

January 2002

## Intestacy Law - The Dual Generation Dilemma - Wyoming's Interpretation of Its 130-Year-Old Intestacy Statute - Matter of Fosler, 13 P.3d 686 (Wyo. 2000)

Samuel B. Shumway

Follow this and additional works at: <https://scholarship.law.uwyo.edu/wlr>

---

### Recommended Citation

Shumway, Samuel B. (2002) "Intestacy Law - The Dual Generation Dilemma - Wyoming's Interpretation of Its 130-Year-Old Intestacy Statute - Matter of Fosler, 13 P.3d 686 (Wyo. 2000)," *Wyoming Law Review*: Vol. 2: No. 2, Article 11.

Available at: <https://scholarship.law.uwyo.edu/wlr/vol2/iss2/11>

This Case Notes is brought to you for free and open access by the UW College of Law Reviews at Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

# INTESTACY LAW—The Dual Generation Dilemma—Wyoming’s Interpretation of its 130-Year-Old Intestacy Statute. *Matter of Fosler*, 13 P.3d 686 (Wyo. 2000).

## INTRODUCTION

Wyoming’s intestacy statute had been in place, unchanged, for more than 130 years when the Wyoming Supreme Court ruled on its proper interpretation in *Matter of Fosler*.<sup>1</sup> On December 23, 1998, Constance Louise Fosler died in Casper, Wyoming, having accumulated an estate valued at over nineteen million dollars.<sup>2</sup> Ms. Fosler left no surviving spouse, children, grandchildren or other lineal descendants.<sup>3</sup> Even more remarkable, given the size of her estate, was the fact that Ms. Fosler died intestate leaving no will to indicate her intentions with respect to the distribution of her wealth.<sup>4</sup> Her only remaining living relatives were one first cousin and three second cousins on her paternal side, and six first cousins, twelve second cousins and four third cousins on the maternal side.<sup>5</sup> In all, a genealogical search identified twenty-six collateral relatives.<sup>6</sup>

Constance Fosler moved to Casper, Wyoming from Tyler, Texas in the early 1980s.<sup>7</sup> She lived in Casper for fourteen years before she died in 1998 at the age of seventy-seven, leaving an estate worth more

---

1. *Matter of Fosler*, 13 P.3d 686 (Wyo. 2000).

2. *Id.* at 687.

3. *Id.* “A ‘lineal descendant’ is not a new expression to the law or of doubtful import. It has a fixed and settled meaning, describing blood relatives in the direct line of descent.” *In re Smith Estate*, 72 N.W.2d 287, 291 (Mich. 1955).

4. *Fosler*, 13 P.3d at 686.

5. Brief of Appellant at 9, *Matter of Fosler* 13 P.3d 686 (Wyo. 2000)(No. 00-55)[hereinafter Appellant’s Brief].

6. Collateral heir or relative is defined as, “One who is neither a direct descendant nor an ancestor of the decedent, but whose kinship is through a collateral line, such as brother, sister, uncle, aunt, nephew, niece or cousin” BLACK’S LAW DICTIONARY 580 (Abridged 7th ed. 2000).

7. Telephone interview with Drew Perkins, Member, Perkins & Powers, P.C. (Feb. 5, 2002). Mr. Perkins was the Personal Representative for estate of Constance Fosler. *Id.* Mr. Perkins reports that it appeared that Constance walked out of her home in Texas right after breakfast one day, and never returned, other than one or two midnight visits. *Id.* This Texas house was part of the estate and had several works of art still in it including one painting valued at over \$10,000. *Id.*

than nineteen million dollars.<sup>8</sup> The source of all of her wealth is somewhat of a mystery; however, the Personal Representative was able to identify some factors that helped account for her sizeable estate.<sup>9</sup>

Constance was somewhat of a recluse and maintained little to no contact with her relatives.<sup>10</sup> Constance was a unique individual who exhibited very interesting behavior.<sup>11</sup> She was extremely concerned that the economy would collapse and took extreme measures to prepare for this event and protect her assets.<sup>12</sup>

---

8. Probate File, Record Volume I, pg. 99, Estate of Constance Louise Fosler, Appraisal of Assets at December 23, 1998. Constance's estate consisted of both real and personal property. *Id.* She had two bank accounts. *Id.* One had a balance of \$796,042.60 and the other with \$226,743.30. *Id.* A large portion of the value of her estate was in stocks and bonds. *Id.* The value of her investments combined was \$16,780,767.91. *Id.* She also had nine Volkswagen bugs, each ranging in value from \$350 to \$1000. *Id.* She had a Chevrolet Suburban, A Ford van, a Ford Bronco, and a Chevrolet Caprice. *Id.* at 100. She possessed \$23,557 worth of gold coins and \$37,225 in silver coins. *Id.* In addition, she had miscellaneous property that was sold at auction for \$128,720. *Id.* Her residential property had an appraised value of \$202,000, and she owned two commercial properties appraised at \$278,000 and \$730,000. *Id.*

9. Perkins interview *supra* note 7. Constance had an Aunt Reid. *Id.* The Reids were a very wealthy family. *Id.* This aunt left each of her fourteen nephew and nieces, of which Ms. Constance was one, approximately \$49,000 in stocks in blue chip companies, GM, IBM, Standard Oil, etc. in the '60s. *Id.* These, of course, did very well over the next two decades. *Id.* Also, Constance's father owned a small savings and loan in Indiana and was a very astute investor. *Id.* He eventually sold his savings and loan to a bank and continued to invest. *Id.* As an only child, Constance inherited his estate. *Id.* Constance was an astute investor and started fairly early. *Id.* She was a schoolteacher and had done some modeling as a young woman. *Id.* She was very frugal and invested wisely. *Id.*

10. *Id.* A few of her cousins, who received a portion of her estate, knew her. *Id.* Daniel Fosler reported that he knew her as a child; however, the last time that he had seen her was at a funeral twenty years earlier. *Id.* Some of the other cousins had heard family stories about Cousin Connie, but many had never heard of her. *Id.* It is likely that she had not had any contact with any family in over twenty years. *Id.*

11. *Id.* Constance used a number of different aliases including: Mary Dougan, Mary Snyder, Mary Schnieder and Louise Fosler. *Id.* She also used variations of the names, e.g. M. Snyder, C.L. Fosler, etc. *Id.* Apparently, she had a run in with the IRS in the early 1970s. *Id.* Her fear of government oversight and the decaying U.S. economy eventually caused her to leave and live in Canada for several years. *Id.* During this time, she paid no Federal Income Taxes. *Id.* The IRS mailed a notice to her regarding the delinquencies. *Id.* She simply wrote back under one of her aliases, and told the IRS that her "sister", Constance Fosler, was living in Paraguay. *Id.* She offered to pay the money that her sister owed and recommended that they could continue to contact her on behalf of her sister. *Id.* When the Personal Representative found this letter that purported to be from a sister of Constance, he became very concerned that the genealogical search that had been done to identify her relatives had missed this sister. *Id.* It was not until further investigation that he realized that it was Constance writing under one of her aliases. *Id.*

12. *Id.* When Constance purchased her home in Casper, she also bought the

When a person dies without leaving a will, Wyoming law provides for the distribution of both personal and real property in its intestacy statutes.<sup>13</sup> The first step in the probate of an intestate estate is to appoint a personal representative.<sup>14</sup> The principal duties of the personal representative are to collect and manage the assets of the decedent during administration of the estate, pay claims of creditors, and distribute the remaining assets to those entitled.<sup>15</sup> The court supervises the actions of the personal representative and must approve many of the actions taken relating to the estate.<sup>16</sup> In Ms. Fosler's case, the personal represen-

---

neighboring lots on both sides of her house. *Id.* Constance had a six-foot privacy fence built around the perimeter of the home. *Id.* Then she had another nine-foot fence, rimmed with barbed wire, erected right in front of the existing fence. *Id.* She also had steel bars put on all the windows. *Id.* She was very concerned with her own safety and the safety of her property. *Id.* She also stored large amounts of food in freezers and closets so that she would be prepared for the collapse of the economy. *Id.* It is reported that Constance was also very afraid of drive by shootings and the AIDS virus. *Id.*

13. WYO. STAT. ANN. § 2-4-101 (LexisNexis 2001). Section 2-4-101 reads in pertinent part:

Whenever any person having title to any real or personal property having the nature or legal character of real estate or personal estate undisposed of, and not otherwise limited by marriage settlement, dies intestate, the estate shall descend and be distributed in parcenary to his kindred, male and female, subject to the payment of his debts, in the following manner:

...

(c) Except in cases above enumerated, the estate of any intestate shall descend and be distributed as follows.

To his children surviving, and the descendants of his children who are dead, the descendants collectively taking the share which their parents would have taken if living;

If there are no children, nor their descendants, then to his father, mother, brothers and sisters, and to the descendants of brothers and sisters who are dead, the descendants collectively taking the share which their parents would have taken if living, in equal parts;

If there are no children nor their descendants, nor father, mother, brothers, sisters, nor descendants of deceased brothers and sisters, nor husband nor wife, living, then to the grandfather, grandmother, uncles, aunts and their descendants, the descendants taking collectively, the share of their immediate ancestors, in equal parts.

14. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 35 (6th ed. 2000).

15. *Id.*

16. *Id.* at 43.

The supervision can be time-consuming and costly. The court must approve the inventory and appraisal, payment of debts, family allowance, granting options on real estate, sale of real estate, borrowing of funds and mortgaging of property, leasing of property, proration of federal estate tax, personal representative's commissions, attorneys fees, preliminary and final distributions,

tative was given the task of determining the possible distribution of her estate.<sup>17</sup> The question of distribution rested on the issue of what generation would be considered the "root generation" where the initial shares of the estate would be calculated.<sup>18</sup>

On October 8, 1999, the personal representative filed a petition for partial distribution requesting that the court determine the appropriate method of distribution.<sup>19</sup> In a memorandum of law, the personal representative set forth four possible methods of distribution referred to as 1(a), 1(b), 2(a), and 2(b).<sup>20</sup> The differences between the four methods are subtle; however, because of the size of Ms. Fosler's estate, the monetary implications of each of the four methods were, in fact, quite significant. The variance between the four methods is best understood using the percentages that Mr. Daniel Fosler, the only living first cousin on the paternal side, would have received under each method and the corresponding dollar amount. Under 1(a) he would have received 11.11% of the entire estate, which would equal a before-tax dollar amount of approximately \$2,111,109.<sup>21</sup> Under 1(b) he would receive 12.82% or \$2,435,895, under 2(a), 6.25% or \$1,187,500, and under 2(b) 3.84% or \$730,778.<sup>22</sup>

Daniel Fosler filed a response to the personal representative's memorandum of law, urging the district court to adopt Method 1(b).<sup>23</sup> Under this method, the root generation would consist of the statutorily named persons: grandfather, grandmother, uncles and aunts.<sup>24</sup> The estate would be divided into thirteen equal shares with all nine uncles and aunts assigned a share and both the paternal and maternal grandmothers and grandfathers assigned a share.<sup>25</sup>

---

and discharge of the personal representative.

