ARIZONA
LAW REVIEW

VOLUME 14 1972 NUMBER 2

INTESTATE SUCCESSION AND WILLS: A COMPARATIVE ANALYSIS OF THE LAW OF ARIZONA AND THE UNIFORM PROBATE CODE

Daniel H. O'Connell* and Richard W. Effland**

In August 1969 the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Probate Code.[1] Shortly thereafter the Code was approved by the House of Delegates of the American Bar Association.[2] This final approval culminated nearly a decade of cooperation between these two legal organizations in attempting to promulgate a model system of probate law that could be enacted into legislation in the various states. The Code was designed to stem the tide of property arrangements, such as joint tenancy with right of survivorship and revocable living trusts, effectuated for the purpose of avoiding the costs and delays of probate. At the same time, it was an answer to critics of the legal profession who have been

* Assistant Dean and Associate Professor of Law, University of Arizona. B.S. 1963, University of Oregon; LL.B. 1966, University of California at Berkeley; LL.M. 1967, New York University. Member of the Arizona and Oregon bars.

** Professor of Law, Arizona State University. LL.B. 1940, University of Wisconsin; LL.M. 1941, Columbia University. Member of the Wisconsin bar. Professor Effland was a co-reporter for the Uniform Probate Code.

1. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PROBATE CODE (1969) [hereinafter cited as UNIFORM PROBATE CODE]. For a bibliography of the Uniform Probate Code, see Wellman, *Law Teachers and the Uniform Probate Code*, 24 J. LEGAL ED. 180, 192 (1972). The National Conference of Commissioners worked through a Special Committee which met periodically to review manuscripts prepared by a group of draftsmen recruited largely from the academic ranks. The first complete draft was submitted in 1966. The Code went through five subsequent working drafts before going to the floor of the Conference for a final reading in August, 1969. Throughout the entire process a liaison group from the Real Property, Probate and Trust Law Section of the American Bar Association met with the Special Committee, participated in the policy deliberations, and made valuable suggestions.

2. *Uniform Probate Code*, 55 A.B.A.J. 976 (1969).

particularly vocal about the cost and delay of transmitting property upon death.[3]

The desirability of adopting the Uniform Probate Code in Arizona was scrutinized by a Probate Revision Committee appointed in 1970 by the Arizona Legislative Council.[4] Composed of legislators, judges and practicing attorneys, this Committee convened monthly to consider in detail the impact the Code would have on existing Arizona law. As a result of more than a year of deliberations, the Committee voted in November, 1971, to recommend the introduction of a bill based substantially on the Uniform Code.[5] Senate Bill 1104 was introduced on January 17, 1972.[6] After hearings before a subcommittee of the Senate Judiciary Committee, a decision was reached to refer the bill to an interim study committee for further examination.

Since it has always been recognized that the Code would require modification in order to adequately deal with local problems peculiar to Arizona, the bill proposes a slightly different version of the Code. For example, one purpose of the Code nationally is to upgrade the probate bench and to establish the probate court as a court of record with broad jurisdiction.[7] In states like Arizona, where probate is established as a branch of the Superior Court,[8] there is no need to adopt such provisions. Likewise, it is generally recognized that community

3. *See, e.g.*, N. DACEY, HOW TO AVOID PROBATE (1965); Bloom, *The Mess in Our Probate Courts*, READERS' DIGEST, Oct. 1966; Bloom, *Time to Clean Up Our Probate Courts*, READERS' DIGEST, Jan. 1970. Taylor, *You Can Avoid the Probate Trap*, READERS' DIGEST, June 1970.

4. The Probate Code Revision Committee consisted of the following members: Attorney Richard H. Elliott, Chairman (one of the Arizona Commissioners on Uniform State Laws); Senators Sandra O'Connor, James F. McNulty, Jr. and Raymond Rottas; Representatives Craig Davids, Peter Kay and Frank Kelley; The Honorable Jack Marks, Pima County Superior Court Judge; The Honorable Robert L. Myers, Maricopa County Superior Court Judge; Attorneys William W. Clements, F.L. Gibson (representing the Trust Division of the Arizona Bankers Association), Roland R. Kruse, Richard K. Mangum, Robert A. May, and Kenneth I. Todd; Professor Richard W. Effland (Committee Reporter). Executive Director Harry Gutterman of the Arizona Legislative Council and Attorney Sandra Day of the Council staff worked closely with the Committee.

5. There are no official records of the Committee's deliberations, except for the bill introduced in the Arizona Legislature. *See* S.B. 1104, 30th Ariz. Legis., 2d Sess. (1972) [hereinafter cited as S.B. 1104]. References in this article to informal action of the Committee were written by Professor Effland, a member of the Committee, and are based on his recollections and notes.

6. S.B. 1104. Divisions within the bill parallel those in the Uniform Probate Code. Arizona's present statutes on decedents' estates, contained in Title 14, ARIZ. REV. STAT. ANN., are divided generally into "chapters" and chapters are divided into "Articles". The Uniform Probate Code is divided into "Articles," and subdivided into "Parts." Thus in S.B. 1104, Code "Articles" become "Chapters" and "Parts" become "Articles." The numbering of the Senate Bill parallels the Uniform Probate Code. For example, § 2-201 of the Uniform Code is renumbered in the proposed bill as section 14-2201.

7. UNIFORM PROBATE CODE 7-8 (Draft No. 3, 1967); Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 476 (1970).

8. *See* ARIZ. CONST. art. VI, § 6; ARIZ. REV. STAT. ANN. § 12-123(A) (1956).

property states would undoubtedly wish to modify some of the substantive rules and certain of the procedural sections to conform to community property laws peculiar to the individual states. Thus uniformity is an objective, not an absolute.

Although the term "probate" technically means proof of the last will of the decedent, the phrase "probate law" in its broadest sense connotes the entire subject matter and procedure relating to the work of the court which handles probate. Consequently, it includes much of the substantive law of wills and intestate succession, the entire administration of a decedent's estate, the area of guardianship both of the person and property, and that portion of trust law relating specifically to testamentary trusts. The Uniform Code, as finally promulgated, consists of seven articles which cover these areas of the law.[9]

This inquiry, however, is limited to an analysis of the law governing intestate succession and wills.[10] The approach will be to scrutinize provisions governing this subject under the Uniform Probate Code, Senate Bill 1104 and existing Arizona law, to isolate the important differences and to suggest which provisions best govern this area of the law. Postponement of final legislative action on Senate Bill 1104 affords members of the bar and other interested groups sufficient time to examine the bill in greater depth. This discussion attempts to facilitate that examination by making available a comprehensive comparison of Article II of the Code with the present law in Arizona. In addition, it is hoped that this analysis will serve as a useful tool for attorneys during the transition period if the Code is adopted in Arizona.

Table of Contents

9. The articles are organized as follows: Article I, General Provisions, Definitions and Probate Jurisdiction of Court; Article II, Intestate Succession and Wills; Article III, Probate of Wills and Administration; Article IV, Foreign Personal Representatives; Ancillary Administration; Article V, Protection of Persons under Disability and their Property; Article VI, Non-Probate Transfers; Article VII, Trust Administration; Article VIII, Effective Date and Repealer.

10. Although the substantive and procedural sections of the Code are interrelated, it is feasible to examine the substantive portions on wills and intestate succession as a separate entity with a view toward their possible adoption by the legislature at a different time than the consideration and possible adoption of the other sections. If this approach is taken, careful attention must be paid to the enactment of the necessary definitions contained in Article I.

INTESTATE DESCENT AND DISTRIBUTION

It is generally thought that intestate succession laws should contain patterns for the distribution of property that reflect the intent of the average decedent had he executed a will.[11] Thus the legislature should attempt to determine how the average person would dispose of his property at death and then draft statutory provisions which are in accord with his intentions. This raises the task of defining the important characteristics of the average intestate decedent and ascertaining his wishes concerning the distribution of his property at death. Two relatively recent empirical studies[12] indicate that those who die intestate are typically the young,[13] those of modest wealth,[14] and those of medium or low occupational status.[15] Additionally, the studies examined a sample of wills of persons in similar circumstances in order to determine, by inference, the testamentary intentions of the average person who dies intestate.[16]

Compared to the results of these studies, present Arizona statutory provisions appear not to reflect the probable wishes of the average person who dies without executing a will. In addition, a large number of the provisions are ambiguous or leave important issues unresolved, two factors that have caused or have the potential for causing unnecessary litigation. On the other hand, the drafters of the Uniform Probate Code, relying on the quantitative studies as well as the knowledge of experienced members of the bar who specialize in estate planning, have developed a dispository scheme that reflects the desires of the average intestate decedent.[17] The proposed statutes are expressed in clear, understandable language and are written for the purpose of anticipating and resolving issues that have not been covered by previous state intestacy laws. Their viability may be assessed by studying the changes which the new statutes seek to effect.

Succession Generally

1. *Succession of Separate Property When Spouse Survives.* Un-

11. *See* Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 & n.1 (1963).
12. One study was made in Chicago, Illinois by Dunham, *supra* note 11. The other study was conducted in Cleveland, Ohio and is published in M. SUSSMAN, J. CATES & D. SMITH, THE FAMILY AND INHERITANCE (1968).
13. Dunham *supra* note 11, at 279; M. SUSSMAN, *supra* note 12, at 6.
14. In the Chicago study the average gross intestate estate was valued at $7,920. Dunham, *supra* note 11, at 264. In the Cleveland study the average was $8,599. M. SUSSMAN, *supra* note 12, at 19.
15. *See* Dunham, *supra* note 11, at 248; M. SUSSMAN, *supra* note 12, at 25, 29.
16. *See* Dunham, *supra* note 11, at 259-60.
17. Address by Professor V. Wellman, chief reporter for the Uniform Probate Code, in UNIFORM PROBATE CODE 12-13 (Draft No. 3, 1967).

der Arizona law,[18] when there are surviving children or their descendants, a surviving spouse receives only one-third of the intestate deceased spouse's separate personal property and a life estate in one-third of the separate realty with the remaining interests passing to the surviving children and their descendants. If there are no children or their descendants, the spouse receives all separate personalty and one-half of the separate realty with the remainder passing to a surviving parent, if any, or if no surviving parent, all the separate realty.

This dispository scheme does not appear to reflect the testamentary intentions of the average decedent. The empirical studies show quite clearly that married persons of ordinary means want all or substantially all of their property to pass to their surviving spouse. In the Cleveland study, 85 percent of those persons investigated willed all their property to their spouse when there were surviving children.[19] In the Chicago study, every testator willed his property to the surviving spouse.[20] Comparable percentages were observed in those situations in which there were surviving parents or relatives but no surviving children.[21]

The Uniform Probate Code provides that a surviving spouse receives the first $50,000 of the predeceased spouse's separate estate.[22] Thus, in the vast majority of intestate estates, the entire separate estate will pass to the surviving spouse. If the estate exceeds $50,000 and there are surviving issue, or only surviving parents or a surviving parent, the spouse and the survivors (either issue, if any, or parent(s)) equally divide the excess. If there are neither surviving issue nor a surviving parent, the entire separate estate passes to the spouse.

Senate Bill 1104 embodies substantial deviations from the scheme of distribution and descent in the Uniform Probate Code. First, it eliminates any share for the surviving parents in those situations in which the decedent is survived by a spouse but no issue.[23] Second, the Arizona version differs from the Code in the situation in which the decedent is survived by issue. The Arizona bill would entitle the surviving spouse to the entire separate property regardless of its value

18. ARIZ. REV. STAT. ANN. § 14-201 (1956).
19. M. SUSSMAN, *supra* note 12, at 8. *See also* Dunham, *supra* note 11, at 258-63.
20. Dunham, *supra* note 11, at 261.
21. *See, e.g.*, M. SUSSMAN, *supra* note 12, at 9.
22. UNIFORM PROBATE CODE § 2-102(A). For the definition of "spouse" which controls for the purposes of intestate succession, see UNIFORM PROBATE CODE § 2-802; text & notes 284-87 *infra*.
23. *See* S.B. 1104, § 14-2102. The section number is that proposed to be created in ARIZ. REV. STAT. ANN. Such numbers will hereinafter be cited as sections of the bill.

rather than limiting that share to the first $50,000 and one-half of the balance.[24]

It might be argued that the Arizona bill goes too far in extending the surviving spouse's inheritance rights in the decedent's separate property since in Arizona there is a strong likelihood that the decedent's separate property[25] was inherited from his parents or other relatives. If the decedent is survived by parents but no issue, the Uniform Code would allow the parents to share in the estate in excess of $50,000, thus keeping a portion of the property within the family from whence it was likely derived. If the decedent is survived by issue, the Code would allow the issue to receive one-half of the estate in excess of $50,000, thus precluding the possibility that the surviving spouse might completely disinherit the issue at her death by a testamentary disposition to other persons.

There are arguments, however, in favor of granting all the separate property to the surviving spouse. The empirical studies indicate that this disposition accords with the probable wishes of most decedents.[26] Moreover, the $50,000 limitation complicates distribution of the estate and may create disputes over property distributed in kind. If the decedent dies at a young age, eliminating a share passing to minor children avoids the necessity of the expensive, restrictive and time-consuming procedures of guardianship. If the children are adults when decedent dies, the property is more likely to be needed for support of the elderly spouse than by adult children in the productive years of their lives. If the decedent fears disinheritance of his issue or other relatives by the surviving spouse, he may execute a will supplanting the dispository scheme of the intestate succession statutes.

The Uniform Probate Code[27] and Senate Bill 1104[28] contain one exception to these distributive patterns, where the decedent is survived by issue of a previous marriage. The surviving spouse and issue of the decedent (including issue of the latest marriage, if any) each receive one-half the separate estate. In this situation there is greater likelihood that the property, if it all passes to the surviving spouse, will be removed from the decedent's family permanently, usually by shifting it to issue of the surviving spouse's previous marriage or to other relatives, to the exclusion of decedent's children by his

24. *Id.* § 14-2102(1).
25. Separate property includes all property owned prior to marriage and that acquired after marriage by gift, devise or descent, and income derived from such property. ARIZ. REV. STAT. ANN. § 25-213 (1956).
26. *See* text & notes 18-20 *supra.*
27. UNIFORM PROBATE CODE § 2-102(4).
28. S.B. 1104, § 14-2102(2).

previous marriage. The Code assures that half the separate property will pass to the decedent's issue if one or more are by a prior marriage, even when the estate is of moderate size. This provision is consistent with the findings of the Cleveland study that a testator usually divided his estate between the present spouse and the issue of a prior marriage.[29]

An important improvement in the law under both the Uniform and Arizona version of the Code is the abolition of the distinction between real and personal property.[30] Under present Arizona law the surviving spouse receives separate personal property outright but only a life estate in separate realty where there are surviving issue.[31] Thus, the composition of the estate determines the spouse's share. The distinction between realty and personalty derived from the laws of England at a time when its social structure depended for its stability upon keeping land within blood lines.[32] Limiting the surviving wife to a life estate assured that the realty would ultimately pass to blood relatives of the decedent. Today, adequate financial protection for the surviving spouse is more important than maintaining ownership of realty in blood lines. The Code abolishes the distinction between the two types of property,[33] a demise which is long overdue.

2. *Succession of Community Property.* Arizona law presently states that one-half of the community property "shall go to" the surviving spouse; the decedent's half passes to his surviving descendants or, if none, it also passes to the surviving spouse.[34] The provision dealing with the surviving spouse's interest in the community property is misleading and superfluous; one-half already belongs to the survivor under general community property law.[35]

Although the Uniform Probate Code does not take a position on who should receive the decedent's share of the community property, a strong argument can be made that the surviving spouse should be the recipient, even when the decedent is survived by descendants. Empirical studies previously mentioned indicate that the overwhelming majority of testate decedents want all their property to pass to the surviving spouse. The wife's claim is stronger as to community property than to separate—the property is theoretically the result of

29. M. SUSSMAN, *supra* note 12, at 35.
30. UNIFORM PROBATE CODE § 1-201(33); S.B. 1104, § 14-1201(34).
31. *See* text & note 18 *supra.*
32. *See* Holt, Jr., *Intestate Succession in Alabama,* 23 ALA. L. REV. 319, 322 (1971).
33. Both the UNIFORM PROBATE CODE § 1-201(33) and S.B. 1104, § 14-1201(34) define property as including "both real and personal property or any interest therein."
34. ARIZ REV. STAT. ANN. § 14-203 (1956).
35. La Tourette v. La Tourette, 15 Ariz. 200, 137 P. 426 (1914).

the joint efforts of the couple during their marriage.[36] Furthermore, if the couple is older when a spouse dies, receipt of half the marital property by children and other descendants, who are likely self-supporting, may seriously deplete the funds necessary for the support of the surviving spouse. If the couple is young, the property will often pass to minor children which requires the appointment of a guardian.

The proposed Arizona code gives the surviving spouse all the community property, except where the decedent leaves issue by a prior marriage.[37] In that case, the property would pass as it does under the present law—the surviving spouse would receive half of the community property and the decedent's half would pass to his issue. Thus, the disposition of separate and community property follow a similar pattern under the proposed Arizona law.[38]

In summary, there are several advantages to the proposed Arizona code over the present law, in the common situation in which a decedent leaves a surviving spouse. Initially, the proposed law accords with the probable intent of most testators. Unless there are children by a prior marriage, most husbands and wives who execute wills leave their entire estate to the other spouse. When issue by a decedent's prior marriage survive, the issue receive a share of the estate in order to protect against their disinheritance by the surviving spouse. Further, when the decedent is survived by issue who are all issue of the surviving spouse, guardianships of property inherited by minor children are avoided.

