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The Uniform Probate Code represents a monumental effort to modernize the law of decedents' estates. In this, Part 1 of a multipart article, Professor Averill examines the Wyoming law governing both intestate and testate succession and compares Wyoming law with the provisions of the Uniform Probate Code. This comparative approach not only renders a comprehensive description of the status of present law but also demonstrates the need for reform in Wyoming.

WYOMING'S LAW OF DECEDENTS' ESTATES, GUARDIANSHIP AND TRUSTS: A COMPARISON WITH THE UNIFORM PROBATE CODE --- PART I

*Lawrence H. Averill, Jr.**

I. INTRODUCTION

THE word "probate"¹ in recent years symbolizes in the minds of some persons the evils of graft, waste and delay. The resultant cry has been "avoid probate." Several successful commercial enterprises have been launched from this conceptual pad and they accuse the legal profession of perpe-

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1. Technically the word "probate" refers to the process of proving and deciding the validity of a will before a court having competent jurisdiction; more generally, it refers to all matters appropriately before the probate courts. BLACK'S LAW DICTIONARY 1365-66 (4th Ed. 1951). To most laymen, it probably refers to the law dealing with the disposition of property at one's death.

trating and perpetuating the undesirable situation.² Public confidence in the legal house of probate is certainly depressed.³

The source of much of the distrust is in the laws themselves. First, there is no real uniformity between the laws of the fifty states. This fact not only may cause unjust results⁴ but also an inherent confusion and distrust among a very mobile lay populace.⁵ Second, most of the current legislation on decedents' estates matters are not contemporary. Their principal enactment dates range from over one hundred years ago to sixty years ago. Even the latter laws do not take into account the material changes in our society. Not only has it changed from a primarily rural to primarily urban and therefore from a proprietary emphasis directed to real property to one directed toward forms of personal property and other contractual relationships, but also from one educationally and sociologically provincial to one national and even international in scope. Consequently, the present laws on this matter do not generally deal with or at least adequately pursue the primary problems faced by the average person in distribution of wealth at death. Lastly, the relevant laws are typically not adequately codified or in language which can be easily understood. Although central codification and modern legislative draftsmanship are not usually reasons in themselves for totally rewriting an area of law, their absence in a particularly interrelated and fundamental area of law such as that of decedents' estates may indicate that deficiencies, overlaps and confusion are a part of the laws' content

2. BLOOM, *THE TROUBLE WITH LAWYERS*, ch. 11, pp. 233-63 (1968) (Chapter 11 is entitled "Our Unknown Heirs"); DACEY, *HOW TO AVOID PROBATE* 8 (1965).

3. In October, 1966, the editors of the American Bar Association commented: But we should be less than fair if we sought to excuse the abuses in the probating of wills that are inducements to avoiding probate. It is our belief that regardless of the merits of the revocable trust, it is the duty of a vigilant organized Bar to take to heart the criticisms that have been aimed at lawyers and at the improper practices of the probate courts. We should not be content to answer the problems by mere avoidance of probate on the part of our clients. We should work assiduously to stamp out the evils the revocable trust is calculated to avoid.

56 A.B.A.J. 938, 939 (1966).

4. For example, a will which would be valid and effective where executed may not be where probated merely because the testator has changed his domicile.

5. The legal literature on this problem indicates that even lawyers are having difficulty. *E.g.*, Polasky, *Estate Planning for the Migrant Executive*, 2 U. MIAMI INST. ON ESTATE PLANNING ¶ 68-7 (1968); Scoles & Rheinstein, *Conflict Avoidance in Succession Planning*, 21 LAW & CONTEMP. PROB. 499 (1956); Scoles, *Conflict of Laws in Estate Planning*, 9 U. FLA. L. REV. 388 (1956).

and application.⁶ The same criticism can typically be stated against the present laws concerning guardianship and trusts.

The Wyoming's statutory pattern on these matters is subject more or less to all of the above criticisms. In addition, some clearly harmful omissions and inadequacies exist. It is the intent of this article, therefore, to describe and examine Wyoming's present law of decedents' estates, guardianship and trusts and further to compare and analyze it in view of the provisions of the recently published Uniform Probate Code. The comparative analysis is justified for two reasons: first, because the Code is the final product of a great deal of thought, work and compromise by a large number of experts concerned with and working in this area of law, it represents an extremely useful comparative tool; and second, the Code or its significantly inspired imitation will more than likely be introduced into the Wyoming legislature sometime in the near future. The article will therefore be useful both as a reference source of present law and as a springboard and guide to the changes which may and should occur in the future.

II. BRIEF HISTORY

A. Wyoming Law

The purpose of this section is to put into perspective the chronological progress of legislation related to decedents' estates, guardianship and trusts. No attempt will be made to explain the provisions of the enactment other than to explain briefly the effect of amendments. For convenience and organization this chronology is separated into six categories: intestate distribution, testacy regulation, administration of estates, guardianship, miscellaneous related enactments and trusts.

6. Of course, the most vitriolic criticism leveled at many of the present probate laws is that they permit exorbitant fees for attorneys, administrators and other probate officials. See references cited *supra* note 2. This criticism, although the motivation behind much of the present movement for reform, is not mentioned in the text because it does not go to the totality of the problem. To remedy it would only reach the tip of the iceberg. If reform is needed it is needed throughout the whole area of law. The truly valid criticisms are those which concern this broader subject and that is why they appear in the text of this article.

Wyoming's intestacy provisions⁷ were enacted during the first session of the legislative assembly on December 10, 1869.⁸ This act covered nearly the full range of intestacy questions including the rights of all full blooded next of kin, half bloods, illegitimates, posthumous children, aliens, children receiving advancements, and children whose parents are divorced.⁹ Other than a minor amendment in 1877¹⁰ and a little more significant one in 1915,¹¹ the basic distribution provisions have remained unchanged.

Wyoming's will provisions¹² were enacted in 1882 by the seventh legislative assembly.¹³ This act included the requirements and limitations on execution, revocation, will construction,¹⁴ appointment of executors, and several other procedural matters. Other than an amendment in 1895 that specifically permitted wills to be typewritten,¹⁵ no substantive alterations of formalities have occurred. The surviving spouse's option or forced share, however, was not added until 1915¹⁶ and after a significant substantive amendment in 1919,¹⁷ reached its present form in 1957.¹⁸

Although the first session of the legislative assembly enacted a law concerned with the administration of estates,¹⁹

7. WYO. STAT. §§ 2-37 to -45 (1957).

8. Law of Dec. 10, 1869, ch. 41, [1869] Wyo. Laws 398-402.

9. The act also included a provision providing for a limited allowance of personal property for the wife. *Id.*

10. Law of Dec. 15, 1877, [1877] Wyo. Laws 35. This amendment merely made the under \$10,000 proviso in favor of the surviving spouse limited to the situation when "no child nor descendants of any child" were alive.

11. Ch. 4, §§ 1-3, [1915] Wyo. Sess. Law 4-5. The surviving spouse's rights were significantly enhanced in that the \$10,000 provision in favor of the spouse was changed to \$20,000; and, the spouse would get all of the estate if there were no children, or parents or descendants of either. Ministerial alterations were also made such as removing the word "That" from the beginning of Section 1; using arabic numbers rather than spelled out numbers for the enumerated order of distribution; and, changing "leave a husband or wife" language to "leaves husband or wife."

12. WYO. STAT. §§ 2-47 to -52 (1957, Supp. 1971).

13. Ch. 107, §§ 1-15, [1882] Wyo. Laws 211-12.

14. After acquired property passed by will.

15. Ch. 20, § 1, [1895] Wyo. Sess. Laws 43.

16. Ch. 149, §§ 1-2, [1915] Wyo. Sess. Laws 230.

17. Ch. 21, §§ 1-2, [1919] Wyo. Sess. Laws 21. This act added the present statutory language concerned with surviving children of a prior marriage and no children of the present marriage causing the surviving subsequent spouse to receive one-half of the normal share.

18. Ch. 204, §§ 1-2, [1957] Wyo. Sess. Laws 329-30. Other than minor ministerial changes, it added the requirement and procedure for notification to the surviving spouse of the option by the judge of the probate court and that the right may be exercised by the surviving spouse's personal representative or guardian.

19. Ch. 6, §§ 1-239, [1869] Laws of Wyo. 177-219. Wyoming apparently had a probate procedure before it had a will validation statute. *See supra* note 13.

it was not until 1891 that the first state legislature enacted the Probate Procedure Act²⁰ which presently composes Wyoming's law of administration of decedents' estates.²¹ Comparatively few and no truly significant alterations have been made to the act.²² Several recent amendments are worthy of mention, however, in that they have shortened many of the limitation periods, with the idea of speeding the administration process.²³

Wyoming's law of guardian and ward²⁴ was also included within the 1890-91 Probate Procedure Act²⁵ and has remained basically unaltered with the exception that several acts have been enacted dealing with specific situations.²⁶

Several miscellaneous enactments deserve mention. Holographic wills²⁷ were recognized in 1895²⁸ and a procedure was adopted for their probate in 1925.²⁹ The nuncupative will provisions of the 1890-91 Probate Procedure Act were repealed in 1925.³⁰ The Uniform Foreign Probate Act was enacted in

20. Ch. 70, (chs. I-XX), [1890-91] Wyo. Sess. Laws 243-304. Substantially all of the Wyoming Probate Procedure Act was copied from the probate part (Title XI consisting of 12 chapters) of the California Code of Civil Procedure of 1872. This Code was in turn primarily a redraft of the California Probate Act of 1851 which apparently had a Texas origin. *In re Schroeder's Estate*, 46 Cal. 304 (1873). California frequently added and amended the 1872 Code until the 1931 Probate Code was enacted. The 1931 Code basically consolidated into one title the previously separate laws of wills, succession, administration of decedents' estates and guardian and ward: it was not intended to change the substance of the law. Frequent piecemeal amendments have kept the Code in a slow rate of flux up to the present. Turrentine, *Introduction to California Probate Code*, 52 CALIF. PROBATE CODE 1-40 (West. 1956).

21. See Editor's note, WYO. STAT. § 2-1 (1957).

22. *Id.* The Uniform Estate Tax Apportionment Act was enacted in 1959, however. WYO. STAT. §§ 2-336 to -346 (Supp. 1971).

23. WYO. STAT. §§ 2-47, -83, -89, -219 (Supp. 1971). The time limitations for electing against a will, contesting a will and filing a claim against the estate were shortened from six months to three months.

24. WYO. STAT. §§ 3-1 to -58 (1957).

25. Ch. 70, (chs. XXI-XXVI), [1890-91] Wyo. Sess. Laws 304-16.

26. Guardianship for Mental Incompetents or Incompetents, WYO. STAT. §§ 3-29.1 to -29.15 (Supp. 1971); Conservators of Estates of Minors and Incompetents Admitted to State Training School and State Hospital, WYO. STAT. §§ 3-33.1 to -33.8 (Supp. 1971); Uniform Veterans' Guardianship Act, WYO. STAT. §§ 3-59 to -77 (1957).

27. WYO. STAT. §§ 2-54 to -56 (1957).

28. Ch. 20, § 3, [1895] Wyo. Sess. Laws 43.

29. Ch. 40, §§ 1-3, [1925] Wyo. Sess. Laws 28.

30. Ch. 7, § 1-2, [1925] Wyo. Sess. Laws 6. This act failed to repeal the reference to nuncupative wills presently contained in WYO. STAT. § 2-58 (1957).

1921³¹ providing Wyoming with a very liberal Conflict of Laws rule with regard to probate in Wyoming of wills previously probated elsewhere.³² In 1915 the legislature added a section³³ which prohibited a person from obtaining property by feloniously killing another.³⁴ A provision³⁵ which permitted a will to "pour over" assets into an amended trust was enacted in 1957.³⁶

Until recent years the Wyoming legislature has been generally inactive with regard to the area of trusts. Much of the activity has been piecemeal legislation concerned with the liability of third persons dealing with trustees who are acting in breach of trust.³⁷ During the last ten years, however, there has been a flurry of significant legislation in the area of trust law. In 1963³⁸ the Revised Uniform Principal and Income Act was adopted.³⁹ The 1965 legislature enacted⁴⁰ the Uniform Trustees' Powers Act.⁴¹ And, finally, after a constitutional amendment in 1967⁴² the "prudent man" fiduciary investment standard⁴³ was adopted.⁴⁴

Except in the area of trust management, this historical review reveals that Wyoming's basic statutory pattern in the law of decedents' and wards' estates was set more than eighty years ago.

B. The Uniform Probate Act

Although the official text of the Uniform Probate Code as adopted in August, 1969, does not have a nineteenth century

31. Ch. 81, §§ 1-7, [1921] Wyo. Sess. Laws 85. Chapter XIX of the 1890-91 Probate Procedure Act included provisions for the probate of foreign wills. The 1921 Uniform Act did not repeal these provisions although laws or their parts inconsistent or in conflict with the Uniform Act were repealed. The 1931 Revision Act finally specifically repealed the chapter. Ch. 73, § 179, [1931] Wyo. Sess. Laws 136-37.