*Id.*

17. Appellant's Brief, *supra* note 5, at 10.

18. The terms "root" and "stock" are used interchangeably by various authorities. Root is defined as, "a stock of descent - an ancestor in whom a succession of inheritance begins." *BALLENTINE'S LAW DICTIONARY* 1125 (3d ed. 1969). The use of "root generation" in *Fosler* is consistent with this definition. *Fosler* 13 P.3d at 688. "The aunts and uncles form the root generation and would take per capita, and their descendants would take per stirpes." *Id.*

19. *Matter of Fosler*, 13 P.3d. 686, 687 (Wyo. 2000).

20. *Id.* at 688.

21. Appellant's Brief, *supra* note 5, at 11.

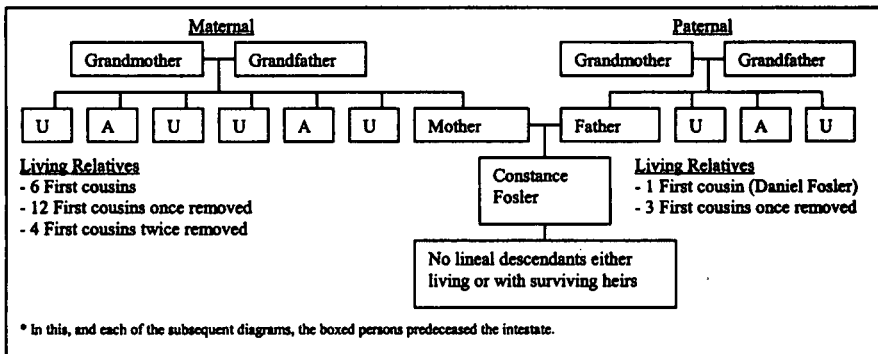
22. *Id.* at 11-13.

23. *Fosler*, 13 P.3d at 688.

24. *Id.*

25. Appellant's Brief, *supra* note 5, at 11.

*Diagram 1: Living and Deceased Heirs of Constance Fosler*



This method was the most appealing to Mr. Fosler because, as one of only four living relatives on the paternal side, he would share in a five-thirteenths share of the estate, and the twenty-two living relatives on the maternal side would end up sharing in eight-thirteenths of the estate.<sup>26</sup> Under this scheme, Mr. Fosler as the only paternal first cousin would be entitled more than two million dollars, whereas the maternal cousins, who were equally related to Constance, would receive only \$961,000.

After a hearing on the matter, the court issued a decision letter adopting Method 2(a).<sup>27</sup> This method denoted the root generation as the first generation with living heirs, and provided that an equal share be allocated to each of the first cousins either living or with surviving issue.<sup>28</sup> Under this method, Mr. Fosler's share would be approximately \$1,187,500 instead of the \$2,435,895 that he would receive under 1(b).

Mr. Fosler filed a Motion for Reconsideration of Ruling and was granted a hearing on the motion.<sup>29</sup> The motion was ultimately denied and

26. *Id.* at 11-12.

27. *Fosler*, 13 P.3d at 688.

28. *Id.*

29. Transcript of Motion for Reconsideration of Ruling, *Fosler*, 13 P.3d 686 (Wyo. 2000); Record at 664. This hearing lasted only twelve minutes. Judge Park, sitting in the District Court of Natrona County, Wyoming, upheld his previous ruling for method 2(a). *Id.* His decision was based on his reading of a section of a previous Wyoming case, *In re Gilchrist's Estate*, 58 P. 2d 431, 434 (Wyo. 1950). *Id.* This section stated:

In this case she left no children or descendants; both of her parents and all of her brothers and sisters were dead. If she had died intestate, her property would have been distributed in accordance with subdivision 2 of section 88-4001 our statute of descent and distribution . . . . In other words, if the testatrix had died intestate, her property would have been distributed among the

the court issued an order for partial distribution consistent with method 2(a).<sup>30</sup> With more than a million dollars at stake, Mr. Fosler filed his Notice of Appeal.<sup>31</sup>

The Wyoming Supreme Court was asked to determine the meaning of the phrase "*then to grandfather, grandmother, uncles, aunts and their descendants, the descendants taking collectively, the share of their immediate ancestors, in equal parts.*"<sup>32</sup> The court reversed the district court's ruling and declined to read into the statute that the root generation was the first generation with living members.<sup>33</sup> It held that the initial distribution had to be among the statutorily named set of descendants (i.e. grandparents, aunts, uncles).<sup>34</sup> This interpretation would, in effect, create a root generation consisting of two generations: the grandparents and the uncles and aunts.<sup>35</sup> The court recognized that this approach was a minority view, as many state legislatures have adopted intestacy provisions that identify the root generation as the nearest generation with living members.<sup>36</sup>

This case note will provide a concise history and overview of intestate succession laws in the United States beginning with a brief description of the contemporary forms of intestate distribution, including strict per stirpes, modern per stirpes, and the Uniform Probate Code's per-capita-at-each-generation. It will also discuss the rationale of intestacy laws generally and examine studies that have attempted to ascertain which of the distribution methods is most desirable. Next, this note will examine the rationale and holding in *Fosler* and discuss how the court reached and justified its conclusion that the root generation should consist of grandparents, uncles and aunts, examining closely the validity and flaws of the court's analysis in deciding *Fosler*. Finally, it will compare how other states have interpreted the dual generation language of similar statutes, and explore some of the adverse implications that the *Fosler*

---

descendants of her brothers and sisters.

*Gilchrist*, 58 P.2d at 431.

Judge Park, referring to this section of the case, concluded; "Actually, it's the basis for my analysis. But it also seems to be a logical interpretation to the extent that logic can be applied to these matters of the statute. I mean, we are left with very little guidance and much of this is, for lack of a better word, kind of a subjective interpretation on my part." *Id.*

30. *Fosler*, 13 P.3d at 688.

31. *Id.*

32. *Id.* at 690.

33. *Id.* at 692.

34. *Id.* at 693.

35. *See generally Fosler*, 13 P.3d at 693.

36. *Id.* at 689.

interpretation of Wyoming Statutes section 2-4-101 could have on future intestate distribution in the state of Wyoming. In conclusion, this note will address the need for either judicial clarification or legislative action regarding this 130-year-old statute.

## BACKGROUND

### *History*

Intestacy law is among the oldest of the civil laws established in society.<sup>37</sup> Most cultures with a system of individual, as opposed to family, ownership of property must design a method of succession to adequately dispose of the decedent's property.<sup>38</sup> Guidelines for the distribution of one's property can be found as far back as biblical times when the Israelites were given an intestacy scheme that allowed inheritance by the closest relative.<sup>39</sup> Intestacy laws help in preserving order because, without some legal method of distributing a decedent's property, people may engage in violent conflicts to acquire property rights.<sup>40</sup>

---

37. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*11-12 (Banks & Brothers 1878). Blackstone speculates about the origin of intestacy law in general: "A man's children or nearest relations are usually about him or his death-bed, and are the earliest witnesses of his decease. They become therefore the next immediate occupants, til at length in process of time this frequent usage ripened into general law." *Id.*

38. THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS AND OTHER PRINCIPLES OF SUCCESSION INCLUDING INTESTACY AND ADMINISTRATION OF DECEDENTS' ESTATES 6 (2d ed. 1953). "With the recognition of individual as distinguished from family property, rules of succession became necessary. Naturally these followed earlier rules as to inheritance of status, which in turn depended upon the family or clan structure." *Id.*

39. The intestate scheme the Israelites followed was:

If a man dies without leaving a son, you shall let his heritage pass on to his daughter; if he has no daughter, you shall give his heritage to his brothers; if he has no brothers, you shall give to his father's brothers; if his father has no brothers, you shall give his heritage to the nearest relative in his clan, who shall take possession of it.

*Numbers* 27:8-11 (King James).

40. 2 BLACKSTONE, *supra* note 37, at \*4. Blackstone comments on the acquisition of property rights:

But when mankind increases in number, craft and ambition, it becomes necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it.

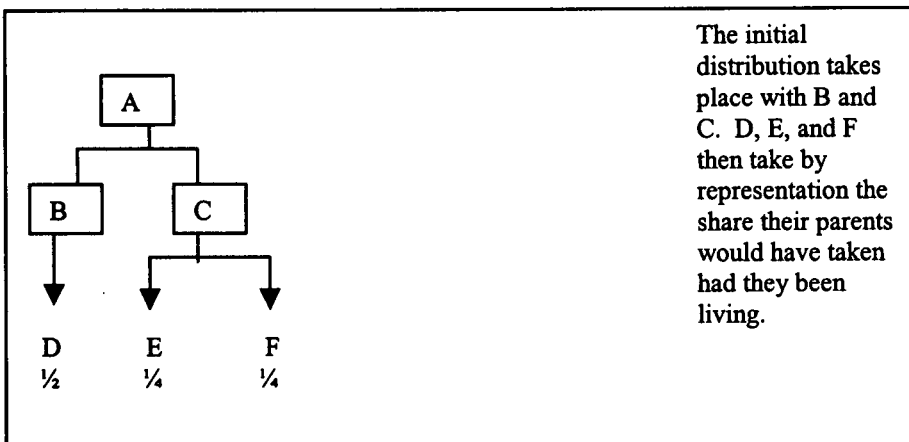
*Id.*



Medieval England developed its intestacy laws around a system of primogeniture, where the eldest male child was afforded exclusive inheritance rights.<sup>41</sup> The English Administration of Estates Act of 1925, in accordance with modern social and economic concepts, effectively abolished the system of primogeniture.<sup>42</sup> However, the broad principles established in that system of descent and distribution remained intact.<sup>43</sup>

Under the English system, sometimes called "strict per stirpes," the intestate estate is divided at the generation nearest to the decedent into as many shares as there are members of that generation living, or deceased with surviving issue.<sup>44</sup> For example, *A* dies intestate leaving two children *B* and *C*, who both predeceased *A*. *B* is survived by one child, *D*, and *C* is survived by two children, *E* and *F*.