The proposal also simplifies title to land. When there are also surviving issue, the life estate in a fractional interest of the decedent's separate realty which the surviving spouse receives under present law is completely unmarketable. If the decedent is survived by a spouse and parents but no issue, the undivided interest in realty received by the spouse and parents creates complications when one party wants to sell. The proposed law also minimizes legal disputes over characterization of property, since the surviving spouse has the same rights whether the property

36. For an article persuasively stating the argument that the surviving spouse should receive the entire community estate, see Gibson, Jr., *Inheritance of Community Property in Texas—A Need for Reform*, 47 TEXAS L. REV. 359 (1969).

37. S.B. 1104, § 14-2102(2), as introduced provides that the surviving spouse receives all of the community property when the decedent is survived by issue of a previous marriage. This does not reflect the policy adopted by the Probate Revision Committee, because of an error in the draft. The discussion in text here and the table in the Appendix, p. 266 *infra*, reflect the committee's intended proposal that the decedent's one-half interest in the community property should pass to his surviving issue. Although the Probate Revision Committee no longer officially exists, the members of the Committee will propose an amendment to this section to correct the drafting error.

38. *See* Appendix, "Comparison of Present and Proposed Patterns of Intestate Succession," p. 266 *infra*.

is classified as separate or community. At present, she usually benefits by claiming that the property is community. This leads to family conflict, particularly where there are children by a prior marriage.

Finally, the proposed bill is simpler. Simplicity in the inheritance pattern makes it easier for the ordinary person to understand. It also simplifies to a certain degree the administration of the law. For example, under some circumstances certain kinds of property may be classified as real property and under others as personal property. An intestate succession law which differentiates between these, as the present law does, invites litigation in those cases.

3. *Succession of Separate Property When No Spouse Survives.* The present Arizona law and the Uniform Probate Code have similar provisions concerning inheritance within the inner circle of relatives when there is not a surviving spouse.[39] Generally, the property passes to issue if any survive; if none, it passes to a surviving parent or parents; if there is no surviving parent, to brothers and sisters and their descendants. The Code differs from Arizona law in giving the entire estate to one surviving parent even if there is also a surviving brother or sister or a descendant of a brother or sister; in the latter case Arizona presently gives half to the surviving parent and the other half to brothers, sisters and their descendants.

If no members of the inner circle survive, both the Arizona and Code provisions provide for inheritance by ascendant and collateral relatives. The Code[40] is similar to present Arizona law,[41] dividing the estate equally between the paternal grandparents and their descendants on the one hand, and the maternal grandparents and their descendants on the other. Inheritance by collaterals under the Code, however, is limited to descendants of grandparents; the Arizona statute provides for unlimited inheritance.[42]

There are persuasive reasons for the adoption of the limitation contained in the Code. If inheritance is limited to grandparents and descendants, the group that will inherit includes grandparents, uncles, aunts, first cousins and their descendants. In the mobile and urban America of today, the family is rarely viewed as extending beyond this group. It is very unlikely that a person would even be acquainted

39. *See* ARIZ REV. STAT. ANN. § 14-202 (1956); UNIFORM PROBATE CODE § 2-103.
40. UNIFORM PROBATE CODE § 2-103(4).
41. ARIZ. REV. STAT. ANN. § 14-202(4) (1956).
42. *Id.* § 14-202(4) provides that the property goes to paternal and maternal grandparents and their descendants "and so on without end." In State *ex rel.* Swift v. Tullar, 11 Ariz. App. 112, 114-15, 462 P.2d 409, 411-12 (1969), this language was interpreted to mean that if there are no maternal grandparents or their descendants, then one-half passes to the nearest maternal lineal ancestors and their descendants.

with more remote collateral relatives and most persons probably would not want inheritance by persons whom they do not know or have never seen.

In addition to contravening the probable intent of the decedent, unlimited inheritance can have a pernicious effect on estate administration. If remote kindred can inherit, proper administration requires a search that is time-consuming, expensive and often wasteful. If the nearest heirs are remote relatives, the number of claimants may result in the division of the estate into minute fragments. Adverse effects from the statute may also be felt in the administration of a testate estate. Since any potential heir may contest a will, a remote relative, no matter how tenuous his connection with the deceased, can contest and thereby increase the delay and expense of probate. No sound reason has been advanced to support a policy of unlimited inheritance by collaterals. Unlimited succession can be historically traced to the English law of intestacy.[43] Blind adherence to what has "always been the law" cannot be supported when the policy behind the law is irrelevant to modern conditions.

4. *Per Capita v. Per Stirpes.* The intestate succession statutes include various classes of persons, such as children, brothers and sisters and grandparents, as possible recipients of intestate property. When a member of the primary class predeceases the decedent and is survived by descendants, both the Arizona statutes[44] and the Uniform Code[45] provide that the descendants of the predeceased member of the class share in the decedent's estate. For example, if the decedent had two children, one of whom predeceased him leaving children who survived the decedent, the decedent's surviving grandchildren will share in his estate. When descendants of a predeceased member of the primary class have a right to a portion of the estate, it is necessary to determine how to compute their share. This question is resolved by determining whether they take per capita (equally) or per stirpes (the share their predeceased parent would have received had he or she survived the decedent).

A strict per stirpes distribution involves dividing the estate into equal shares among those members of the primary class who survive the decedent, if any, and those that predecease him with issue who survive the decedent, and passing the share allocated to a predeceased member of the class to his descendants by representation. It is arguable that present Arizona statutes require a strict per stirpes rule with

43. *See* 6 R. POWELL, THE LAW OF REAL PROPERTY ¶ 998 at 664 (1971).
44. ARIZ. REV. STAT. ANN. §§ 14-201, -202 (1956).
45. UNIFORM PROBATE CODE § 2-103.

respect to inheritance by descendants of children.[46] This results in treating the children as the "primary class" in all cases with the property divided equally among living children, if any, and predeceased children leaving descendants. Descendants of predeceased children always take by representation. In many situations the resulting division will not be in accord with the probable wishes of the decedent. For example, suppose the decedent is survived by four children of a predeceased son and one child of a predeceased daughter. Since the grandchildren receive the share their parents would have received had he or she survived, the four children of the predeceased son each receive only one-eighth of the estate whereas the child of the predeceased daughter receives one-half. This result is objectionable because it imposes an unequal distribution among people who are otherwise equal. There is no reason to presume that the decedent cared for any of his grandchildren less than the others, or that he would not have distributed the property equally among them.

This problem is cured by the adoption of a modified per stirpes distribution under which the primary class is composed of those *surviving* descendants in the nearest degree of kinship to the decedent. An equal division is made at this level with only the more remote descendants taking by representation. In the above example, the equal division is made among grandchildren since they compose the nearest class of decedent's descendants containing living members, and the grandchildren, therefore, would share equally. The Uniform Probate Code adopts the modified per stirpes method of distribution.[47]

Arizona presently has a separate statute dealing with inheritance by heirs *other than lineal descendants* which provides that "relatives . . . standing in the same degree shall take per capita . . . . When a part of them are dead and a part living, the issue of those dead shall

46. ARIZ. REV. STAT. ANN. § 14-101 (1956) defines "children" to include "descendants of every degree but they shall be counted only for the child they represent." Note that *id.* § 14-203 provides for succession of the decedent's half of community property "to his or her descendants equally if such descendants are of the same degree of kindred to the decedent, otherwise according to the right of representation." *Id.* § 14-202(1) merely provides for descent to "his children and their descendants" with no corresponding reference to method of division. *Id.* § 14-209 might save the situation if it were interpreted to apply to direct descendants. *See* text & note 48 *infra.* Unfortunately as it now reads, it refers to collaterals: "brothers and sisters, uncles and aunts, or other relatives." It appears that this is the result of legislative oversight. This statute was adopted from Texas where the corresponding section includes "the intestate's children, or brothers, sisters, uncles, and aunts, or any other relatives." TEX. PROB. CODE § 43 (1956). This was (apparently erroneously) copied into the Ariz. Rev. Stat., Civil ¶ 2123 (1901) to read: "the children of the intestate's brothers and sisters, uncles and aunts, or any other relations of the deceased." Apparently because this was confusing, the 1928 revision omitted the reference to "children" entirely. Ariz. Rev. Code § 984 (1928).

47. UNIFORM PROBATE CODE §§ 2-103, -106.

take per stirpes."[48] This rectifies the type of problem discussed above —if all the heirs are of the same degree of kindred to the decedent then they take equal shares. There are other factual situations, however, which may result in an inequitable distribution even under this statute. For example, suppose the class which inherits is brothers and sisters and their descendants. Assume also that decedent had one brother and one sister, both of whom predeceased him, and that the brother was survived by four children and the sister was survived by one grandchild. Since the heirs are of unequal degree to the decedent, they take per stirpes. The difficulty is in determining the primary class at which level the equal division should be made. Similar statutes have been interpreted to mean that a per capita distribution is to be made *only* when all heirs are of equal degree of kinship to the decedent, and when some takers are of unequal degree the computation follows the strict per stirpes rule with the primary class being that of brother and sister.[49] Thus, under present Arizona law the brother's four children each would receive one-eighth of the estate, dividing among them the share allocated to their parent, and the sister's grandchild would receive one-half. As a result, the more remote heir receives an amount four times greater than those heirs who are in a closer degree of kinship to the decedent.

The Code, on the other hand, provides that when heirs take by representation, the primary class is always composed of those surviving heirs who are in the nearest degree of kinship to the decedent.[50] In the above example, the primary class is children of brothers and sisters which requires the four children each to receive one-fifth of the estate while the grandchild receives one-fifth by representation. This result would seem more closely in accord with the probable wishes of the decedent.

There is one situation which would appear to result in an inequitable distribution under both the present Arizona law and the Uniform Code. Suppose decedent is survived by one brother, six children of a predeceased brother, and one child of a predeceased sister. Under both statutes, the primary class is brothers and sisters, since brothers and sisters is the class with living members in the nearest degree of kinship to the decedent. Thus, the surviving brother and the child of the predeceased sister each receive one-third while the children of the predeceased brother each receive one-eighteenth, dividing among them the one-third share allocated to their predeceased father. This method

48. ARIZ. REV. STAT. ANN. § 14-209 (1956).
49. *See, e.g.*, Maud v. Catherwood, 67 Cal. App. 2d 636, 155 P.2d 111 (1945).
50. UNIFORM PROBATE CODE §§ 2-103(3), -106.

of distribution contradicts the basic tenet that it is desirable to have equality among members of the same class. No reason can be suggested for not observing the rule of equality among the children of predeceased brothers and sisters in the situation where one or more brothers or sisters survive. A statutory scheme that gives the one surviving brother his one-third share and divides the remaining two-thirds equally among all the children of the brother and sister who did not survive would recognize the principle of equality and would present no administrative difficulties.[51]

Questions of Status

1. *Adopted Children.* The Arizona legislature has recently modified the statutory provisions dealing with adoption to more clearly reflect an intent to treat the adopted child the same as a natural child for all purposes. The amended statute provides that after the adoption "the relationship of parent and child and all the legal rights, privileges, duties, obligations and other legal consequences of the natural relationship of child and parent shall thereafter exist . . . the same as though the child were born to the adoptive petitioner in lawful wedlock."[52] With respect to inheritance, the statute provides that the child shall inherit "from and through" the adoptive parents and that the adoptive parents may inherit "from and through" the child. Thus the adopted child is treated the same as a natural child for purposes of inheritance and the adoptive parents are treated the same as natural parents in determining their inheritance rights.[53]

The statute does not specifically mention the right of inheritance by relatives of the adopting parents from the adopted child and his descendants, nor does it cover the right of descendants of the adopted child to inherit from the adoptive parents and their relatives. Some courts would allow such inheritances on the theory that the language of the statute evinces a legislative intent to treat the adopted child as a natural child for all purposes.[54] Other courts, however, would con-

51. *See* McCall & Langston, *A New Intestate Succession Statute for North Carolina*, 11 N.C.L. REV. 266, 290-2 (1933); Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants*, 66 NW. U.L. REV. 626 (1971).

52. ARIZ. REV. STAT. ANN. § 8-117(A) (Supp. 1971-72).

53. This conclusion is subject to some uncertainty because the legislature, unfortunately, has failed to repeal a statute restricting inheritance by the adoptive parents from the adopted child to that property previously transferred by the adoptive parent to the child. *See id.* § 14-207 (1956). Although this statute likely would be deemed repealed by inconsistency, it leaves some doubt as to the inheritance rights of the adoptive parents.

54. *See, e.g., In re* Estate of Taylor, 136 Neb. 227, 285 N.W. 538 (1939); *In re* Estate of Enyart, 116 Neb. 450, 218 N.W. 89 (1928); St. Louis Union Trust Co. v. Hill, 336 Mo. 17, 76 S.W.2d 685 (1934).

strue the statute strictly and deny inheritance to relatives of the adopting parents or to children or other descendants of the adopted child.[55] The Code provides that for purposes of inheritance by, through or from a person, an adopted person is treated as the child of the adopting parent and not the natural parents.[56] Adoption of that provision would delineate more precisely the rights of inheritance in these two situations.

There is one ambiguity in the Uniform Code provision on adoption, however, which may need to be clarified. If a person were to be adopted a second time, it would appear that he might be entitled to inherit from both sets of adoptive parents and vice versa.[57] The statute should be modified in order to make clear that in the event of multiple adoptions, the child shall be considered the natural child of his most recent adoptive parents. Another potential problem which is avoided by adoption of the Code is the possibility of a double inheritance by the adopted child, one portion of the estate received by virtue of his adoption status and another portion by virtue of his status as a blood relative. For example, if a person adopts his own grandchild, at the grandparent's death the question arises whether the adopted child could claim one share as an adopted child and another share as a grandchild by blood.[58] The Code provides that an adopted person ceases to be the child of his natural parents for all purposes of intestate succession.[59] Consequently, he can no longer claim a share as a grandchild related by blood to the decedent, but is limited to a single share as an adopted child.

2. *Illegitimate Children.* Arizona presently allows a child born out of wedlock to inherit from his natural parents and their relatives in the same manner as the child born in lawful wedlock.[60] Such a provision is worthy of continuation. Illegitimate children do not ask to be born and consequently should not be penalized for something in which they had no part.[61] Although this result does not appear to

55. *See, e.g.*, Harle v. Harle, 109 Tex. 214, 204 S.W. 317 (1918); *cf. In re* Estate of Harrington, 96 Utah 252, 85 P.2d 630 (1938).

56. UNIFORM PROBATE CODE § 2-109(1). The statute provides that the adoption has no effect on the relationship between the child and a natural parent when the spouse of the natural parent adopts the child.

57. *See* Holmes v. Curl, 189 Iowa 246, 178 N.W. 406 (1920), where the Supreme Court of Iowa allowed a twice-adopted child to inherit from his former adoptive parents.

58. When this issue is not specifically resolved by the statute, some courts have allowed the adopted child to receive a double inheritance. *See In re* Benner's Estate, 109 Utah 172, 166 P.2d 257 (1946); Bartram v. Halcomb, 109 Kan. 87, 198 P. 192 (1921); Wagner v. Varner, 50 Iowa 532 (1879).

59. UNIFORM PROBATE CODE § 2-109(1).

60. ARIZ. REV. STAT. ANN. § 14-206(B) (1956).

61. Holt, Jr., *supra* note 32, at 330.

be constitutionally required,[62] it represents a policy which is approved by most commentators[63] and which is the more equitable result.[64]

Although the inheritance rights of the illegitimate child are expressed in the Arizona statute, there is no provision concerning inheritance rights of others from and through the illegitimate. Because the statute states that "[e]very child is the legitimate child of its natural parents,"[65] it is arguable that technically the status of illegitimacy is not recognized in this state and that, therefore, inheritance rights are determined without reference to his illegitimate status. Since the statute does not explicitly address itself to the inheritance rights of persons other than the illegitimate child, however, it is unclear whether such an argument would prevail.

The Uniform Probate Code provides that for purposes of determining inheritance by, through or from a person born illegitimate, he or she is treated as the child of the mother. The person is also treated as the child of the father, but only if the father and mother participated in a marriage ceremony, or if paternity is established by adjudication prior to the father's death or is established thereafter by clear and convincing proof.[66] Thus, with one exception noted below, the Code expressly provides for inheritance by the illegitimate child *and* by his blood relatives.

The results under this provision of the Uniform Probate Code should not be greatly different from those under present Arizona law. In many instances illegitimate children are adopted and thereafter are treated as children only of the adopting parents for purposes of inheritance. In other cases in which the child is born out of wedlock, the parents subsequently marry and acknowledge the child as theirs.[67] In these situations, the inheritance rights would be identical both under present law and the Code. Only if the paternity is never acknowledged or judicially established during the lifetime of the decedent would the Code provisions add anything to existing law. In such a

62. Labine v. Vincent, 401 U.S. 532 (1971) (state statute which bars an illegitimate child from sharing in the father's intestate estate is not a denial of due process or equal protection under the federal Constitution). *See also* Note, *Lavine v. Vincent: Louisiana Denies Intestate Succession Rights to Illegitimates,* 38 BROOK. L. REV. 428 (1971).