32. WYO. STAT. §§ 2-67 to -71 (1957).

33. Ch. 95, §§ 1-2, [1915] Wyo. Sess. Laws 107.

34. WYO. STAT. § 2-46 (1957).

35. Ch. 180, § 1, [1957] Wyo. Sess. Laws 300.

36. WYO. STAT. § 2-53 (1957).

37. Uniform Fiduciaries Act, WYO. STAT. §§ 4-1 to -15 (1957) (sections 4-4 to -8 were repealed when the UCC was enacted); Uniform Act for Simplification of Fiduciary Security Transfers, WYO. STAT. §§ 4-15.1 to -15.11 (Supp. 1971); WYO. STAT. 34-8-304(2), 34-10-102(2) (Supp. 1971) (Uniform Commercial Code).

38. Ch. 189, § 1-16, [1963] Wyo. Sess. Laws 331.

39. WYO. STAT. §§ 34-374 to -389 (Supp. 1971).

40. Ch. 54, § 1-10, [1965] Wyo. Sess. Laws 47-52.

41. WYO. STAT. §§ 4-36 to -45 (Supp. 1971).

42. WYO. CONST. art. 3, § 38.

43. WYO. STAT. §§ 4-19.1 to -19.5 (Supp. 1971) (Sections 4-16 to -19 repealed).

44. Ch. 36, § 1-7, [1967] Wyo. Sess. Laws 25-27.

birthdate, its origin indicates that it is of establishment age. In 1940 it was suggested to the American Bar Association Section of Real Property, Probate and Trust Law that this organization prepare a Model Probate Code.⁴⁵ This idea resulted in the publishing of the Model Probate Code in 1946⁴⁶ which had an influence on legislation concerning decedents' estates' matters in several states.⁴⁷

Unfortunately this code had neither the scope nor the impetus to influence a majority of states to adopt it. Therefore, in 1962, the Real Property, Probate and Trust Law Section was again challenged⁴⁸ to produce a uniform probate law. It was also recommended and accepted that this project be prepared with the cooperation of the well known, highly respected and influential Commissioners on Uniform State Laws. After 6 drafts, six years in production and extensive research, consultation and discussion,⁴⁹ the final official text⁵⁰ was approved in August, 1969, by the National Conference of Commissioners on Uniform State Laws and by the House of Delegates of the American Bar Association.

The Code represents a comprehensive legislative guide⁵¹ to state legislatures or their committees for revision of the whole area of decedents' estates, guardianship and trusts. At least two states⁵² have adopted legislation which was greatly affected by the provisions and ideas of the drafts of the Code. The literature on the Code is rapidly increasing⁵³ and states

45. Atkinson, *Wanted—A Model Probate Code*, 23 J. AM. JUD. SOC'Y 183, 189 (1940).

46. PROBLEMS IN PROBATE LAW—A MODEL PROBATE CODE (1946). [Hereinafter cited as Model Probate Code].

47. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U.L. REV. 1037, 1039 (1966). See also Fratcher, *Estate Planning and Administration Under the Uniform Probate Code*, 110 TRUSTS & ESTATES 5 (1971); Durand, *An Introduction to the Uniform Probate Code*, P-H SUCCESSFUL ESTATE PLANNING—IDEAS AND METHODS ¶ 15,001, at 15,002 (1969).

48. See Fratcher, *Estate Planning and Administration Under the Uniform Probate Code*, 110 TRUSTS & ESTATES 5 (1971).

49. See Durand, *supra* note 47.

50. UNIFORM PROBATE CODE: OFFICIAL TEXT WITH COMMENTS (West, 1970) [hereinafter cited as U.P.C.]. An unofficial copy can be found in 1 P-H ESTATE PLANNING—WILLS, ESTATES AND TRUSTS, Report Bull. 6 (1969).

51. Wellman, *A Reaction to the Chicago Commentary*, 1970 U. ILL. L.F. 536, 542. Professor Wellman, who was the Code's Chief Reporter, has emphasized that the Code will not be presented to legislators on a take-it-or-leave-it basis. *Id.*

52. MD. ANN. CODE art. 93 (Supp. 1970); ORE. REV. STAT. §§ 111.005-119.990 (Repl. 1969).

53. *E.g.*, Diab *New Jersey and the Uniform Probate Code*, 2 SETON HALL L. REV. 323 (1971); Durand, *supra* note 47; Fratcher, *supra* note 48; Haviland, *Shall We Rebuild Our House of Probate? The Uniform Probate*

not possessing recently enacted legislation on these areas of law will feel increasing pressure to do so from the sponsoring organizations.

III. INTESTATE SUCCESSION

A. General Patterns—Master Plan

The general intent of intestacy laws is to distribute a person's wealth on his death in a pattern which represents a close facsimile to that which the person would have designed had he properly manifested his intent.⁵⁴ Obviously, to provide this on a general scale, the legislature has to develop an objective rather than a subjective program which will necessarily be subject to debate. All of our common law states have developed such patterns and although there is a definite similarity between them significant differences do appear. Since the laws have been enacted at various times in our country's history, the moods of the legislatures under their contemporary ideas of society have altered the intestacy designs. An example of such a variation is the surviving spouse's share in that the most recent concepts have encouraged larger shares than earlier legislation provided for that spouse.

A description and comparison of Wyoming's law and of the Code provision can best be achieved through the following charts.

[Chart No. 1—Wyoming Law of Distribution]⁵⁵

	Children & Their Descendants	Parents	Brothers & Sisters & Their Descendants	Grand- parents, Uncles & Aunts, & Their Descendants
1. Spouse	$\frac{1}{2}$	—	—	—
2. $\frac{3}{4}$ surviving	None	$\frac{1}{4}$	—	—

Code, 19 U. OF KAN. L. REV. 575 (1971); McKelroy, *The Uniform Probate Code: A Comparison with Existing Alabama Probate Law*, 2 CUMBERLAND-SAMFORD L. REV. 1 (1971); Wellman, *The New Uniform Probate Code*, 56 A.B.A.J. 636 (1970). For a recent article which is hyper-critical of the Code see Zartman, *An Illinois Critique of the Uniform Probate Code*, 1970 U. ILL. L.F. 413.

54. MODEL PROBATE CODE § 22, Comment at 63. See also U.P.C. art. 2, pt. 1, General Comment at 21.

55. WYO. STAT. § 2-37 (1957).

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3.	20,000	None	None	$\frac{1}{4}$	—
	$\frac{3}{4}$	surviving	surviving		
4.	All	None	None	None	—
		surviving	surviving	surviving	
5.	None	All	—	—	—
	surviv-				
	ing				
6.	None	None	—	All	—
	surviv-	surviving			
	ing				
7.	None	None	None	None	All
	surviv-	surviving	surviving	surviving	
	ing				

[Chart No. 2—Uniform Probate Code]⁵⁶

	Spouse	Children & Their Descendants	Parents	Brothers & Sisters & Their Descendants	Grand- parents, Uncles & Aunts & Their Descendants
1.	50,000				
	$\frac{1}{2}$	$\frac{1}{2}$			
1a.	$\frac{1}{2}$	$\frac{1}{2}$	—	—	—
		(children of another mar- riage)			
2.	50,000	None	$\frac{1}{2}$	—	—
	$\frac{1}{2}$	surviving			
3.	All	None	None	—	—
		surviving	surviving		
4.	All	None	None	None	—
		surviving	surviving	surviving	
5.	None	All	—	—	—
	surviv-				
	ing				
6.	None	None	All	—	—
	surviv-	surviving			
	ing				

56. U.P.C. §§ 2-102 [Share of the Spouse]; 2-103 [Share of Heirs Other Than Surviving Spouse].

7. None	None	None	All	—
surviv-	surviving	surviving		
ing				
8. None	None	None	None	1/2 paternal
surviv-	surviving	surviving	surviving	1/2 maternal
ing				

The substantive variations between the two schemes are insignificant if not merely a matter of opinion. The most significant differences are that the Code is more detailed in the situations covered and the \$50,000 figure in favor of the surviving spouse will protect that spouse more adequately in a greater number of estates.

In some other areas not shown by the chart, the Wyoming pattern is also similar to the Code. No distinctions between real or personal property or between sex are made; the estate is subject to debts of the decedent;⁵⁷ and dower and curtesy are abolished.⁵⁸

Although the concept of representation is permitted by a descendant of a person entitled to receive a part of the estate under both Wyoming's law and the Code, its application materially differs. The Wyoming statute is ambiguous with regard to which generation comprises the root generation for purposes of determining the representative share of the surviving relative. The most likely interpretation is that the root generation is that of the relative designated in the statute.⁵⁹ In other words for the descendants of children the root generation would be the children; for the descendants of brothers and sisters it would be the brothers and sisters; and for the descendants of uncles and aunts it would be the uncles and aunts. These roots would remain the same regardless of whether or not one of the specified relatives survived.

It is with this latter point that the Code differs from the Wyoming approach. The root generation is designated to be

57. WYO. STAT. § 2-37 (1957); U.P.C. § 3-807.

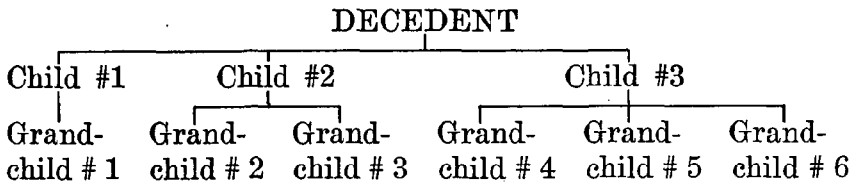
58. WYO. STAT. § 2-37 (1957); U.P.C. § 2-113. There is also no distinction made between ancestral and non-ancestral real estate. This old English common law distinction has lost its validity in today's society. See generally, ATKINSON, WILLS § 21 (2d ed. 1953).

59. The phrase "the descendants, collectively taking the share which their parents would have taken if living" would seem to require this interpretation. See Note, 11 WYO. L.J. 120 (1957).

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the one in which one relative survives; this generation provides the number for purposes of allocating the shares to those who represent their ancestor.⁶⁰ The following chart [No. 3] is illustrative of the difference. If Child No. 1 is alive and Child No. 2 and No. 3 are deceased, then the Code and Wyoming's law will distribute among the descendants in the same manner: the portion which the descendants receive will be divided into thirds with Child No. 1 receiving one-third and the grandchildren of the other two children dividing their ancestor's one-third equally

[Chart No. 3]



Grandchildren #2 and #3 will receive one-sixth each and grandchildren #4-#6 will receive one-ninth each. If, however, all of the children are dead, the two laws will divide it differently. Wyoming would apparently still divide it in a true per stirpes manner⁶¹ making the children the root generation. Consequently the portion would be divided into thirds again and the grandchildren of each child would divide his third equally. Grandchild #1 would obviously receive more than the other since there is no one else with which to divide the third. The Code would in this example divide the portion in a per capita manner⁶² thereby permitting each grandchild to receive an equal share. If a grandchild was dead leaving descendants, then the representation part of the Code would apply and the grandchild's descendants would divide his share.

The rationale for this approach is that the probable intent of a decedent would be to divide a portion equally among living relatives of equal degree but to favor a living relative of a closer degree.⁶³ Therefore, representation is only em-

60. U.P.C. § 2-106.

61. See Page, *Descent Per Stirpes and Per Capita*, 1946 WIS. L. REV. 3.

62. See *Id.*

63. Cf. ATKINSON, *WILLS* § 18, at 71-72 (2d ed. 1953). See also Wellman, *A Reaction to the Chicago Commentary*, 1970 U. ILL. L.F. 536, 537; but see Zartman, *An Illinois Critique of the Uniform Probate Code*, 1970 U. ILL. L.F. 413, 417.

ployed when the descendants are of unequal degree. In other words, the root generation is the first generation leaving a living representative.

Although the example discussed was directed to descendants of the decedent, the same approach is applied in the same manner as indicated by the Code and by the Wyoming statute regardless whether the situation concerns decedent's descendants, or his brothers' and sisters' descendants or his uncles' and aunts' descendants.

Another variation between the two laws concerns the problem of distant relatives and their rights in the estate of a decedent. Under Wyoming law a "shirt tail" relative is apparently entitled to share in the estate if no one mentioned in the intestacy statute is living.⁶⁴ In other words, a relative, who is related no closer than a great grandparent or his descendants or an even more distant one, could take as the nearest relative. Such relatives are frequently called "laughing heirs"⁶⁵ because they obtain their share although far beyond the normal confines of a family unit and thus far beyond the probable donative intent of the decedent.

In determining who would take the share, Wyoming would probably follow the majority rule and apply the civil law method of counting degrees.⁶⁶ This method counts each generation from the descendant up to the common ancestor, then counts from this ancestor to the claimant, totalling the two figures.⁶⁷ All claimants possessing the lowest total figure share per capita; therefore, there is no representation under this method.

The Code takes a different approach.⁶⁸ To the delight of all decedents' estates' students, there would be no more degree

64. The primary bases for justifying this conclusion are: (1) the Wyoming escheat statutes, WYO. STAT. §§ 9-687, -688 (1957, Supp. 1971), do not specifically restrict intestate inheritance to the relatives mentioned in the intestacy statutes; and, (2) the Wyoming Supreme Court held in *Dutton v. Donahue*, 44 Wyo. 52, 8 P.2d 90 (1932), that any doubt in the application of the escheat statutes should be construed against the state taking. The answer to this problem is obviously not free from doubt, however.

