexities in applying marital deduction formula clauses. The decision to place the allowance in the terminable interest category despite potential estate tax disadvantages was based on the belief that state law exemptions should not be influenced by tax considerations that will be relevant in relatively few estates.[97]

To date, Nebraska, Arizona, and Utah have changed this section. The Nebraska deviation from the Code attempts to make this allowance, when payable to the surviving spouse, nonterminable.[98] Thus, it appears that either the considerations discussed above were overlooked, or they were subordinated to a seldom realized estate tax advantage. The small potential tax advantage gained by the change certainly does not warrant deviation from the carefully considered reasons behind making the allowance terminable.

Arizona and Utah have each made a significant change in section 2-403 consistent with their own changes made in preceding sections of Part 4. Arizona put administration expenses ahead of the family allowance;[99] Utah put funeral expenses before this allowance.[100] Criticisms of the same changes to related exemption sections are equally valid with regard to the alterations in section 2-403.[101]

K. Section 2-404: Source, Determination, and Documentation

Section 2-404 allows beneficiaries to select property for the homestead allowance of section 2-401 and for the exemption under section 4-402, subject to the restriction that specific devises to others may not be disturbed except in cases of necessity.[102] If

97. This tax consideration affects only a small percentage of estates since only a small percentage of estates are large enough to be concerned with the marital deduction.

98. NEB. REV. STAT. § 30-2324 (Cum. Supp. 1974).

99. ARIZ. REV. STAT. ANN. § 14-2403 (Spec. Pamphlet 1974).

100. UTAH CODE ANN. § 75-2-403 (Spec. Supp. 1975).

101. *See* text accompanying notes 93, 95 *supra*.

102. UPC § 2-404 is consistent with UPC § 3-906, establishing a preference for distribution in kind, and UPC §§ 3-709, 3-715(27), and 3-907, which provide guidelines for all distributions.

the beneficiaries of these exemptions fail to make their selections within a reasonable time, the personal representative may do so in behalf of the beneficiaries. The personal representative also determines the amount of the family allowance within the bounds set by the Code.[103] Review of the personal representative's decision is available to any interested person who petitions the court.

Three states modified this section: South Dakota, Nebraska, and Utah.[104] Curiously, South Dakota excludes nondependent adult children from the rights outlined in the section,[105] thereby causing a procedural rule to contradict the substantive rule in that state's section 2-402, which gives adult children rights in exempt property.

The Utah change in section 2-404 is one of the most damaging of any made to article II. By inserting a requirement that the personal representative pay the family allowance only "after notice to all interested parties and approval by the court,"[106] Utah has contradicted the Code's premise that probate matters should be handled like other business and brought to court only when a dispute arises among interested persons. Utah's deviation will also frustrate a major policy of the UPC to permit small estates to be distributed quickly and without undue risk to personal representatives. With respect to larger estates, the change frustrates the UPC effort to allow a sizeable "nest egg" to be released rapidly and easily to the surviving spouse.

The Utah revision is especially damaging since the added delay and expense accomplish nothing. With or without the change, creditors and other interested persons are protected by all of the Code safeguards, including the provisions relating to personal representatives, the limitation in amount of the allowances themselves, and the provisions in section 2-404 that allow contest of the selection, determination, or payment of the allowance by the personal representative.[107]

The Nebraska change provides that the personal representa-

103. The personal representative may award up to $500 per month for up to 1 year or up to $6,000 in a lump sum without court order. Upon petition by an aggrieved party, the court has the power to increase the award.

104. NEB. REV. STAT. § 30-2325 (Cum. Supp. 1974); S.D. UNIFORM PROB. CODE § 2-404 (1975); UTAH CODE ANN. § 75-2-404 (Spec. Supp. 1975). Arizona made some changes in this section to bring it into conformity with that state's community property approach, but those are not significant enough to warrant discussion here.

105. *See* S.D. UNIFORM PROB. CODE § 2-404 (1975).