63. *See generally* Gray, Jr. & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.,* 118 U. PA. L. REV. 1 (1969); Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity,* 36 U. CHI. L. REV. 338 (1969).

64. For policy reasons for giving illegitimate children favored treatment, see Holt, Jr., *supra* note 32, at 328-30.

65. ARIZ REV. STAT. ANN. § 14-206(A) (1956).

66. UNIFORM PROBATE CODE § 2-109(2).

67. *See* ARIZ. REV. STAT. ANN. §§ 12-621 to -622 (1956); *cf. id.* §§ 12-841 to -851 (Supp. 1971-72).

case under present law, the paternity could be an issue in the probate proceeding. In such circumstances, the Uniform Code imposes a heavier burden of proof than is required in a paternity action during the alleged father's lifetime.[68] If the child is claiming as the heir of the alleged father, the increased burden of proof in probate is justified by the inability of the decedent to testify.

The Code contains an exception to the general rule that the illegitimate child is treated the same as a child born in lawful wedlock: the father or his relatives cannot inherit from and through the child unless "the father has openly treated the child as his, and has not refused to support the child."[69] Presumably, the purpose of this provision is to encourage fathers to acknowledge and support their illegitimate children. If a father has ignored his own child and refused to support him during the child's lifetime, it would be difficult to maintain that he should share in the child's estate.

3. *Aliens.* Arizona law provides that real property which is devised or descends to an "alien eligible to citizenship" is forfeited or escheats to the state unless one of three conditions is met: either (1) the alien within 5 years becomes a citizen of the state and takes possession of the property, or he sells the property within this period; or (2) a treaty between the United States and the alien's country of citizenship directs otherwise; or (3) the alien proves that a citizen of the United States can inherit property in the country of which the alien is a citizen.[70] The Uniform Probate Code, on the other hand, provides that no "person is disqualified to take as an heir because he . . . is or has been an alien."[71]

The rule that aliens cannot hold realty is historically traceable to early English law based on feudal notions of the obligations of the tenant to the King.[72] This policy is no longer relevant. It might be argued, however, that the statute has a new and contemporary purpose in the case where inheritance rights are not covered by treaty—to promote the right of United States citizens to succeed to property abroad by predicating the succession rights of aliens within the state on reciprocity. Although the effectuation of this purpose is no doubt

68. UNIFORM PROBATE CODE § 2-109(2)(ii) ("clear and convincing evidence" required). A paternity action is a civil action. ARIZ. REV. STAT. ANN. § 12-841 (Supp. 1971-72). Hence the burden of establishing paternity is that of a preponderance of the evidence. *See* McGuire v. State, 84 Ariz. 242, 326 P.2d 362 (1958); Skaggs v. State, 24 Ariz. 191, 201, 207 P. 877, 880 (1922). If the prosecutrix is married, however, the presumption that her husband fathered the child must be overcome by clear and convincing evidence. State v. Mejia, 97 Ariz. 215, 399 P.2d 116 (1965).

69. UNIFORM PROBATE CODE § 2-109(2)(ii).

70. ARIZ. REV. STAT. ANN. § 14-212 (1956).

71. UNIFORM PROBATE CODE § 2-112.

72. *Id.*, Comment.

desirable, the state legislature might take the position that the federal government, which bears the responsibility for the conduct of foreign affairs, is better suited to promote its accomplishment.

Another reason for lifting the present restrictions on inheritance by aliens is that such restrictions are of doubtful constitutionality. In *Zschernig v. Miller*,[73] the United States Supreme Court held that a similar statute was unconstitutional as construed by the state court because of its *potential* capacity to impair the power of the national government to deal with foreign affairs. Although the case cannot be read to invalidate all reciprocity statutes, the Court's broad assault on any state activities that could potentially embarrass the federal government in the conduct of foreign relations makes it difficult to assess the applications and constructions of the Arizona statute that will render it unconstitutional.[74]

Further doubt on the validity of the Arizona statute is cast by a more recent decision of the Supreme Court. *Graham v. Richardson*,[75] invalidated as an abridgment of equal protection a denial of welfare benefits to resident aliens who had not resided in the state for a specified period of years. Although decisions in the last century have sustained statutes restricting inheritance of land by aliens on the grounds of state interest,[76] the whole doctrine of state interest was seriously questioned by Justice Blackmun in his opinion in *Graham*. Due to the equal protection issue and the potential interference with the power of the federal government to conduct foreign relations, the present statute would appear to be doomed once it is challenged.

With respect to aliens not eligible for citizenship, Arizona law provides that they may not through any means acquire, possess and enjoy, or transfer real property or any interest therein, unless a treaty provides otherwise.[77] The constitutionality of this provision is even more doubtful than the reciprocity statute. Although the Supreme Court in 1923 sustained the California and Washington alien land laws which are similar to the Arizona statute,[78] several state courts, in light of more recent Supreme Court opinions, have declared such statutes unconstitutional under the due process clause and also on the ground that such statutes invade the exclusive federal power over im-

73. 389 U.S. 429 (1968).
74. *See* Comment, *Alien Inheritance Statutes and the Foreign Relations Power*, 1969 DUKE L.J. 153.
75. 403 U.S. 365 (1971).
76. *E.g.*, Porterfield v. Webb, 263 U.S. 225 (1923); Terrace v. Thompson, 263 U.S. 197 (1923).
77. ARIZ. REV. STAT. ANN. § 33-1201 (1956).
78. *See* cases cited in note 73 *supra*.

migration.[79] These decisions have gained increased vitality in light of the Court's recent mandate in *Zschernig*. Because of their doubtful constitutionality, it would appear desirable to replace the present Arizona statutes with the Uniform Probate Code provision which prohibits disqualification of aliens as legitimate heirs.

4. *Kindred of the Half Blood.* A half blood situation occurs when a person has children by more than one spouse; the children (and their descendants) of one spouse are half blood heirs to the children (and their descendants) of the other spouse. Arizona presently restricts inheritance by half bloods to one-half of that portion of an estate which they would receive if of the whole blood.[80] The Uniform Probate Code abolishes discrimination against half blood relatives—they inherit the same share they would have received if they were of the whole blood.[81]

Discrimination against half bloods can be traced to the early common law of England which disqualified the half blood as an heir.[82] The rule in England was more one of evidence than descent. Under the principle then in effect that collateral inheritances had to take place within the lineal descendants of the "first purchaser" of the property, it was necessary to show that a claimed heir had the requisite relationship to the first purchaser. After the passage of time, it was often impossible to prove the identity of the first purchaser and, therefore, proof that the claimant was of the whole blood to the person last in possession developed as a substitute method of proving the requisite relationship.[83]

Discrimination against half bloods is a vestige of another era—the concept of first purchaser carries no significance in our property and inheritance laws. Since the distinction between whole and half bloods is not needed as an evidentiary tool, there would appear to be no rational basis for its continuation. It is anomalous to confine a relative of the half blood to a half share but to give a relative who is adopted and has no blood relationship at all a full share. Adoption of the Code would bring Arizona in line with the majority of other states concerning inheritance by relatives of the half blood.[84]

5. *Afterborn Heirs.* As a general rule a person must be born as of the date of a decedent's death before he can qualify as an heir

79. Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952); State v. Oakland, 129 Mont. 347, 287 P.2d 39 (1955); Namba v. McCourt, 185 Ore. 579, 204 P.2d 569 (1949).
80. ARIZ. REV. STAT. ANN. § 14-210 (1956).
81. UNIFORM PROBATE CODE § 2-107.
82. 2 BLACKSTONE'S COMMENTARIES 224 (W. Lewis ed. 1897).
83. *Id.*
84. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS (2d ed. 1953).

under the present Arizona intestacy laws.[85] Exception is made, however, for lineal descendants conceived prior to the decedent's death but born thereafter, in which case the descendant inherits as if he had been born in the lifetime of the decedant.[86] For example, if the decedent is survived by a predeceased son's spouse who is with child of the marriage, the child, when born, will share in his grandfather's estate.

The Uniform Probate Code extends the exception to cover all intestate heirs conceived before but born after the decedent's death.[87] Under the more restrictive Arizona statute the exception does not apply to collateral heirs. Thus if decedent's brother were to predecease him leaving a wife expecting a child who is born one week after decedent's death, the nephew could not inherit even though this might mean that the estate would pass to more remote heirs. Reflecting the rule followed in the majority of states,[88] the Code would allow the nephew to inherit.

Miscellaneous Provisions Relating to Intestate Succession

1. *Survivorship Requirement.* Attorneys commonly include in wills a clause to take care of the common accident situation in which two or more members of the same family die simultaneously within a few days of each other. The clause provides that if a beneficiary under the testator's will dies within a certain number of days after the death of the testator, he shall be deemed to have predeceased the testator. Such a provision accords with the probable intent of the average testator—presumably a decedent would not wish his property to pass to someone who could not enjoy it, merely because that person survived him for a short period of time. This provision also avoids multiple estate administration of the same assets within a short time period. A survivorship requirement is not available, however, to one who dies without a will. An heir will inherit under the intestacy statutes if he survives the decedent no matter how short the period of survivorship.

The Uniform Simultaneous Death Act, in effect in Arizona,[89] provides only a limited solution to the problem in both testate and intestate estates. The act applies only if the order of deaths is unknown and therefore encourages litigation to ascertain whether the or-

85. ARIZ. REV. STAT. ANN. § 14-208 (1956).
86. *See id.*
87. UNIFORM PROBATE CODE § 2-108.
88. *See* T. ATKINSON, *supra* note 84, at 75.
89. ARIZ. REV. STAT. ANN. §§ 14-221 to -227 (Supp. 1971-72).

der of the deaths can be determined. Many times the act is found inapplicable to the situation in which the decedent would probably want a survivorship requirement to be operative. For example, in a case involving deaths as a result of an automobile accident, a California court held the act inapplicable on the basis of a coroner's "rough guess" that the testatrix died 1/150,000 of a second before the beneficiary because the testatrix was sitting on the side of the car closest to the point of impact.[90]

The Uniform Probate Code provides that any person who fails to survive an intestate decedent by 120 hours shall be deemed to have predeceased the decedent.[91] If the time of death of the decedent, the beneficiary, or both cannot be determined, and it cannot be established that the potential heir survived for the requisite period, the person is treated as not having survived. Requiring survival for a short period of time will avoid the controversies that can arise under, and the shortcomings of the Simultaneous Death Act and would appear to more closely approximate the probable intent of the average decedent.

In the event that the potential heir is the decedent's spouse, the spouse's intestate share will qualify for the federal estate tax marital deduction if the spouse in fact survives for the requisite period.[92] To assure a marital deduction in cases where the surviving spouse does not survive for the required period, however, the decedent must leave a will. The draftsmen concluded that the statute should accommodate the typical modest estate to which it applies, rather than the atypical case in which an intestate estate involves large sums of money.[93]

2. *Debts to Decedent.* If an intestate heir is indebted to the decedent, the question arises whether the debt is to be subtracted from the heir's intestate share. In accord with the Arizona rule,[94] the Uniform Probate Code provides for a setoff in this situation.[95] The Code, following the general weight of authority,[96] also provides that in the event the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's issue. Adoption of the Code in Arizona would be beneficial in avoiding future litigation on this problem.

3. *Advancements.* An advancement is a lifetime gift to a donee of all or part of the intestate share to which he would be entitled at

90. *In re* Estate of Rowley, 257 Cal. App. 2d 324, 65 Cal. Rptr. 139 (1967).
91. UNIFORM PROBATE CODE § 2-104.
92. INT. REV. CODE OF 1954, § 2056(b)(3).
93. UNIFORM PROBATE CODE § 2-104, Comment.
94. Kinealy v. O'Reilly, 28 Ariz. 246, 236 P. 716 (1925). Arizona follows the majority of jurisdictions on this point. T. ATKINSON, *supra* note 84, at 787.
95. UNIFORM PROBATE CODE § 2-111.
96. T. ATKINSON, *supra* note 84, at 790.

the donor's later death. In Arizona, by statute, an advancement to a lineal descendant of the decedent is subtracted from the descendant's intestate share.[97] The determination whether an advancement occurred is made by reference to the subjective intent of the decedent at the time of the inter vivos transfer.[98] Obviously, something as difficult to ascertain as the subjective intent of a decedent represents a source of potential litigation. For this reason, the Uniform Probate Code treats a lifetime gift as an advancement "only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement."[99]

An additional issue which is unclear under the present Arizona statute is whether an advancement to a predeceased child of the decedent is subtracted from the intestate share that the deceased child's children receive. It could be argued that there should be no offset since there is no assurance that the advancement would be passed from the deceased child to his children. It is possible that he might have willed it to someone else or dissipated it during his lifetime. On the other hand, the contrary could be argued—the grandchildren take by representation in that they take only the share their parent would have received had he survived the decedent, which share would be reduced by the advancement. The Code steers a middle course on this issue by providing that the advancement is not taken into account in computing the share of the descendants unless provided to the contrary in the written declaration by the decedent or written acknowledgment by the predeceased child.

The comment to this provision of the Code states that the method of taking the advancement into account is not covered in the Code since it is well settled under the common law and is not a source of litigation.[100] This is true if separate property is involved, but uncertainties arise if the advancement derives from the community estate. For example, suppose that a husband and wife with two children have $100,000 of community property and the husband advances $20,000 of community property to one child and then dies. How is the remaining $80,000 of community property divided between the two children and the surviving spouse? If the surviving spouse inherits *all* of the community property, as would be the case under the proposed Arizona bill unless there are issue by a prior marriage,[101] the advancement would not be taken into account at the husband's

97. ARIZ. REV. STAT. ANN. § 14-211 (1956).
98. *See* T. ATKINSON, *supra* note 84, at 719-22.
99. UNIFORM PROBATE CODE § 2-110.
100. *Id.*, Comment.
101. *See* text & note 24 *supra.*

death. When the surviving spouse subsequently dies, it is not clear whether the advancement would be computed in determining the share of the children in the surviving spouse's estate. Generally, the courts have held that advancements made by one parent cannot be considered in the distribution of the other parent's estate.[102] In order to avoid unequal inheritance by the children when equal inheritance was intended, therefore, the statute should be modified to expressly state that the advancement is considered in connection with the distribution of the surviving spouse's estate.

It is also uncertain how advancements from community property will be treated under the proposed Arizona statute when the decedent is survived by children of a previous marriage, in which event his children (including those of the present marriage) receive one-half of the decedent's estate. If the $20,000 advancement in the preceding illustration had been to a child by a previous marriage, there would be four possible alternative dispositions of the remaining $80,000 of community property at the husband's death: (1) the full $20,000 is taken into account in recomputing the share of the children but the spouse does not benefit by the augmented estate ($40,000 to spouse; $10,000 to *A*; $30,000 to *B*); (2) the same except only the husband's community interest of $10,000 is treated as an advancement ($40,000 to spouse; $15,000 to *A*; $25,000 to *B*), with the $10,000 representing the surviving spouse's interest taken into account in computing the inheritance of *A* and *B* at her death; (3) the full $20,000 is taken into account and the wife benefits from the augumented estate ($50,000 to spouse; $5,000 to *A*; $25,000 to *B*); (4) the same as (3) except only the husband's community interest of $10,000 is treated as an advancement ($45,000 to spouse; $12,500 to *B*; $22,500 to *A*), with the $10,000 representing the surviving spouse's interest taken into account in computing the inheritance of *A* and *B* at her death. Absent legislation, there is no clear answer which alternative would be adopted by the courts. To avoid uncertainty and potential litigation, the statute should expressly provide for the treatment of advancements from community property when the decedent is survived by a child of a previous marriage.

LIMITATIONS ON TESTATION

Legislation in most states confers on the surviving spouse and minor children rights in the property of the decedent that cannot be destroyed by testamentary gifts by the decedent to other persons. The right to occupy a homestead and to receive certain exempt property

102. *See, e.g.*, Ruch v. Biery, 110 Ind. 444, 11 N.E. 312 (1887).

and a family allowance during the administration of the estate universally are guaranteed. Some states grant the surviving spouse additional rights in the deceased spouse's estate to protect against disinheritance of the spouse. Surviving children, although not protected against intentional disinheritance by their parent, are usually given rights in the testator's estate if they were unintentionally omitted from his will. The Uniform Probate Code would continue the rights provided the surviving spouse and issue under present Arizona law, but with substantial modifications, and as revised by the proposed Arizona statute would confer additional rights in the surviving spouse to protect against his or her disinheritance.

Rights of Spouse

No portion of Article II of the Uniform Probate Code is likely to provoke as much controversy as Part 2 which deals with the elective share of the surviving spouse of a decedent. This is true for common law states and even more so for community property states. The concept of the elective share is an outgrowth of common law dower and its counterpart curtesy which gave the surviving spouse limited rights in the realty of the deceased spouse that could not be avoided by testamentary disposition.[103] A decedent could force the spouse to elect whether to take a testamentary share offered expressly in lieu of the dower or curtesy right but could not by will defeat the right. Neither could the right be destroyed by an inter vivos conveyance without the consent of the spouse. In a land-based economy the dower-curtesy concept operated effectively to prevent the owner of wealth from disinheriting his spouse.