65. Cavers, *Change in the American Family and the "Laughing Heir,"* 20 IOWA L. REV. 203 (1935).

66. ATKINSON, *supra* note 63, at 69.

67. *Id.*

68. Wyoming does, of course, have an escheat procedure. WYO. STAT. § 9-687 (1957) ("fails for want of legal heirs") WYO. STAT. 9-688 (Supp. 1971) (property "unclaimed for a period of five (5) years . . . shall be deemed

counting problems in an intestacy situation. The Code provides that the property will escheat to the state if there are no takers who qualify under the general intestacy pattern.⁶⁹ Grandparents and their descendants are the most distant relative who can inherit under the Code.⁷⁰ This approach is designed to simplify proof of relationship and to limit inheritance within the probable group a decedent would desire to receive his estate. Considering that most families do not remain in the same geographical areas anymore, let alone actually know each other, the Code's approach has significant merit.⁷¹

Although in order to inherit from an intestate one must survive his death, the general rule is that the survival need not be for any specific length of time: one minute or theoretically one second is sufficient. When the question of whether one or another person survived the decedent materially affects who receives the assets of the estate, the timing of death becomes an extremely litigable issue. In a day when simultaneous death is a frequent possibility, the problem is magnified. Many states including Wyoming have attempted to alleviate the problem by enacting what is called the Uniform Simultaneous Death Act.⁷² This Act provides that in an intestacy situation when "there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived. . . ."⁷³ The solution is only a partial one, however, because the Act is specific in that if there is adequate proof of the time of the order of death, then it does not apply and the surviving decedent, for however short period of time,⁷⁴ will be entitled to inherit his share of the prior decedent's

prima facie evidence of the failure of title to such property for want of legal heirs"). This procedure would apparently not apply if a person could adequately prove his relationship to the decedent. See discussion *supra* note 64.

69. U.P.C. § 2-105.

70. U.P.C. § 2-103. See Chart No. 2 *supra* pp. 177-78.

71. The limitation was accepted by the Oregon legislature. ORE. REV. STAT. § 112.055 (Repl. 1969). See also N.Y. EST., POWERS & TRUSTS LAW § 4-1.1(a) (8) (McKinney 1967); but see Zartman, *supra* note 63, at 416.

72. WYO. STAT. §§ 34-100 to -106 (1957). The act also applies to survivorship problems raised in wills, inter vivos transfers, joint tenancies, tenancies by the entireties and life insurance policies. See Note, 15 WYO. L.J. 229 (1961), for a discussion of the act as it relates to jointly owned property.

73. WYO. STAT. § 34-102 (1957).

74. See Schmitt v. Pierce, 344 S.W.2d 120 (Mo. 1961). (Proof of survival by one second would rebut the Act's rule of construction).

estate. This could cause undesirable litigation over who survived and unnecessary expense by requiring multiple administrations of the same property.

The Code has a creative solution to the problem. Drawing upon a frequently employed estate planning device, the Code requires that a person in order to qualify as an heir, must survive the decedent for 120 hours.⁷⁵ Although questions of the time of survival are still a reasonable possibility,⁷⁶ in most situations this provision will prevent litigation over who has survived and avoid multiple administration of the same property where it is totally unnecessary. The specific length or phraseology of the time one has to survive seems to be the primary variation or debatable issue to this provision's adoption.⁷⁷ This is readily alterable to suit the preferences of the individual legislature.

B. Status

The Wyoming law and the Code take significantly varying approaches to many of the questions of status as such a concept affects decedents' estates. The status of the posthumous heir conceived before but born alive after the death of the decedent is a prime example. Under the Wyoming statute only such posthumous descendants of the intestate are entitled to take as one born during the intestate's lifetime.⁷⁸ This limitation would exclude heirs of collateral relatives who are conceived before but born alive after the intestate's death such as uncles, cousins, brothers and nephews. The Code permits, however, all such "relatives" to inherit and therefore would apparently include these classes of relatives as well as descendants of the intestate.⁷⁹ The merits of either

75. U.P.C. 2-104. The time limitation does not apply if the property would escheat to the state because of a death of an heir during this time limitation. *Id.* Maryland and Oregon have adopted the concept. MD. ANN. CODE art. 93, § 3-110 (Supp. 1970) ("survive the decedent by thirty (30) full days"); ORE. REV. STAT. § 112.085 (Repl. 1969) ("survive the decedent by five days").

76. The most obvious problems which can occur is in determining whether the person lived the full 120 hours. The Code, however, has attempted to aid this inquiry by making certain facts or documents or both prima facie proof or evidence of death or status or both. U.P.C. § 1-107.

77. See statutes cited *supra* note 75.

78. WYO. STAT. 2-39 (1957).

79. U.P.C. § 2-108. Unfortunately, the term "relatives" is not defined in the Code: it probably includes all persons related to the intestate by consanguinity.

approach is subject to personal preference.⁸⁰ In all cases the length of time will be determinable in that it will be no more than the period of gestation from the death of the intestate and the child will have to be born alive.

The special status of illegitimates as far as inheritance is concerned has required that specific provision be made for them both with regard to whom inherits from them and from whom they inherit. Both Wyoming and the Code have special provisions. Since both statutes permit illegitimates to inherit from the mother, one of the principal problems concerns inheritance rights from the father.⁸¹ Wyoming's statute grants such rights if the "parents subsequently intermarry, and such children be recognized after such intermarriage by the father, to be his illegitimate children."⁸² The Code pursues this in more detail and in more liberal fashion. In order for the illegitimate to inherit from the father, the parents need only participate in a "marriage ceremony before or after the birth of the child."⁸³ No recognition by the father of the child as his illegitimate is required and in fact even the ceremony may be "void" without changing the child's rights.⁸⁴ In addition, proof of paternity either before or after the father's death, establishes the illegitimate's rights in the father's estate.⁸⁵ Exposing the decedent male's estate to paternity litigation may be subject to dispute.⁸⁶ The debate centers around balancing the merit of protecting a minor child who for no fault of his own is born illegitimate and who needs protection versus the disruption and apparent unfairness caused by an unknown illegitimate, who has reached maturity and who has never been a part of the decedent's family, claiming his share from the estate. Both are extreme situations but both typically represent the center of the controversy. Many

80. The Code's approach, although not its language, was accepted in Oregon. ORE. REV. STAT. § 112.075 (Repl. 1969) Maryland, however, limited the rights of posthumous inheritance to a child of the intestate. MD. ANN. CODE art. 93, §§ 3-107, 1-205 (Repl. 1969).

81. The United States Supreme Court recently held that it was not a denial of due process or of equal protection for a state to deny illegitimates rights in their father's estate. *Labine v. Vincent*, 401 U.S. 532 (1971).

82. WYO. STAT. § 2-44 (1957).

83. U.P.C. § 2-109(2) (i).

84. *Id.*

85. U.P.C. § 2-109(2) (ii). If proof of paternity is attempted after the father's death, it must be established by "clear and convincing proof." *Id.*

86. Maryland did not accept this. MD. ANN. CODE art. 93, § 1-208 (Repl. 1969). See also WYO. STAT. § 14-64 (1957).

would contend that the Code represents the modern policy in the direction of mitigating the impact of illegitimacy. The Code's approach could also have a collateral benefit by motivating some to execute wills in order to exclude potential illegitimates.⁸⁷

The inheritance rights from an illegitimate are also covered by the laws. Wyoming's statute places emphasis on the definition of a "bastard or illegitimate person" and if one falls within this characterization, the inheritance rights are as follows: (1) to the surviving spouse and descendants as in normal situations; (2) if no surviving descendants, the whole estate goes to the surviving spouse; (3) if neither spouse nor descendant survives, one-half to the mother and one-half to her descendants and (4) if none of the above survive, to the next of kin of the mother.⁸⁸ The Code takes a direct approach. Inheritance from an illegitimate is the same as from any other person except the father or his relatives cannot inherit unless the provisions covering when an illegitimate is a child of the father are satisfied and if adjudication of paternity is the method of creating that status only when the father has treated the child as his and has not refused to support the child.⁸⁹ The Code's inclusion of the father and his kindred under the limited situation as capable of inheriting is the better approach.⁹⁰

An ambiguity which appears in the Wyoming statute concerns whether the illegitimate will inherit through his parents⁹¹ or his descendants inherit through him. This problem can arise when the illegitimate would inherit through his mother as her representative from the intestate, or when the illegitimate has predeceased the intestate and it is the illegitimate's descendant claiming through his illegitimate ancestor's estate as his representative. The Code specifically permits in-

87. Wellman, *Some Effects of the Uniform Probate Code on Estate Planning*, 4 U. MIAMI INST. ON ESTATE PLANNING, ch. 70-19, ¶ 70.1905 at 19-8 (1970).

88. WYO. STAT. § 2-38 (1957).

89. U.P.C. § 2-109.

90. See MD. ANN. CODE art. 93, § 3-108 (Repl. 1969); ORE. REV. STAT. § 112.105 (Repl. 1969).

91. *But cf. In re Cadwell's estate*, 26 Wyo. 412, 186 P. 499 (1920) (adopted son inherited from intestate brother of adopting father). The holding was codified in 1969. WYO. STAT. § 1-721 (Supp. 1971).

heritance in both situations.⁹² The ambiguity under the Wyoming law should be removed in favor of the Code's approach.⁹³

With regard to a similar problem of status, *i.e.*, adoption, Wyoming's law⁹⁴ and the Code⁹⁵ are nearly identical in effect. The adopted child inherits from and through⁹⁶ the adopting parents and the child's estate is inherited to and through the adopting parents. Unfortunately the Wyoming section on adoption is not included in the Decedents' Estates Title of the 1957 Wyoming Statutes but instead is included in the Code of Civil Procedure title.

The Wyoming section is materially deficient in one aspect, however. It does not mention whether the adopted child can inherit from or through his natural parents. Since the section does not prohibit this, apparently he is able to do so.⁹⁷ The Code correctly deals with the problem by specifically stating that an adopted child is not the child of his natural parents: when the adoption is by a spouse of a natural parent, the adoption, of course, has no effect on the relationship of that natural parent and the child.⁹⁸ This is the better rule in that it fully carries out the intent and the effect of an adoption, *i.e.*, to make the adopted child the child of the adopting parents in all legal relations. Concomitantly, all legal relations to the natural parents should be severed.

92. U.P.C. § 2-109.

93. A problem, which has arisen in recent years and which neither body of law specifically considers, is the legitimacy of children conceived by artificial insemination when the semen of a third party donor is used. *Cf. Gursky v. Gursky*, 39 Misc.2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963) (child held to be illegitimate). *But cf. People v. Sorensen*, 68 Cal.2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968) (child held to be legitimate). The earlier drafts of the Code contained a provision on this problem but it was omitted in the Fifth Working Draft and in the Final Official Text. Compare Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U.L. REV. 1037, 1078 (1966) (quoting § 2 of the FIRST TENTATIVE DRAFT, pt. II); U.P.C., THIRD WORKING DRAFT, § 2-111(b) (1967); U.P.C., FOURTH WORKING DRAFT, § 2-111(a) (1968), with U.P.C., FIFTH WORKING DRAFT, § 2-109; U.P.C. § 2-109. No explanation is given for the omission. Presumably, the strong presumption of legitimacy for children born in wedlock is being relied upon. It might be advisable to reinstate the provision similar to that found in those early drafts. Maryland included a special provision on the matter. MD. ANN. CODE art. 93, § 1-206(b) (Repl. 1969). See also ARK. STAT. ANN. § 61-141(c) (Supp. 1969); OKLA. STAT. ANN. tit. 10, §§ 551-53 (Supp. 1967).

94. WYO. STAT. § 1-721 (Supp. 1971).

95. U.P.C. § 2-109(1).

96. See *supra* note 91.

97. ATKINSON, WILLS § 23, at 89 (2d ed. 1953). *But cf. WYO. STAT. § 1-708 (B)* (Supp. 1971) (files to be kept confidential).

98. U.P.C. § 2-109(1).

A problem of status which has received more legislative attention than it should have is that of the rights of aliens. The Wyoming statute, enacted in 1959, provides that an alien may inherit real estate; however, no non-resident foreign citizen alien can inherit or take by testamentary disposition real property in Wyoming if the laws of the alien's country do not allow citizens of the United States to take real property by succession or by testamentary disposition.⁹⁹ This legislation is frequently called an "Iron Curtain Act" because it generally applies to the laws of the so called Iron Curtain countries which fail to qualify on the reciprocity requirement. Apparently there is no such restriction on an alien taking personal property in Wyoming.

The Code takes less than two printed lines to deal with this situation. There is no restriction on an alien inheriting any kind property regardless of the laws of his country.¹⁰⁰ The stated reasons are clear and convincing.¹⁰¹ The prohibition of aliens inheriting property is an ancient rule possessing a rationale applicable only to feudal times. In addition, a recent Supreme Court case held a restrictive state statute unconstitutional on the grounds that the reciprocal requirement of the statute involved a question of foreign policy which thus made it "an intrusion by the state into the field of foreign affairs which the Constitution entrusted to the President and Congress."¹⁰² Consequently the drafters of the Code felt it wise to put no restriction an alien inheritance rights. Wyoming would be well advised to do the same, too.

Half blooded relatives of the decedent have often also had their inheritance rights restricted. The general American rule, however, is to treat such relatives the same as whole blood ones¹⁰³ and the Code follows this rule.¹⁰⁴ Wyoming, however, has a most curious and perplexing statute with respect to these relatives. Briefly the section provides that children and their descendants of the half-blood inherit the

99. WYO. STAT. § 2-43.1 (Supp. 1971). In addition, the burden of proving that reciprocity exists is on the non-resident alien. WYO. STAT. § 2-43.2 (Supp. 1971).