*Diagram 2: Strict Per Stirpes*



Under strict per stirpes distribution, *A*'s estate would be divided into two equal shares between *B* and *C* even though they are not living.<sup>45</sup> *D* would then take *B*'s half share by representation and *E* and *F* would share in *C*'s half share by representation, taking one quarter each.<sup>46</sup> About a dozen states use the strict per stirpes distribution method.<sup>47</sup> Al-

41. DUKEMINIER, *supra* note 38, at 43.

42. *Id.* Primogeniture is: "The superior or exclusive right possessed by the eldest son, and particularly, his right to succeed to the estate of his ancestor, in right of his seniority by birth to the exclusion of younger sons." BLACK'S LAW DICTIONARY 1191 (6th ed. 1990).

43. ATKINSON, *supra* note 38, at 43.

44. DUKEMINIER, *supra* note 14, at 87.

45. *Id.*

46. *Id.*

47. Delaware, Florida, Georgia, Illinois, Iowa, Kentucky and Tennessee use the

though the English strict per stirpes system was the early standard for America, the majority of states now follow a different system of distribution.<sup>48</sup>

Because a majority of American jurisdictions have abandoned the English strict per stirpes distribution scheme, the majority method of distribution in the United States has become known as "American" or "modern" per stirpes distribution.<sup>49</sup> Twenty-three states have adopted some variation of a modern per stirpes distribution.<sup>50</sup>

Under the modern per stirpes distribution, the estate is divided into shares at the generation nearest the decedent where one or more descendants are living, with the living ancestors of any deceased members of that generation taking by representation.<sup>51</sup> The distinction between modern per stirpes and strict per stirpes can be illustrated using the above example. Instead of dividing the estate into shares at the generation nearest the decedent, the estate is divided into equal shares at the nearest generation with surviving heirs.<sup>52</sup> Therefore, instead of dividing the estate into two equal shares at *B* and *C*, the estate is divided among the living heirs: *D*, *E*, and *F*.

---

term per stirpes in the body of their statute, while other states contain language that would seem to describe a strict per stirpes system. RESTATEMENT (THIRD), OF PROPERTY: PROBATE TRANSFERS § 2.3 stat. note 1. (1998).

48. Joseph Dainow, *Inheritance by Pretermitted Children*, 32 U. ILL. L. REV. 1 (1937).

When the early settlers came to this country from England, they naturally brought with them the common law; but it was not unexpected that the new social and economic conditions and opportunities should gradually be manifested in the legal institutions. For intestate succession many colonies at first retained the rule of primogeniture for land, and a number of others set up the unusual rule of double portion for the eldest son. However the pioneers' attitude of rugged individualism and their feeling of independence and equality brought to bear on all matters and powerful principles of democratization and of the sanctity of individual property rights. Thus, it was not very long before all the privileges of inheritance were abolished and the rule of equal partition established for intestacy.

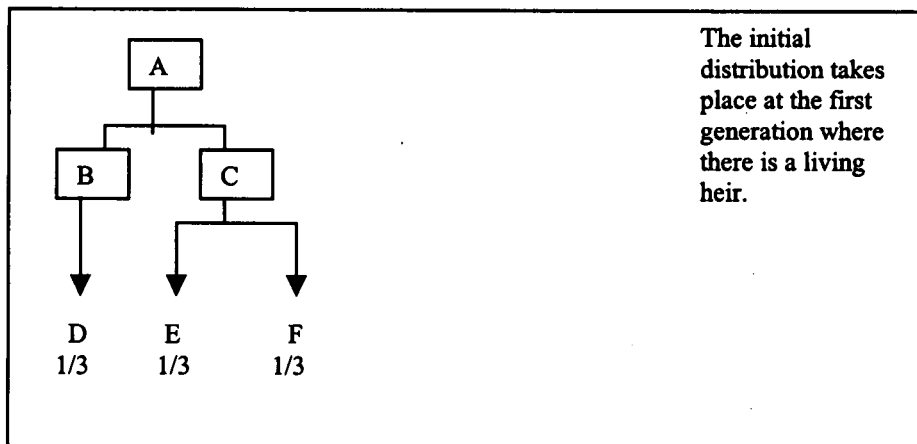
*Id.*

49. DUKEMINIER, *supra* note 14, at 87.

50. Arkansas, Indiana, Ohio, Massachusetts, Missouri, Nevada, Pennsylvania, Texas, Vermont, Virginia, Washington, and Wisconsin have statutory language that would indicate a modern per stirpes system of distribution. Also, Alabama, California, Idaho, Maine, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, Oregon and South Carolina had adopted the Original UPC version which is similar to a modern per stirpes system. RESTATEMENT (THIRD) OF PROPERTY: PROBATE TRANSFERS § 2.3 stat. notes 2-3. (1998).

51. *Id.*

52. *Id.*

*Diagram 3: Modern Per Stirpes*

Under modern per stirpes, *D*, *E*, and *F* receive an equal 1/3 share, instead of *D* receiving one-half and *E* and *F* each receiving one-fourth. Also, if *F* had predeceased *A*, leaving descendants, *F*'s descendants would have taken *F*'s 1/3 share by representation.<sup>53</sup>

In 1946, the American Bar Association section of Real Property, Probate and Trust Law ("Probate Section") published the Model Probate Code, which, in 1969, was revised as the Uniform Probate Code (UPC).<sup>54</sup> In 1990, it was again revised, creating what is now the current UPC.<sup>55</sup> The original version of the UPC provided a distribution scheme essentially the same as the modern per stirpes system.<sup>56</sup> However, the 1990 UPC modified the system and adopted a variation known as the "per-capita-at-each-generation" system.<sup>57</sup> This system is similar to modern per stirpes in that the initial division is made at the first generation with living heirs, but then the shares of the deceased members of the initial generation are combined and descend to be divided equally (per capita) among the next generation.<sup>58</sup> Nine states have enacted the Revised UPC provision.<sup>59</sup>

53. *Id.*

54. Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 895-896 (1992).

55. *Id.* at 898.

56. DUKEMENIER, *supra* note 14, at 88.

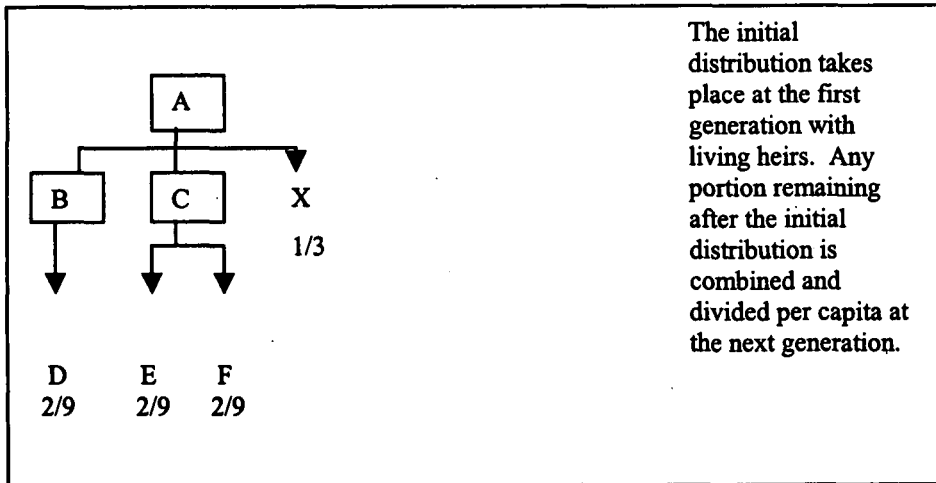
57. *Id.*

58. *Id.* at 89.

59. Alaska, Arizona, Colorado, Hawaii, Michigan, Minnesota, Montana, New Mexico, Utah and West Virginia have adopted UPC § 2-103. RESTATEMENT (THIRD) OF PROPERTY: PROBATE TRANSFERS § 2.3 stat. note 4 (1998).

The UPC per-capita-at-each-generation system can be illustrated using a slightly modified version of the above example. Assume that there was one other sibling *X*, who survives *A*, in addition to *B* and *C*, who are deceased.

*Diagram 4: UPC Per-Capita-at-each-Generation*



Under the UPC per-capita-at-each-generation method, *X* would take a one-third share. The one-third shares that *B* and *C* each would have taken if living would be combined and divided equally among *D*, *E* and *F*, each taking a two-ninths share. This is different from both strict and modern per stirpes. Under strict per stirpes, *X* would still take his one-third share, *D* would take the one-third share that *B* would have taken if living, and *E* and *F* would split the one-third share that *C* would have taken, or one-sixth each. Similarly, under modern per stirpes, because *X* is living, the initial distribution would occur at the generation of *B*, *C*, and *X*. *X* would take his one-third share, and *B* and *C*'s shares would descend by representation to *D*, *E* and *F*, with *D* taking one-third and *E* and *F* taking one-sixth each.<sup>60</sup>

As these illustrations indicate, the differences in the schemes can prove quite significant, especially when large amounts of money are involved. For example, under modern and strict per stirpes, *D*'s share equals one-third, however, under the UPC scheme, *D* receives only a two-ninths share. In a large estate, this can mean the difference of millions of dollars.

60. DUKEMINIER, *supra* note 14, at 89.

### *Purpose of Intestacy Law*

The general purpose of intestacy statutes is to distribute a decedent's estate upon their death in a pattern that would closely represent the distribution the decedent would have chosen had he manifested his intent through the use of a will.<sup>61</sup> When a person dies without a will, the intestacy statutes provide a default plan.<sup>62</sup> Intestacy laws are intended to provide a scheme that would coincide with the desires of the average person who owns an average-sized estate composed of ordinary property.<sup>63</sup> The estate is supposed to be distributed among the usual number and kind of relatives who are each of equal need and friendly toward one another.<sup>64</sup>

Intestacy statutes consider, as most worthy, the claims of those who stand nearest to the affections of the intestate.<sup>65</sup> Also, the division of an intestate's property should be executed according to the principles of equality and equity.<sup>66</sup> Moreover, intestate statutes "should consider the obvious wishes of the intestate, the well being of his/her family, and the well being of society."<sup>67</sup> However, the right to take property of an intestate person is not an absolute or natural right, but is a privilege granted by the states in the exercise of their plenary powers.<sup>68</sup> Therefore, the distribution of the estate of an intestate is strictly subject to the intestacy statute of the state where the distribution is to occur.<sup>69</sup>

Some have argued that a modern per stirpes method of distribution where the estate is distributed per capita at the first generation with living members is more resonant with principles of equality and repre-

---

61. 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS §1.6 at 20 (1960).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Garwols v. Bankers Trust Co.*, 232 N.W. 239, 241 (Mich. 1930).