As the economy shifted its focus from land as its primary source of wealth to an industrial and commercial society in which wealth was represented by stocks, bonds and other forms of personal property, it became obvious that dower and curtesy were inadequate protection for the surviving spouse. Most of the common law states therefore supplemented, or completely supplanted, dower with a statutory elective share in both real and personal property included in the probate estate. In most states the elective share was available only to the widow, reflecting not so much the male attitude that only the woman requires protection but rather the economic reality that most family wealth was acquired and owned by the husband.

103. *See generally* T. ATKINSON, *supra* note 84, § 29 at 104-06; 1 AMERICAN LAW OF PROPERTY §§ 5.1 to 5.49, 5.57 to 5.74 (A. Casner ed. 1952); 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 209 at 140 *et seq.* (1971); 2 H. TIFFANY, THE LAW OF REAL PROPERTY §§ 487 *et seq.* (3d ed. 1939).

Primarily because the clever estate planner could defeat the elective share by resort to various ownership arrangements for avoiding probate, such as joint tenancies and revocable living trusts, the statutory formula expressing the elective share as a fraction (usually one-third) of the probate estate proved inadequate. In order to reach the non-probate assets passing at death, the widow would have to resort to a separate suit against the recipients of the inter vivos transfer. Various theories have been judicially developed to allow the disinherited spouse a measure of relief. These theories—that the transfer was a sham, a fraud on the widow, or illusory—have given the courts substantial leeway to allow or disallow relief on the basis of individual circumstances.[104] At the same time, the elective share based solely on the probate estate frequently operated to benefit the widow unjustly. The husband who had transferred the bulk of his wealth to his wife by joint tenancy survivorship, by designating her as beneficiary of life insurance, or by making her the primary beneficiary of a living trust might have his testamentary plan upset by her election of a third of the probate assets.

In many states, the community property concept has supplanted dower and the elective share.[105] Wealth acquired during marriage, other than by gift, devise or inheritance, is the community property of both spouses.[106] Upon the death of one, the surviving spouse owns a one-half interest in the estate.[107] If the decedent leaves a will, he can only dispose of his one-half share. If the husband as manager of the community seeks to defeat the wife's share by making inter vivos gifts or by creating a revocable living trust, the wife can claim relief on the theory that the transfer is beyond the scope of the husband's managerial powers.[108]

During the formulation of the Uniform Probate Code, it was the view of some that there should be no elective share. It was argued that disinheritance can be fought by contesting the will on grounds of lack of capacity or undue influence. Furthermore, the incidence of disinheritance is too slight to warrant elaborate provisions and carefully worked out estate plans are upset by the elective share,

104. For an indepth analysis of these theories, see W. MACDONALD, FRAUD ON THE WIDOW'S SHARE (1960).

105. *See* W. DE FUNIAK & M. VAUGHN, COMMUNITY PROPERTY § 201 (1971); R. BALLINGER, COMMUNITY PROPERTY § 10 (1895).

106. *E.g.*, ARIZ. REV. STAT. ANN. § 25-211 (1956).

107. *E.g., id.* § 14-203 (1956).

108. The Supreme Court of Arizona has indicated that the husband may not make gratuitous transfers that "defraud" his wife. Gristy v. Hudgens, 23 Ariz. 339, 348, 203 P. 569, 572 (1922). *See generally* W. DE FUNIAK & M. VAUGHN, COMMUNITY PROPERTY §§ 122, 126 (1971); Coulter, *Limitations on the Power of a Community Manager to Make Gifts from the Community Property*, 28 ORE. L. REV. 210 (1949).

often unjustly.[109] The Committee decided, however, that the elective share is well established and has a deterrent effect on testators who might otherwise disinherit a spouse. It was felt that will contests as a solution were unacceptable both because the family is reluctant to contest and because the burden of proof is often prohibitive. The possible inequities that may result under prevailing statutes could be avoided by drafting to deal with both probate and nonprobate assets. The final result of the Conference deliberations was a policy decision to retain the familiar elective share of one-third, but to apply the share to both probate and nonprobate transfers through the application of the concept of the "augmented estate."[110]

The Code provisions are necessarily complicated, but the following examples illustrate their operation. Assume first that the testator leaves a net probate estate of $50,000 of which $10,000 is given to his wife. During his lifetime he transferred stock into joint ownership with *X* which is valued at $30,000 at death. He also put money into a bank account in his name "in trust for *Y*"; the balance in the account at his death is $10,000. The augmented estate would consist of the probate estate ($50,000), the stock passing to *X* by survivorship ($30,000), and the so-called trust account ($10,000). The latter two arrangements are treated as substitutes for wills. Hence, the widow could elect one-third of $90,000, a share amounting to $30,000. Against this would be credited the $10,000 she received under the will. The remaining $20,000 would be collected from the other testamentary devisees and from *X* and *Y* in proportion to the amounts they receive.

If on the same facts the testator made his widow beneficiary of his life insurance, this insurance would be included in computing the augmented estate but would also be charged against the widow's share. Thus, if $30,000 in life insurance were paid to the widow, the augmented estate would be increased to $120,000 and the widow's share would be $40,000. Because she received $10,000 under the will and $30,000 in life insurance proceeds, her elective share is fully satisfied. The result of this feature of the Code is to reduce the incidence of election to cases of genuine disinheritance.

The elective share provisions of the Uniform Code were designed predominantly for common law states. With regard to the application

109. For an able exposition of this view, see Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966).

110. UNIFORM PROBATE CODE § 2-202. For a critical view of the Code provisions, see Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513 (1970).

of such provisions in community property states, the official comment merely states:

> Optional sections adapting the elective share system to community property jurisdictions were contained in preliminary drafts, but were dropped from the final Code. Problems of disherison [sic] of spouses in community states are limited to situations involving assets acquired by domiciliaries of common law states who later become domiciliaries of a community property state, and to instances where substantially all of a deceased spouse's property is separate property. Representatives of community property states differ in regard to whether either of these problem areas warrant statutory solution.[111]

Last year, one community property state adopted the Uniform Code with an elective share in separate property[112] while a bill was introduced in another such state proposing an elective share in separate property.[113]

The major criticism of the community property system as an exclusive method of protecting each spouse arises from the mobility of contemporary society. A husband and wife domiciled in a common law jurisdiction accumulate marital wealth and carry investments in the husband's name as his separate property. If the husband were to die at that juncture, his widow would typically be able to claim a one-third elective share. If he did not die but rather retired and the couple moved to Arizona where the husband died after investing in Arizona land, the property would retain its separate character when transferred to Arizona because the wealth accumulated during marriage was so characterized in the state where acquired.[114] Hence, upon the death of the husband, the entire wealth would pass under

111. UNIFORM PROBATE CODE at 29, General Comment to art. II, pt. 2.

112. IDAHO CODE §§ 15-2-201 to 15-2-207 (Supp. 1972). *Id.* at 251-55. The elective share is one-third of the separate estate. There is no provision for offsetting community property against the elective share. Thus, unless the will expressly provided otherwise, the surviving spouse could claim an elective share in separate property and would not be charged with community property devised to her by the decedent. The Idaho code also adds a provision restricting the power of the decedent to dispose of the first $50,000 of his share of community property only in favor of his surviving spouse, children, grandchildren, or parents of either spouse. *Id.* § 15-2-103A (Supp. 1972).

113. S.B. 313, 42d Wash. Legis., 1st Sess. (1971). If enacted as introduced, the Washington bill would provide an elective share of *one-half* of the augmented separate estate. *Id.* § 11A.2-201. Under the Washington bill, community property derived from the decedent would be applied in satisfaction of the elective share. *Id.* § 11A.2-207. The bill did not pass before adjournment. *See* [1971] Wash. Sess. Laws 1844.

114. Stephen v. Stephen, 36 Ariz. 235, 284 P. 158 (1930). *See also* Rau v. Rau, 6 Ariz. App. 362, 432 P.2d 910 (1967). No mention is made in *Stephen* of ARIZ. REV. STAT. ANN. § 25-217 (1956), which reads: "Marital rights in property which is acquired in this state during marriage by persons married without the state who move into the state shall be controlled by the laws of this state." The meaning of this statute is open to question, but certainly its relevance to the issue should have been argued and considered in the opinion. *Cf.* De Funiak, *Conflict of Laws in the Community Property Field*, 7 ARIZ. L. REV. 50 (1965).

his will and he would have unrestricted power of testamentary disposition. The widow has lost the protection of the common law elective share and failed to acquire any protection under Arizona law because the property is not community. To a limited extent the strong presumption that property is community rather than separate,[115] and the rules on commingling,[116] might operate to ameliorate the problem if the couple were to reside here for any extended period prior to death.

A lesser problem arises if the couple retains its domicile in the common law state and invests in Arizona land. Because the situs of land governs inheritance rights, Arizona law would apply.[117] There would presumably be no community property involved, however, for a couple domiciled in a common law state even if the court were to apply community property rules since the source of the purchase price would be separate funds. Still another problem concerns the spouse whose wealth is entirely inherited. A husband who inherits wealth may devote his full energies to investing and reinvesting the funds. Even though there may be a large accumulation of capital gains during the marriage, it appears that the entire property retains its separate character.[118] Had the husband been employed by others to perform the same function, his salary would be community property.

All of these situations raise the question of how to protect the surviving spouse. One possible solution, developed in California, treats local property as "quasi-community" if it is property or the income therefrom that would have been community property had the spouses been domiciled in California at the time it was acquired, and gives the surviving spouse an elective right in such property.[119] The early drafts of the Uniform Code contained an elective share in quasi-community property, but the final draft omitted these provisions because of lack of agreement among the Commissioners representing community property states.[120]

Although the Probate Revision Committee in Arizona has con-

115. C. SMITH & H. SIGWORTH, REVISED SUMMARY OF ARIZONA COMMUNITY PROPERTY LAW § 13 (1969).
116. *Id.* at § 20.
117. T. ATKINSON, *supra* note 84, at § 94.
118. ARIZ. REV. STAT. ANN. § 25-213 (1956). *See* C. SMITH & H. SIGWORTH, *supra* note 115, at § 16.
119. *See* CAL. PROB. CODE § 201.5 (West Supp. 1972). Election to take under or against the decedent's will is provided in *id.* § 201.7, and the right to reach nonprobate transfers over which the decedent had "a substantial quantum of ownership or control" at death is governed by *id.* § 201.8. *See also* Abel, Barry, Halsted & Marsh, *Rights of a Surviving Spouse in Property Acquired by a Decedent While Domiciled Outside California*, 47 CALIF. L. REV. 211 (1959).
120. *See* text & note 111 *supra*. For comment on and a recommendation of adoption of this doctrine, see Comment, *Quasi-Community Property—California's New Property Concept*, 6 ARIZ. L. REV. 121 (1964).

sidered various alternatives [121] and has never been in complete agreement over the most appropriate resolution to the problem, Senate Bill 1104 embodies the approach adopted in California. It has met with criticism on the expected grounds. Quasi-community property is a new concept to Arizona lawyers, and novelty is likely to incur opposition. Moreover, the complexity of the statutory provisions has made them unpopular with the California bar. The tracing problems undoubtedly present difficulties, just as characterizing community and separate property now does. There is no statistical data on the need for the new provision and there is concern that the elective share would upset existing estate plans.

These arguments do not appear to be persuasive. Although the statutory provisions are complicated, they will be applicable only in the rare case where the decedent who owns quasi-community property attempts to disinherit the surviving spouse. In the vast majority of cases each spouse leaves the bulk of his estate to the other. Even in the case of large estates, the marital deduction provisions of the *Internal Revenue Code of 1954*[122] operate as an inducement to leave one-half of the separate property, which includes the quasi-community property, to the surviving spouse. The tracing problems should not be much more difficult than when the couple has always been domiciled in Arizona, except that the separate property in the estate would have to be characterized as quasi-community or other separate property. The same rules and presumptions that now facilitate a determination of which property is community and which is separate would be beneficial in determining which is quasi-community property and which is not. The argument that such a provision would upset estate plans would have to concede as its tacit premise that the plan is one to disinherit a spouse from a share in wealth accumulated during the marriage. Such a plan deserves upsetting. Moreover the elective share is easily barred by an agreement or unilateral waiver.[123] Thus it is an easy matter to assure consent to a fair estate plan.

Despite the imposing appearance of the statutory sections, operation of the statute would be relatively simple. Assets in the estate would first have to be characterized as community, quasi-community

121. The main alternatives considered were:
1. Leave the law as it is, with no provision.
2. Adopt a statutory version of an elective share in quasi-community property only.
3. Adopt an elective share in all separate property, as was done in Idaho and has been proposed in Washington. [*See* notes 112 & 113 *supra.*]

122. *See generally* INT. REV. CODE OF 1954, § 2056.

123. S.B. 1104, § 14-2204.

or other separate property. Quasi-community property is defined as follows:

> (1) That separate property of the decedent acquired by him while domiciled in another state and acquired under such circumstances that it would have been the community property of the decedent and his surviving spouse had the decedent been domiciled in this state at the time.
>
> (2) Any separate property of the decedent, whenever and wherever acquired, which is acquired as a product of, in exchange for, or with the proceeds of, the property described in paragraph 1.[124]

The surviving spouse would be entitled to elect a one-half share in the quasi-community property in the same fashion as the spouse who is presently entitled to one-half of the community property. Quasi-community property transferred to third persons by means that are essentially will substitutes, such as joint tenancy with right of survivorship, revocable living trusts and transfers with retained life estates, would be taken by them subject to the elective share.[125] Against this share the surviving spouse would be required to credit property transferred to him or her by the decedent.[126] Thus, if the decedent by will devised separate property or his one-half of the community assets to the spouse, this would be credited against the elective share. Similarly, if during his or her lifetime the decedent had given the surviving spouse assets that would be characterized as quasi-community, one-half of these assets would be treated as belonging to the surviving spouse while the other half would be treated as a gift from the decedent and credited against the elective share of the surviving spouse. Life insurance purchased out of quasi-community funds and payable to the surviving spouse would similarly be credited against the elective share to the extent of one-half of the proceeds. Thus, the election would be applicable only in the rare case of substantial disinheritance of a spouse from a share in assets accumulated during marriage while the couple were domiciled in a common law state.

One final point should be noted concerning the elective share. Both the Uniform Probate Code[127] and the proposed Arizona bill[128] give the right to an elective share to both the widow and the widower. Increasingly, husbands invest marital wealth in the wife's name, usually because the wife has a longer life expectancy and the couple de-

124. *Id.* § 14-2201.
125. *Id.* § 14-2202(A)(2).
126. *Id.* § 14-2202(C)(3).
127. UNIFORM PROBATE CODE § 2-201 (a).
128. S.B. 1104, § 14-2201(A).

sires to avoid probate upon the death of the husband. In cases in which the wife dies first and disinherits the husband from wealth which in many cases he earned and gave to her, the disinherited spouse ought to enjoy a certain degree of statutory protection.

While the elective share is primarily designed to prevent intentional disinheritance, disinheritance may also occur by inadvertence. For example, if a person executes a will at a time when he does not contemplate marriage and he subsequently marries, no testamentary provision will be made for his widow. Present Arizona law has somewhat alleviated the problem of inadvertent disinheritance by creating a prima facie presumption that the will is revoked by the subsequent marriage. The presumption may be rebutted by a showing either that the intended spouse has been provided for in the will or mentioned in the will in a manner that displays the testator's intent that the will is to be effective despite the subsequent marriage, or that "provision has been made for the wife by marriage contract."[129] The statute raises several problems, however. If the decedent creates a living trust for the benefit of his wife and recites that the trust has been established because his will executed prior to their marriage made no provision for the wife, the will would nevertheless be revoked at the decedent's death under the literal terms of the statute since his intent was not manifested in his will. If the husband and wife execute their wills prior to marriage and subsequent to marriage execute an agreement with each waiving a right in the other spouse's separate property, at one of the spouse's subsequent death, his or her will would be revoked since the agreement is probably not a "marriage contract" and, if it is, it makes no "provision" for the surviving spouse.

The Code contains a slightly different provision. It treats the omitted spouse like the pretermitted child and provides him or her with an intestate share.[130] The purpose of this approach is to preserve the remainder of the will. Thus, if a widower executed a will creating a trust for his children and later remarried, the second wife would obtain the same share as if the husband had died intestate, but the trust would be preserved as to the remainder of his property. Under present Arizona law, the will would be revoked and the entire scheme would fail. In view of the expanded intestate share of the surviving spouse under the proposed Arizona bill,[131] however, the overall effect of the Code provision will often be the same as total revocation since the surviving spouse receives the decedent's entire estate

129. ARIZ. REV. STAT. ANN. § 14-134 (1956).
130. UNIFORM PROBATE CODE § 2-301.
131. S.B. 1104, § 14-2102.

under the intestacy statutes unless there are surviving children by a prior marriage.

Additionally, the Code adopts a more liberal rule on the admission of extrinsic evidence to show that a transfer is intended to be in lieu of a testamentary provision. For example, suppose the testator executes a will providing for his children, later marries a second wife, and takes out a large life insurance policy payable to her, stating orally that this is to provide for her because his will makes no such provision. Evidence as to the statement would be admissible to preclude the second wife from upsetting the will. Such evidence would be barred under present Arizona law since the testator's intent can only be determined from the will provisions, and the will would be revoked. Although the Code opens the door to the admission of parol evidence, it is more likely to accomplish the testator's intent.