100. U.P.C. § 2-112.

101. U.P.C. § 2-112, Comment at 28.

102. *Zschernig v. Miller*, 389 U.S. 429, 432 (1968).

103. ATKINSON, WILLS § 19, at 74 (2d ed. 1953).

104. U.P.C. § 2-107.

same as their counterparts of the whole blood but that collateral relatives of the half blood inherit only one-half the share of collateral of the whole blood.¹⁰⁵ The meaning of this section is not clear because one cannot have half-blood children or descendants; one can only have half blooded collaterals. Consequently, the section would seem to mean that half blood relatives inherit one-half of the whole blooded relative's share¹⁰⁶ and the reference to children and descendants of children of the half-blood is a nullity.¹⁰⁷ Wyoming definitely needs to correct this situation.

C. Prior Transactions and Events

A problem which occasionally arises with respect to the shares to which a child or his descendant is entitled under the intestacy statute is that of advancements.¹⁰⁸ An advancement is an irrevocable gift of money or property, real or personal, to a child by a parent which enables the child to anticipate his inheritance to the extent of the gift. If it is determined that a child has received an advancement and if he constructively brings his advancement into the "hotchpot," the value is added to the estate and the recipient is then allowed to take from the estate the excess of his share over his advancement.¹⁰⁹ The theory of this concept is to bring about equality between the children of a decedent.¹¹⁰ The advancement concept does not apply when there is a will which disposes of all the decedent's estate and by majority rule does not apply when there is partial intestacy.¹¹¹

The basic question when there has been an inter vivos gift by a parent to a child is whether it is an advancement. Not all such gifts are so characterized. The intent of the donor at the time of the gift is the determinative factor.¹¹² Seldom, however, does one find that the parent has clearly

105. WYO. STAT. § 2-40 (1957).

106. *Cf.* Trustees of Univ. of Wyo. v. Eadie, 50 Wyo. 153, 58 P.2d 431 (1936), *rehearing denied*, 50 Wyo. 179, 60 P.2d 364.

107. *But cf.* Finley v. Abner, 129 F. 734 (8th Cir. 1904).

108. *See generally* ATKINSON, WILLS § 129 (2d ed. 1953).

109. If the child's advancement is more in value than his share from the estate, he will not participate in the hotchpot. On the other hand, he will not receive his intestate share, either.

110. An advancement brought into the hotchpot will not affect the surviving spouse's share, however. ATKINSON, *supra* note 108, at 722.

111. *Id.* at 723-24.

112. *Id.* at 721.

indicated his intent. The transferring document, if there even is any, will seldom specifically indicate one way or the other. The courts have, therefore, generally liberally admitted extrinsic evidence, including the decedent's declarations, in order to determine the intent. Since even this has not been satisfactory, presumptions have developed. For example, a distinction has been made between gifts given for the child's pleasure and those which are employed for his profit. Whereas the latter type of gift has been said to be an indication of an intent to make an advancement, the former type has not.¹¹³

Wyoming legislatively recognizes the advancement concept.¹¹⁴ The applicable procedure provides that, upon application by the other heirs, a hearing before the judge and a determination of the amount of advancement, any advancement to the children¹¹⁵ of the decedent shall be charged against his share. An additional section provides that gifts for maintenance, education or allowance to a child before majority without more express indication of intent are not advancements.¹¹⁶ Other than the latter proviso, no guidance either legislative or judicial is provided for determining the status of a gift to a child and therefore the common law decisions and rules discussed above would be relevant.

The Code has attempted to clarify the rules with respect to advancements. In addition, the scope of the advancement concept is materially restricted. In order for a gift to be considered as such, the donor must have "declared in a contemporaneous writing" or the donee must have acknowledged in writing that it is an advancement.¹¹⁷ This is in line with modern practice since most gifts today are not thought of as transfers in anticipation of an inheritance. It removes the evidentiary problem of proving intent by requiring the intent to be in writing. This is not overburdensome on the donor if to give an advancement is his intent. Valuation of an expressed advancement is determined as of the time of the

113. *Id.* at 720.

114. WYO. STAT. §§ 2-41, -299 (1957).

115. WYO. STAT. § 2-299 (1957) uses the word "heirs." It is doubtful, however, that a substantive change was intended.

116. WYO. STAT. § 2-42 (1957).

117. U.P.C. § 2-110. *Accord*, MD. ANN. CODE art. 93, § 3-106 (Repl. 1969); ORE. CODE ANN. § 112.135 (Repl. 1969).

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donee's possession or enjoyment or as of the donor's death, whichever occurs first.

An additional provision in the Code deals with the rights in the donor's estate of the descendants of a predeceased advancee. The Code specifically provides that an intended advancement does not affect the share of the donee's issue unless again the writing expressing the status of the gift so provides.¹¹⁸ The common law on this matter was not uniform and statutory clarification is desirable.¹¹⁹

A prior event which may affect a person's right to inherit is the question of disqualification for misconduct.¹²⁰ Primarily the concern is in the situation where the decedent is murdered by one of the successors to his property. Without statutes prohibiting the taking, some state courts have held that the murderer can take his reward.¹²¹ In order to correct what is felt to be an injustice, most states, including Wyoming, enacted statutes to specifically prohibit the felon from profiting by his wrongdoing.

The Wyoming statute¹²² is broad in scope in that it prevents one who feloniously¹²³ takes the life of another from taking from such person by way of intestacy, testacy or by way of insurance contract on the life of that person. Unfortunately, it is deficient in several respects. It does not apply to survivorship interests or to most contract interests other than the life insurance related ones. Except for an intestate share, it does not appropriately dispose of the assets when a disqualification occurs. Since the property will pass as if the decedent died intestate, there is a substantial potentiality of defeating the intent of the decedent in a testate or contract situation. In addition, no provision is made for the manner in which the claimant, alleging that a person feloniously took the life of another, is going to prove the event. Unless

118. U.P.C. § 2-110. *But see* MODEL PROBATE CODE § 29(c), at 66; MD. ANN. CODE art. 93, § 3-106 (Repl. 1969); ORE. REV. STAT. § 112.155 (Repl. 1969). The Code applies the same rule to descendants of predeceased heirs who owe debts to the decedent. U.P.C. § 2-111.

119. *See* ATKINSON, WILLS § 129, at 722-23 (2d ed. 1953).

120. *See generally id.* § 37.

121. *Id.* § 37 at 153. *But see* Dowdell v. Bell, 477 P.2d 170, 172 (Wyo. 1970).

122. WYO. STAT. § 2-46 (1957).

123. This word was recently held to require an "intentional" killing; involuntary manslaughter, although a felony, was held not within the meaning of the word. Dowdell v. Bell, 477 P.2d 170 (Wyo. 1970).

the alleged felon pleads guilty, his conviction of the crime is not admissible in evidence in a civil action on the same crime¹²⁴ and this would apparently apply to an administration of an estate matter. If the claimants must prove the crime before the probate court, nothing is mentioned concerning what the standard of proof will be, *i.e.*, beyond a reasonable doubt, clear and convincing or by a preponderance.

The Code covers all of these points in its section¹²⁵ on the matter. All possible forms of receiving assets or property of another are covered.¹²⁶ In addition, the method of disposing of the forfeited assets is improved by treating the felon as having predeceased the decedent and not that the latter died intestate.¹²⁷ This permits the property to pass according to the rules related to the type of transaction involved. For example, a forfeited general legacy would pass to the residuary beneficiaries in the will or a forfeited life insurance payment would be paid to the alternative beneficiaries. With regard to proof, the Code makes a final judgment of conviction conclusive in the probate court and lays down the "preponderance test" for an actual litigation of the event in the probate court.¹²⁸ The Code also protects all bona fide purchasers who purchase assets and the insurance company for payment to the wrongdoer.¹²⁹

124. WYO. STAT. § 6-13 (1957).

125. U.P.C. § 2-803.

126. U.P.C. § 2-803(a)-(d).

127. *Id.*

128. U.P.C. § 2-803(e).

129. U.P.C. § 2-803(f). Two related problems not covered by either the Wyoming statutes or the Code are releases and assignments of expectancies. Although both concepts are maybe related more to contract law than to decedents' estates law, some problems can occur within the administration of the estate. A principal problem is whether these devices bind the appropriate next of kin of the next of kin who has transferred his expectancy. The general rule is that it does bind them when a release has been made to the intestate himself but not when an assignment has been made to a third person. The rationale for this difference in approach is that a release is a transaction between the intestate and his potential next of kin whereas an assignment does not involve the intestate. Consequently, it is by focusing on the intestate and his presumed intent to cut off the potential next of kin's line of inheritance that the reason for the difference is apparent. *See generally* ATKINSON, WILLS §§ 130-31 (2d ed. 1953). It might be wise to enact a provision which covers at least the problem of a release of an expectancy.

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IV. ALLOWANCES, HOMESTEADS AND EXEMPTIONS

Both Wyoming statutes¹³⁰ and the Code contain an array of protective devices for the surviving spouse and certain children. The following chart [No. 4] best illustrates the basic provisions and how the laws compare to each other.

[Chart No. 4]

Homestead	
Code ¹³¹	Wyoming
\$5,000	\$4,000 ¹³²
In favor of surviving spouse	In favor of surviving spouse
<i>or</i>	<i>or</i>
Minor or dependent children	Minor children
	<i>or</i>
	½ surviving spouse— ½ minor children from another marriage ¹³³
Decedent must be a domiciliary	Decedent must be a resi- dent ¹³⁴
Exempt from all claims against the estate [except security interests on the property itself] ¹³⁵	Exempt from claims against the estate except expen- ses of administration, of last sickness, funeral ex- penses and security in- terests on the property itself ¹³⁶

130. The Wyoming provisions on homestead, exempted property and family allowances for decedents' estates are found both in Titles 1 and 2 of the 1957 *Wyoming Statutes* since the normal debtor protections are incorporated in a modified fashion into the provisions for decedents' estates. WYO. STAT. § 2-213 (1957). See also *Wambeke v. Hopkins*, 372 P.2d 470 (Wyo. 1962).

131. U.P.C. § 2-401.

132. WYO. CONST. art. 19, § 9; WYO. STAT. § 2-217 (1957). See generally Note, 16 Wyo. L.J. 81 (1961).

133. WYO. STAT. § 2-213 (1957).

134. *Id.* But cf. *Stolldorf v. Stolldorf*, 384 P.2d 969 (Wyo. 1963) (the surviving spouse's nonresidency is not a bar to taking advantage of the homestead provision).

135. See U.P.C. §§ 3-803, -809, -814.

136. WYO. STAT. §§ 2-212, -213, -215 (1957). The Wyoming Constitution adds: sale for taxes, secured obligations and mechanics' liens. WYO. CONST. art. 19, § 9.

May be waived ¹³⁷	[No similar provision] ¹³⁸
Phrased in terms of a monetary allowance	Phrased in terms of a household ¹³⁹ but if none a monetary allowance is granted ¹⁴⁰
It is in addition to any share passing to beneficiaries by will unless otherwise provided, ¹⁴¹ by intestacy or by elective share of spouse	[No express provision but it is presumed to be the case] ¹⁴²

Exempt Property

Code ¹⁴³	Wyoming
Up to \$3,500	Approximately \$650 ¹⁴⁴
If favor of surviving spouse	Surviving spouse
<i>or</i>	<i>or</i>
Children (Need not be minors)	Minor children ¹⁴⁵
Decedent must be a domiciliary	Decedent must be a resident ¹⁴⁶
Priority over all claims against the estate [except security interests on the property itself ¹⁴⁷]	Exempt from claims against the estate except expenses of administration, last sickness, funeral expenses and security interests on the property itself ¹⁴⁸

137. U.P.C. § 2-204. This section definitely applies to a waiver between the spouses but a question of interpretation could arise as to whether it would apply to a waiver to a creditor holding an unsecured obligation.

138. *But cf.* WYO. STAT. § 34-53 (1957).

139. WYO. STAT. § 1-501 (1957).

140. WYO. STAT. § 2-213 (1957).

141. A testator's will may specifically make the provisions in the will for the surviving spouse in lieu of these rights. U.P.C. § 2-206(b).

142. *See* WYO. STAT. § 2-213 (1957). *Cf.* Dixon v. Dixon, 73 Wyo. 236, 278 P.2d 258, 259 (1954).

143. U.P.C. § 2-402.

144. WYO. STAT. §§ 1-504 (wearing apparel up to \$150), -505 (personal property up to \$500) (1957).

145. WYO. STAT. § 2-213 (1957).

146. *Id.* *See* Stollendorf v. Stollendorf, *supra* note 134.

147. *See* authorities cited *supra* note 135.

148. *See* authorities cited *supra* note 136.

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May be abated by homestead and family allowance	[No similar provision]
Household furniture, automobiles, furnishings, appliances and personal effects	Wearing apparel (\$150) ¹⁴⁹ furniture, bedding, provisions and other household articles (\$500) ¹⁵⁰
<i>or</i>	<i>or</i>
Other assets if above not sufficient	A monetary value equal to the maximum amount
May be waived ¹⁵¹	[No similar provision]
It is in addition to any share passing to beneficiaries by will unless otherwise provided, ¹⁵² by intestacy or by elective share of spouse	[No express provision but it is presumed to be the case ¹⁵³]

Family Allowance

Code ¹⁵⁴	Wyomnig
Reasonable allowance in money out of the estate [not to exceed \$6,000 per year or \$500 per month ¹⁵⁵]	Reasonable provision for support and possession and use of household, clothing and utensils ¹⁵⁶
In favor of surviving spouse	In favor of surviving spouse
<i>and</i>	<i>or</i>
Minor and dependent children (payable to spouse if children living with spouse otherwise one-half to guardian)	Minor children
Decedent must be a domiciliary	Not specified—probably a resident

149. WYO. STAT. § 1-504 (1957).
 150. WYO. STAT. § 1-505 (1957).
 151. See authority and discussion *supra* note 137.
 152. See authority and discussion *supra* note 141.
 153. See authority cited *supra* note 142.
 154. U.P.C. § 2-403.
 155. U.P.C. § 2-404.
 156. WYO. STAT. § 2-210 (1957). See generally *Dixon v. Dixon*, 73 Wyo. 236, 252-55, 278 P.2d 258, 262-64 (1954).