106. UTAH CODE ANN. § 75-2-404 (Spec. Supp. 1975).

107. *See* Kelley, *Defensive Remedies Under the Uniform Probate Code*, UPC NOTES No. 12 (June 1975).

tive can be ordered to give "such notice as the court may require in a proceeding initiated under . . . section 30-2405" before making selections of property to satisfy the allowance.[108] This language might be interpreted to require what amounts to a formal proceeding as a precondition to distribution in kind of allowances, even though the state legislature states that the "insertion of this provision is not intended to imply that there should be a court order except in unusual circumstances."[109] Still, if the section is construed in the way the Nebraska draftsmen suggest, it adds nothing to the official text since section 2-404 already provides for court review of the personal representative's discretion whenever an interested person invokes the court's jurisdiction under section 3-105. The provision appears to have been inserted to invite the use of formal proceedings in relation to allowances. As experience with independent administration develops, it is hoped that the invitation will be ignored.

L. Section 2-502: Execution

Section 2-502 requires wills to meet minimal execution formalities. A signature by or for the testator and the signatures of two witnesses are required. The usual strict requirement that witnesses sign the will in the testator's presence is eliminated. Also eliminated are the requirements that the witnesses act together and that they witness the testator's signature. It is enough that the witnesses hear an acknowledgement by the testator of his signature or his statement that the instrument is his will. Finally, oral wills are omitted from the UPC.

The stated policy of the Code with regard to the execution of wills is to reduce the formalities required for execution of a witnessed will to a minimum.[110] This policy coordinates with others that are designed to make the will more popular. In a society where mere signatures on checks and credit transactions can transfer unlimited sums of money, where deeds of land may be witnessed by persons who sign out of the presence of the grantor, and where revocable trusts of personalty which control vast estates may be established without the aid of any witness, there is no justification for a rule that invalidates a will witnessed by persons who happen to sign out of the testator's presence.

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108. NEB. REV. STAT. § 30-2325 (Cum. Supp. 1974).
109. *Id.* § 30-2325, Comment.
110. UPC § 2-502, Comment.

Utah retains the requirement that witnesses sign the will in the testator's presence and in the presence of each other.[111] The word "presence" has proved troublesome,[112] as is evident from the large number of cases interpreting it.[113] The perpetuation of this requirement, with all of its refinements as appended by the cases, strikes directly at the policy behind the Code section. Certainly enough formality is kept by the Code to solemnize the execution of a will without maintaining esoteric rituals for their own sake.

Oral wills were omitted from the UPC since they are generally disapproved. Courts have often declared their distaste for such wills,[114] and commentators have attacked them as outdated, of "inferior dignity," and subject to the usual problems of proof where only oral evidence of a deceased person's intention is available.[115] The generally disfavored position of oral wills and the simplicity of UPC formalities involved in the execution of a will, including section 2-503, which permits holographic wills, militate against a provision permitting oral wills.

Alaska has changed this provision to allow continued recognition of oral wills made by mariners and soldiers in the state.[116] Perhaps Alaska, as a frontier state, apprehends some special need for oral wills. Even so, it would seem that those needing to use oral wills would include more than merely mariners and soldiers.

M. Section 2-503: Holographic Will

Section 2-503 provides for recognition of holographic wills. South Dakota, Utah, and Nebraska all have added provisions that affect the validity of such wills.

South Dakota's version of section 2-503 adds to the recommended Code provision the requirement that a holographic will be dated to be valid, but then tacks on a section numbered 2-503A, which states that "failure to have dated a will does not affect its validity . . . [!]"[117] It is difficult to know what to make

111. UTAH CODE ANN. § 75-2-502 (Spec. Supp. 1975).

112. For discussion of existing law and an indication of how ripe this area of the law is for simplifying reform see Comment, *Attestation of Wills—An Examination of Some Problem Areas*, 11 S. TEX. L.J. 125 (1969). For an example of how complex and variable interpretation of traditional execution requirements has become see Annot., 75 A.L.R.2d 318 (1961) (dealing with the "presence" requirement only).

113. *See, e.g., In re* Thurman's Estate, 13 Utah 2d 156, 369 P.2d 925 (1962); *In re* Alexander's Estate, 104 Utah 286, 139 P.2d 432 (1943).

114. ATKINSON 367.

115. *Id.*

116. ALASKA STAT. § 13.11.155 (1972).

117. S.D. UNIFORM PROB. CODE §§ 2-503, -503A (1974).

of this legislation.