Protection of Issue

If an Arizona testator is survived by a child born or adopted after the execution of his will, the child receives the share he would have received had the testator died intestate if the child "is not mentioned or provided for in such will, either specifically or as a member of a class."[132] The Uniform Probate Code contains a similar provision: the child takes his intestate share if "it appears from the will that the omission was intentional."[133] The purpose of these statutes is to reflect the probable intention of the testator who inadvertently fails to provide for a child born after the will is executed. There are, however, several situations in which the probable intent of the testator will not be realized by application of the Arizona statute.

The Arizona statute fails to deal with a common situation in which a testator would undoubtedly exclude an afterborn child. Assume the testator has two children, John and Mary, when he executes the will. He leaves his entire estate to his wife, reciting, "I have made no provision for my beloved son John and daughter Mary, knowing that their mother will adequately provide for them." Subsequently a third child is born. At his father's later death, the third child will receive his intestate share, even though his brother and sister take nothing and the testator would have undoubtedly excluded the third child for the same reason.[134] Under the Code the third child would not take his intestate share, thus resulting in equal treatment of the children.[135]

132. ARIZ. REV. STAT. ANN. § 14-131 (1956).
133. UNIFORM PROBATE CODE § 2-302(a)(1).
134. *See* DeCoste v. Superior Court, 106 Ariz. 50, 470 P.2d 457 (1970).
135. UNIFORM PROBATE CODE § 2-302(a)(2).

Suppose in the above example the testator's will left his property to his wife and two children. After the third child is born the testator makes provision for the child outside the will through life insurance or the creation of a living trust, intending his will to stand. Under the present Arizona statute the child can claim an intestate share in addition to the non-probate property he receives. Under the Code, however, provision for the child outside the will coupled with proof of the testator's intent that the transfer be in lieu of a testamentary provision disqualifies the child from receiving his intestate share.[136]

Additionally, the Code deals with a special problem which has heretofore been ignored by Arizona's statutory law. Suppose a testator draws his will stating, "I leave nothing to my son, David, since he was killed in Viet Nam." After the testator's death David is released as a prisoner of war and returns home. He cannot take under the pretermitted heir statute since he was born prior to the execution of the will. On the other hand, he might claim a share of the estate on the ground that the will was written on the basis of a mistake of fact. Most courts would not permit such a recovery unless the will revealed both the mistake and the provision that the testator would have made for the the child if he were alive.[137] In this situation the Code would entitle the child to receive his intestate share.[138]

Homestead

The Uniform Probate Code gives a homestead allowance in terms of a dollar amount,[139] although the spouse, or the minor or dependent children when there is no spouse, can take distribution in property rather than cash in most cases.[140] Arizona law presupposes a homestead in the estate;[141] if there were no realty, there would be no homestead to set apart. Moreover, the homestead allowance may not be of much worth if the residence is owned in fee simple but is subject to encumbrances. The homestead allowance, stated in a dollar amount under the Code, is equally valuable whether the family home is owned outright, owned subject to a mortgage, or rented. The Code makes the allowance available not only to a minor child but also to an adult child who is in fact dependent upon the deceased. The Arizona provisions are limited to benefiting only minor children.

136. *Id.* § 2-302(a)(3).
137. *See* T. ATKINSON, *supra* note 84, at § 59; 1 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS, § 13.11 (1960).
138. UNIFORM PROBATE CODE § 2-302(b).
139. *Id.* § 2-401.
140. *Id.* § 3-906(a)(2).
141. ARIZ. REV. STAT. ANN. §§ 14-513, -514 (1956).

Additionally, present law embodies two distinctions which would be dispensed with under the Code. First, there is a distinction based upon whether the homestead was selected or recorded during the decedent's lifetime, in which case it is limited to a fair market value of $8,000,[142] or is selected by the probate court, in which case there is no limit on value.[143] There is a second distinction between a homestead selected from community property, which vests absolutely in the surviving spouse, and one selected from the decedent's separate property, which must be set apart by the court "only for a limited period."[144] Such distinctions complicate the law and result in inequities based on factors that are not relevant to the basic policy behind the homestead exemption, which is to provide minimum protection for family members.

Exempt Property

The surviving spouse, or minor children in cases in which there is no surviving spouse, presently are entitled to "all property exempt from execution."[145] This is objectionable in that property exempted during the owner's lifetime is not necessarily the property the surviving family needs. Moreover, tying the exemption to general exemption laws makes the total dollar amount vary widely, depending upon the composition of the assets in the decedent's estate.

The Uniform Probate Code entitles the surviving spouse or children to exempt property up to an amount not exceeding $3,500 in value.[146] If there is not $3,500 of exempt property in the estate, they are entitled to other assets of the estate to compensate for the deficit. Thus, the amount received will not vary based on the assets in the estate and assets most needed by the family can be used to fund the $3,500 amount. Moreover, the property is available, if there is no surviving spouse, to all children of the decedent, not just minor children as is presently the case under Arizona law.[147]

Family Allowance

Generally the Arizona[148] and Code[149] provisions for a family allowance are similar, both providing for reasonable support payments

142. *Id.* §§ 14-519, -520.
143. Schock v. Schock, 11 Ariz. App. 53, 461 P.2d 697 (1969).
144. ARIZ. REV. STAT. ANN. 14-516(B) (1956). *See also id.* § 14-518.
145. *Id.* § 14-514(A) (1956). *See also id.* § 14-516.
146. UNIFORM PROBATE CODE § 2-402.
147. The proposed Arizona statute is more restrictive, limiting the recipients of exempt property to minor children that were dependent on the decedent. S.B. 1104, § 14-2402.
148. ARIZ. REV. STAT. ANN. §§ 14-513, -515 (1956).
149. UNIFORM PROBATE CODE § 2-403.

during the administration of the estate. The Arizona statutes are more restrictive, however, limiting the support allowance to the widow and minor children. The Code would expand the number of eligible persons to include a widower and adult children who were in fact supported by the decedent. The Code also expressly provides the time and recipient of the payment. Additionally, it provides that the receipt of a support allowance does not reduce the amount the beneficiary would otherwise receive by intestate succession or by will unless the will provides otherwise, and that the death of a person entitled to a family allowance terminates his right to allowances not yet paid.

EXECUTION, REVOCATION AND REVIVAL

Formalities of Execution

1. *Testamentary Capacity.* The Uniform Probate Code provides that a person 18 or more years of age may make a will.[150] Arizona law until recently required a person to be 21 years of age or older before he could execute a will, with two exceptions—a person under the age of majority could execute a will if married, or if in the armed forces and 18 years of age or older.[151] In response to similar enactments elsewhere, and the argument that in modern times most persons 18 years of age possess a high school education, and ought to be deemed to possess adult capacity, Arizona has recently emancipated 18-year-olds.[152] Thus, the Code provision lowering testamentary capacity to 18 years would make no change in Arizona law.[153] Both the Code[154] and Arizona law[155] require the testator to be of "sound mind". Consequently, determination of testamentary incapacity based upon mental incompetency[156] and insanity[157] will continue to be defined by case law if the Code is adopted in Arizona.

2. *Requirements For Formal Execution.* The requirements for formal execution of a will under the Uniform Probate Code[158] are substantially the same as those presently in effect in Arizona.[159] Both

150. *Id.* § 2-501.
151. ARIZ. REV. STAT. ANN. § 14-102 (1956).
152. H.B. 2014, 30th Ariz. Legis., 2d Sess. (1972), ch. —, [1972] Ariz. Sess. Laws —.
153. *Compare id.* § 24 *with* UNIFORM PROBATE CODE § 2-501. Interestingly, the marriage and military exceptions were repealed as well.
154. UNIFORM PROBATE CODE § 2-501.
155. ARIZ. REV. STAT. ANN. § 14-102 (1956).
156. *See, e.g., In re* O'Connor's Estate, 74 Ariz. 248, 246 P.2d 1063 (1952); *In re* Estate of Teel, 14 Ariz. App. 371, 483 P.2d 603 (1971).
157. *See, e.g., In re* Stitt's Estate, 93 Ariz. 302, 380 P.2d 601 (1963); *In re* Estate of Greene, 40 Ariz. 274, 11 P.2d 947 (1932).
158. UNIFORM PROBATE CODE § 2-502.
159. ARIZ. REV. STAT. ANN. § 14-121 (1956).

require a writing signed either by the testator or in the testator's name by another in the testator's presence and under his direction, and the signatures of two attesting witnesses. Requirements in the Code relating to the witnesses have been relaxed, however, in an attempt to reduce the formalities of execution to a minimum.

Arizona law contains the potentially ambiguous requirement that the will must be attested by the witnesses. In some states this has been interpreted as requiring only that the witnesses sign the will, while in other states similar statutes have been construed to require the persons to witness the act of signing by the testator. In some more liberal jurisdictions it is sufficient if the witnesses either see the signing, hear the testator declare the document to be his will, or hear the testator state that the signature on the document is his.[160] The Code, which adopts the more liberal approach, avoids the ambiguity inherent in the use of the word "attest."

In Arizona the witnesses must sign the will "in the presence of" the testator.[161] This requirement has generated a considerable volume of interpretive litigation in other states. Applying a strict interpretation, some courts require that the testator be able to view the act of signing by the witnesses.[162] Although these courts agree that the testator must be able to view the witnesses when they sign, they disagree as to what the testator must actually be able to see.[163] Other courts have adopted a more liberal approach which requires only that the witnesses sign within the testator's "immediate nearness or vicinity."[164]

The purpose of the "presence" requirement is to prevent fraud—to guard against the substitution of some other writing for the will of the testator.[165] It seems, however, that fraud would be prevented by this requirement only in the exceptional case. If the witnesses sign a substitute will outside the presence of the testator, his signature must have been forged. If the witnesses are willing to perjure themselves concerning a testator's signature, they will undoubtedly have little difficulty in purporting that they signed the will in the testator's presence. If the requirement is not met and the execution is fraudu-

160. *See generally* T. ATKINSON, *supra* note 84, §§ 66-69.
161. ARIZ. REV. STAT. ANN. § 14-121 (1956).
162. *E.g.*, Nichols v. Rowan, 422 S.W.2d 21 (Tex. Civ. App. 1967).
163. *Compare* Earl v. Mundy, 227 S.W. 716 (Tex. Civ. App. 1921) (uninterrupted view of witnesses required, but not necessary that testator actually see them sign the will), *with In re* Will of Pridgen, 249 N.C. 509, 107 S.E.2d 160 (1959) (testator must be able to see the witnesses sign the will).
164. *In re* Lane's Estate, 265 Mich. 539, 251 N.W. 590 (1933) (witnesses signed will in hospital corridor some thirty feet from the testator's room).
165. *See* 2 W. BOWE & D. PARKER, *supra* note 137, at § 19.120.

lent, the fact that the witnesses signed outside the presence of the testator will likely not be discovered. Moreover, in most cases in which the test of presence is not met it results in the invalidation of a will executed without fraud. Since the requirement has little utility and carries with it the potential for generating litigation, it has been omitted from the Uniform Code.

Under Arizona law each attesting witness must be "credible" before his signature will satisfy the witness requirement. This means generally that at the date of execution the witness must meet the test of competency to testify in court.[166] The Code contains a similar provision requiring the witness to a will to be "generally competent to be a witness."[167]

Under the common law a devisee named in a will is an "interested" witness not competent to testify in court in connection with the probate of the will.[168] To avoid invalidation of the entire will when a devisee is a witness, Arizona provides that the gift to the witness is void, thereby making him disinterested and "credible."[169] The gift to the witness, however, is nevertheless valid if his testimony is corroborated by one disinterested witness.[170] Thus, practically speaking, the will is in most cases valid in its entirety when only one witness is a devisee. The Code provides that a will is not invalidated when signed by an interested witness.[171] Of course, the purpose of this change is not to encourage the use of interested witnesses, but to avoid automatic invalidation of a gift in the exceptional case in which the testimony of the interested witness cannot be corroborated by another. If the witness receives a substantial gift in the will, his testifying would itself be a suspicious circumstance which could lead to a challenge of the will based on the ground of undue influence.[172]

If several requirements are satisfied,[173] Arizona presently allows a person to dispose of his property by an oral will. The Code, however, does not recognize oral wills. Oral or nuncupative wills were

166. T. ATKINSON, *supra* note 84, § 65 at 310.
167. UNIFORM PROBATE CODE § 2-505(a).
168. J. WIGMORE ON EVIDENCE § 575 (3rd ed. 1940).
169. ARIZ. REV. STAT. ANN. § 14-122(A) (1956).
170. *Id.* § 14-122(C).
171. UNIFORM PROBATE CODE § 2-505(b).
172. *Id.*, Comment.
173. A person may dispose of his property orally if: he is competent to make a will; the testator's testamentary wishes are spoken during his last sickness; it is proved by three credible witnesses that the testator called on some person to take notice that such is his will, or words of like import; and the testimony is received by the court within 6 months of the testator's statement, or after 6 months only if the testimony or the substance thereof was reduced to writing within 6 days after the statement was made. ARIZ. REV. STAT. ANN. § 14-124 (1956). *See also id.* § 14-320, concerning the requirements for the probate of an oral will.

recognized in an era when most people could not read or write and when many had no access to legal services. Consequently, there does not appear to be any rational basis for the existence of oral wills in modern times; they are obsolete and should be abolished.[174] The use of a holographic will can be utilized for those who wish to dispense with the witnesses required for a formally executed will.[175]

A problem may arise in situations in which a testator executes his will in another state and then moves to or purchases realty in Arizona. If the will is probated in Arizona, the question arises whether the will must conform to the requirements for formal execution under local law. Presently, a will that does not meet these requirements is nevertheless valid if, at the time of execution, the execution was valid under the law of the testator's domicile or the place where the execution took place.[176] Before this more liberal provision becomes operative, however, it must be shown that the will was allowed and admitted to probate in another state or country.[177] Thus, if the testator does not own property in another state, his will cannot be probated elsewhere and, therefore, cannot be probated in Arizona unless its execution conforms to Arizona's formal requirements. The Code deletes the requirement that the will must first be probated elsewhere and expands the validating law to include the law of the place where the will was executed and where, at either the execution or at death, the testator is domiciled, has a place of abode or is a national.[178]

3. *Holographic Wills.* Both Arizona law[179] and the Uniform Probate Code[180] validate an unwitnessed will if it was written and signed in the handwriting of the testator. There is one significant difference between the two provisions: Arizona law requires the holograph to be "entirely" handwritten while the Code only requires "the material provisions" and the signature to be in the testator's handwriting.

When the statute requires the will to be entirely in the testator's hand, courts many times find the will valid even though it contains printed matter or writing by others. Applying an intent theory, some courts disregard the nonholographic matter if they find that the testator did not intend it as part of his will; other courts construe the statute more liberally and disregard the nonholographic writing and give effect to that portion of the will which is written in the testator's own

174. Rheinstein, *The Model Probate Code: A Critique,* 48 COLUM. L. REV. 534, 550 (1948).
175. *See* text & notes 179-84 *infra.*
176. ARIZ. REV. STAT. ANN. § 14-343 (1956).
177. *Id.*
178. UNIFORM PROBATE CODE § 2-506.
179. ARIZ. REV. STAT. ANN. § 14-123 (1956).
180. UNIFORM PROBATE CODE § 2-503.

handwriting.[181] The problem with both approaches is that in varying degrees they disregard the plain meaning of the statutory requirement.

The Code provision, which essentially adopts the more liberal of the aforementioned approaches, is preferable to the present requirement. Dispensing with the witness requirements for this type of will is allowed because the handwritten character of the will is a guarantee of its genuineness and lack of fraudulent execution. If the material provisions and the signature are in the testator's handwriting, the same protection against fraud is guaranteed.

Exceptions to Required Formalities

1. *Incorporation by Reference.* It is frequently convenient and a safeguard against error to refer to an existing document instead of reproducing its contents in the will. For example, the testator may wish to duplicate complicated trust provisions contained in an inter vivos trust or the will of another. Rather than repeat the provisions, his will may simply refer to them and provide that they shall govern the disposition of certain property. The majority of states permit the extrinsic writing to be incorporated into the will by reference, while others prohibit incorporation altogether.[182]

There is neither a statute nor a case in Arizona which recognizes the doctrine. The Uniform Probate Code, however, sanctions the doctrine, and its requirements are sufficiently liberal to permit its use in appropriate situations.[183] To qualify for incorporation, the extrinsic writing must be in existence when the will is executed and the language in the will must manifest the intent to incorporate and must describe the writing sufficiently to permit its identification.[184]

2. *Events of Independent Significance.* The Uniform Code provides that a will may dispose of property by reference to acts and events that have significance independent of their effect upon the will.[185] Reference to future acts of the testator or facts within his control (for example, "the automobile which I own at death"), to future acts or facts within the control of another (such as, "to the wife of my son if he marries"), including a beneficiary (for example, "to the person taking care of me at the time of my death"), does not

181. T. ATKINSON, *supra* note 84, § 75 at 357-59.
182. *Id.* at § 80; 2 W. BOWE & D. PARKER, *supra* note 137, at § 19.17.
183. UNIFORM PROBATE CODE § 2-510.
184. Some courts have applied a requirement, deleted in the Uniform Probate Code, that the will must refer to the extrinsic writing as one which is already in existence. *See, e.g.*, Keeler v. Merchants' Loan & Trust Co., 253 Ill. 528, 97 N.E. 1061 (1912) (held the will must refer to the writing as already in existence even when it was actually in existence and unambiguously identified).
185. UNIFORM PROBATE CODE § 2-512.

invalidate that portion of the will. In these cases it is necessary to look beyond the will to determine the property or beneficiary referred to in the will, the identity of which can be determined by the testator prior to his death or by another person. Since the acts have significance apart from their impact on the will, the statute permits reference to them.