Exempt from all claims against the estate up to the \$5,000 homestead allowance	Preference to all claims against the estate except expenses of administration, funeral expenses and security interests against specific property ¹⁵⁷
Lump sum or periodic installments	Not specified
For period of administration <i>BUT</i>	For period of administration ¹⁵⁸
For only one year if estate is insolvent	[No similar provision]
It is in addition to any share passing to beneficiaries by will unless otherwise provided, ¹⁵⁹ by intestacy or by elective share of spouse	[No express provision but it is presumed to be the case ¹⁶⁰]

Miscellaneous Procedural Provisions

Code¹⁶¹

Wyoming¹⁶²

Informal Procedure	Formal Procedure for claiming rights
Control is in personal representative—court is involved if requested by personal representative or other interested person	Control is in court ¹⁶³

157. See authorities cited *supra* note 136.

158. See WYO. STAT. § 2-211 (1957). The Wyoming Supreme Court has held that the widow is entitled to her allowance from the date of death to the time when the executor objects because partial distribution of the estate has been made to the widow. *Dixon v. Dixon* 73 Wyo. 236, 253-54, 278 P.2d 258, 263-64 (1954).

159. See authority and discussion *supra* note 141.

160. See authorities cited *supra* note 142.

161. U.P.C. § 2-404.

162. WYO. STAT. §§ 2-210, -211, -214 (1957).

163. The Wyoming Supreme Court has held that the executor may make allowance payments to the surviving spouse without an order of court which payments will be subsequently approved by the court if reasonable. *Dixon v. Dixon*, 73 Wyo. 236, 253, 278 P.2d 258, 263 (1954).

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If sufficient assets in the estate, specific devises are not to be used to satisfy above rights Basically similar approach¹⁶⁴

The basic differences between the two laws are that the Code provides for larger amounts and is more specific on many of the problems. These factors would seem to be advantageous, in that they relate more to the problems of modern decedents' estates law. In addition, separating decedent estates' protections from debtors' estates has the advantage of reducing confusion.¹⁶⁵

V. TESTATION LIMITATIONS

Although apparently not of constitutional proportions,¹⁶⁶ the concept of freedom of testamentary and inter vivos disposition is generally recognized throughout the United States.¹⁶⁷ In fact this concept is one of the pervasive policies of the law of property disposition.¹⁶⁸ There are other important policies, however, which sometimes conflict with this policy.¹⁶⁹ The policy of protection of the family unit, for example, is one which has motivated legislatures to restrict full freedom of disposition and which will continue to do so in the future. The most significant and widely found restrictions are statutes which protect the minimum rights of the surviving spouse and which guard against unintentional issue disinheritance.¹⁷⁰

A. Surviving Spouse.

The idea of providing the surviving spouse protection from total disinheritance is partially derived from the common law concepts of dower and curtesy. Although many states,

164. See WYO. STAT. § 2-297 (1957).

165. But see Zartman, *An Illinois Critique of the Uniform Probate Court*, 1970 U. ILL. L.F. 413, 424-25.

166. ATKINSON, WILLS § 5, at 31 (2d ed. 1953).

167. *Id.* at 34-35.

168. SCOLES & HALLBACH, PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 22 (1965).

169. *Id.* at 21-23.

170. See ATKINSON, *supra* note 166, §§ 30, 36, at 108, 140. The family protection discussed *supra* pp. 191-95 are also limitations on testation. Another restriction sometimes found is one on charitable bequests and devises. See generally *id.* § 35. Since neither Wyoming nor the Code includes such provisions, will not be discussed.

including Wyoming,¹⁷¹ abolished these concepts, substitutes were enacted¹⁷² which were more consistent with the needs of the time. For non community¹⁷³ property states these substitutes, of course, are the "forced share" and "spouse's elective share" statutes.

Wyoming's forced share statute provides that if the decedent spouse in a valid will deprives "his or her husband or wife of over one-half of his or her property remaining after the payment of his or her debts, it shall be optional with the surviving spouse after the death of the testator or testatrix to accept the condition of such will or one-half of the estate, real and personal, of the deceased spouse."¹⁷⁴ The quoted phrase is extremely illuminating with respect to the scope of the surviving spouse's rights and of the restriction on testation: (1) the option is only available if over one-half of the probate estate is denied the surviving spouse; (2) the property to which the election attaches is subject to the debts of the decedent; (3) the option applies against real and personal property; (4) the elected property passes in fee; (5) *inter vivos* transfers are not affected; and, (6) the right is an option and not a mandate which the surviving spouse must affirmatively exercise. In addition, the statute's application is apparently not limited to decedents domiciled in Wyoming.

Procedurally,¹⁷⁵ unless the option is exercised in a notarized writing within three months after the probate of the decedent spouse's will, it is forfeited and the will controls the distribution of the estate. The judge of the probate court is instructed to advise the surviving spouse of the option within sixty days from the date of probate. If not so advised within this period, the surviving spouse has thirty more days from the day of receiving the advice. The same rules apply to

171. WYO. STAT. § 2-37 (1957).

172. North Dakota and South Dakota are the noted exceptions which do not protect the surviving spouse other than by the homestead and family allowances. See N.D. CENT. CODE § 56-01-02 (1960); S.D. COMPILED LAWS ANN. § 29-1-3 (1967). See also ATKINSON, *supra* note 166, § 30, at 108.

173. Eight states have enacted community property laws. See Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U.L. REV. 1037, 1053 (1966).

174. WYO. STAT. § 2-47 (Supp. 1971). The will must deprive the surviving spouse of over three fourths of the estate if children or their descendants of a prior marriage survive and the surviving spouse has no children or their descendants surviving the subsequent marriage. *Id.*

175. *Id.*

advising a guardian or personal representative of a surviving spouse who is or becomes incompetent or dies within three months of the date of probate.

Judicial decisions have also explored the scope and limitations of the forced share right. The Supreme Court has permitted a waiver of the forced share in an antenuptial agreement which was entered into voluntarily without fraud and with reasonable understanding¹⁷⁶ and presumably it would similarly recognize a postnuptial agreement which satisfies the same standard.¹⁷⁷ In addition, judicial determination has set out the effect on the interests of other testamentary beneficiaries of a spouse electing her share.¹⁷⁸ The court determined that until satisfied the forced share interest is charged on all of the property of the estate not necessary for the payment of debts.¹⁷⁹ Individual assets, however, may be used to discharge this interest.¹⁸⁰ In deciding what assets to use in discharging the interest, the provisions of the will should be disturbed as little as possible¹⁸¹ and property given by the will to the spouse may be used to satisfy the interest when it makes for the best adjustment.¹⁸²

As the drafters comment, the Code's technique for the elective share of the surviving spouse is controversial and complex.¹⁸³ Its basic premise is similar to the one in Wyoming: the surviving spouse is entitled to protection from disinheritance. From this point on, the similarity vanishes. In the first place, the surviving spouse¹⁸⁴ is entitled to the election only if the decedent was domiciled in the state where the Code applies; otherwise the law of the decedent's domicile controls those rights.¹⁸⁵ This is a good provision because it promotes uniformity of distribution of a decedent's estate ac-

176. *In re Borton's Estate*, 393 P.2d 808 (Wyo. 1964).

177. See ATKINSON, *supra* note 166, § 31, at 111.

178. *Dixon v. Dixon*, 66 Wyo. 197, 207 P.2d 510 (1949); *Dixon v. Dixon*, 73 Wyo. 236, 278 P.2d 258 (1954).

179. 66 Wyo. at 209, 207 P.2d at 513.

180. *Id.*

181. *Id.* at 218, 207 P.2d at 517; 73 Wyo. at 250, 278 P.2d at 262.

182. 73 Wyo. at 243-49, 278 P.2d at 261.

183. U.P.C. art. 2, pt. 2, General Comment at 29-30.

184. The term "surviving spouse" is defined for this part of the Code. U.P.C. § 2-802.

185. U.P.C. § 2-201(b).

ording to the laws of only one state¹⁸⁶ rather than the checkerboard approach which has occurred under some situations.¹⁸⁷

If the domicile requirement is met, then the surviving spouse may elect to take one-third of the "augmented estate."¹⁸⁸ The Code, of course, defines what this concept means.¹⁸⁹ First it includes what is normally thought of as the probate estate less debts, funeral and administration expenses, the homestead allowance, exemptions and the family allowance.¹⁹⁰ Second, it includes inter vivos gratuitous transfers: which are irrevocable, exceed \$3,000 per year per person and made within two years of death;¹⁹¹ in which the decedent retained a life interest until death,¹⁹² or a power, either alone or in conjunction with any other person, to revoke, consume or otherwise control the disposition for his own benefit;¹⁹³ or in which he possessed a right of survivorship at the time of his death.¹⁹⁴ All is not favorable to the surviving spouse, however. The third group of assets included are all those which the surviving spouse has received from the decedent spouse during their joint lifetime as a gift or by way of contract, survivorship, appointment and any other property derived from the decedent.¹⁹⁵ In addition, the augmented estate excludes the decedent's transfers made before marriage, or made with the consent of the surviving spouse and all of the decedent's life insurance, accident insurance, joint annuities or pensions payable to a person other than the surviving spouse.¹⁹⁶

This statutory hotchpot constitutes the amount to which the one-third interest is to be applied. Of course, those assets in the augmented estate which the surviving spouse received by testate or intestate succession or by the means described

186. New York and Oregon have similar requirements. N.Y. EST., POWERS & TRUSTS LAW § 5-1.1(d) (7) (McKinney 1970 Supp.); ORE. REV. STAT. § 114.105 (Repl. 1969).

187. See generally LEFLAR, AMERICAN CONFLICTS LAW § 195, at 478 (1968).

188. U.P.C. § 2-201 (a).

189. See generally Fratcher, *supra* note 173, at 1058-64.

190. U.P.C. § 2-202.

191. U.P.C. § 2-202(1) (iv).

192. U.P.C. § 2-202(1) (i).

193. U.P.C. § 2-202(1) (ii).

194. U.P.C. § 2-202(1) (iii).

195. U.P.C. § 2-202(3).

196. U.P.C. § 2-202(2).

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above are to be used first to satisfy the elective share.¹⁹⁷ Equitable apportionment is applied to the other beneficiaries for all losses suffered in order to make up a deficiency which may occur.¹⁹⁸ For those who received their property or interest during the decedent's lifetime, only the original recipients and their donees are subject to contribution and even then an option is given to give up the transferred property or its equivalent value.¹⁹⁹

The general rationales of this complex method of protecting the surviving spouse are threefold: (1) to continue the familiar protective forced share concept, (2) to prevent will substitutes from defeating the prior purpose, and (3) to prevent the surviving spouse from electing the forced share when an adequate share has already been provided.²⁰⁰

The essence of these rationales, interestingly, is really in the first one. If the forced share type of protective device is to be continued,²⁰¹ one should not be able to so easily avoid the public policy by the use of the multitude of will substitutes.²⁰² Concomitantly, the public policy is certainly not served by the surviving spouse's ability to obtain more than even the most liberal outside reaches of the intent of the protection policy.²⁰³ It is therefore necessary to make this spouse declare his full benefit received for purposes of adjustment. Obviously the latter two propositions, in order to accomplish their purposes, are necessarily complex and will cause fact finding problems when and if litigation occurs. Consequently,

197. U.P.C. § 2-207(a). The surviving spouse may renounce all or any of the rights under provisions of the will or under intestate succession, otherwise these rights are unaffected by the election. If he does, these provisions pass as if this spouse had predeceased the decedent except as contribution may have to be made in favor of the other legatees under the will. U.P.C. § 2-206(a).

198. U.P.C. § 2-207(b).

199. U.P.C. § 2-207(c). Absolute protection of third persons dealing with donees may permit avoidance of the Code's intent; however, it is probably essential for purposes of clearing title to property.

200. See U.P.C. art. 2, pt. 2, General Comment at 29-30.

201. See Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966).

202. *E.g.*, Allender v. Allender, 199 Md. 541, 87 A.2d 608 (1952) (creation by husband of a joint interest with rights of survivorship in the name of the husband and a third person cannot be attacked by surviving wife because it is not illusory).