It may well be said 'to be founded on the great principles of justice, with the object of making such a will for the intestate as he would himself probably make, its obvious policy being to follow the lead of the natural affections, and to consider as most worthy the claims of those who stand nearest to the affections of the last occupant.

*Id.*

66. *Daniel v. Whartenby*, 84 U.S. 639, 647 (U.S. 1873). "Our policy is equality of descent and distribution. Such is the sentiment of our people, and such the spirit of *our* institutions." *Id.*

67. GEORGE W. THOMPSON, THE LAW OF WILLS § 2 (3d ed. 1947).

68. *Id.*

69. *Id.*

sents the natural impulses of mankind.<sup>70</sup> This question of preference between strict per stirpes versus modern per stirpes has been the subject of a number of studies.<sup>71</sup> Although the methodology of each of these studies is generally different, the purpose of most is to ascertain the preference of the subjects with regard to intestate distribution and, in turn, to provide an objective base for specific recommendations for statutory revisions.<sup>72</sup>

One of the more comprehensive studies examining this issue of preference was conducted in Iowa.<sup>73</sup> This study gathered and examined data from three separate data sources, including probate estate records on file, a survey of the intestate estate survivors, and personal interviews of randomly selected Iowa citizens.<sup>74</sup> The study examined preferences with regard to many aspects of intestate succession including the share of the surviving spouse, the distribution to stepchildren, stepparents and adopted children, and most importantly what the preference is with regard to strict per stirpes or modern per stirpes distribution.<sup>75</sup>

The research was aimed specifically at people who had survived and taken part in the intestate distribution of an estate.<sup>76</sup> They were

---

70. *Old Colony Trust Co. v. Lathrop*, 177 N.E. 675, 676. (Mass. 1931); Morris R. Massey, *Probable Interpretation of Wyoming Rules of Descent*, 11 WYO. L.J. 120, 124-25 (1957).

71. Jaki K. Samuelson & Dennis Thorson, *Contemporary Studies Project: A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041 (1978); Raymond H. Young, *Meaning of "Issue" and "Descendants"*, 13 Prob. Notes 225 (AM.C. of Tr. & Est. Couns. 1988); Powell & Looker, *Decedent's Estates*, 30 COLUM. L. REV. 919 (1930).

72. Samuelson, *supra* note 72, at 1045.

73. *Id.* at 1041.

74. *Id.* at 1045.

75. *Id.*

76. *Id.* at 1053.

Since the focus of this project was Iowa's intestate succession statutes, the time and personal resources available for survivor interviews were spent contacting survivors of intestate estates. No effort was made to interview survivors of testate estates. There were a total of 450 people who had survived.... No attempt was made to contact minors (34) or subsequently deceased survivors (19). Of the remaining 397 survivors, 74 responded to telephone interviews, after having received a copy of the questionnaire and an explanatory letter by mail; 27 who either live out of state or for whom no phone numbers were located, returned mailed questionnaires; and 77 refused to be interviewed. Questionnaires were mailed to the last known address of the remaining 219 survivors, with no response. Altogether, out of the 450 survivors there were 101 responses.

*Id.*

asked one question aimed at ascertaining their preference between the two methods.<sup>77</sup> The question posed was this: "How would you like your property distributed if your two adult children were deceased, but your adult child *A* left one child and your adult child *B* left three children?"<sup>78</sup> The results of the survey clearly indicate that Iowans would prefer a modern per stirpes distribution where the estate would be distributed per capita among all four of the surviving children of *A* and *B*.<sup>79</sup> Nearly nine of ten respondents, 87 percent, followed this approach.<sup>80</sup> Although the survey did not contain questions regarding the treatment of members of subsequent generations, the equal treatment accorded to the grandchildren in response to the question presented at least suggests that Iowans would prefer an equal treatment of members of the same generation regardless of where in the distribution pattern that generation was encountered.<sup>81</sup>

#### *Other Jurisdictions' Interpretation of Statutes Similar to Wyoming's*

Other states with intestacy statutes similar or identical to Wyoming's have attempted to ascertain the proper interpretation of the statutory language. In *Thatcher v. Thatcher*, the Colorado Supreme Court interpreted a portion of its intestate succession statute that was virtually identical to Wyoming Statutes section 2-4-101.<sup>82</sup> In *Thatcher*, the decedent had one surviving grandmother on the paternal side and various

---

77. *Id.* at 1108.

78. *Id.*

79. *Id.* at 1111.

80. *Id.*

81. *Id.* at 1112.

82. *Thatcher v. Thatcher*, 29 P. 800, 800 (Colo. 1892). The Colorado statute at that time read:

Except in the cases above enumerated, the estate of every intestate shall descend and be distributed as follows: *First.* To his children surviving, and the descendants of his children who are dead; the descendants collectively taking the share which their parents would have taken if living. *Second.* If there be no children, nor their descendants, then to his father; if there be no father, then to his mother; if there be no mother, then to the brothers and sisters, and to the descendants of brothers and sisters who are dead; the descendants collectively taking the share of their immediate ancestors in equal parts. *Third.* If there be no children, nor their descendants, nor father, mother, brothers, sisters, nor descendants of deceased brothers or sisters, nor husband nor wife living, then to the grandfather, grandmother, uncles, aunts, and their descendants; the descendants taking collectively the share of their immediate ancestors in equal parts. *Fourth.* And if none of the relatives above enumerated be living, then to the nearest lineal ancestors and their descendants; the descendants collectively taking the share of their immediate ancestors in equal parts.

uncles and aunts on both the paternal and maternal sides.<sup>83</sup> The question in *Thatcher* was whether the estate should be initially distributed only to the generation of grandparents or whether the root generation should include uncles and aunts.<sup>84</sup> The court held that the estate should be distributed equally among the one living grandmother and the uncles and aunts.<sup>85</sup> The court argued that if the distribution was made only to the generation of grandparents, ignoring the uncles and aunts, the words uncles and aunts become mere surplusage.<sup>86</sup> The court stated that by giving the language, "then to grandfather, grandmother, uncles, aunts" its literal meaning, any infraction of rule requiring that meaning be given to all parts of a statute was avoided.<sup>87</sup> Colorado has since amended its intestacy statute and adopted a form of the UPC per-capita-at-each-generation provision.<sup>88</sup>

Missouri is the only other state with current statutory language similar to Wyoming's intestacy statute.<sup>89</sup> However, the Missouri Probate Code includes a provision that the Wyoming Probate Code does not.<sup>90</sup> This provision acts to clarify the dual generation language of the statute by providing that where there is a generation of descendants with at least one member living and others dead, that generation, where there is a living member, is to take per capita and the descendants take per stirpes.<sup>91</sup> This statute provides that the distribution should occur consistent

---

83. *Thatcher*, 29 P. at 801.

84. *Id.*

85. *Id.* at 802.

86. *Id.* at 801.

87. *Id.*

88. COLO. REV. STAT. ANN. § 15-11-103 (2002) Subsection (5) provides: "If there is no surviving descendant, surviving parent, surviving descendant of a parent, or surviving grandparent, to the surviving descendants of the decedent's grandparents per capita at each generation." *Id.*

89. MO. ANN. STAT. § 474.010(2)(b) and (c) provide: "(b) If there are no children, or their descendants, then to the decedent's father, mother, brothers and sisters or their descendants in equal parts;(c) If there are no children, or their descendants, father, mother, brother or sister, or their descendants, then to the grandfathers, grandmothers, uncles and aunts or their descendants in equal parts." *Id.*

90. MO. ANN. STAT. § 474.020 (West 2002) provides, "When several lineal descendants, all of equal degree of consanguinity to the intestate, or his father, mother, brothers and sisters, or his grandfathers, grandmothers, uncles and aunts, or any ancestor living and their children, come into partition, they shall take per capita, that is, by persons; where a part of them are dead, and part living, and the issue of those dead have a right to partition, such issue shall take per stirpes; that is, the share of the deceased parent." *Id.*

91. *Copenhaver v. Copenhaver*, 1883 WL 9806, 9806 (Mo. 1883). Here the decedent died intestate leaving no living descendants, nor father, mother, brothers or sisters, but was survived by thirty-two nieces and nephews. *Id.* The issue in the case was whether the nieces and nephews living at the time of the death of the decedent would



with a modern per stirpes scheme where the first generation with a living member is the root generation.<sup>92</sup>

Like Wyoming's intestacy statute, the language of Missouri's statute clearly lists two generations (i.e., grandfather, grandmother, uncles and aunts; mother, father, brothers and sisters). However, Missouri Revised Statutes section 474.020 has been interpreted to allow only the generation where there is a living member to take per capita, and the descendants of that generation to take per stirpes.<sup>93</sup>

In sum, the Colorado and Missouri courts have interpreted the dual generation language of the statute quite differently. The Colorado court, in *Thatcher*, interpreted the language of the statute to indicate that if a member of both generations is living, then the estate should be divided per capita among members of both generations. Missouri concluded, however, that the first generation where there is a living member is to take per capita as the root generation. In reaching its conclusions, Missouri relied on a provision of its Probate Code that set out the proper distribution, and Colorado based its interpretation on general rules of statutory interpretation.

### *The Law in Wyoming*

Wyoming's intestacy statute was enacted in the first session of

---

take by representation or per capita. *Id.* The court, relying on Missouri Statute section 474.020 held that the "nephews and nieces would take in their own right, *per capita.*" *Id.*

92. *Lewis v. Williams*, 414 S.W. 2d 367, 368 (Mo. 1967). In *Lewis* the decedent died intestate, leaving no living father, mother, brothers, sisters, nieces, nephews, or any lineal descendants. *Id.* He left one living uncle and the lineal descendants of three deceased uncles and one deceased aunt. *Id.* The court held that the one surviving uncle, as the sole survivor of the five persons who once bore that degree of relationship to the deceased, identifies and establishes the class among which the estate should initially be divided. *Id.* at 368. The initial calculation of shares did not consider the grandparents, even though they were in the same statutorily named set of relatives as the uncles and aunts. *Id.* The initial distribution was made at the generation where there was a living member, and the deceased grandparents, although named in the same statutory set of relatives, were ignored. *Id.*

93. *Estate of Ferguson* provides additional guidance as to the proper distribution in a situation factually similar to *Fosler*. *Estate of Ferguson v. Conklin*, 723 S.W.2d 24 (Mo. 1986). The decedent died in this Missouri case leaving as her only surviving heirs a number of whole and half blood cousins. *Id.* at 25. The issue was whether relatives of half blood, who were on the same generational level as relatives of whole blood, should take the same share. *Id.* at 26. The court determined, "[T]he surviving first cousins [of the half blood] was that level of kinship most consanguineous to the intestate Ethel Eula Ferguson, and hence was that class among whom the apportionment was to be calculated in equal parts." *Id.*

the legislative assembly on December 10, 1869, more than 130 years ago.<sup>94</sup> From 1868 to 1979, Wyoming's probate laws remained virtually unchanged; however, in 1979, the Legislature enacted Chapter 142, now called the Wyoming Probate Code, which substantially altered prior Wyoming law.<sup>95</sup> Because of a number of technical and substantive problems with the code, the Legislature, in its second session, reenacted a full and substantially amended version.<sup>96</sup> The new provisions of the Wyoming Probate Code come from two main sources: the Iowa Probate Code and the Uniform Probate Code.<sup>97</sup> Although the Wyoming probate code was substantially changed in 1979, the basic pattern of intestate succession outlined in Wyoming Statutes section 2-4-101 remained unchanged.<sup>98</sup> Wyoming's legislative history provides no insight into the Legislature's justification for not addressing that particular provision when the new code was enacted.