Frequently a testator in his will makes reference to a list to be prepared in the future to govern the disposition of certain items of property. The majority of courts hold that the list cannot be probated.[186] The extrinsic writing does not qualify under the incorporation by reference doctrine since the list was not in existence on the date the will was executed. Nor can it be given effect under the doctrine of reference to acts of independent significance since the preparation of the list has no significance apart from the testamentary disposition of the testator's property.

Pursuant to its policy of effectuating a testator's intent and of relaxing formalities of execution, the Uniform Code permits the testator to refer in his will to an extrinsic document including one prepared subsequent to the execution of the will, disposing of items of tangible personalty.[187] The provision contains sufficient limitations to prevent the abuse of and to justify an exception to the general requirements for formal execution of a will. The exception is limited to the disposition of tangible personalty other than money, evidence of indebtedness, documents of title, securities, or property used in trade or business. The extrinsic writing must either be in the handwriting of the testator or signed by him and must describe the items of property and the donees with reasonable certainty. This limited exception validates the use of a list in the typical situation in which the testator itemizes personal effects and the persons whom he wishes to receive them.

3. *Testamentary Additions to Trusts.* A popular estate planning device is the use of a "pour-over" clause in a will directing that certain assets in the estate be added to the corpus of an existing trust, the terms of which are not reproduced in the will itself. Such directions generally can be given effect under the doctrines of incorporation by reference or reference to acts of independent significance. Specific situations, however, raise questions not clearly answered under the two doctrines. For example, if the doctrine of incorporation by reference

186. *See, e.g.*, Hastings v. Bridge, 86 N.H. 172, 164 A. 906 (1933); Hartwell v. Martin, 71 N.J. Eq. 157, 63 A. 754 (1906). *Contra,* Daniel v. Tyler's Executors, 296 Ky. 808, 178 S.W.2d 411 (1944).

187. UNIFORM PROBATE CODE § 2-513.

is relied upon to "pour-over" to a trust that can be amended and an amendment occurs subsequent to the execution of the will, the issue arises whether the amendment invalidates the "pour-over" or, if valid, whether the property will be governed by the trust terms effective when the will was executed or those in effect at the time of the testator's death. If the doctrine of reference to acts of independent significance is utilized, the question arises whether the "pour-over" is valid when the receptacle is an inter vivos trust with minimal assets such as an unfunded life insurance trust. It the "pour-over" is valid, the question remains whether the testamentary assets contained in the trust are subject to the statutory provisions relating to testamentary trusts.

To resolve these uncertainties both present Arizona law[188] and the Uniform Probate Code[189] adopt the Uniform Testamentary Additions to Trust Act. Under the Act the "pour-over" is valid if the trust is identified in the testator's will and its terms are set forth in a written trust instrument or in the valid last will of a person who predeceased the testator, either of which must have been executed before or concurrently with the execution of the testator's will. The devise is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will, and is valid regardless of the existence, size or character of the trust corpus. The assets are disposed of and administered according to the terms of the extrinsic writing in effect at the time of the testator's death and, if the will so provides, including any amendments to the trust made after the death of the testator. The property so devised is not deemed to be held under a testamentary trust, unless the will provides otherwise.

Revocation in Whole or In Part

1. *By the Testator.* Requirements for the revocation of a will by the testator are the same under Arizona law and the Uniform Probate Code, but the Code states expressly what, in some cases, has evolved through litigation under the Arizona statute. Generally, a testator may revoke a will either by physical act or by execution of a subsequent instrument. The Code allows revocation "by a subsequent will which revokes the prior will or part expressly or by inconsistency."[190] Under this provision, a holographic instrument can revoke a formally executed will. Although the Arizona statute requires

188. ARIZ. REV. STAT. ANN. § 14-141 (Supp. 1971-72).
189. UNIFORM PROBATE CODE § 2-511.
190. *Id.* § 2-507(1). A "will" is defined as including a codicil and "any testamentary instrument which merely . . . revokes or revises another will." *Id.* § 1-201 (48).

that the revoking instrument must be "executed with the same formalities as the will revoked,"[191] it has been held that a holographic will and one executed in the presence of attesting witnesses are of the same formality, and, therefore, one can revoke the other.[192] Both statutes leave to the court the determination of whether a subsequent will that has no express revocation clause is inconsistent with the prior will so as to revoke it in whole or in part.[193]

Under either statute a will may be revoked by physical act.[194] Under the Code, the act must be performed with the intent and for the purpose of revoking the will; the same is required by the Arizona statute as interpreted by Arizona case law.[195] The Uniform Code continues to leave to case law the determination of what constitutes the necessary physical act and whether the act was accompanied by the requisite intent.[196]

2. *By Divorce.* Many courts have taken the view that a divorce subsequent to the execution of the testator's will, particularly if accompanied by a property settlement, operates to revoke a provision in the will for a spouse.[197] Whether subsequent divorce would revoke provisions for the spouse is debatable under Arizona law, however.[198]

The Uniform Code provides that if the testator executes a will and subsequently the marriage ends in divorce or annulment, then the provisions for the spouse, including fiduciary appointments, are revoked and construed as if the spouse had predeceased the testator unless the will expressly provides otherwise.[199] This provision does not operate if at the time of the testator's death the spouses are separated but not

191. ARIZ. REV. STAT. ANN. § 14-126(1) (1956).
192. Estate of Morris, 15 Ariz. App. 378, 381, 488 P.2d 1015, 1018 (1971).
193. ARIZ. REV. STAT. ANN. § 14-126(1) (1956) (by implication); UNIFORM PROBATE CODE § 2-507, Comment. *See* T. ATKINSON, *supra* note 84, § 87 at 450-52.
194. ARIZ. REV. STAT. ANN. § 14-126(2) (1956) (requires "destruction, cancellation or obliteration" of the will or a part thereof); UNIFORM PROBATE CODE § 2-507(2) (a will or a part thereof may be revoked "by being burned, torn, canceled, obliterated or destroyed").
195. *In re* Welch's Estate, 60 Ariz. 215, 222, 134 P.2d 701, 704 (1943).
196. UNIFORM PROBATE CODE § 2-507, Comment. Extrinsic evidence, including statements of testator as to his intent, are admissible in determining whether the statutory requirements are satisfied. *In re* Welch's Estate, 60 Ariz. 215, 222, 134 P.2d 701, 704 (1943) (extrinsic evidence relating to physical act); Franklin v. Jacobs, 28 Ariz. 187, 203, 236 P. 694, 699 (1925) (evidence of declarations by testator).
197. The authorities, however, are divided. *See* T. ATKINSON, *supra* note 84, § 85 at 431-32; 2 W. BOWE & D. PARKER, *supra* note 137, at § 21.101.
198. ARIZ. REV. STAT. ANN. § 14-126 (1956), the basic revocation statute, makes no provision for revocation by operation of law. Moreover, Article 3 of the Wills Chapter is titled "Effect of Events Subsequent to Execution of Will" and nowhere includes divorce. Some courts, however, have implied an exception even in the face of similar statutory wording. *See* Luff v. Luff, 359 F.2d 235 (D.C. Cir. 1966).
199. UNIFORM PROBATE CODE § 2-508. Provisions that are revoked under this section are revived by testator's remarriage to the former spouse. *Id.*

divorced. Under another section of the Code, however, a complete property settlement entered into after or in anticipation of separation or divorce constitutes a renunciation of all benefits under a prior will, unless the settlement provides otherwise.[200]

These provisions seem clearly necessary to effectuate the intent of the ordinary testator. If a couple is divorced, the surviving ex-spouse will have already received a substantial portion of the marital property in connection with the divorce. For reasons that are apparent, the testator would not likely wish to benefit further the ex-spouse. If they have entered into a binding property settlement agreement in contemplation of divorce, the testator presumably would not intend additional property to pass to the surviving spouse at his or her death, unless specifically provided for in the property settlement agreement. Adoption of the Code would protect against the inadvertent failure to modify a will in these situations.

3. *By Homicide of Testator.* States have taken several different approaches, either by statute or case law, concerning the rights of an heir or devisee who intentionally kills the decedent.[201] Some courts hold that the killer's right of inheritance is not affected by the wrongful act, reasoning that a court cannot engraft an exception onto the provisions enacted by the legislature.[202] Other states hold that the killer forfeits his right to succession; some require conviction of homicide,[203] others do not.[204] A third view is that title passes to the killer, but he holds it upon constructive trust since equity will not allow a person to profit from his own wrong.[205]

In view of the diversity of approaches and results now possible absent a statute, a code should contain provisions that delineate the inheritance rights of the alleged murderer. The Uniform Probate Code provides that the intentional and felonious killing of a decedent forfeits the killer's rights to any benefits under the intestate succession statutes, by will or in joint tenancy property, with the exception of the killer's one-half interest in the joint tenancy property which existed prior to the decedent's death. Nor can he benefit as the named beneficiary of a bond, life insurance policy or other contractual arrangement where the decedent was the principal obligee or the person upon whose life the policy was issued.[206] A final judgment of con-

200. *Id.* § 2-204.
201. T. ATKINSON, *supra* note 84, § 37, at 153-56.
202. McAllister v. Fair, 72 Kan. 533, 84 P. 112 (1906).
203. *In re* Tarlo's Estate, 315 Pa. 321, 172 A. 139 (1934).
204. Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641 (1908).
205. *In re* Estate of Griswold, 13 Ariz. App. 218, 475 P.2d 508 (1970) (*semble*); Garner v. Phillips, 229 N.C. 160, 47 S.E. 2d 845 (1948).
206. UNIFORM PROBATE CODE § 2-803(a)-(c). Such a statute would not be un-

viction conclusively determines the issue adverse to the claimant, but a criminal conviction is not required. If a murder trial finding the alleged killer guilty were required, it would frustrate the policy of the law to prevent the acquisition of property through commission of a wrong. The killer may commit suicide, become insane, or avoid capture. In these circumstances, the inability to prosecute criminally should not preclude litigation of the issue in the probate court.

More troublesome is the case in which the alleged murderer is acquitted in a criminal trial. The Code allows the issue to be relitigated in the probate court for purposes of determining inheritance and other rights in the decedent's property.[207] Thus, a person acquitted of the murder charge might be barred from taking property through the probate process. This would not seem objectionable, however, because different considerations as well as a different burden of proof[208] enter into a finding of guilt in the criminal proceeding. Analogies exist in other fields—a defendant may be acquitted on a criminal charge of assault and battery, but later be held liable in a tort action based on the same facts.

Revival of Revoked Wills

There are several methods by which a previously revoked will can be revived. The will can be redrafted and executed with the proper formalities; the revoked will can be reexecuted with a re-signing by the testator and the witnesses; or it may be revived if still in existence, by the execution of a codicil which incorporates the revoked will by reference. A fourth possible method is revocation of the revoking instrument. This possibility develops where the testator executes a second will which revokes the first will either expressly or by inconsistency, and still later revokes the second will and preserves the first will. Thus, the question arises whether the revocation of the second will operates to revive the first.

With respect to this question, "[u]pon no subject relating to the law of wills are the authorities in such hopeless and irreconcilable conflict."[209] Some courts adopt the rule that the revocation of the second will automatically revives the first will.[210] The rationale of this view

constitutional by reason of ARIZ. CONST. art. II, § 16, which prohibits "corruption of blood, or forfeiture of estate." *See* Annot., 6 A.L.R. 1408 (1920).

207. UNIFORM PROBATE CODE § 2-803(e). No problem of double jeopardy exists in this situation under Ariz. Const. art. II, § 10. *See* Miranda v. Beaman, 95 Ariz. 388, 391-92, 391 P.2d 555, 557 (1964).

208. "Preponderance of evidence" is used as the burden of proof in the probate proceeding. UNIFORM PROBATE CODE § 2-803(e).

209. Blackett v. Ziegler, 153 Iowa 344, 349, 133 N.W. 901, 903 (1911).

210. *E.g.*, Whitehill v. Halbing, 98 Conn. 21, 118 A. 454 (1922); Kollock v. Williams, 131 S.C. 352, 127 S.E. 444 (1925).

is that the second will would not have become effective until the testator's death at which time it would revoke the first will; hence, its revocation prior to testator's death leaves unimpaired the effectiveness of the first will. Although the rule is logical in application, the result is probably not in accord with the intentions of the average testator.[211] A second position is that the revocation of the second will does not revive the first will under any circumstances.[212] This view thwarts the testator who in fact intended to revive the first will by revocation of the second. A third view, adopted by the Uniform Probate Code,[213] conditions revival upon the intention of the testator. Revocation of the first will is presumed unless the evidence proves otherwise. If the revocation of the second will was accomplished by physical act, extrinsic evidence of the circumstances surrounding the revocation of the second will and the testator's contemporary or subsequent statements relating to his intent to revive the first will are admissible.[214] If the second will is revoked by a third testamentary document, however, the intent to revive the first will must appear from the terms of the revoking instrument.

In light of the absence of statutory or case law on this point in Arizona, there is no established rule to be followed. The Code provision embodies the most realistic and workable approach. It presumes that revival was not intended, which probably reflects the actual intent of the testator in most cases, but if it can be proven that the testator in fact intended revival, his intent should and will be given effect.

RULES OF CONSTRUCTION AND INTENTION

The meaning of a will provision is determined by the process of interpretation and construction. Interpretation is the process of discovering from permissible data the meaning or intention of the testator, as expressed in his will. Both the Uniform Probate Code[215] and Arizona cases[216] provide that if interpretation discloses a clear and full intention on the part of the testator, further inquiry is not necessary.

---

211. 2 W. BOWE & D. PARKER, *supra* note 137, at § 21.54.
212. *E.g.*, Danley v. Jefferson, 150 Mich. 590, 114 N.W. 470 (1908); Brackenridge v. Roberts, 114 Tex. 418, 267 S.W. 244 (1924) (statute).
213. UNIFORM PROBATE CODE § 2-509.
214. *Id.* Since the same type of evidence is admissible to prove the testator's intent to revoke the second will, *see* notes 194-96 *supra*, it should be admissible to prove his intent to revive the first will.
215. UNIFORM PROBATE CODE § 2-603.
216. *See, e.g.*, Franklin v. Jacobs, 28 Ariz. 187, 203, 236 P. 694, 699 (1925); *In re* Tyrrell's Estate, 17 Ariz. 418, 422, 153 P. 767, 768 (1915); La Tourette v. La Tourette, 15 Ariz. 200, 208, 137 P. 426, 429 (1914). *See also* T. ATKINSON, *supra* note 84, at § 146; 4 W. BOWE & D. PARKER, *supra* note 137, at § 30.3.

If the testator formed no actual intention on the point in dispute, or if a lack of admissible evidence makes it necessary to proceed as if no actual intent existed, the court may resort to rules of construction. In applying these rules, the court is seeking to assign intention to the words used by the testator; it is not seeking the testator's actual intention, since it has already failed to find this. The Code supplies several rules of construction which apply unless a contrary intention is indicated by the will.[217]

As a prelude to specific provisions, it is useful to note examples of the simplified language employed by the Uniform Code. Instead of distinguishing between legacies, bequests, and devises,[218] one term—devise—is used to describe disposition by will of all property, real or personal.[219] Similarly, a person designated to receive such property is a devisee;[220] those who have actually received property under the will or by statute are distributees.[221]

The Will Passes All Property

The Uniform Code provides that "[a] will is construed to pass all property which the testator owns at death including property acquired after the execution of the will."[222] This provision embraces several rules. It adopts a presumption against intestacy; it allows a will to pass after-acquired realty; and it requires a devise of realty to be construed to pass a fee simple if that was the testator's interest, rather than requiring an expression of intent to pass the fee. Except for the presumption of a fee simple devise,[223] these rules of construction are not presently codified in Arizona.

Failure of Testamentary Disposition

If a devisee under the will predeceases the testator and an alternative disposition is not specified in the will, a rule of construction must be utilized to determine the recipient of the property. If the lapsed gift is not of the residue and an alternative disposition is not specified in the will, the Code adopts the uniformly followed rule of construction that the lapsed gift passes by the residuary clause.[224] Such a provision would appear to reflect the testator's probable intent—he would

217. UNIFORM PROBATE CODE § 2-603.
218. *Cf.* ARIZ. REV. STAT. ANN. §§ 14-479, -540, -652(A) (1956).
219. UNIFORM PROBATE CODE § 1-201(7).
220. *Id.* § 1-201(8).
221. *Id.* § 1-201(10).
222. *Id.* § 2-604.
223. ARIZ. REV. STAT. ANN. § 33-432 (1956).
224. UNIFORM PROBATE CODE § 2-606(a).

rather have the residuary devisees receive the property than have it pass by intestacy. If one of several residuary devisees predeceases the testator, the orthodox view is that the property passes by intestacy rather than to the surviving devisees.[225] The Code,[226] reflecting the modern trend and the result that has been reached under Arizona case law,[227] presumes that the testator wishes the surviving residuary devisee or devisees to take under the will rather than have the property pass by intestacy.