203. For example, the surviving spouse under ordinary rules could elect a forced share even though a life insurance policy on the decedent in favor of the surviving spouse more than equaled the share intended to be protected.

the issue is between having a non-revolutionary protective device which minimizes circumvention of policy by either spouse or a device, such as typically exists presently, which encourages circumvention or one which would be significantly revolutionary to the forced share system for spousal protection.²⁰⁴ The Code's technique is clearly the middle ground and one can hardly criticize it when its intent is to encourage adoption and therefore uniformity.²⁰⁵

Besides the significant substantive differences between the Code and Wyoming law, there are several procedural variations which deserve mention. The surviving spouse has six months to petition the court for his elective share; however, the judge may extend for cause shown.²⁰⁶ The demand for the elective share may be withdrawn by the surviving spouse any time before entry of a final determination.²⁰⁷ In addition, the right of election is personal to the surviving spouse and cannot be exercised by anyone else or after the surviving spouse's death except the court may exercise the election when the surviving spouse is incompetent and it is necessary to provide adequate support for him during his probable life expectancy.²⁰⁸ Antenuptial and postnuptial waivers are also specifically recognized so long as they are in writing and after a fair disclosure.²⁰⁹

Many of the above Code provisions are designed to discourage or restrict a surviving spouse from petitioning for the election. In addition, they will encourage persons concerned about potential election problems to seek counseling.

A related problem concerns the spouse who is omitted from a will because the marriage to the testator occurred after the execution of the will. Wyoming law does not protect the omitted spouse other than to give him the forced share option.²¹⁰ The Code, on the other hand, treats it as a separate

204. For example, the civil law *legitime* concept. See generally, Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499 (1964).

205. New York and Oregon enacted modified versions of this approach. N.Y. EST., POWERS & TRUSTS LAW § 5-1.1(b) (McKinney 1967, Supp. 1971); ORE. REV. STAT. §§ 114.105, 114.125 (Repl. 1969). But see Zartman, *An Illinois Critique of the Uniform Probate Code*, 1970 U. ILL. L.F. 413, 420-23.

206. U.P.C. § 2-205(a).

207. U.P.C. § 2-205(c).

208. U.P.C. § 2-208.

209. U.P.C. § 2-204.

210. But see text *infra* pp. 209-10.

situation. It provides that the "omitted spouse" may take her intestate share as if the testator had died without a will.²¹¹ If the will indicates that the omission is intentional or if the surviving spouse was intentionally provided for by transfers in lieu of testamentary provisions, the above provision does not apply.²¹² The drafters justify this provision on the grounds that this is what the testator probably would have wanted and it will have the benefit of reducing elections against the will.²¹³ Unfortunately, a qualified omitted spouse taking the automatic intestate share from the estate would disrupt the estate as much as an election to take forced share would. In addition, the elective share's limitations are not present and more serious proof problems of intent are. The necessity of this provision is debatable.²¹⁴

B. Pretermitted Children

Except in Louisiana no other state has an actual forced kinship statute in favor of descendants²¹⁵ and consequently one may, if he desires, even disinherit his children. A typical provision which is prevalent, however, is the one for the pretermitted descendant.²¹⁶ The general idea behind such provisions is that it is presumed the testator did not intend to disinherit the descendant omitted in he will. There are many variations, however, which differ as to whom, when and how the provisions are to be applied.

Wyoming is the only state which does not have some form of pretermitted heir provision²¹⁷ and the Wyoming Supreme Court has very strictly applied the absence of such a provision.²¹⁸ These facts have caused some planning problems when the intent of the testator is to include after born children. The use of class gifts has been the most frequently used device.

211. U.P.C. § 2-301.

212. *Id.*

213. *Id.*, Comment at 39.

214. This section of the Code was added after the publication of the Fifth Working Draft. U.P.C., FIFTH WORKING DRAFT.

215. ATKINSON, WILLS § 36, at 138-39 (2d ed. 1953). This problem is sometimes partially covered by the homestead, exempt property and family allowance provisions. See *supra* pp. 191-95.

216. *Id.* at 141.

217. *Id.*

218. *In re Ray's Estate*, 287 P.2d 629 (Wyo. 1955); *Burns v. Burns*, 224 P.2d 178 (Wyo. 1950).

The Code on the other hand, provides for pretermitted descendants under the following prescribed requirements:²¹⁹ (1) one must be a child of the testator; (2) the child must be born or adopted after the execution of the testator's will; (3) the terms of the will must not show an intentional omission; (4) the other parent of the omitted child must not have been devised substantially all of the estate in a will executed when other children of the marriage were living;²²⁰ and (5) the child must not have received outside of the will transfers intended by the testator to be in lieu of a testamentary provision.²²¹ If these conditions are met the omitted child receives the share in the estate to which he would have been entitled had the testator died intestate. The section also provides an intestate share for the child who is omitted because the testator believes him to be dead.²²² The general abatement section of the Code is applicable to this section.²²³

Although interpretation problems²²⁴ will still exist under the Code's provision for pretermitted heirs, it basically adequately covers the who, when and how of the situation. The limitations on the application of the provision should greatly reduce the number of times it is employed and should avoid most of the situations where injustices resulted under other similar laws. Considering the injustices and the increase of will contests which can arise without such a provision, when all things are balanced this provision should be recommended.

219. U.P.C. § 2-302(a).

220. This provision is to prevent unfair results when children born prior to the execution are omitted and cannot take under the statute, but those in the same family who were born after the execution can. See MODEL PROBATE CODE § 41(a) and Comment at 76-77.

221. This provision liberalizes the extrinsic evidence rule in comparison to the rules applied to advancements and ademption by satisfaction. See U.P.C. §§ 2-110, 2-612. The reason given for this is that it is not inconsistent because there is no provision in the will for the omitted child. U.P.C. § 2-302, Comment at 40.

222. U.P.C. § 2-302(b).

223. U.P.C. §§ 2-302(c), 3-902.

224. For example, what is sufficient to constitute an intentional omission on the face of the will? The Comment states that a simple recital that the testator intends to make no provision for the prospective child is sufficient. U.P.C. § 2-302, Comment at 40. Language, which is not so specific, however, may cause courts some difficulty.

Another problem which might appear is when the claimant is the descendant of the omitted child. The Code states that the section applies only to "children" which according to its definition does not include grandchildren. U.P.C. §§ 1-201(3), 2-109. Under a provision similarly limited, however, one court held that a grandchild in the situation described could take. *In re Horst*, 264 N.Y. 236, 190 N.E. 475 (1934). Considering the sympathies which will obviously run in the grandchild's favor, the Code's limitation may find it will have to bend.

VI. EXECUTION, REVOCATION AND RELATED CONCEPTS

A. Execution

The basic instrument for distribution of wealth upon death is the ordinary²²⁵ will. All fifty states have legislation recognizing this type of instrument and specify the required formalities which must be followed in order to execute a valid one. Generally those formalities derive their existence from the English Statute of Frauds of 1677 or Wills Act of 1837 or a combination of both.²²⁶ The Wyoming²²⁷ and Code²²⁸ provisions are not exceptions in that they draw most of their content from the Statute of Frauds.

The general comparison of the two pieces of legislation is that they are simple in approach although the Code provides more detail on some formalities for purposes of clarification. The similarities between the two laws are numerous. They both require: (1) a writing;²²⁹ (2) the testator's signature or a proxy signature in his presence and by his direction; (3) two witnesses; (4) the witnesses must be competent at the time of witnessing;²³⁰ and (5) the testator must be of sound mind. They both do not require:²³¹ (1) a signing at the end of the will; (2) the witnesses to sign in the testator's presence; (3) the witnesses to sign in each other's presence; or (4) a statement in all cases by the testator that he publishes this document as his will.

The Code covers two particular areas on which the Wyoming statute is silent. First, the Code specifically requires that the witnesses sign the will. Although the Wyoming statute is silent on this point, presumably it is a requirement in Wyo-

225. This word is intended to exclude holographic, nuncupative and other special types of wills.

226. Rees, *American Wills Statutes*, 46 VA. L. REV. 613, 614 (1960).

227. WYO. STAT. §§ 2-47, -50 (1957 and Supp. 1971).

228. U.P.C. §§ 2-501, -502, -505.

229. Although Wyoming's statute specifically provides that a "writing" includes "typewritten," it would seem to be the law regardless of the word's inclusion. Rees, *supra* note 226, at 615.

230. No age requirement is set in either the Code or under Wyoming law. See U.P.C. § 2-505 (a); WYO. STAT. § 2-50 (1957); *cf.* WYO. STAT. § 1-138 (1957).

231. These points are important because although strict compliance with the formalities required by the statute is necessary, no additional ones are. ATKINSON, WILLS § 62, at 293 (2d ed. 1953).

ming.²³² Second, the Code has the broadest rule with regard to the attestation requirement providing that the witnesses must witness "either the signing or the testator's acknowledgment of the signature or of the will."²³³ Wyoming would seemingly require some form of attestation but its exact content is unknown. There is generally no difficulty when the signing and witnessing occurs all in the presence of each other.²³⁴ As stated above, however, this joint presence is not a requirement, and therefore some form of acknowledgment may be necessary. A mere signing by the witness would not seem sufficient because an acknowledgment that the instrument is the will of the testator or that the signature is that of the testator is an implied necessity.²³⁵ Probably either one is sufficient. The lack of any case law on this question indicates that there has been little if any problem with it. Notwithstanding a more specific statement such as is in the Code of what the witnesses are to do is certainly preferred.

In one specific area, the Code and the Wyoming statute presently differ. The Code states that a person eighteen years or older may make a will.²³⁶ The Wyoming law uses the description "Any person of full age"²³⁷ and at common law this phrase meant that all persons who make a will must be twenty-one years of age or more.²³⁸ Until a statute changes this judicial rule it will remain in effect in Wyoming.²³⁹

Another problem of competence concerns whether a person who receives an interest from a will is competent to witness it. The Wyoming statute provides that no witness can derive "any benefit" from the will unless two other competent and disinterested witnesses have also witnessed it.²⁴⁰ A

232. See *Merrill v. State*, 21 Wyo. 421, 133 P. 134 (1913); *In re Stringer's Estate*, 80 Wyo. 389, 423-24, 343 P.2d 508, 522 (1959). In addition, the second sentence of section 2-50 uses the words "subscribing witness" with reference to the problem of interest of the witnesses; therefore, a signing by the witnesses as a requirement can be readily inferred. WYO. STAT. § 2-50 (1957).

233. U.P.C. § 2-502.

234. ATKINSON, *supra* note 231, § 66, at 322.

235. *Id.* § 66, at 321.

236. U.P.C. § 2-501.

237. WYO. STAT. § 2-47 (1957).

238. See 2 WILLISTON, CONTRACTS § 224, (3d ed. 1959).

239. *But see* ch. 247, § 139 [1971] Wyo. Sess. Laws (age of "majority" is changed to eighteen). Section 141, however, does not make the section effective until January 1, 1973 and only if the state constitutional amendment giving eighteen year olds the right to vote is adopted by the voters. Ch. 247, § 141 [1971] Wyo. Sess. Laws.

240. WYO. STAT. § 2-50 (1957).

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proviso states that the interested witness if also an heir may receive such intestate share up to the amount devised in the will. The apparent meaning of these provisions is to make the interested person competent as a witness but in doing so, to take away the interest so as to remove the temptation and inference of undue influence.²⁴¹

The Code completely removes the question of interest from consideration. Not only does an interested person not invalidate a will but also he may take the gift provided in the will regardless of any right to an intestate share.²⁴² The Code leaves the question of undue influence to a direct attack on this basis in a will contest. No encouragement to use interested witnesses is intended, however. The section's avowed purpose is to prevent injustices which occasionally have occurred.²⁴³

The special holographic²⁴⁴ will is recognized under both Wyoming's law and the Code. Although only twenty-two states recognize holographic wills,²⁴⁵ it would seem that a continuation of the concept is advisable. The modern policy with respect to wills is to increase recognition and many of the old fears with regard to fraud and undue influence have either not materialized or are not relevant today. In any case, the holographic approach satisfactorily protects a person from these dangers. Forgery, particularly when there is a substantial exhibit of one's handwriting, is nearly impossible and undue influence or duress would be more unlikely when one has written the dispositive provision in his own hand than when an ordinary will could be produced by another and need only be signed and witnessed.

The Wyoming holographic provision has only two requirements: it must be (1) entirely written and (2) signed by the hand of the testator himself.²⁴⁶ The Code retains basically these two requirements but modifies the first one

241. See *Harris v. Schoonmaker*, 50 Wyo. 119, 143, 58 P.2d 415, 423 (1936), *rehearing denied*, 50 Wyo. 143, 60 P.2d 360; WYO. STAT. §§ 1-138, -140 (1957).

242. U.P.C. § 2-505 (b).

243. U.P.C. § 2-505, Comment at 49.

244. Typically defined as a will which is wholly in the testator's handwriting. ATKINSON, WILLS § 75 (2d ed. 1953).

245. Rees, *American Wills Statutes*, 46 VA. L. REV. 613, 634-35 (1960).

246. WYO. STAT. § 2-55 (1957).

from "entirely written" to "material provisions are in the handwriting."²⁴⁷ This modification has a definite purpose because of strict statutory construction applied by some courts to the words "entirely written."²⁴⁸ These courts have held holographic wills invalid which contain any printed matter on its face if the testator intended that matter to be a part of the will. The "material provisions" language would permit, on the other hand, a holding of validation to a holographic will which was executed on a printed will form if the printed portions could be eliminated and if the handwritten portions would still adequately describe the testator's testamentary scheme.²⁴⁹

Neither Wyoming nor the Code requires, as do many holographic statutes, that the will be dated.²⁵⁰ Nor do they prescribe the place where the signature must be located. The primary problem in situations when there is no date or when the signature is in an unusual place or both these facts are present is whether the person intended the instrument to be his will or nothing more than a statement of what he would do if he executed a will. This is, of course, an evidentiary and not a formality problem.