The Utah section adds a provision indicating that the absence of a date on a holographic will invalidates the instrument under certain circumstances, *e.g.*, when there are several conflicting holographic wills and no "circumstances . . . that establish which will was last executed."[118] Although this is clearly better than a rigid requirement that a holograph be dated, the provision is superfluous. Nothing has been added to the general rule that a will may be too indefinite to be given effect.

Utah adds an additional provision to section 2-503, requiring that "the provisions" of the holographic will be in the testator's handwriting, in contrast to the Code's requirement that only its "material provisions" be in the testator's handwriting.[119] This raises the spectre of possible invalidation of holographs that are not "entirely" in the testator's hand, as in the case of holographs on will forms, because one or more words on the paper are printed. The draftsmen of the official text sought to support the testator's intention whenever possible. The Utah committees evidently favored a rule that tends to subject homemade wills to an unreasonable, technical trap.

Nebraska presents the least justifiable alteration of this section. Its statute simply adds dating to the other requisites for validity of holographs.[120] Lack of a date on a will may cause problems, but not necessarily; the date may be irrelevant, or other evidence of the will's probable date may exist. In any event, there is no reason to impose a different dating requirement on holographic wills than other forms of wills. The change reflects the bias of lawyers against homemade wills and departs from the UPC policy of moving probate law closer to the desires of the public.

N. Section 2-505: Who May Witness

Section 2-505 provides that a beneficiary may be a witness

118. UTAH CODE ANN. § 75-2-503 (Spec. Supp. 1975).

119. *Compare* UTAH CODE ANN. § 75-2-503 (Spec. Supp. 1975) *with* UPC § 2-503. The UPC language leaves the determination of what constitutes material provisions in each case to the courts. The thrust of this section is to overrule those cases that have strictly construed statutes which require the will to be entirely in the testator's handwriting. Such constructions have resulted in the destruction of a testator's plan because of a typewritten date, preamble, or other insubstantial departure from the statute. The handwritten character of the material provisions and the signature combine to assure reliability against fraud sufficiently to allow unimportant deviations in nonmaterial elements. *See* UPC § 2-503, Comment.

120. NEB. REV. STAT. § 30-2328 (Cum. Supp. 1974).

without invalidating the will or disqualifying himself from taking his full bequest. This is a departure from the ancient rule disqualifying "interested witnesses."

Disqualification of the interested witness dates from the time of the passage of the Statute of Frauds in England. At that time, no one interested in a lawsuit was competent to testify in it.[121] It followed that anyone who had an interest under a will was incompetent to testify concerning its execution. With no competent witnesses to prove its execution, the will failed. Although modern law no longer disqualifies interested witnesses completely, most state laws continue to discriminate against these witnesses in some manner. Nearly all states now have rules that save the will but expunge the witness of the taint of interest by voiding or limiting his bequest.[122]

The UPC position is based on a realization that the rule disqualifying witnesses or forfeiting devises to them only penalizes persons (including the testator, whose wishes are contradicted in part) who were ignorant, either that the testator included a provision for them, or of the rule that denies them their legacy. Professional will draftsmen would not use beneficiaries of the will as witnesses in any event, since the suggestion of undue influence would invite contest. This means that in practice the rule likely applies only to cases involving homemade wills and to testators who turned to those closest to them, often persons who would be expected to be named as beneficiaries, for assistance in completing their wills. UPC draftsmen concluded that these typical circumstances do not support what amounts to a conclusive presumption of undue influence. Indeed, persons who unduly persuade testators to make wills in their favor may be less likely than innocent persons to want their names to appear as witnesses on their handiwork.[123] The only meaningful protection against undue influence is the ability to contest a will when the evidence warrants. The UPC position is that this approach is more satisfactory for cases involving devises to witnesses than one that predictably draws legal lightning bolts down upon innocent and intended will beneficiaries.[124]

Nebraska, Utah, and Montana have substantially altered

121. ATKINSON 312.

122. *See* Annot., 95 A.L.R.2d 1256 (1964).