Until *Fosler*, the Wyoming Supreme Court had never explicitly prescribed the proper distribution pattern required by Wyoming Statutes section 2-4-101.<sup>99</sup> The court did examine a different provision of Wyoming Statutes section 2-4-101 in one prior case, and speculated about the proper intestate distribution in another; however, neither case purported to be deciding the proper interpretation of Wyoming's intestacy statute.<sup>100</sup> Nonetheless, these cases were examined by the court in *Fosler* and will be discussed in more detail later in this note.

---

94. Lawrence H. Averill, Jr., *The Wyoming Probate Code of 1980: An Analysis and Critique*, 16 LAND & WATER L. REV. 103, 105-06 (1981).

95. *Id.*

96. *Id.* at 106.

97. *Id.* at 108.

98. *Id.* at 109.

99. *Matter of Fosler*, 13 P.3d 686, 689 (Wyo. 2000).

100. *Moralee v. Cadwell*, 186 P. 499, 499 (Wyo. 1920). The issue in *Moralee* was whether or not the adopted child of a deceased brother should take the same share as the natural children of a deceased sister. *Id.* Although the court did not directly address the issue of distribution, the initial shares were calculated using the deceased brother and sister and the children took by representation. *Id.* at 501. The distribution in *Moralee*, although not at issue, suggests that Wyoming would adhere to a strict per stirpes method of distribution.

In *Gilchrist's Estate*, the court established that where a will gives a bequest to "blood relatives," the intestacy statute should be used to determine what blood relatives should take. In re *Gilchrist's Estate* 58 P.2d 431, 438 (Wyo. 1950). The case is useful in that it specifies that intestate succession should occur in a per stirpes manner, yet it does not answer the question posed in *Fosler* of where the initial distribution should occur in an intestate estate.

## PRINCIPAL CASE

The court in *Fosler* was asked to decide the proper interpretation of Wyoming Statutes section 2-4-101(c)(iii).<sup>101</sup> In the prior court proceedings, the district court was asked to interpret a portion of the statute that states, "then to the grandfather, grandmother, uncles, aunts, and their descendants, the descendants taking collectively, the share of their immediate ancestors, in equal parts."<sup>102</sup> The personal representative of the estate set forth four possible interpretations of the statute, which he outlined in a Memorandum of Law in Support of Partial Distribution.<sup>103</sup>

Method 1(a) proposed that the grandparents be ignored and that the root generation consist only of the generation of uncles and aunts.<sup>104</sup> Because none of the grandparents survived the decedent, they would be ignored and the aunts and uncles would be the root generation where the estate would initially be divided per capita.<sup>105</sup> With six maternal aunts and uncles and three paternal aunts and uncles, the estate would be divided into nine equal shares with the estate descending by representation to the cousins on both sides.<sup>106</sup>

Method 1(b) did not ignore the grandparents, but allocated one share to each grandparent and uncle and aunt, with all representing the root generation.<sup>107</sup> Under this method, the estate was divided into thirteen separate shares.<sup>108</sup> Each of the grandparents and each aunt and uncle

---

101. *Fosler*, 13 P.3d at 690; WYO. STAT. ANN. § 2-4-101(c)(iii) (LexisNexis 2001) reads:

(c) Except in cases above enumerated, the estate of any intestate shall descend and be distributed as follows:

If there are no children nor their descendants, nor father, mother, brothers, sisters, nor descendants of deceased brothers and sisters, nor husband nor wife, living, then to the grandfather, grandmother, uncles, aunts and their descendants, the descendants taking collectively, the share of their immediate ancestors, in equal parts.

102. *Fosler*, 13 P.3d at 690.

103. Appellant's Brief, *supra* note 5, at 6. The alternatives were numbered 1(a), 1(b), 2(a) and 2(b). This numbering method may have been used as opposed to a straight numbering system (i.e. 1,2,3 . . .) in an attempt to more clearly indicate the two different theories of distribution with a per stirpes distribution set out in both 1(a) and (b) and a per capita form of distribution in 2(a) and (b).

104. *Fosler*, 13 P.3d at 688.

105. *Id.*

106. Appellant's Brief, *supra* note 5, at 11.

107. *Fosler*, 13 P.3d at 688.

108. Appellant's Brief, *supra* note 5, at 11-12.

would be assigned a share.<sup>109</sup> Each grandparent's share would descend by representation to uncles and aunts, and then the aggregate shares of each uncle and aunt would descend by representation to cousins.<sup>110</sup>

Method 2(a), the method adopted by the district court, called for the root generation to be the first generation with living heirs.<sup>111</sup> The nearest generation with living members was that of first cousin.<sup>112</sup> Constance Fosler had twelve maternal first cousins either alive or with surviving heirs, and four paternal first cousins living or with surviving heirs, so the estate would be divided into sixteen equal shares and each living first cousin would take per capita with the descendants of deceased cousins taking by representation.<sup>113</sup>

The final alternative, method 2(b), would make a per capita distribution of the estate to every surviving heir.<sup>114</sup> There were twenty-two surviving first, second and third cousins on the maternal side, and four surviving cousins of the paternal side.<sup>115</sup> Therefore, the estate would be divided into twenty-six equal shares and these heirs would represent the root generation.<sup>116</sup>

The Wyoming Supreme Court overruled the decision of the district court, which had approved method 2(a), and selected method 1(b).<sup>117</sup> In reaching this conclusion, the court examined closely the two prior Wyoming cases that, although not directly addressing the issue of *Fosler*, provided guidance as to the appropriate interpretation of the statute.<sup>118</sup>

The first case it examined was *Morale v. Cadwell*.<sup>119</sup> In *Moralee*, the decedent left no living children, spouse, father, mother, or siblings.<sup>120</sup> The only surviving relatives were the adopted son of the decedent's brother and the two natural children of the decedent's sister.<sup>121</sup> The issue was whether the adopted relative should take the same as the

---

109. *Id.* at 11.

110. *Id.*

111. *Id.* at 12.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 12-13.

117. *Matter of Fosler*, 13 P.3d 686 (Wyo. 2000).

118. *Id.* at 690-93.

119. 186 P. 499, 499 (Wyo. 1920).

120. *Id.*

121. *Id.* at 500.

natural relatives.<sup>122</sup> The court held that the adopted child of the brother should take the same share as the natural children of the sister.<sup>123</sup> The initial distribution was made at the generation of the brothers and sister and then descended by representation to the three nephews.<sup>124</sup>

The *Fosler* court relied the holding in *Moralee* as setting out a strict per stirpes form of distribution.<sup>125</sup> It argued that if in *Moralee* the court had intended to adopt a modern per stirpes method, it would have distributed the estate into three equal shares at the first generation with living heirs.<sup>126</sup> Because the *Moralee* court divided the estate per capita at the statutorily named generation represented by the deceased brother and sister, and then by representation to the descendants of that brother and sister, the court viewed this scheme as a strict per stirpes method of distribution consistent with method 1(b).<sup>127</sup>

The court also relied on *Gilchrist*.<sup>128</sup> Although this case did not directly address the issues involved in *Fosler*, it was considered for guidance on the statutory interpretation.<sup>129</sup> The decedent in *Gilchrist* left no surviving children or descendants of children, spouse, parents or siblings.<sup>130</sup> The decedent died testate and her will provided that each of her surviving blood relations were to receive \$100.<sup>131</sup> Over 485 persons filed an affidavit with the court claiming to be blood relations of the decedent.<sup>132</sup> The court looked to the intestacy statute in order to determine who actually should take as blood relations, and confined the definitions of blood relations only to those who would take under the statute.<sup>133</sup>

The significance of *Gilchrist* was illustrated when the case returned to the Wyoming Supreme Court after one of the parties filed for a rehearing.<sup>134</sup> The question on rehearing asked how the estate should be distributed to the living descendants of the deceased blood relation who

---

122. *Id.* at 499.

123. *Id.* at 500.

124. *Id.* at 501.

125. *Matter of Fosler*, 13 P.3d 686, 690-91 (Wyo. 2000).

126. *Id.* at 691.

127. *Id.*

128. *Fosler*, 13 P.3d at 691.

129. *Id.*

130. ??

131. *Id.*

132. *Id.*

133. *Id.* at 438.

134. *In re Gilchrist's Estate v. Eadie*, 60 P.2d 364 (Wyo. 1936). The Wyoming Supreme Court revisited the case to provide further clarification.

took \$100.<sup>135</sup> The court concluded, "If there had been a doubt as to whether the testatrix intended to include such claimant, we could then have gone to the statute of distribution, and have held that the distribution should be per stirpes."<sup>136</sup> The Wyoming Supreme Court found that *Gilchrist* established "that proper distribution to descendants of the statutorily named root generation is per stirpes."<sup>137</sup> Although this case answers the question of how the shares are to descend, it does not provide guidance as to where the initial distribution should occur.