Neither statutory system provides for any recognition of nuncupative or oral wills.²⁵¹ Considering the very limited application or such wills, their nebulous, difficult of proof character and their tendency to encourage litigation, the absence of such provisions is surely justified.

The Code adds a new type of special will. This will is called the self-proved will.²⁵² Basically it is an ordinary will which includes a notarized affidavit executed by the testator and two witnesses. The form for the affidavit is given in the Code and it is similar to the technique of attestation clauses typically included in wills today in that it prescribes the formalities and facts which were followed and observed during execution. The effect of executing a self-

247. U.P.C. § 2-503.

248. See ATKINSON, WILLS § 75, at 357-58 (2d ed. 1953).

249. U.P.C. § 2-503, Comment at 47. See also ATKINSON, *supra* note 244, at 358.

250. See Rees, *supra* note 245, at 635.

251. Merrill v. State, 21 Wyo. 421, 133 P. 134 (1913); U.P.C. §§ 2-502 to -504. See generally Rees, *supra* note 245, at 636-39.

252. U.P.C. § 2-504.

proved will is not very significant, however. Its principal distinguishing feature is to permit the will to be admitted to probate in a formal testacy proceeding without the necessity of testimony of one of the subscribing witnesses.²⁵³ In most other respects it is subject to the same treatment.²⁵⁴

Wyoming has a section which can achieve nearly the same result. It permits a will to be admitted to probate on the affidavit of one subscribing witness when no person appears to contest it.²⁵⁵ The content of the affidavit must indicate that the will was executed in the manner required for an ordinary will and state that the testator was of sound mind at the time of the execution.²⁵⁶ It would not seem improper to execute such an affidavit for one or more of the witnesses at the time of execution for purposes of retaining it and taking advantage of this section's procedural shortcut. It would be very difficult to state and mostly a matter of opinion whether the Code's or Wyoming's provision is superior.

In a mobile society such as we presently live in, the question of the validity of wills executed under the laws of other states, nations or countries becomes an important consideration. The question is that when the decedent has a will executed according to another jurisdiction's law, "is it valid in the state of probate?" The Code expressly deals with the problem. It provides under the heading "Choice of Law as to Execution" that a written will is valid if executed in compliance with the law of any of the following jurisdictions: (1) the forum or probate state; (2) the state where executed; or (3) the testator's state of domicile, place of abode or nationality if different from place of execution.²⁵⁷ The rationale behind this provision is to satisfy as far as possible a testator's expectations with respect to the validity of his will.

Wyoming has similar rules with respect to wills previously probated in another state.²⁵⁸ This does not cover the same problem, however. The Code provision anticipates a domiciliary administration of the foreign executed will under

253. U.P.C. § 3-405.

254. See U.P.C. § 3-406(b).

255. WYO. STAT. § 2-66 (1957).

256. *Id.*

257. U.P.C. § 2-506.

258. WYO. STAT. §§ 2-67 to -71 (1957).

its law whereas the Wyoming Act anticipates an ancillary administration of an estate already being administered in the state of the decedent's domicile. Consequently, the Wyoming Act does not adequately provide for the most common Conflict of Laws problem. Since different procedures still exist for the execution of wills, the liberal choice of law provision of the Code is clearly the better rule.²⁵⁹

B. Revocation

A characteristic of the will concept is the power of the testator to revoke.²⁶⁰ The three generally accepted methods are: (1) by physical act; (2) by subsequent instrument, and (3) by operation of law due to changed circumstances.²⁶¹ Statutes of all states adopt these methods in differing degrees.

With respect to revocation by physical act, Wyoming followed the Statute of Frauds language providing that a will may be physically revoked by "burning, tearing, cancelling or obliterating."²⁶² Partial revocation by a physical act is apparently possible under the statute, too.²⁶³ Generally, the specified methods have been interpreted to require some form of physical evidence of revocation on the will itself but not to require total destruction.²⁶⁴ Courts have often, however, refused to find a will physically revoked on very technical grounds.²⁶⁵ The rationale is that physical revocation is inherently ambiguous because it fails to indicate the actual intent of the testator; therefore, a strict construction on physical revocation methods is a necessity to prevent fraud by third persons who happen to obtain possession of the will.²⁶⁶

259. *See generally*, Rees, *supra* note 245, at 905-07. The Comment on this section of the Code points out that if the Code is widely adopted by our fifty states, "the impact of this section will become minimal." U.P.C. § 2-506, Comment at 50.

260. 1 BOWE & PARKER, PAGE ON WILLS § 5.17 (3d rev. ed. 1960).

261. ATKINSON, WILLS § 84 (2d ed. 1953). The first two methods require three principal elements: (1) an authorized act or instrument; (2) an intent on the part of the testator to revoke; and (3) a testator possessing legal capacity at the time of the revocation. The "by operation of law" method does not necessarily include these elements but actually represents a finding of a presumed intent on the part of the testator due to the changed circumstances.

262. WYO. STAT. § 2-51 (1957).

263. ATKINSON, *supra* note 261, § 86, at 444.

264. *Id.* § 86.

265. *E.g.*, Thompson v. Royall, 163 Va. 492, 175 S.E. 748 (1934).

266. *See* SCOLES & HALBACH, PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 142 (1965).

Revocation by subsequent instrument is also permitted by the statute if accomplished by an instrument executed with the same formalities as any valid will.²⁶⁷ One of the primary problems with this type of revocation is whether a prior will can be revoked impliedly by a subsequent written will which is inconsistent with the prior will or whether the former will is merely superseded by the latter will. This point is important in determining the question of a subsequent revocation of the latter will. If the subsequent will merely superseded the prior will, a total revocation of the later will will apparently reinstate the former will's provisions whereas if the former is actually considered to be revoked, the concept of revival, with all of its own rules and problems, will apply.²⁶⁸ There is a body of case law on the problem in other jurisdiction;²⁶⁹ however, the Wyoming Supreme Court has not decided the issue.

At common law, revocation by operation of law was recognized in two situations: a single woman's will was revoked when she subsequently married and a single man's will was revoked after his marriage and birth of an issue.²⁷⁰ No other change of circumstances would revoke a will by operation of law. It was apparently with these circumstances in mind that several states, including Wyoming, adopted a provision in their revocation statute which basically provided that the expressed methods of revocation in the statute do not "prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator."²⁷¹ Obviously, this provision leaves an element of uncertainty with respect to the validity of a will which would otherwise be valid under all other ordinary circumstances.

Since the phrase does not specify what changes in circumstances will cause a revocation, the courts are left the power to determine its scope on a case by case basis. The Wyoming

267. WYO. STAT. § 2-51 (1957). See also *In re Stringer's Estate*, 80 Wyo. 389, 402-03, 343 P.2d 508, 512 (1959). Although the phraseology of the provision could be interpreted inversely, an holographic will would apparently be a proper revoking instrument.

268. See text *infra* pp. 211-12.

269. See generally 2 BOWE & PARKER, PAGE ON WILLS § 21.43 (3d rev. ed. 1960); ATKINSON, WILLS § 87, at 450-52 (2d ed. 1953).

270. ATKINSON, *supra* note 269, § 85.

271. WYO. STAT. § 2-51 (1957). See Rees, *American Wills Statutes*, 46 VA. L. REV. 856, 880-81 (1960).

Supreme Court has taken four opportunities to explore this problem.²⁷² In the first case it held that a man's will was revoked by operation of law when a chronology of the following events occurred: a marriage, a will executed, an annulment granted, a property settlement rendered, and a subsequent marriage.²⁷³ Although this situation was not recognized by early common law decisions, many courts today hold the same way under similar circumstances.²⁷⁴ In the second case the court correctly reversed the outdated common law rule that an unmarried woman's will is revoked upon her marriage.²⁷⁵ In the third case, the court followed the common law and held that a man's will executed after his marriage is not revoked by the birth of a subsequent issue.²⁷⁶ The fourth case concerned a modification of the first one. The Supreme Court held that a pro forma divorce unaccompanied by adequate proof of a property settlement does not constitute a per se revocation of the husbands' will.²⁷⁷ This is the present status of the rules of revocation by operation of law in Wyoming. It does not, however, answer whether the second common law exception would be recognized and leaves open to doubt whether divorce and property settlement without a remarriage would revoke a decedent's will by operation of law.²⁷⁸

The Code is not intended to materially alter many of the above rules on revocation of wills, but it does attempt to provide answers for some of the questions left unanswered. All three methods are in one form or another approved.²⁷⁹ With regard to physical revocation, the Code merely adds the word "destroyed" to the list of conduct sufficient to revoke a will. In addition, the subsequent properly executed instrument is a proper method to revoke a prior will. This subsequent instrument may accomplish a revocation either expressly or by

272. See Note, 10 Wyo. L.J. 112 (1956).

273. *Johnston v. Laird*, 48 Wyo. 532, 52 P.2d 1219 (1935).

274. See generally ATKINSON, *supra* note 269, § 85, at 431-32. See also ORE. REV. STAT. § 112.315 (Repl. 1969).

275. *Naab v. Smith*, 55 Wyo. 181, 97 P.2d 677 (1940).

276. *Burns v. Burns*, 67 Wyo. 314, 224 P.2d 178 (1950). See also *In re Ray's Estate*, 287 P.2d 629 (Wyo. 1955).

277. *In re Hoebet's Estate*, 436 P.2d 540 (Wyo. 1968). Other relevant facts in the case were that there had been a transfer by quit claim deed from the husband to the wife and the couple had continued to live together after the divorce.

278. *But cf. id.*

279. U.P.C. § 2-508.

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inconsistency. Under both these methods, a partial revocation is recognized.

Taking the modern approach to revocation by operation of law, the Code recognizes revocation of any disposition or appointment of property made by a will to a person to which the testator is no longer married. The Code section is very explicit with respect to the scope and limitations of this situation.²⁸⁰ In addition, the provision specifically states that no other change of circumstance shall be deemed to revoke a will by operation of law. Considering the other protections provided in the Code for omitted or pretermitted spouses and children, abolishing the old common law rules on revocation by operation of law is justified.

C. Revival of Revoked Wills

A related and recurring problem with respect to revocation is the matter of revival of revoked wills. The best way to pursue this discussion is to state an example of the problem: by subsequent instrument the testator revokes a prior will; later, the testator revokes the second will and the question, of course, is, "is the first will revived?" A significant amount of judicial and legislative time has been relegated to determining the answer to this question.²⁸¹ Wyoming has been no exception to this endeavor. In reference to a situation similar to that described above, the Wyoming Supreme Court stated "the question of revival is one of pure intention, without there being any *presumption* either for or against revival arising by virtue of the destruction of the revocatory will."²⁸² The Court rejected the two other recognized approaches to this problem, *i.e.*, revival as a matter of law upon revocation of revoking instrument and revival only by re-execution or republication.²⁸³ Unfortunately, the court did not indicate the type of evidence which could be used to prove the intent of the testator. For example, would statements by the testator expressing an intent to revive at the time of the revocation of

280. Divorce and annulment are defined by U.P.C. § 2-802(b).

281. ATKINSON, WILLS § 92 (2d ed. 1953).

282. *In re Wilson's Estate*, 397 P.2d 805, 809 (Wyo. 1964) *construing*, *In re Stringer's Estate*, 80 Wyo. 389, 343 P.2d 508, *modified*, 80 Wyo. 426, 345 P.2d 786 (1959) (emphasis by the court).

283. *See Comment*, 19 Wyo. L.J. 223 (1965).

the second instrument be admitted into evidence to prove this question of intent?

Wyoming also apparently recognizes the revival by codicil concept. The typical example for this rule to apply is as follows: Will #1 is validly executed; Will #1 is revoked by valid Will #2; valid Will or Codicil #3 revokes Will #2 and states that Will #1 is revalidated. The Wyoming Supreme Court held that the revoked will was revalidated if the testator indicated an intent to so revive the revoked will and if the revoked will was sufficiently described.²⁸⁴

The Code deals specifically with both these problems. With respect to the first example, the physical revocation of the second will does not revive the first will unless it is evident from the circumstances of the revocation of the latter will or from contemporary or subsequent declarations by the testator that he intended to revive the first will.²⁸⁵ The Comment indicates that statements by the testator concerning his intent can be admitted.²⁸⁶ With respect to revival by a third will, it is required that the terms of the third will indicate that the testator intended that the first will be revived.²⁸⁷ Although not mentioned in the provision, it must be presumed that the third will must adequately describe the first will in order to revive it. In other words, the Code would with a few additional clarifications legislatively recognize Wyoming's present rules on these matters.²⁸⁸

284. *In re Wilson's Estate*, 397 P.2d 805, 808-09 (Wyo. 1964).

285. U.P.C. § 2-509(a). This aspect of the Code's revival provision was not adopted by Maryland and Oregon: both states require republication in some manner of the prior will. MD. ANN. CODE art. 93, § 4-106 (Repl. 1969); ORE. REV. STAT. § 112.295 (Repl. 1969).