123. UPC § 2-505, Comment.

124. Many commentators have been critical of the "interested witness" rule. *See, e.g.*, Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 11-13 (1941) (excoriating the rule as a harsh measure to solve merely a "hypothetical" problem).

this section. Nebraska allows an "interested witness" to receive a bequest up to, but not exceeding, the share he would have received had the testator died intestate.[125] If there is at least one disinterested witness to the will, however, the witness-devisee takes his full devise. Montana and Utah accepted the narrower and more traditional pattern that limits the portion an interested witness may take to the lesser of his testate or intestate share.[126] Although none of these deviations from the Code invalidate the entire will (as did early English law), they are still substantially out of step with the Code provisions. Since there is no good reason for deviation on this point, the Nebraska, Utah, and Montana versions of section 2-505 serve as a sad monument to the predilection of lawyers, who serve as legislative draftsmen or critics of proposed legislation, to adhere to old formulations of law that lack modern justification.

O. Section 2-507: Revocation by Writing or by Act

Section 2-507 gives familiar latitude to a testator to revoke his will, in whole or in part, by express writing, implication, or act. The breadth of this provision is consistent with the Code's policy of giving effect to a decedent's intention whenever possible. All but Colorado have accepted the UPC version of this section.

By restructuring section 2-507 so as to omit any mention of partial revocation by act, Colorado effected a construction of the section that will always work to defeat a testator's intention.[127] Admittedly, unexecuted markings on wills cause numerous problems. But forbidding partial revocation by act has had little tendency to prevent or correct these problems. While testators who leave ambiguous marks on their wills may be presumed to be ill-advised, it is not practical to try to prevent this ill-advised conduct or just to deny all effect to revealed intent. Hence, the only satisfactory position for the law is to effectuate the testator's intention to the extent possible. Surely this is preferable to the absurdity of denying effect to an attempted act of partial revocation where the unrevoked portion of the will is readily ascertaina-

125. NEB. REV. STAT. § 30-2330 (Cum. Supp. 1974).

126. MONT. REV. CODES ANN. § 91A-2-505 (Spec. Uniform Prob. Code Pamphlet 1975); UTAH CODE ANN. § 75-2-505 (Spec. Supp. 1975).

127. COLO. REV. STAT. ANN. § 15-11-507(2) (1973). This change also raises some interesting practical questions. What will be the effect of interlineations in the testator's handwriting? If initialed or signed, could they not be construed to be holographic codicils revoking inconsistent sections of the prior will? What is a "signature" for purposes of UPC § 2-503?

ble while conceding, in cases of successful partial obliteration, that only what remains as intelligible may be given effect. Yet this result has been reached under statutes similar to Colorado's.[128]

P. Section 2-508: Revocation by Divorce; No Revocation by Other Changes of Circumstances

Section 2-508 limits revocation by change of circumstance to divorce, which revokes the portion of the will in favor of the former spouse. Remarriage between the same persons revives the will's provisions if revoked only by section 2-508.

Arizona[129] and Utah[130] added to the UPC by providing that divorce not only revokes testamentary provisions in favor of the ex-spouse, but also any in favor of the former spouse's issue who are not also issue of the testator. Although this change has superficial appeal, many may quarrel with the implicit assumption—that divorce usually ends all contact and emotional ties between the testator and issue of his ex-spouse—that justifies the conclusion that a testator would not continue to intend to provide for the ex-spouse's issue. In some circumstances, revocation of gifts to a spouse's issue because of divorce undoubtedly reflects intention, as in the case where a will provides for class gifts to the spouse's "issue" or "children" without naming them. But considerable doubt would attend the revocation of gifts to a spouse's issue when the devise is to an individual by name and does not refer to the relationship between the devisee and the spouse. The rule becomes positively untenable where the relationship between the devisee and the testator antedates the marriage.

It seems doubtful that other states will want to follow this deviation of Arizona and Utah, at least not without some qualifying language. Even with qualifiers, the notion of extending revocation by operation of law can be challenged as an unwise legislative venture into the motives of testators concerning their reasons for choosing the beneficiaries named in wills. After a testator dies, guesswork about why he wrote the will that he left unrevoked at death should be discouraged whenever possible. It is one thing to legislate that devises to ex-spouses are revoked by divorce, for there is no doubt that the relationship between the testator and

128. *See, e.g.*, Henry v. Fraser, 58 App. D.C. 260, 29 F.2d 633 (D.C. Cir. 1928); *In re* Johannes' Estate, 170 Kan. 407, 227 P.2d 148 (1951).