The court also relied on rules of statutory construction and interpretation in reaching its conclusion.<sup>138</sup> The court stated that in interpreting statutes, the primary goal is to determine the intent of the Legislature.<sup>139</sup> The court will apply this general rule to look to the ordinary and obvious meaning of the statute when the language is unambiguous.<sup>140</sup> However, when the language is not clear, the court must look to other factors.<sup>141</sup> These factors include "the mischief the statute was intended to cure, the historical setting surrounding its enactment, the public policy of the state, the conclusions of law, and other prior and contemporaneous facts and circumstances."<sup>142</sup> Although the court did consider these factors, it held the language naming "grandfather, grandmother, uncles, aunts" was specific enough that the statute should be construed to mean that only those persons should be the root generation and cousins should take by representation.<sup>143</sup>

The court arrived at the conclusion that the root generation should consist of the statutorily named persons. However, it was then faced with answering a second difficult question: Why should the root generation include uncles, aunts *and* grandparents if the normal distribution will allow uncles and aunts to take by representation from the grandparents?<sup>144</sup> The court's rationale for accepting all statutorily named persons and not just uncles and aunts was based on the maxim of statutory interpretation that requires meaning be given to every part of the statute.<sup>145</sup> It noted that if the grandparents were not recognized as members of the root generation, that portion of the statute would be meaning-

---

135. *Id.*

136. *Id.* at 365.

137. *Matter of Fosler*, 13 P.3d 686, 692 (Wyo. 2000).

138. *Id.* at 688-89.

139. *Id.* at 688.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 692.

144. *Id.*

145. *Id.*

less.<sup>146</sup> The court stated that it did not have “power to add to, or to substitute, words in the statute.”<sup>147</sup>

The court recognized that it was in the minority in holding that the root generation was not the nearest generation with living heirs.<sup>148</sup> However, it also observed that the language of an intestacy statute is not an issue for the court to decide, but rather the responsibility of the Legislature.<sup>149</sup>

### ANALYSIS

The problem with Wyoming’s intestacy statute is in the language that names two separate generations as if they were one single generation. Wyoming Statutes section 2-4-101 (c)(ii) reads in pertinent part, “then to his father, mother, brothers and sisters” and section (iii) states, “then to the grandfather, grandmother, uncles, aunts and their descendants.”<sup>150</sup> Three states currently have, or had at one time, an intestacy statute with language similar to this.<sup>151</sup> With the decision in *Fosler*, each of the states has reached different conclusions as to the proper interpretation of the dual generation language of the statute. This disparate result is likely the product of both the problematic language of the statute itself, as well as the unique circumstances in which its application arises. Because none of the other two states have been confronted with a case factually identical to that of *Fosler*, it is impossible to determine exactly how they would apply the statute to that type of intestate distribution. However, based on the interpretations of each state, it appears that both Colorado and Missouri would reach a different result than that reached by the court in *Fosler*.

Although the court in *Fosler* was attempting to clarify Wyoming’s intestacy statute and establish the proper distribution, the interpretation has the potential to be quite problematic when applied. The next section will examine how Colorado and Missouri have interpreted the dual generation language of the statute. Then it will discuss problems that are likely to arise when applying the *Fosler* decision to future distribution in Wyoming, and propose potential solutions.

---

146. *Id.*

147. *Id.*

148. *Id.* at 689.

149. *Id.* at 693.

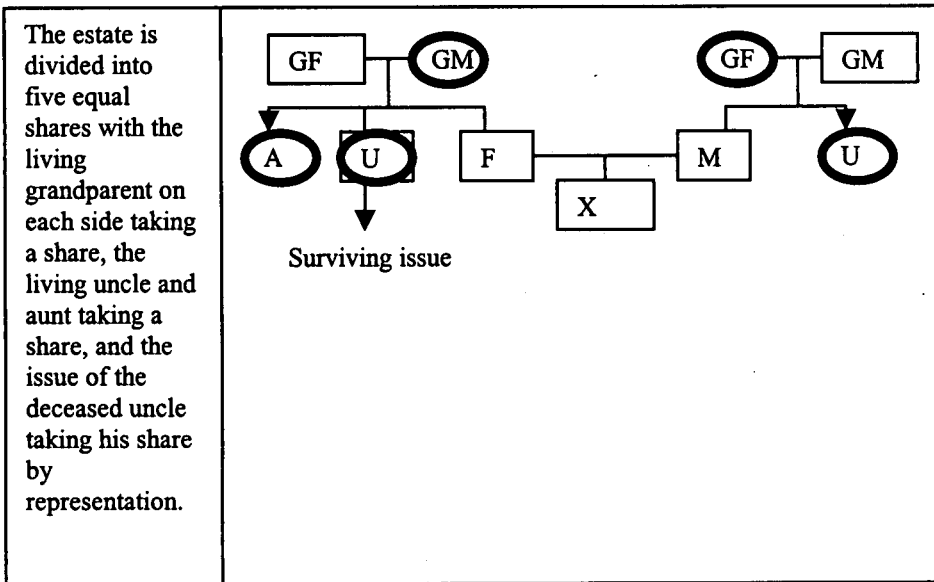
150. WYO. STAT. ANN. § 2-4-101 (LexisNexis 2001).

151. WYO. STAT. ANN. §2-4-101 (LexisNexis 2001); Old Colorado Statute: 1 Mills' Ann. St. § 1524 (Colorado); MO. ANN. STAT. § 474.020 (West 2001).

*The Colorado Approach*

Colorado’s interpretation of the dual generation language is based on case law. “ In the absence of nearer kin, the estate vests in such grandparents and uncles and aunts collectively, and not in the grandparents as a class, if there are any; and, if there be none, then to the uncles and aunts as a separate class.”<sup>152</sup> The root generation under the Colorado approach consists of both the statutorily named generations. However, it does not include *all* members of both generations. For example, in *Thatcher*, the root generation was made up of the living grandmother and various aunts and uncles. The deceased grandfather was not assigned a share as part of the root generation. The Colorado approach is illustrated in the following example:

*Diagram 5: Colorado Distribution*



In this example *X*, the decedent is survived by a paternal grandmother, a maternal grandfather, a paternal aunt and a maternal uncle. There is also a deceased paternal uncle with surviving issue. Under the Colorado interpretation, the estate vests in the grandparents and the uncles and aunts collectively.

Colorado relied on rules of statutory construction in reaching the conclusion that the root generation should consist of members of the

---

152. *Thatcher v. Thatcher*, 29 P. 800 (Colo. 1892)



both the statutorily named generations. In *Thatcher*, the appellant argued that the estate should vest in the grandparents as a separate class and then descend per stirpes to the uncles and aunts.<sup>153</sup> The court rejected this approach, holding that in order to give every word of the statute meaning and effect, uncles and aunts must be included as part of the root generation.<sup>154</sup> It concluded that unless uncles and aunts were part of the root generation, their inclusion in the language of the statute would be mere surplusage.<sup>155</sup> However, one should note that the court did not feel that this surplusage argument should extend to the deceased grandparents, as they were excluded from the root generation.<sup>156</sup>

It is not certain how the Colorado interpretation of the dual generation language would apply to the *Fosler* facts. However, another Colorado case indicates that the result would be to distribute the estate to the first generation with a living member.<sup>157</sup> Accordingly, the generation of first cousins, the nearest lineal ancestors, would likely be considered the root generation. In 1994 the Colorado legislature repealed the intestacy statute and subsequently adopted a provision very similar to the UPC section 2-103 per-capita-at-each-generation scheme.<sup>158</sup>

### *The Missouri Approach*

Missouri has the advantage of a separate provision of its probate code that clarifies the dual generation language.

When several lineal descendants, all of equal degree of consanguinity to the intestate, or his father, mother, brothers and sisters, or his grandfathers, grandmothers,

---

153. *Id.* at 801.

154. *Id.*

155. *Id.*

156. In *Fosler*, the court made a similar surplusage argument as that made by the court in *Thatcher*. However, the *Fosler* court extended the argument to include the deceased grandparents reasoning that, "to ignore the 'grandfather, grandmother' in the event they predecease the intestate would make the statutory reference in that circumstance meaningless." *Matter of Fosler*, 13 P.3d 686, 692 (Wyo. 2000).

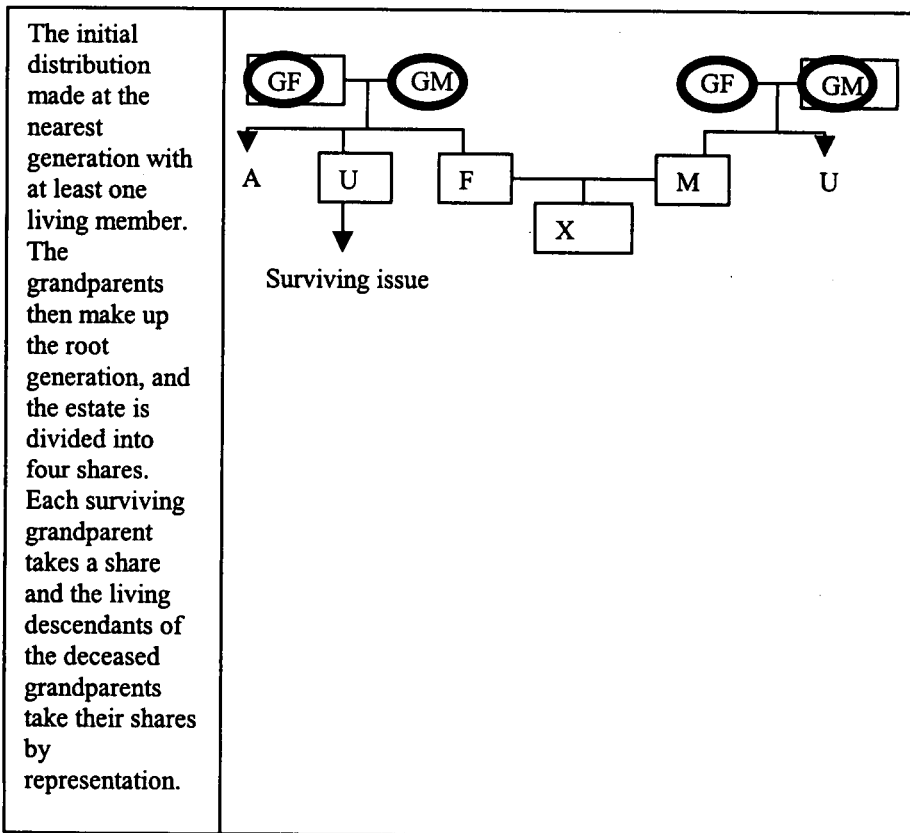
157. *Estate of Gregory*, 616 P.2d 186, 189 (Colo. 1980). *Gregory* held that the where there were paternal first cousins, descendants of paternal grandparents, and maternal second cousins, descendants of maternal great-grandparents, of paternal first cousin was the generation where the estate would be distributed per capita. *Id.* The court reached this result relying on Colorado Revised Statute section 153-2-1(3)(e) which reads, "and if none of the relatives above enumerated be living, then to the nearest lineal ancestors and their descendants . . ." *Id.* at 188. Although this provision does not explicitly state that the first generation with a *living* member is to take, the result in *Gregory* would appear to support this conclusion.