Anti-Lapse Statute

Both the Uniform Code[228] and Arizona by statute[229] provide that if a devisee within a specified class of persons predeceases the testator, the devise passes to the descendants of the predeceased devisee rather than to the residuary beneficiaries. The Code would broaden Arizona law and eliminate potential construction problems in the Arizona statute. Arizona now limits the anti-lapse provision to gifts to a member of the class consisting of testator's children and other lineal descendants. The Code, however, applies to gifts to a grandparent or a lineal descendant of a grandparent, such as a brother, an aunt or a cousin. If a testator leaves property by will to a child who predeceases the testator, the Arizona statute supplies a presumption that the testator would intend the deceased child's descendants to take his share. There would appear to be no reason for assuming that the average testator would not wish the same result to occur where the predeceased devisee is a close relative. The intestate succession statutes, designed to reflect the intent of the average decedent, allow descendants of a predeceased class member to take their parent's share.[230] This applies to all relatives, not just the descendants of the intestate. A similar provision should apply where the decedent leaves a will.

The Code expressly states that the anti-lapse provision applies to a class gift.[231] For example, if the testator leaves the residue of his estate "in equal shares to my children" and one child predeceasing the testator leaves surviving issue, the issue take their parent's share. If the problem is not expressly covered by statute, some courts hold the anti-lapse provision inapplicable to a class gift on either of two theo-

225. T. ATKINSON, *supra* note 84, § 140 at 784; 4 W. BOWE & D. PARKER, *supra* note 137, at § 33.56.
226. UNIFORM PROBATE CODE § 2-606(b).
227. *In re* Estate of Jackson, 106 Ariz. 82, 471 P.2d 278 (1970).
228. UNIFORM PROBATE CODE § 2-605.
229. ARIZ. REV. STAT. ANN. § 14-133 (1956).
230. *See* text & notes 44-51 *supra.*
231. UNIFORM PROBATE CODE § 2-605.

ries: one, that the testator intended only those persons to take who answered the class description at the date of his death, following the rule of construction that the members of the class are ascertained at the testator's death; or two, that there is technically no lapse since the share the deceased member would have taken goes to the surviving class members.[232] The Code approach seems preferable. There is no reason why the probable intent of the testator would be different in the class gift situation. If the statute is inapplicable, it would result in an unequal distribution of the testator's property among the objects of his affection. Adoption of the Code in Arizona would favorably resolve this issue, which has recently caused litigation in several other jurisdictions.[233]

The Arizona statute contains other ambiguities. It does not mention the intent of the testator and would seem applicable even though the testator clearly expressed a contrary intent. Under the Code the testator's intent controls.[234] Moreover, it is not clear whether the Arizona statute applies when a beneficiary under the will has died before the will is executed. Since the gift technically is viewed to be void rather than lapsed and the statute speaks only of "lapse," it might be interpreted as inapplicable in this situation.[235] The Code provision, however, applies when the beneficiary "is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator."[236]

Nonademption

If the testator's will contains a gift of specific property and the asset is not owned by the testator at death, courts generally hold that the gift is adeemed by extinction.[237] The orthodox position has been that the testator's intention should not be considered when ademption by extinction is at issue;[238] the only inquiry is whether the property is part of the estate. If it is not, the gift is adeemed and the devisee receives nothing. The courts have not applied the doctrine without difficulty, however, since many times its application defeats a gift in con-

232. *See* Casner, *Class Gifts—Effect of a Failure of Class Member to Survive the Testator*, 60 HARV. L. REV. 751 (1947).
233. *See* T. ATKINSON, *supra* note 84, at § 140; 4 W. BOWE & D. PARKER, *supra* note 137, at § 35.15; L. SIMES & A. SMITH, LAW OF FUTURE INTERESTS § 661 (1956).
234. UNIFORM PROBATE CODE § 2-603.
235. *E.g., In re* Estate of Matthews, 176 Cal. 576, 169 P. 233 (1917); Moss v. Helsley, 60 Tex. 426 (1883).
236. UNIFORM PROBATE CODE § 2-605.
237. *See* T. ATKINSON, *supra* note 84, at § 134.
238. *See, e.g.*, Lang v. Vaughn, 137 Ga. 671, 74 S.E. 270 (1912); Elwyn v. De Garmendia, 148 Md. 109, 128 A. 913 (1925); Moffatt v. Heon, 242 Mass. 201, 136 N.E. 123 (1922); Welch v. Welch, 147 Miss. 728, 113 So. 197 (1927).

travention of the probable desires of the testator. For this reason, some courts have held the doctrine inapplicable under circumstances in which the testator probably would not wish the gift to fail.[239] The Uniform Probate Code codifies these exceptions and specifies the assets the devisee is to receive.[240]

Modern changes in security distributions such as stock dividends and stock splits and changes in corporate structure in the form of mergers and consolidations have created serious problems in situations in which a testator makes a specific gift of stocks or bonds and a change in the composition of his holdings occurs between the execution of his will and his death. Most courts hold that there is no ademption if it is shown that there has been a mere change in the form of the property described in the gift.[241] Adopting this exception, the Code provides[242] that the devisee receives the devised securities that are in the testator's estate and additional or other "securities"[243] of the *same* entity owned by the testator by reason of action initiated by the entity, as well as securities of *another* entity owned by the testator as a result of a merger, consolidation, reorganization or other similar action initiated by the first entity. Similarly, additional securities in a regulated investment company acquired by the testator as a result of a plan of reinvestment go to the specific devisee of the stock. Any other distributions in connection with a specifically devised security prior to the testator's death are not included in the specific gift.

Operation of the section is illustrated by the situation in which the testator's will includes a devise of "my 300 shares of *XYZ* common stock." If the entity declares a stock dividend in its own preferred stock and the testator has the additional preferred shares at his death, they will pass to the devisee along with those shares of common stock still held by the testator at death. Were the entity to issue stock options and the testator to purchase additional shares of common

239. *See, e.g., In re* Elliott's Estate, 174 Kan. 252, 255 P.2d 645 (1933); Walsh v. Gillespie, 338 Mass. 278, 154 N.E.2d 906 (1959).

240. UNIFORM PROBATE CODE §§ 2-607, -608.

241. *E.g., In re* Frahm's Estate, 120 Iowa 85, 94 N.W. 444 (1903); Goode v. Reynolds, 208 Ky. 441, 271 S.W. 600 (1925); Gorham v. Chodwick, 135 Me. 479, 200 A. 500 (1938). *See* Note, *Ademption by Extinction: The Form and Substance Test*, 39 VA. L. REV. 1085 (1953).

242. UNIFORM PROBATE CODE § 2-607.

243. Securities include "any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing." *Id.* § 1-201(37).

stock, those shares would not pass to the specific devisee since they were not acquired by action initiated by the entity. If the company is merged with a conglomerate and the testator's shares are exchanged for stock in the conglomerate, the devisee will get the new shares that the testator holds at death. Finally, a cash dividend declared and paid before the testator's death would not go to the specific devisee. Although there is a growing body of case law bearing on these problems, the cases are not in agreement and litigation is inevitable in a state such as Arizona where there is no authoritative ruling.[244]

The "change in form only" exception has not been applied by the courts when property *other* than securities is involved. If the circumstances in those cases clearly rebut the inference that the testator intended an ademption, however, some courts hold that the specific gift does not adeem.[245] The Code provides for nonademption in situations where the results reflect the probable wishes of the testator. If the devised asset is eliminated from the testator's estate at a time when he cannot alter his will, the gift should not adeem since it can be presumed that the testator still wishes to benefit the devisee in his will. In those cases in which the testator's property is being managed by a conservator, the Code provides that a sale of the property by the conservator or receipt by the conservator of a condemnation award or insurance proceeds as the result of a condemnation, fire or casualty gives the specific devisee a right to a general pecuniary devise equal to the net sale price, the condemnation award or the insurance proceeds.[246] This reflects the result reached by most courts which have considered the issue.[247]

In cases where a specifically devised asset is involuntarily removed from the testator's estate at or shortly before his death, it is reasonable to assume that the testator did not intend an ademption of the specific gift. On the other hand, if the testator has a reasonable time to amend his will after the asset has been removed from his estate, it can be assumed that the failure to act indicates an intent to have the devise fail. The Code[248] allows the specific devisee to receive unpaid amounts of a condemnation award for the taking of the property or unpaid proceeds from fire or casualty insurance on the

244. For a discussion of these problems, see Paulus, *Special and General Legacies of Securities—Whither Testator's Intent*, 43 IOWA L. REV. 467 (1958).

245. *See* Paulus, *Ademption by Extinction: Smiting Lord Thurlow's Ghost*, 2 TEX. TECH. L. REV. 195, 201 (1971).

246. UNIFORM PROBATE CODE § 2-608(a).

247. *See, e.g.*, Our Lady of Lourdes v. Vanator, 91 Idaho 407, 422 P.2d 74 (1967); Lewis v. Hill, 387 Ill. 542, 56 N.E.2d 619 (1944); Walsh v. Gillespie, 338 Mass. 278, 154 N.E.2d 906 (1959).

248. UNIFORM PROBATE CODE § 2-608(b)(2), (3).

property. If the testator dies before receipt of the condemnation award or insurance proceeds, the specific devisee receives the payment. If the testator dies after receipt, the specific gift adeems.

If the testator voluntarily sells a specifically devised asset prior to his death it seems clear that he does not intend for the specific devisee to receive the asset. But what if the testator at death owns a contract right, secured or unsecured, for future payments from the buyer? Possibly the testator would wish the devisee to receive the contract right in lieu of the property. On the other hand, the buyer has possession of the property and either has the title or an enforceable right to acquire title. The testator may feel he no longer has any real interest in the property and that his gift of that property is no longer effective. The Code resolves the question of the testator's intent in favor of the devisee by providing that any balance of the purchase price remaining to be paid by the buyer, together with any security interest in the property, goes to the specific devisee.[249]

Nonexoneration

At common law if real or personal property is specifically devised and the will does not indicate a contrary intent, the personal representative has a duty to satisfy any lien against the property out of intestate or residuary property if the lien secures a personal debt of the testator.[250] This right of the specific devisee is called exoneration. The Uniform Probate Code reverses the presumption regarding the testator's intent; there is no right of exoneration unless the will expresses an intent that the devisees take free of any lien.[251]

The Code approach seems preferable in those situations in which there is a lien on the property at the time the will is executed. There is a strong implication that the testator was contemplating the property as it then existed subject to the lien and, therefore, the presumption should be against exoneration. If the testator devises property which he owns free of a lien at the time he executes his will and later creates a security interest in the property, however, it is much more likely that he wants the specific devisee to take the property unencumbered. This is particularly true where he pledges or mortgages property to secure a loan, the proceeds of which swell the residuary estate. It

249. *Id.* § 2-608(b)(1). Also, if the testator's will specifically devises an obligation and prior to his death the testator obtains the property through foreclosure, the devisee receives the property in lieu of the obligation. *Id.* § 2-608(b)(4).

250. *See* T. ATKINSON, *supra* note 84, at § 137; W. BOWE & D. PARKER, *supra* note 103, at § 52.16. Arizona recognizes the doctrine of exoneration. Hill v. Hill, 37 Ariz. 406, 294 P. 831 (1931).

251. UNIFORM PROBATE CODE § 2-609.

would be a simple matter to modify the Code provision to reflect the differing probable intents in these two situations.

Exercise of a Power of Appointment

A number of states have recently adopted comprehensive legislation dealing with powers of appointment. Since there are indications that more states will follow, the Uniform Probate Code has generally avoided provisions relating to these powers.[252] There is one issue, however, that is frequently litigated and in great need of uniformity of result: Does a will purporting to dispose of all of the testator's property exercise a power of appointment? Consider, for example, whether a residuary gift of the "rest, residue and remainder of my estate, real, personal or mixed" manifests an intent to exercise the power.[253]

The Code takes the position that general language of this type is not sufficent to exercise a power of appointment.[254] The donor of the power has deliberately withheld from the donee-testator outright ownership of the property subject to the power and presumably the donor wants the property to pass under *his* estate plan unless the testator specifically and deliberately decides to alter the plan by exercise of the power. Hence, the will of the testator should be more explicit if it is to constitute an exercise. Moreover, the power typically is one over assets in a trust created by another. The testator does not think of the trust assets as "his property" even though he has a power to appoint the trust assets.[255] Thus, the intent of the testator is probably not to exercise a power of appointment by the use of a general will clause disposing of all his property.

Questions of Status

If a will contains class-gift terminology, a question of construction may be raised concerning inclusion within the class of persons with a special status. The Code generally provides that half bloods, adopted persons and persons born out of wedlock are included in a class gift

252. *Id.* § 2-610, Comment.

253. For a discussion of this problem, see 1 AMERICAN LAW OF PROPERTY, *supra* note 103, at § 23.40; L. SIMES & A. SMITH, *supra* note 233, at § 973; W. BOWE & D. PARKER, *supra* note 103, at § 45.21.

254. UNIFORM PROBATE CODE § 2-610.

255. It should be noted that a will may manifest an intent to exercise a power under the Code without expressly saying so. If specific reference is not made to the power, it will nevertheless be exercised if "there is some other indication of intention to include the property subject to the power." *Id.* For example, if the testator executes a will which obviously purports to dispose of more than the assets he owns, he must be thinking of the appointive assets, and the will would be an effective exercise of the power. This result would be clear if the testator, although not making specific reference to the power, makes specific reference to the assets subject to the power.

in accordance with rules for determining relationships under the intestate succession provisions.[256]

The question of whether an adopted child is included in a class gift has generated a large volume of litigation; the courts are divided on the question, although the trend is to include adopted persons within the class.[257] Unless the will contains a definition limiting the gift to blood descendants, the adopted child will take under the Code. Such a presumption in favor of the adopted child seems preferable since it undoubtedly reflects the wishes of the usual testator and parallels the legislative policy treating the adopted child as a natural child for purposes of intestate succession. The Code thus complements existing Arizona law.[258]

A child born out of wedlock is qualifiedly treated by the Code as a natural child—the child will always be included in a gift to "children" of the mother, but the same child will only be included in a gift to "children" of the father if the illegitimate can establish paternity and the father "openly and notoriously" treats the child as his own.[259] Presumably, the latter is required to increase the likelihood that the testator will be aware of the illegitimate child and will be able to specifically exclude him from the class if he so desires.

Satisfaction

The issue of satisfaction deals with the following situation: the testator executes a will devising $10,000 to his daughter and subsequently gives her $5,000 to help her husband get started in business. Did the testator intend to make the gift in addition to his testamentary plan, or did he want the $5,000 deducted from the $10,000 devise when he died? Under the present law in most jurisdictions it would be presumed that the testator intended the latter—ademption by satisfaction—where the testator stood in loco parentis to the devisee, but not where the gift was to someone with whom such a relationship did not exist.[260] The doctrine of satisfaction reflects the same policy against double portions which underlies the doctrine of advancement in the intestacy area. The Uniform Probate Code[261] provision paral-

256. *Id.* § 2-611.

257. *See, e.g., In re* Estate of Coe, 42 N.J. 485, 201 A.2d 571 (1964); *In re* Estate of Park, 15 N.Y.2d 413, 207 N.E.2d 859, 260 N.Y.S.2d 169 (1965); *In re* Estate of Adler, 30 Wis. 2d 250, 140 N.W.2d 219 (1966); Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971 (1965) (an excellent dission).

258. ARIZ. REV. STAT. ANN. § 8-117 (Supp. 1971-72); *see* text & notes 52-59 *supra.*

259. UNIFORM PROBATE CODE §§ 2-109(2), -611; *see* text & notes 60-69 *supra.*

260. *See* T. ATKINSON, *supra* note 84, at § 133; 6 W. BOWE & D. PARKER, *supra* note 137, at §§ 54.21 *et seq.*

261. UNIFORM PROBATE CODE § 2-612.

lels the section on advancements by requiring written evidence of an intent that lifetime gifts are to be taken into account in distribution of the estate.[262]

MISCELLANEOUS PROVISIONS RELATING TO WILLS

Self-Proved Will

Before a will can be probated, Arizona law requires proof that the will was executed with the requisite formalities.[263] The testimony of a subscribing witness is necessary if it can be obtained; otherwise the will can be admitted to probate upon the testimony of any other witness.[264] Under the Uniform Code, if evidence concerning execution of the will is necessary, the testimony or affidavit of an attesting witness is required if available; if not available, execution may be proven by other evidence or by affidavit.[265]

To facilitate the probate of a will, the Code introduces a unique provision—the self-proved will.[266] If the will offered for probate is accompanied by a notarized acknowledgement by the testator and affidavits by the witnesses that the requisite formalities were complied with at the date of execution, compliance with signature requirements is conclusively presumed and there arises a rebuttable presumption that the other requirements of execution were satisfied, without the testimony of any witness.[267] The conclusive presumption would foreclose only questions relating to the signing of the will. Proof of fraud or forgery would not be precluded, nor would other grounds for probate contest, such as undue influence or lack of testamentary capacity.