129. ARIZ. REV. STAT. ANN. § 14-2508 (Spec. Pamphlet 1974).

130. UTAH CODE ANN. § 75-2-508 (Spec. Supp. 1975).

the devisee has changed. It is quite another matter to extend the assumption of changed relationship to persons who are not parties to the divorce. There is, therefore, a sound reason for limiting revocation by operation of law in divorce cases to the devise to the former spouse.

Q. Section 2-513: Separate Writing Identifying Bequest of Tangible Property

Section 2-513 permits a testator to note in his will that he will designate the beneficiaries of various personal assets on a list that he has prepared or will prepare and leave to be found or identified, as described in the will. Although frequently encountered in practice, these lists were of doubtful validity under pre-Code rules, and of utility only in cases where survivors were willing to be guided by them. By validating these lists, the UPC provides for the testator who may want to change his specific bequests periodically, or who may wish to defer decision about chattel dispositions until after the execution of his will. This concession to testator's intent came into the Code because of the interests of lawyers and clients in avoiding the necessity of preparing a codicil whenever a client's whim changes concerning who should inherit treasured items of personal property.

Nebraska changed section 2-513 to require that the outside writing be dated.[131] This change is consistent with the unfortunate and unqualified requirement in that state that holographic wills be dated.[132] The addition of a date requirement for a section 2-513 writing is even more dubious than the requirement of a date for a holographic will. It is irrelevant to the application of section 2-513 whether the instrument referred to by the will was written before or after the execution of the will. If there is no uncertainty, such as in the case where only one document meets the description in the will, the outside list should not be made inoperative simply because that instrument happens to be undated.

R. Section 2-605: Anti-lapse; Deceased Devisee; Class Gifts

Section 2-605 prevents the lapse of devises to certain devisees. Basically, if the testator makes a devise to a grandparent or a lineal descendant of a grandparent, unless otherwise indicated, the devise will not lapse by reason of the devisee's death if the

131. NEB. REV. STAT. § 30-2338 (Cum. Supp. 1974).

132. *See* text accompanying note 120 *supra*.

devisee leaves issue who survive the testator.

Nebraska and Utah have both modified section 2-605 so that it applies to devises to *any* relative, rather than only to relatives who are descended from the testator's grandparents.[133] The change is consistent with the acceptance in these codes of the possibility of inheritance by very remote relatives. Still, it can be questioned whether testators who make devises to remote relatives assume or intend that their gifts will pass to a deceased devisee's issue. In addition, earlier criticism of inheritance by remote relatives applies equally well here.[134]

S. Section 2-608: Nonademption of Specific Devises in Certain Cases

Section 2-608 deals with three categories of ademption of specific devises. The *first* category deals with dispositions of specifically devised assets by a conservator. In these cases, if the testator is not restored to competency at least 1 year before death, the devisee is entitled to a general pecuniary devise in the amount of the net proceeds of the conservator's sale. This devise is to be made whether or not the proceeds of the disposition can be traced into the testator's estate or whether the conservator has received the sale proceeds. The *second* category deals narrowly with situations in which a testator's title to a specifically devised asset has been supplemented or replaced wholly or in part by the testator's right (a) to unpaid proceeds from a sale of the asset; (b) to an unpaid award in condemnation for a public taking of the asset; (c) to unpaid proceeds from fire or other casualty insurance covering a loss of the asset; or (d) to property owned as a result of foreclosure of a security interest in the specifically devised asset. In situations (a), (b), and (c), the devise is adeemed to the extent that the testator has received payment but not otherwise; it is irrelevant whether the proceeds remain in his hands or can be traced into other assets he owns at death. In situation (d), the property received replaces the devise. The *third* and largest category embraces all other instances in which some or all of a specifically devised asset is not owned by the testator at the time of his death. Section 2-608, by failing to provide nonademption, implicitly adopts the traditional view that such a devise is adeemed.