158. See COLO. REV. STAT. ANN. §12-11-103 (WEST 2001).

uncles and aunts, or any ancestor living and their children, come into partition, they shall take per capita, that is, by persons; where a part of them are dead, and part living, and the issue of those dead have a right to partition, such issue shall take per stirpes; that is, the share of the deceased parent.<sup>159</sup>

Although the language of this statute is somewhat convoluted, Missouri courts have read it to mean that where members of both generations come into partition, meaning that there are members of both generations living, only the nearest generation with a living member is to be included in the root generation. In *Ferguson v. Conklin*, the court held that, “[s]ection 474.020 then operates to partition the estate *per capita* . . . among all the living heirs of that generation still alive, and to the issue of those among them who are dead, *per stirpes*—that is the share of the deceased parent.”<sup>160</sup>

Diagram 6 illustrates the Missouri approach.



159. MO. ANN. STAT. § 474.020 (2001).

160. Estate of Ferguson v. Conklin, 723 S.W.2d 24, 30 (Mo. 1986).

The Missouri interpretation places the root generation where there is a living member. Therefore, in this example, the root generation would consist of the two living grandparents and the two deceased grandparents. The paternal aunt would take one-half of the deceased grandfather's share by representation, and the surviving issue of the deceased paternal uncle would receive the other one-half. The surviving uncle on the maternal side would take the deceased grandmother's entire share.

Missouri has never had a case factually identical to *Fosler*, where the grandparents and the uncles and aunts all predecease the intestate. However from the language of Missouri Statutes section 474.020 and Missouri case law it is likely that that the root generation under those circumstances would be first cousins. This result is alluded to in *Copenhaver v. Copenhaver*, where the nearest generation to the decedent with living members was that of nieces and nephews, the children of his deceased brothers and sisters.<sup>161</sup> The court, relying on an earlier version of Missouri Statutes section 474.02, concluded that because the nieces and nephews were all of equal degree of consanguinity, they would form the root generation and take per capita.<sup>162</sup>

### *The Wyoming Approach*

The *Fosler* interpretation of the dual generation language is different from both Missouri and Colorado. The *Fosler* court stated, "[w]e conclude, for the language [of the statute] to have meaning, the statutorily mandated root generation must be 'grandfather, grandmother, uncles, and aunts' regardless of whether they survive the intestate."<sup>163</sup> This means that every member of the statutorily named group, dead or alive, forms the root generation. Of the three different interpretations, this is the most literal view of the dual generation language of the statute. The court in *Fosler* stated, "The reference to 'grandfather, grandmother, uncles, aunts' is not qualified by a requirement that they survive the intestate, and we decline to read such a condition into the statute."<sup>164</sup> Diagram 7 will illustrate how the *Fosler* interpretation is likely to be applied.

---

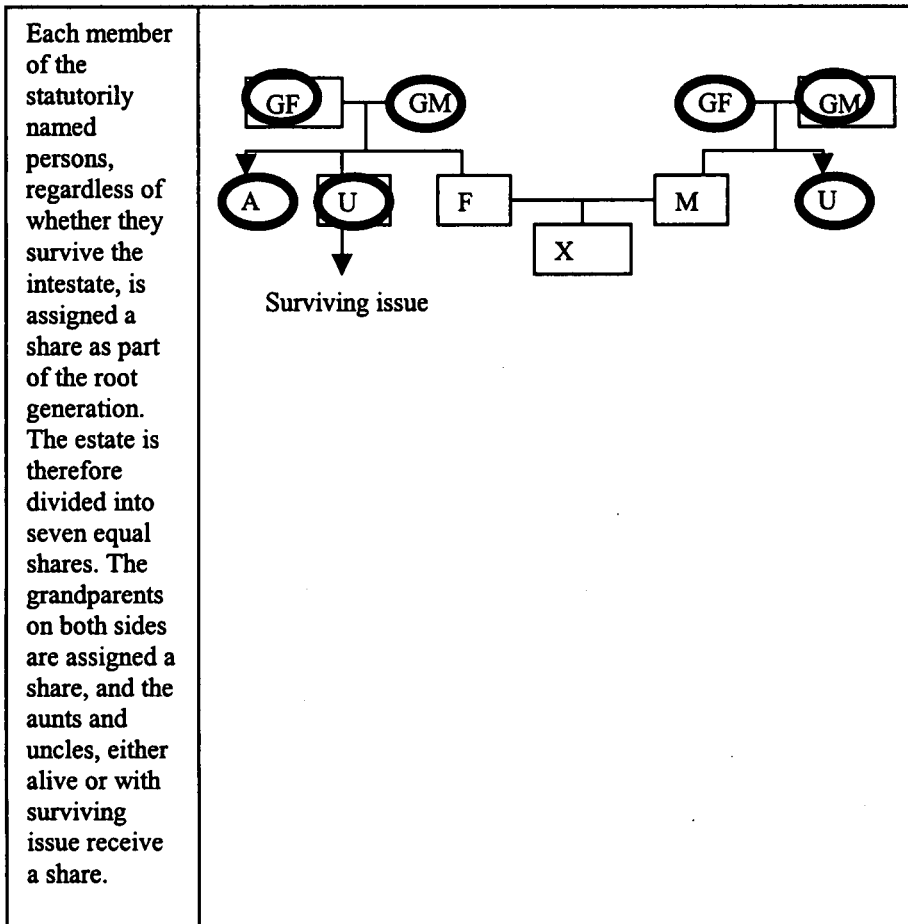
161. *Copenhaver v. Copenhaver*, 1883 WL 9806, 2 (Mo. 1883).

162. *Id.*

163. *Matter of Fosler*, 13 P.3d 686, 693 (Wyo. 2000)

164. *Id.* at 692.

*Diagram 7: Wyoming Distribution*



This result is quite different from both Colorado, which would exclude the deceased grandparents and divided the estate into five shares, and Missouri, which divided the estate into two shares among the first generation with at least one living member.<sup>165</sup> Here, the estate is divided into seven shares among all the grandparents, uncles, and aunts. The shares of the deceased grandparents descend, by representation, to the uncles and aunts.

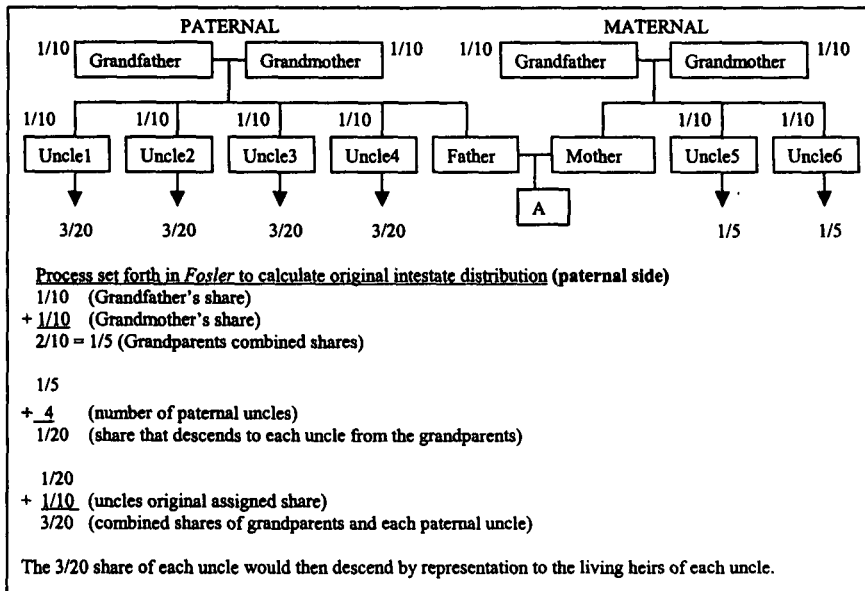
*Application of the Fosler Interpretation: Understanding the Process*

The *Fosler* interpretation of Wyoming Statutes section 2-4-101 can be quite complicated. For example, suppose that *A* dies. He leaves

165. See Diagram 5 (Colorado distribution) and Diagram 6 (Missouri Distribution).

no living descendants or father, mother, brother, sister, grandparents, uncles, or aunts. He leaves four deceased uncles with surviving issue on the paternal side and two deceased uncles with surviving issue on the maternal side.

*Diagram 8: Distribution and Descent under Fosler*



Under the *Fosler* interpretation of Wyoming Statutes section 2-4-101 the root generation consists of the statutorily named generation; in this case the deceased grandparents and uncles.<sup>166</sup> The estate is divided per capita into ten equal shares at that generation. Both the grandparents' one-tenth shares descend by representation to the uncles and are added to the uncles' one-tenth share, giving each paternal uncle a three-twentieth share. These combined shares then descend by representation to the living heirs of each paternal uncle. This process is the same on the maternal side.

Diagram 8 illustrates how complicated intestate distribution becomes when shares are assigned to two generations of deceased persons. The process would be less complicated if the distribution was made at only one generation, as in the Colorado approach, and a simpler solution

166. "[B]ecause 'grandfather, grandmother, uncles, aunts' are specifically named in the statute and therefore must constitute the statutorily named root generation." *Fosler*, 13 P.3d at 692.

would be to divide the initial shares at the first generation with a living member, as Missouri has done.