Survivorship Requirement

The Uniform Probate Code, in the portion thereof dealing with intestate succession, requires an heir to outlive the testator by 5 days before he will be treated as having survived the testator.[268] The section on wills contains a similar provision that treats a devisee who does not survive the testator by 5 days as if he had predeceased the testator, unless the will provides for a different survivorship requirement or contains language dealing with simultaneous deaths or deaths in a common disaster.[269] This provision will prevent multiple probate

262. *See* text & notes 97-102 *supra.*
263. ARIZ. REV. STAT. ANN. § 14-318(A) (1956).
264. *Id.* §§ 14-318(B)-(C), -355(A).
265. UNIFORM PROBATE CODE §§ 3-405, -406(a).
266. *Id.* § 2-504.
267. *Id.* § 3-406(b).
268. *See* text & notes 89-93 *supra.*
269. UNIFORM PROBATE CODE § 2-601.

of the same property when both the testator and the devisee die simultaneously or within 5 days of each other.

One situation exists in which the application of the survivorship requirement may not be desirable. If one spouse owns substantial separate property and the other does not, a transfer at death from the one spouse to the other of separate property that qualifies for the marital deduction may result in a substantial estate tax savings. Before the marital deduction is available, there must be a surviving spouse.[270] When the estate tax savings exceed the cost of a double probate of the property, wills commonly provide that if the spouses die simultaneously the spouse with substantial separate property shall be treated as predecreasing the other spouse, thus making the other spouse the survivor.[271] The Code survivorship requirement is not applicable when this or a similar clause is contained in the will and, therefore, it will not result in the loss of the tax savings otherwise available.

Choice of Law

Traditional conflict of laws rules require application of the law of the testator's domicile at death as to a devise of personal property.[272] When a court is called upon to interpret a will to discover the meaning of certain provisions, or to construe a will to assign a meaning, reference to the testator's choice of a body of law is one method of determining his intent. Hence, some modern authors would permit a testator to choose the applicable law even in the absence of an authorizing statute.[273] The Code not only expressly authorizes a testator to designate the law to be applied in the interpretation and construction of his will provisions, but goes further by also permitting him to choose the law that is to determine the legal effect of those provisions, provided it does not contravene local public policy.[274]

An owner of wealth can achieve his own choice of law by creating a revocable living trust of personalty in the state whose law he

270. INT. REV. CODE OF 1954, § 2056(a).

271. If the order of deaths cannot be established by proof, a presumption provided in the will that decedent was survived by his spouse, if effective under local law, will be followed for tax purposes. Treas. Reg. § 20.2056(e)-2(e) (1954). In Arizona the will provision will be given effect. ARIZ. REV. STAT. ANN. § 14-226 (Supp. 1971-72).

272. *See* H. GOODRICH, CONFLICT OF LAWS §§ 166, 167 (4th ed. 1964); R. LEFLAR, AMERICAN CONFLICTS LAW § 198 (1968); G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 380 (1963).

273. RESTATEMENT (SECOND) OF CONFLICTS §§ 240, 264 (Prop. Off. Draft 1969). *See also* Will of Risher, 227 Wis. 104, 277 N.W. 160 (1938); *In re* Ryan's Estate, 178 Misc. 1007, 36 N.Y.S.2d 1008 (Surr. Ct. 1942), *aff'd*, 265 App. Div. 1051, 41 N.Y.S.2d 196 (1943).

274. UNIFORM PROBATE CODE § 2-602.

wishes applied.[275] Hence, it is arguable that he should be permitted to do the same by a provision in his will. The objection to this as to real property has been that it introduces uncertainty with respect to titles and also imposes on the local court the burden of applying a foreign law. Concern over title problems seems unrealistic, however. If an issue concerning the meaning of a devise of land is involved, title examiners generally insist on a court construction. Courts have accepted the burden of applying foreign law in other situations, such as in the circumstance in which the will devises an interest in land "to my heirs according to the law of" a specified state.[276]

Contracts Concerning Succession

The Arizona Statute of Frauds provides that an agreement to devise property or to make provisions for any persons by will is unenforceable unless there is a written memorandum of the agreement signed by the testator.[277] The Uniform Probate Code contains a similar provision which requires that either the will must set forth the material provisions of the contract, or it must make specific reference to the contract with the terms of the contract proven by extrinsic evidence, or there must be a separate writing signed by the decedent evidencing the contract.[278]

Whether adoption of the Code would change Arizona law depends upon how strictly the courts would follow the existing requirements of the Statute of Frauds[279] as compared to the manner in which they would enforce the provisions of the Code. For years courts have struggled against statutory requirements that contracts be put in writing to be enforced, particularly when confronted with hardship cases.

275. *See, e.g.*, National Shawmut Bank v. Cumming, 325 Mass. 457, 91 N.E.2d 337 (1950). *See also* Hanson v. Denckla, 357 U.S. 235 (1958) (if neither the trustee nor trust property is located in a state, a decision by the state court that the trust is a testamentary disposition is not entitled to full faith and credit in the state where the trustee and trust property were located).

276. Note that UNIFORM PROBATE CODE § 2-602 does not relate to the validity of the will itself (whether it is validly executed, has been revoked, etc.) as distinguished from the validity of its provisions.

277. ARIZ. REV. STAT. ANN. § 44-101 (1967).

278. UNIFORM PROBATE CODE § 2-701.

279. The cases dealing with ARIZ. REV. STAT. ANN. § 44-101 (1967) are not in agreement as to how strictly the court follows the statute. In Evans v. Mason, 82 Ariz. 40, 44, 308 P.2d 245, 248 (1957), the court stated that part performance based on an oral contract to will property cannot take the case out of the statute. But in two earlier cases not mentioned in *Evans*, the court invoked the doctrine of part performance in order to enforce the oral agreement. Remele v. Hamilton, 78 Ariz. 45, 48, 275 P.2d 403, 406 (1954); *In re* Gary's Estate, 69 Ariz. 228, 235, 211 P.2d 815, 820 (1949). Under both the Arizona statute and the Uniform Probate Code recovery in quantum meruit is allowed for the reasonable value of services or other consideration furnished in exchange for an oral promise to compensate by will. *See* Evans v. Mason, 82 Ariz. 40, 45, 308 P.2d 245, 248 (1957).

They have traditionally used the equitable doctrines of part performance and estoppel to avoid the harsh impact of the statute.[280] There is no guarantee that courts will not invoke the same doctrines or some variant thereof under the Uniform Probate Code, even though the intent was to completely extinguish any recovery on oral contracts.

Although it can be argued that a statutory prohibition against oral contracts to will property is unsound as a matter of policy,[281] it seems preferable to require a writing. Persons entering into a contract providing for the disposition of their property at death are unlikely to realize the legal consequences that may result. For example, such contracts if valid usually are construed to restrain inter vivos transfers by the promisor if he survives the promisee, and thus in practical effect he loses his fee simple title to the property and becomes a mere life tenant.[282] Since the contract may cause unintended and undesirable consequences, it may be best to impose a writing requirement that will promote the use of counsel who can give legal advise as to the effects of the contract prior to its execution.[283]

Renunciation of Succession

The Uniform Probate Code allows an intestate heir or a devisee under a will to renounce in whole or in part his rights of inheritance.[284] The interest renounced passes as if the person renouncing had predeceased the decedent. In the case of intestate property, the heirs who would be next in line of succession would take. Often this will be the issue of the renouncing heir, who would take by representation. The same rule is adopted for renunciation by a devisee—the property passes under the will as if the devisee had predeceased the testator.

Renunciation is significant in many instances of postmortem estate planning.[285] Important tax benefits can result from a timely renunciation under local law.[286] Absent a statute providing for the contrary, a devisee can renounce a gift in a will, but an heir cannot renounce his intestate share.[287] In terms of policy, this distinction is

280. *See generally* Schnebly, *Contracts to Make Testamentary Dispositions as Affected by the Statute of Frauds,* 24 MICH. L. REV. 749 (1926).
281. *See* 7 U.C.L.A.L. REV. 132 (1960).
282. Ankeny v. Lieuallen, 169 Ore. 206, 113 P.2d 1113 (1941).
283. Fratcher, *Toward Uniform Succession Legislation,* 41 N.Y.U.L. REV. 1037 (1966).
284. UNIFORM PROBATE CODE § 2-801.
285. *See* Note, *Disclaimers as a Post-Mortem Estate Planning Device,* 37 U. CINN. L. REV. 567 (1968).
286. *See* C. LOWNDES & R. KRAMER, FEDERAL ESTATE AND GIFT TAXES 62-63, 360-62 (2d ed. 1962).
287. T. ATKINSON, *supra* note 84, § 139 at 775-76.

untenable. Tax consequences should not differ depending upon whether the person renouncing is a devisee under a will or an intestate heir. The Code allows renunciation in both cases.[288]

Effect of Divorce, Annulment or Decree of Separation

A person acquires certain rights under the Uniform Probate Code by reason of being "a surviving spouse." The surviving spouse is an heir if the decedent dies intestate, has a right to an intestate share if married to the testator after drafting of his will and he or she is unintentionally omitted, and also has a right to a homestead allowance, exempt property and a family allowance.[289]

Under the Code a person who is divorced from the decedent or whose marriage to the decedent is annulled is not a surviving spouse, unless they are later remarried and the spouse is married to the decedent at the time of the latter's death.[290] Additionally, the Code provides that a person is not a surviving spouse in some of the borderline cases in which the divorce may not be recognized as valid in Arizona.[291] The Arizona courts would likely reach the same result by application of the doctrine of estoppel.[292] Hence, the Code provisions probably would not alter existing Arizona law.

Deposit of Will With Court in Testator's Lifetime—Duty of Custodian of Wills

Under present practice in Arizona, for which there is no authorizing statute, a testator is allowed to deposit his will with the court for safekeeping during his lifetime. Adoption of the Code would officially recognize this practice and would also guarantee that the contents of the will would be kept confidential.[293] The Code allows

288. There are other important matters covered by the Code provision including: (1) the method for renouncing (a written instrument); (2) the information that the renunciation must contain; (3) the time limitation within which the renunciation must be submitted to the court; (4) events which bar the rights to renounce. UNIFORM PROBATE CODE § 2-801.

289. UNIFORM PROBATE CODE §§ 2-102 (intestate succession), 2-301 (unintentionally omitted from testator's will), 2-401 (homestead allowance), 2-402 (exempt property), 2-403 (family allowance).

290. *Id.* § 2-802(a).

291. The spouses are treated as divorced if the survivor obtains a judgment of divorce from the decedent or an annulment of the marriage which is not recognized as valid in this state, unless they subsequently remarried or lived together as husband and wife; if the decedent obtained a judgment of divorce or annulment and the survivor subsequently participated in a marriage ceremony with a third person; or if the survivor was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights. *Id.* § 2-802(b).

292. *See* Unruh v. Industrial Comm'n, 81 Ariz. 118, 301 P.2d 1029 (1956) (workmen's compensation case).

293. UNIFORM PROBATE CODE § 2-901.

the will to be delivered only to the testator during his lifetime, or to a person authorized in a writing signed by the testator to receive the will. If there is a conservator appointed during the testator's lifetime to manage his property, the conservator may examine the will. Knowledge by the conservator of the incompetent's estate plan may be necessary in deciding the advisability of a sale of the incompetent's property.

Both the Arizona statutes[294] and the Uniform Probate Code[295] impose a duty upon the person having custody of a decedent's will to deliver it to a court or some other designated person. Adoption of the Code would make only a slight change in Arizona law. The Arizona statute requires delivery to the executor named in the will or the court having jurisdiction over the testator's estate; while the Code would allow delivery to any person who is able to secure the probate of the will or to an appropriate court. Arizona now requires that the will be delivered within thirty days after the custodian receives knowledge of the testator's death. The Code requires delivery "with reasonable promptness," which may represent a much shorter period. Under both statutes failure to comply with the requirement of delivery renders the custodian liable for damages sustained by one injured by the failure, but the Code additionally provides that a willful refusal or failure to deliver a will after being requested to do so by a court order may subject the custodian to penalty for contempt of court.

CONCLUSION

The Uniform Probate Code is the end product of a long period of study by scholars and practitioners who have distinguished themselves in this area of the law. The Code as finally formulated represents a modern, internally consistent and rational exposition of the substantive rules which should govern the transmission of wealth at death, and it therefore affords a sound basis for the revision of Arizona law.

The proposed provisions on intestate succession are a vast improvement over present Arizona law. They more accurately reflect the desires of the average intestate decedent by favoring the surviving spouse, except where there are issue by a prior marriage; moreover, the proposed law would eliminate guardianships in many intestate estates, avoid

294. ARIZ. REV. STAT. ANN. § 14-311 (1956).
295. UNIFORM PROBATE CODE § 2-902.

disputes over classification of separate and community property, simplify title to realty by minimizing fractional interests when a spouse survives, and eliminate inheritance by very remote collateral relatives having no real claim. By contrast, the present Arizona law of descent and distribution represents social policies now obsolete, is drafted in an ambiguous manner which will continue to cause litigation, and contains provisions[296] which are probably unconstitutional.

In the matter of limitations on the power of the testator to dispose of his separate property, the proposed elective share in quasi-community property is highly controversial and undoubtedly deserves more extended study.[297] There are arguments pro and con which need to be explored in order to determine whether the change from present law is desirable. The other part of the family protection package, containing rules on allowance in lieu of homestead, exempt property, and the family allowance should invoke little opposition. The existing Arizona statutes in this area are an irrational hodge-podge with highly artificial distinctions.

As to execution of wills, the proposed changes represent minor improvement over present law. Some ambiguity in present statutes would be eliminated, but the changes are not substantial. No one should mourn elimination of oral wills. The innovation of the self-proved will, which would eliminate proof of execution after death of the testator, should be popular with both the public and the practicing bar, as should the provision permitting a separate unattested list to dispose of tangible personalty. In the matter of will revocation, the Code provisions are better than the present Arizona statutes because of the Code provision for revocation by subsequent divorce.

In the area of statutory rules for construction of wills the need for reform of present law is less obvious, as a clearly drafted will avoids such problems. But so long as wills are drawn without professional advice—a practice encouraged by permitting holographic wills—there is need for sound rules to deal with unforeseen problems. In this respect the Code contains both more rules and better rules than present Arizona statutes. The new rules requiring the devisee to survive the testator by 5 days, preventing ademption by extinction, settling the issue of when a will exercises a power of appointment, and providing modern rules for construction of class gifts expressed in terms of relationship are in accord with present-day views and provide several advantages: litigants and courts will be saved the cost of judicial determination of each rule;

296. Inheritance by aliens. *See* text & notes 70-84 *supra.*

297. *See* text & notes 119-131 *supra*; Comment, *Quasi-Community Property—California's New Property Concept*, 6 ARIZ. L. REV. 121 (1964).

alternatively, the harsh results of old common law rules will be avoided. Finally, although the Code section on renunciation may not be as broad as some estate planners would like, it goes beyond present law by permitting renunciation of intestate succession as well as gifts by will, and thus is an advance in the right direction.

It has been our purpose to compare the proposed Code with present Arizona law in hopes that this will enable the organized bar, the individual lawyer, and the legislature to come to an intelligent decision on adoption of at least the substantive portion of the Code. Much opposition comes from lack of knowledge and understanding of the Code. Although we have in a few instances pointed out ways we think the Code could have been still better, these are minor and the desirability of uniformity is an important consideration. In comparison, existing Arizona statutes have features that are obsolete or ambiguous, and provisions likely to defeat the probable intent of a decedent. Except for the already mentioned need for further study of the elective share sections, the proposed law should be adopted in Arizona.

APPENDIX

COMPARISON OF PRESENT AND PROPOSED PATTERNS OF INTESTATE SUCCESSION*

CASE 1: SURVIVING SPOUSE AND CHILDREN, ALL BEING CHILDREN OF DECEDENT AND SURVIVING SPOUSE.

Present Law	*Proposed Law*
Community property: Spouse has one-half as her interest in the community; decedent's half passes to children. *Separate property:* *Realty:* One-third to spouse for life; two-thirds and remainder in one-third to children. *Personalty:* One-third to spouse; two-thirds to children.	All to surviving spouse, whether separate or community property.

CASE 2: SURVIVING SPOUSE AND CHILDREN, ONE OR MORE OF WHOM ARE CHILDREN OF DECEDENT BY A PRIOR MARRIAGE.

Community property: Spouse has one-half as her interest in the community; decedent's half passes to children. *Separate property:* *Realty:* One-third to spouse for life; two-thirds and remainder in one-third to children. *Personalty:* One-third to spouse; two-thirds to children.	Surviving spouse has one-half of community property as her interest and acquires one-half of separate property by intestate succession. Half of community and separate property goes to children by intestate succession. (Note same division for both community and separate property.)

CASE 3: SURVIVING SPOUSE AND NO CHILDREN.

If father or mother living, all community property goes to surviving spouse; spouse gets all separate personal property and half of separate real property. Other half of separate real property goes to surviving parents (if only one, then one fourth to that parent and other fourth to brothers and sisters). If no surviving parent, then all to spouse.	All to surviving spouse.

* *See* text & notes 11-51 *supra*. These distributions are subject to homestead, exempt property and allowances.