Both Montana and Colorado changed this section, but lim-

133. NEB. REV. STAT. § 30-2343 (Cum. Supp. 1974); UTAH CODE ANN. § 75-2-605 (Spec. Supp. 1975).

134. *See* notes 51-52 and accompanying text *supra*.

ited their surgery to the portion dealing with sales by conservators. Montana narrowed the protection against ademption to instances where the proceeds from the conservator's sale of the devised asset are owned by the testator at death, or can be traced into other assets then owned by him.[135] This variation follows a line developed in pre-Code decisions[136] which the Code drafters rejected in favor of a California precedent[137] that dispenses with tracing and gives the devisee a pecuniary devise in substitution for the specific devise of the thing sold. Tracing involves problems of proof for estate administrators that should be avoided wherever possible. The principal purpose of rules preventing ademption as the result of conservators' sales is to minimize the possibility that a testator's estate plan will be altered by his conservator. The rule adopted by the UPC is calculated to minimize the effects of a conservator's acts on a protected person's will without creating troublesome problems of proof.[138]

Colorado omits the language of section 2-608(a) that makes the subsection inapplicable when a testator who has been under a disability is adjudicated no longer disabled and survives the adjudication by 1 year.[139] The effect of the omitted Code language is to permit ademption when the testator is competent for the prescribed period, the assumption being that he would make another provision for the devisee if he did not want the bequest adeemed. The Code premise is questionable, however, and the Colorado change seems desirable. About the only thing that can safely be assumed about a conservator's sale is that it does not necessarily involve the approval of the protected testator, and may, therefore, contravene his intentions. It is arbitrary to make any aspect of a testator's estate plan depend on whether he lived more than a year after the conservatorship ends when it is uncertain, contrary to what the UPC drafters seem to have assumed, that the testator within the year would have reviewed and approved of the conservator's actions. The Code rightfully followed a significant amount of authority in its position that a

135. MONT. REV. CODES ANN. § 91A-2-608 (Spec. Uniform Prob. Code Pamphlet 1975).

136. *See, e.g.*, Morse v. Converse, 80 N.H. 24, 113 A. 214 (1921).

137. *In re* Mason's Estate, 62 Cal. 2d 213, 397 P.2d 1005, 42 Cal. Rptr. 13 (1965).

138. It should be noted that a conservator under the Code is given standing to examine the will of the person whose affairs he is managing, and is directed to disturb the estate plan of the protected person as little as possible in carrying out his responsibilities as conservator. UPC §§ 2-901, 5-427. If these provisions have their intended effect, problems of ademption that arise because of conservators' sales should be rare.

139. COLO. REV. STAT. ANN. § 15-11-608 (1973).

conservator's sale should not defeat the protected person's plan to benefit certain persons by devises of the assets sold. There is little to be said, however, for the Code's attempt to deal with cases where the disabled person regains control of his estate. The Colorado committees are therefore to be commended for changing this provision.

T. Miscellaneous

Several states made other significant changes that merit attention. Idaho, by addition to section 2-501, allows emancipated minors, as well as persons over 18, to make a will.[140] This change may represent an improvement on the Code which, at best, leaves this point open and, at worst, will be read to exclude the possibility. Curiously, Idaho complicated matters by allowing only adults to make a self-proving will.[141]

Colorado made three additional changes that are noteworthy. *First*, Colorado requires that writings which are incorporated by reference into a will be filed in court.[142] This alteration apparently follows the pre-Code law in Colorado that developed as probate judges attempted to compel production of all documents affecting a will's meaning for purposes of supervising estate administrations. This practice, however, cuts against the Code's philosophy of reducing the court's role to that of settling disputes. *Second*, section 15-11-511 of the Colorado Code, the testamentary additions to trusts section, was changed to follow prior Colorado law allowing a testator to make testamentary additions to trusts created by the will of another person who dies within 6 months after the testator's death. This change seems unnecessary, however, since the Code's provision, section 2-512, permitting reference to facts of nontestamentary significance, would seem to cover the same point. Finally, Colorado's section 15-11-601 makes a change in section 2-104 that purports to abrogate the UPC's 120-hour survivorship requirement when the state's simultaneous death act applies. This is an ill-considered change that should be ignored as meaningless.[143]

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140. IDAHO CODE § 15-2-501 (Supp. 1975).