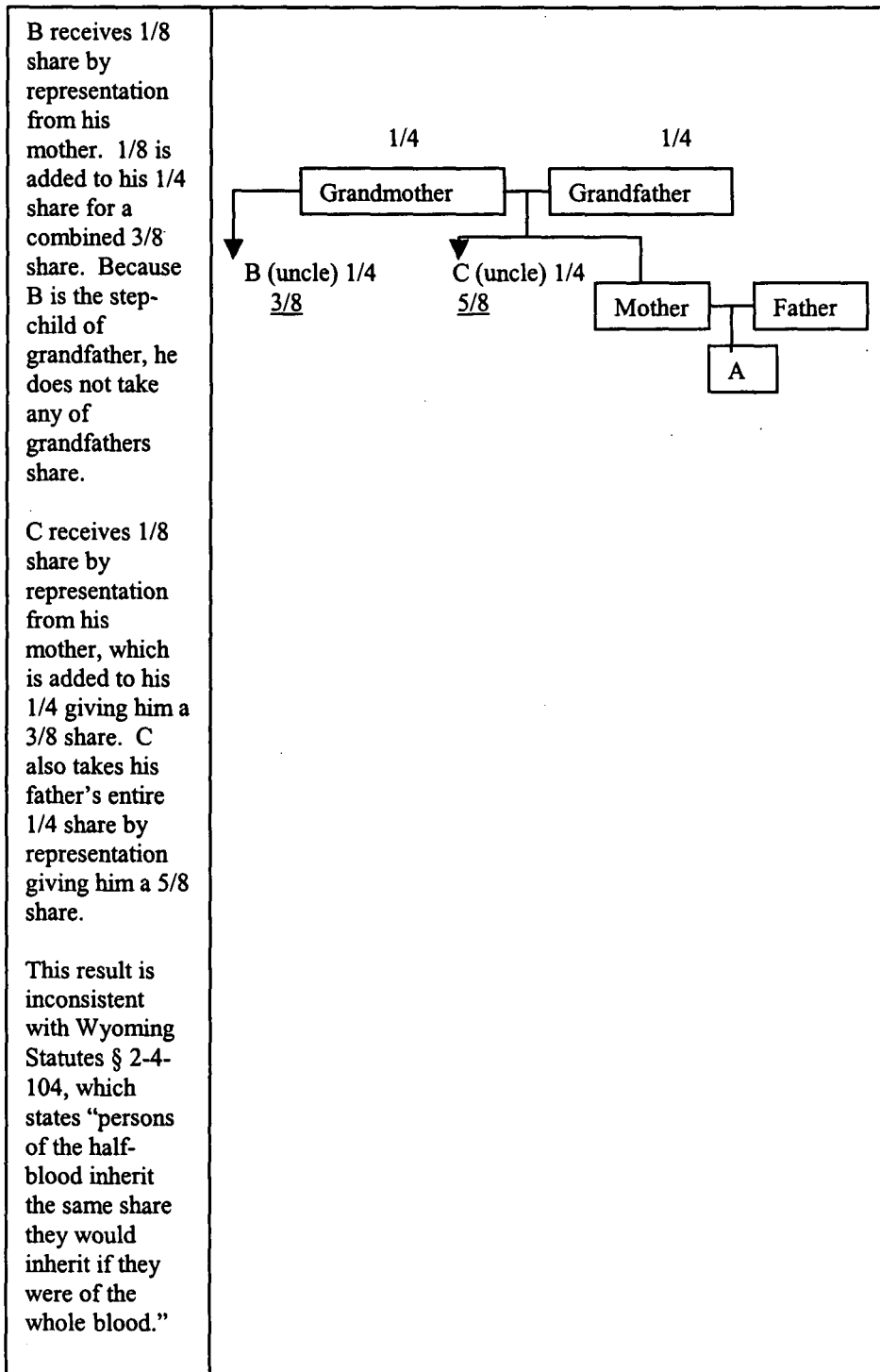
*Application of the Fosler Interpretation: The Half-Blood Conflict*

Not only does the Fosler interpretation further complicate intestate distribution, but also a more serious problem may arise when half-blood relatives are involved. Wyoming Statutes section 2-4-101 dealing with the inheritance rights of half-blood relatives states: “[p]ersons of the half-blood inherit the same share they would inherit if they were of the whole blood, but stepchildren and foster children and their descendants do not inherit.” This statute means that a relative of half-blood should inherit the same amount as a similar relative of whole blood. However, under the *Fosler* interpretation this may not be possible.

The following example will illustrate the statutory conflict. Assume that A dies and leaves as his only living heirs two uncles, B and C. B is a half-blood uncle from the previous

Marriage of his grandmother and was never adopted by A’s grandfather. C is the natural child of A’s grandmother and grandfather.

*Diagram 9: The Half-Blood Conflict*



Under Wyoming Statutes section 2-4-104, *B* as a half-blood relative should receive the same share of *A*'s estate that the *C*, a whole blood relative, receives.<sup>167</sup> However, this is not possible under the *Fosler* interpretation of Wyoming Statutes section 2-4-101. The root generation in this example would be the grandparents and *B* and *C*, the two uncles. Each would receive an initial one-fourth share of *A*'s estate. The one-fourth shares of the grandparents would then descend by representation to *B* and *C*.

Here is where the problem arises. Because *B* was not adopted, *C*, the brother of whole blood is the only descendent of the grandfather and will take the grandfather's entire share by representation. *C* will also take one-half of grandmother's one-fourth share, adding one-eighth share to his distributive share for a total five-eighths share. *B*, on the other hand, will not take by representation from the grandfather because he is not a descendent, and will only take the one-eighth share of grandmother leaving him with a three-eighths share. Therefore *C*, the uncle of whole blood, receives a five-eighths share, whereas *B*, the half blood uncle receives a lesser three-eighths share. This distribution obviously conflicts with the language of Wyoming Statutes section 2-4-104 because the uncle of half blood is not inheriting the same share that he would have inherited if he were a whole blood relation.

This problem is somewhat mitigated by the fact a situation where it will occur seems relatively rare. However, a scenario like this definitely not outside the realm of possibility. Even if the half-blood conflict never arises, it is likely that, given the complexities of applying the *Fosler* interpretation, Wyoming Statutes section 2-4-101 will be frequently misapplied and misunderstood.

### *Possible Solutions*

As has been noted, the dual generation language of Wyoming's intestacy statute is extremely rare and different results have been reached regarding its proper interpretation. It would appear that the Wyoming Supreme Court's attempt to clarify the language has only acted to further complicate the matter. There are three possible options, any one of which could result in more clarity in the application of intestacy law in Wyoming.

The first option would be to do nothing. It took more than 130 years before an interpretation of the Wyoming's intestacy statute was

---

167. WYO. STAT. ANN. § 2-4-104 (LexisNexis 2001).



required. Although it seems unlikely, it could be that long before any of the issues raised in *Fosler* surface again. However, when, and if, the issues come up, it will be the responsibility of the court to decide how they should be resolved.

The problem with this option is that there is a good possibility that the statute will be frequently applied erroneously. The Wyoming Supreme Court may not be confronted with this issue again soon; however, lower courts and practitioners will undoubtedly grapple with ascertaining the proper intestate distribution following the *Fosler* interpretation. It is somewhat counterintuitive to include a deceased person in the initial calculation of shares. It would be very easy for a practitioner to overlook a deceased grandparent, or parent when calculating the proper distribution of an intestate estate, or exclude the grandparents from the root generation altogether where neither is alive. When a large estate is involved, these omissions can make a significant difference.

The next option would be to enact a clarifying statute similar to Missouri's. This statute could codify the holding in *Fosler* and clearly set out exactly how the intestate distribution should occur.<sup>168</sup> However, the problems with descent to spouses and children, and the half blood issue, would not be resolved by such an amendment. A separate statute would probably be required to resolve both of those problems.

The final option would be for the Legislature to follow Colorado's lead and adopt a more workable intestate statute. The court in *Fosler* recognized that many state legislatures have adopted intestacy statutes consistent with a modern per stirpes distribution scheme where the first generation with a living member is the root generation.<sup>169</sup> Ultimately, the court did not interpret the statute in this way, yet it appeared to be somewhat uneasy with the result of the case. Near the end of the opinion the court stated, "we cannot sua sponte revise the statutes through interpretation to satisfy *our individual views* of contemporary family ties and *equitable* distribution" and "courts are not at liberty to impose *their views of the way things ought to be* simply because that is what must have been intended."<sup>170</sup> From these statements, it

---

168. The language of such a statute could be easily added to the current Wyoming Statute § 2-4-101. Subsection (c)(iv) could read, "when applying subsections (ii) and (iii) this section, the initial distribution shall be per capita among the statutorily named generations of "mother, father, brothers and sisters" or "grandfather, grandmother, uncles and aunts" regardless of whether any member of either generation is living, the descendants of such persons taking per stirpes."

169. *Matter of Fosler*, 13 P.3d 686, 693 (Wyo. 2000).

170. *Id.* (emphasis added).

would appear that the court believed a different scheme would be more "equitable," but that the statute could not be changed based on its views. Finally, in the closing paragraph of the opinion, the court alluded to the need for legislative action, noting that prior authorities supported their conclusion and suggesting that the language of the intestacy statute is "for the legislature to decide."<sup>171</sup>

When, and if, the Wyoming Legislature decides to revisit the intestacy provision of the Wyoming Probate Code, it should take into consideration a few important factors. First, it should recognize, as the court in *Fosler* did, that the modern trend is to move toward a distribution scheme where the root generation is selected from the generation nearest in degree of relationship to the intestate with a living member. Not only is this the modern trend, but also it has been adopted in a majority of jurisdictions. Next, the Legislature should thoroughly evaluate the potential problems in applying the *Fosler* interpretation of the statute, including the half-blood conflict and the complicated intestate distribution that arises from the interpretation. It should also consider what remedy, if any, is appropriate. The Legislature should ask whether the statute should be amended to codify the holding in *Fosler*, repealed, or left alone. Finally, the Legislature should look closely at all possible intestacy statute alternatives. When Colorado revised its intestacy statutes, it adopted a modified version of the UPC section. The UPC is one possibility the Legislature may consider. However, there are many variations of intestacy statutes and it would be prudent to consider adopting a version similar or even identical to that of another jurisdiction, or creating an original intestacy statute.

#### CONCLUSION

The *Fosler* interpretation of the dual generation language of Wyoming's intestacy statute is unique from that of Colorado and Missouri, two other states with similar intestacy statutes. Although no case from these two states has been directly on point with the facts in *Fosler*, it appears that if confronted with a similar situation, they would both hold that the first cousins would take per capita as the root generation. However, each state has taken a slightly different approach. The three different interpretations of similar statutes stand as evidence of the problematic nature of its dual generation language.

The *Fosler* interpretation answers the question of what relatives should form the root generation; however, other problems are sure to

---

171. *Id.*

arise when applying the Fosler interpretation. Distributing the initial shares to dual generations, where no member of either is living, can further complicate the already-complex process of intestate distribution. Moreover, Wyoming Statutes section 2-4-101 requires that relatives of half-blood inherit the same as if they were of whole blood. However, under the *Fosler* interpretation that makes the initial distribution to two generations, this may not be possible. The relative of whole blood will take a greater share than the relative of half-blood.

In the closing paragraph of the *Fosler* opinion the court suggested that the issues posed by the language of the intestacy statute were not for it to decide, but rather a task for the Legislature.<sup>172</sup> For one reason or another, the Legislature overlooked the inherent problems in Wyoming Statutes section 2-4-101 when it revamped its probate code in 1979. In light of the complications created by the *Fosler* decision, it is evident that it is time for the Legislature to take some action regarding Wyoming's 130-year-old intestacy statute.

SAMUEL B. SHUMWAY

---

172. *Id.* at 693.