141. *Id.* § 15-2-504.

142. COLO. REV. STAT. ANN. § 15-11-510 (1973).

143. COLO. REV. STAT. ANN. § 15-11-613 (1973) contains the simultaneous death provisions, but provides that the section will not apply in "any . . . situation where provision is made for distribution of property different from the provisions of this section . . . ." Perhaps, therefore, the Colorado addendum to UPC § 2-104, providing that § 15-11-601 is subject to the simultaneous death provisions of § 15-11-613, will never apply.

Montana changed section 2-607, dealing with gifts of specific securities, to allow specific devisees of stock to receive additional stock acquired by the testator through exercise of a purchase option after execution of the will.[144] There is little reason to expand the number of shares described by a devise just because the testator bought more shares after executing the will. Whether or not the acquisition of the additional shares results from purchase options arising from ownership of the devised stock, the testator will have expended new funds in the purchase, and it is quite uncertain whether he would want the new shares acquired to follow the original stock gift.

Utah amended sections 2-110 and 2-612 on advancements and ademption by satisfaction.[145] The requirement of both sections that they be evidenced by a contemporaneous writing was changed so that the execution of the writing need not coincide with the completion of the gift. This alteration is unfortunate because it obscures the focus of the section on the transferor's intention at the time the gift is made. A later writing may be evidence of a later intention, but not necessarily of that at the time the gift was made. The drafters deliberately restricted consideration of intention under the statute to that at the time the gift was made to avoid the inevitable errors that would result if extrinsic evidence of a testator's intentions any time after making of the gift could be brought forward to prove whether the gift was to be in lieu of a devise.

III. Conclusion

In order to facilitate the comparison of the nine enacted versions of article II reported here, the authors have prepared a chart of symbols indicating acceptance or rejection of UPC recommendations for each of the 57 sections of article II. Arranged in columns representing the first enacting states, the chart shows 513 points of comparison between enactments of the Code to date and the original recommendations of the National Conference concerning the substantive rules of inheritance.

Only 47 sections of article II were examined by this article.[146]

144. Mont. Rev. Codes Ann. § 91A-2-607 (Spec. Uniform Prob. Code Pamphlet 1975).

145. Utah Code Ann. §§ 75-2-110, -612 (Spec. Supp. 1975).

146. These 47 sections do not include material in §§ 2-113, 2-201 to 2-207, 2-801, and 2-803, which deal with marital property rights, renunciation, and homicide by an heir. *See* discussion of deleted material in note 1 *supra*.

Of a possible 423 points of comparison, National Conference recommendations were accepted in 354 instances and rejected in 69 others for an acceptance rate of 83.7%. Disregarding the comparisons for sections 2-401 through 2-404, describing family probate exemptions where local policy understandably may be more important than concern for uniform rules supporting or reflecting decedents' intentions, the total number of points of comparison is reduced to 387, with 335 acceptances, for a rate of 86.6%.

In addition to this rather encouraging rate of acceptance of uniform rules, advocates of simplicity in state inheritance laws can take heart from the fact that virtually all of the legislated deviations from the recommendations of article II fall into one of two categories, neither of which should deter or detract from ongoing efforts to win additional enactments of the Code. The first category includes changes that obstruct, rather than regulate, interpret, or presume, a decedent's intention as expressed in his will. Since all states decline, except in a small percentage of situations, to obstruct a testator's intentions, nonuniformity of law regarding testamentary obstructions can be tolerated without significant loss to the goals of modernizing and simplifying inheritance rules through uniformity.

The second category, including most of the changes that are explored in detail in this article, consists of deviations from the uniform law that are arbitrary and unsatisfactory when weighed against the arguments for adhering to Code recommendations. Legislators in states that have yet to enact the Code can be assured that, almost without exception, the changes made by the enacting state do not improve on the Code. Except for a provision in section 2-608 dealing with the effect of a conservator's sale of a specifically devised asset, where the official text of the Code is patently questionable, the decisions of the National Conference and the language of the official text of the Code are preferable to the local deviations.

Once it is accepted that all inheritance rules (save those obstructing testamentary freedom) should be designed for the convenience of testators rather than for the comfort and economic well-being of probate courts and various echelons and degrees of public and private probate specialists, uniformity of inheritance rules becomes an obviously desirable goal in this country of many states and mobile millions. When it is further perceived that the Uniform Probate Code is a sound and tested set of recommendations leading to this goal, the only remaining question for legislators is simply whether the vote should be cast for or against the

simplification that is obviously desired by most nonprofessionals. Despite the fact that nonprofessionals vastly outnumber the professionals, however, the professionals have overwhelming advantages of expertise, interest, time for debate, and history on their side. The principal hope for the public, therefore, is that the Uniform Probate Code may gain enough visibility and momentum to carry the day.

APPENDIX

Summary of Deviations From Article II by the First Nine Enactments

KEY.—S = substantially unchanged; O = omitted; X = substantial change

UPC §	Idaho	Alaska	N. Dakota	Arizona	Colorado	S. Dakota	Montana	Nebraska	Utah
2-101	S	S	S	S	S	S	S	S	S
2-102	S	S	S	X	X	X	X	X	X
2-103	S	S	S	X	X	S	X	X	X
2-104	S	S	S	S	X	S	S	S	S
2-105	S	S	S	S	S	S	S	S	S
2-106	S	S	S	S	S	S	S	S	X
2-107	S	S	S	S	S	S	S	S	S
2-108	S	S	S	S	S	S	S	S	S
2-109	S	S	S	S	X	S	X	S	S
2-110	S	S	S	S	S	S	S	S	X
2-111	S	S	S	S	S	S	O	S	S
2-112	S	S	S	S	S	S	X	X	S
2-113	O	O	S	O	S	O	S	O	S
2-201	X	S	S	O	X	S	S	S	S
2-202	X	S	S	O	S	X	S	X	X
2-203	S	S	S	O	S	S	S	X	S
2-204	S	S	S	X	S	S	S	S	S
2-205	S	S	S	O	X	S	X	X	X
2-206	S	S	S	O	X	S	X	X	S
2-207	X	S	S	O	X	S	S	S	S
2-301	S	S	S	S	S	S	S	X	S
2-302	S	S	S	S	S	S	S	X	X
2-401	X	S	O	X	O	X	X	S	X
2-402	S	S	S	X	X	S	S	S	X
2-403	S	S	S	X	X	S	S	X	X
2-404	S	S	S	S	S	X	S	X	X
2-501	X	S	S	S	S	S	S	S	S
2-502	S	S	S	S	S	X	S	S	X
2-503	S	S	S	S	S	X	S	X	X
2-504	S	S	S	S	X	S	S	S	S
2-505	X	S	S	S	S	S	X	X	X
2-506	S	S	S	S	S	S	S	S	S
2-507	S	S	S	S	S	S	S	S	S
2-508	S	S	S	X	S	S	S	S	X
2-509	S	S	S	S	S	S	S	S	S
2-510	S	S	S	S	S	S	S	S	S
2-511	S	S	S	S	X	S	S	S	S
2-512	S	S	S	S	S	S	S	S	S
2-513	S	S	S	S	S	S	S	X	X
2-601	S	S	S	S	X	S	S	S	S
2-602	X	S	S	S	S	S	S	S	S
2-603	S	S	S	S	S	S	S	S	S
2-604	S	S	S	S	S	S	S	S	S
2-605	S	S	S	S	S	S	S	X	X
2-606	S	S	S	S	S	S	S	S	S
2-607	S	S	S	S	S	S	S	S	S
2-608	S	S	S	S	X	S	X	S	S
2-609	S	S	S	S	S	S	X	S	S
2-610	S	S	S	S	S	S	S	S	S
2-611	S	S	S	S	S	S	S	X	S

UPC §	Idaho	Alaska	N. Dakota	Arizona	Colorado	S. Dakota	Montana	Nebraska	Utah
2-612	S	S	S	S	S	S	S	S	X
2-701	S	S	S	S	S	S	S	S	S
2-801	S	S	S	S	S	S	S	X	S
2-802	S	S	S	S	S	S	S	S	S
2-803	X	S	S	S	X	O	S	X	S
2-901	O	S	S	S	X	S	S	X	S
2-902	X	S	S	S	X	S	S	S	S