286. U.P.C. § 2-509, Comment at 52.

287. U.P.C. § 2-509(b).

288. The related common law concept of dependent relative revocation deals with the question of revival although it is also related to the problem of mistake of law or fact on the part of the testator. See generally, ATKINSON, WILLS § 88 (2d ed. 1953); Warren, *Dependent Relative Revocation*, 33 HARV. L. REV. 337 (1920); 57 AM. JUR. WILLS §§ 514-20 (1948). The basic idea of the concept is that if a testator physically revokes a will or a part thereof with the immediate present intent of making a new will or altering a part thereof as a substitute and if the new will or alteration is not made or fails of effect for any reason, many courts have presumed that the testator would have preferred the old will or its provision than he would have intestacy. Consequently, the old will or its provisions if its contents can be ascertained, have been admitted to probate in absence of evidence overcoming this presumption. Because of the inherent ambiguity of a physical revocation, parol and extrinsic evidence has been readily admitted to clarify the nature of the intent or in other words to permit the showing of the mistake upon which the intent is founded. This approach has been taken even though the same courts have usually refused to correct or to

D. Lost and Destroyed Wills

Another problem which is related to revocation is that concerned with lost and destroyed wills. The general rule has been that in absence of statute, lost and destroyed wills may be admitted to probate upon adequate proof of their contents and due executions.²⁸⁹ If such proof cannot be maintained or if a statute restricts the proof of such wills, in a sense the lost or destroyed will has been revoked. Many states, including Wyoming, have statutes which specifically apply to the probate of such wills.²⁹⁰ A typical provision which is found in some of these statutes is that the lost or destroyed will cannot be probated unless it is "proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator."²⁹¹ This statement of timing has caused problems in situations where the will was lost or destroyed during the testator's lifetime but not by him, by his authority or fraudulently by another person. According to the literal language of the quoted phrase, such a will cannot be probated and therefore it has been revoked by a means not approved by the revocation statute. Since Wyoming has a statute which includes the quoted phrase, the situation could arise in this state.²⁹²

In order to avoid such an unintended revocation, some courts have interpreted the phrase "fraudulently destroyed in his lifetime" as intended to require proof that either the will had not been destroyed during the testator's lifetime or that, if destroyed during his lifetime, it had not been destroyed by him or by his authority;²⁹³ or have interpreted the phrase "in existence at the time of death" as referring to legal exis-

even receive evidence of other types of mistakes. ATKINSON, *supra* § 58. Dependent relative revocation may also be employed when the "conditional" revocation is by a subsequent instrument but in this situation the mistake must appear on the face of the revoking instrument. ATKINSON, *supra* § 88, at 459.

Neither Wyoming law nor the Code specifically provides for the use of such a doctrine, although the Code in a comment does make affirmative reference to the doctrine. U.P.C. § 2-507, Comment at 50. It is probably wise not to have specific legislation on this concept since such legislation would unnecessarily constrict an extremely useful and flexible device.

289. ATKINSON, WILLS § 97 (2d ed. 1953).

290. See generally, Ferrier, *Statutory Restrictions on Probate of Lost Wills: Judicial Inroads on Restrictions*, 32 CALIF. L. REV. 221 (1944).

291. See ATKINSON, *supra* note 289, § 97, at 507.

292. WYO. STAT. § 2-73 (1957). See generally WYO. STAT. §§ 2-72 to -75 (1957).

293. *E.g.*, *In re Fox's Will*, 9 N.Y.2d 400, 174 N.E.2d 499 (1961).

tence rather than physical existence.²⁹⁴ Although these interpretations have achieved just results in the individual cases, they are direct affronts to the literal language of the statutes.

Apparently using the Model Probate Code as a guide,²⁹⁵ the Code contains no special limitation on the probate of a lost or destroyed will other than to require that such will be probated in a "Formal Testacy" proceeding.²⁹⁶ The apparent rationale is that specific guidelines create a rigidity which will prevent appropriate adaptation in all cases; therefore the matter is felt to be best left to the procedural rules and regulations of the probate proceeding itself.²⁹⁷

VII. MISCELLANEOUS RELATED CONCEPTS

A. Incorporation by Reference

The majority of American jurisdictions recognize the concept that an unexecuted document or instrument may be incorporated for specific purposes into a valid properly executed will.²⁹⁸ In order to avoid an obvious possibility of fraud, limitations have been imposed upon the use of this doctrine. Generally, six requirements have been recognized as a necessity for the doctrine's application: (1) a validly executed will; (2) a distinct reference to the unexecuted document in the will itself; (3) a showing or statement in the will that the document is in existence at the time the will is executed; (4) proof that the document was actually in existence at the time of execution; (5) a showing of intent on the part of the testator to incorporate the document into the will; and, (6) a showing that the document offered is the one referred to in the will.²⁹⁹ The Courts have more or less adhered to the above requirements. For example requirements numbers 1 and 4 have been strictly adhered to whereas numbers 2 and 5 have sometimes been liberally applied.³⁰⁰

294. *E.g., In re Havel's Estate*, 156 Minn. 253, 194 N.W. 633 (1923).

295. MODEL PROBATE CODE § 65(e).

296. U.P.C. § 3-402(b).

297. MODEL PROBATE CODE at 20.

298. 2 BOWE & PARKER, PAGE ON WILLS § 19.17 (3d rev. ed. 1960).

299. *See id.* § 19.18.

300. *See* SCOLLES & HALBACH, PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 120-23 (1965).

Another question which can arise even where the doctrine is accepted is whether the incorporated document becomes a "physical" part of the will. If it does then two further questions may have to be asked: Would an inter

Although apparently recognized,³⁰¹ there has been no full exposition of the limitations and regulations of the incorporation by reference doctrine in Wyoming. The Code, however, specifically and wisely provides for recognition of the doctrine. Basically the Code requires all of the six requirements be satisfied before the doctrine is applied.³⁰² Obviously how strictly each requirement would be adhered to must wait for court determinations.

Both Wyoming and the Code have special provisions with respect to will "pour over" provisions into existing inter vivos trusts. These provisions are a recognition of a typical estate planning device which permits a testator to bequeath or devise a part of his estate to an existing inter vivos trust even though the trust is not executed with the formalities of a will and even though the trust is amendable and actually amended subsequent to the execution of the testator's will.³⁰³ Because such amendments or alterations are recognized, this concept obviously goes further than the incorporation by reference doctrine which requires that the writing referred to be complete and in existence when the will is executed.

Whereas the Wyoming legislature enacted³⁰⁴ what is referred to as the shorter Illinois Pour Over Statute,³⁰⁵ the Code³⁰⁶ employs Section 1 of the Uniform Testamentary Additions to Trusts Act. The latter provision is considered to be an improved version of the Illinois Act in that it covers problems such as: (1) where the trust is an unfunded life insurance trust with no substantial interest; (2) when the trust is executed concurrently with the will but not necessarily before the will; (3) when the trust is included within a valid will of another person who has predeceased the testator; (4) whether the inter vivos trust is made into a testamentary trust by the pour over provision; (5) whether if the will so provides,

vivos trust incorporated into a will thereby become a testamentary trust and, can an holographic will incorporate a non-holographic instrument?" Cf. *Id.* at 123.

301. Cf. *In re Nelson's Estate*, 72 Wyo. 444, 475-76, 266 P.2d 238, 250 (1954). See also 15 WYO. L.J. 58 (1960); WYO. STAT. § 34-94 (1957) (incorporation of prior instruments for purposes of charitable bequests).

302. U.P.C. § 2-510.

303. See generally 1 SCOTT, TRUSTS §§ 54-54.3 (3d ed. 1967).

304. WYO. STAT. § 2-53 (1957).

305. ILL. ANN. STAT. ch. 3, § 43(a) (Smith-Hurd 1961).

306. U.P.C. § 2-511.

amendments to the trust made after the testator's death are permitted, and (6) whether revocation or termination of the trust causes the pour over provision to lapse. Wyoming would be well advised to consider the adoption of this provision rather than the one which it presently has.

B. Facts of Independent Significance

One concept of wills which is typically not codified into law but which is an absolute necessity to the proper functioning of our testamentary law is the doctrine of independent significance. This doctrine is universally recognized in the common law and generally permits certain evidence outside of the will to be admitted in order to determine who receives and what property passes under the testator's will.³⁰⁷ The general statement of the rule is that if a fact, be it an act or event, has significance other than to pass property at death, this significance entitles that fact to control the disposition of the property. This rule applies regardless of whether the testator or other third persons can affect the act or event subsequent to the will's execution.³⁰⁸ Typical examples of the use of the doctrine of facts of independent significance are the common use in wills of such words as "children," "cousins," "brothers and sisters," the "residue" and "all my property." In order to determine the meaning of each of those words, it is necessary to look at facts outside the face of the will but since these words have an obvious significance other than to pass property at death, the court permits extrinsic evidence to show the meaning of the words.

The drafters of the Code felt that the doctrine is important enough to necessitate a specific statement of the rule. The relevant provision is a broad statement of the common law rule applicable to acts or events which occur before or after the execution of the will or after the testator's death.³⁰⁹ In addition, it separates and makes a specific statement recognizing and validating a reference to the execution or revocation of another's will.³¹⁰ Although there is general common law recog-

307. See generally 2 BOWE & PARKER, PAGE ON WILLS § 19.34 (3d rev. ed. 1960).

308. ATKINSON, WILLS § 81 (2d ed. 1953).

309. U.P.C. § 2-512.

310. *Id.* See generally ATKINSON, *supra* note 308, § 81, at 398-99; 1 SCOTT, TRUSTS § 54.4 (3d ed. 1967).

inition of this concept, a specific deliniation of the rule and its scope is meritorious.

The Code also adds a new device to the incorporation by reference and facts of independent significance doctrines. By an instrument either in his handwriting or signed by hand and referred to in his will, a testator is permitted to dispose of certain tangible personal property regardless of whether the writing is in existence before or after the execution of the will or of whether it is actually altered by the testator after the execution of the will.³¹¹ The Comment states that this provision is justified because it is in line with the policies of effectuating a testator's intent and of relaxing formalities of execution.³¹² Apparently the belief is that considering the limitations upon the type and extent of property which can be disposed of in this manner, problems of fraud, duress and undue influence are not serious considerations. There is also the apparent feeling that a great many laymen, particularly older people, desire such a provision.³¹³ Without such a provision, the most feasible alternatives³¹⁴ are (1) to create a revocable inter vivos trust of the personal property, or (2) to give the property to a trusted friend outright with precatory words requesting the friend to distribute the personal property according to a list which may be found with the will. Unfortunately, a revocable inter vivos trust of personal effects is cumbersome and an outright gift provides no security that the property will be transferred to the desired beneficiaries and could cause adverse inheritance tax problems.³¹⁵ One of the most beneficial aspects of this Code's provision would be that a client who would otherwise require and wish to change his will frequently will not have to contact his attorney each time such an alteration is desired. Otherwise, the merit of having a special provision for these situations is not entirely clear.

311. U.P.C. § 2-513. The provision would not permit one to dispose of "money, evidences of indebtedness, documents of title, and securities, and property used in trade or business" in this manner. *Id.*

312. *Id.*, Comment at 54.

313. *Cf.* SCOLES & HALBACH, PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 124 (1965).

314. The secret trust in a will device is another judicially recognized approach, but its recognition is founded upon a defective theory. *See* 1 SCOTT, TRUSTS §§ 55-55.1 (3d ed. 1967).

315. *See* WYO. STAT. §§ 2-337(c), -338 (Supp. 1971).

VIII. CONSTRUCTIONAL AND OTHER MISCELLANEOUS PROBLEMS OF TESTAMENTARY DISTRIBUTION

Several problems in the law of decedents' estate, although they also relate to the distribution and might fall under the discussion of administration of an estate, are more relevant to this section in that they materially affect the estate planning aspects of testamentary distribution and therefore deserve discussion in this part of the article. Whereas Wyoming has statutory provisions on only a few of the problems, the Code goes to significant lengths to codify most of them.³¹⁶

A. Choice of Law

The general rule with regard to the Conflict of Laws problems dealing with construction of wills has ordinarily referred to the law of the testator's domicile for purposes of determining the disposition of personal property and to the law of the situs with regard to disposition of real property.³¹⁷ By judicial decision Wyoming has followed this rule.³¹⁸ The Code, however, takes a modern approach³¹⁹ to this problem by permitting the testator to determine what local law shall be applied in construing the disposition of his property provided that the selected law is not contrary to the public policy of the forum state.³²⁰ This concept is meritorious in that it lines testamentary Conflict of Laws rules with what is generally permitted when dealing with inter vivos trusts.³²¹ It will, therefore, carry out one of the purposes of the Code by encouraging the use of the will device for the disposition of property.

B. After-Acquired Property

Both Wyoming³²² and the Code³²³ have a provision providing that a testator's will may pass all of his property including property acquired after the date of the will's execu-

316. The Code specifically provides that the rules are rules of construction and are subject to an express contrary intent by the testator in the will itself. U.P.C. § 2-603.

317. See generally LEFLAR, *AMERICAN CONFLICTS LAW* § 198 (1968).

318. *In re Ray's Estate*, 74 Wyo. 317, 287 P.2d 629 (1955).

319. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* §§ 240, 264 (1971).

320. U.P.C. § 2-602.

321. See LEFLAR, *supra* note 317, at § 192.

322. WYO. STAT. § 2-49 (1957).

323. U.P.C. § 2-604.

tion. The Wyoming statute requires that the intent to pass after-acquired property must be manifested on the face of the will. In practice, however, this additional requirement would not alter the scope of the rule.³²⁴ This rule is a part of the ambulatory concept of wills and is an absolute necessity for modern estate planning.

C. Ademption by Extinction

Ademption by extinction is a common law rule of construction which holds that if a specifically bequeathed or devised³²⁵ item of property is not a part of the testator's estate at the time of his death, the devise or bequest fails.³²⁶ The Code, although it leaves much of this concept to determination by the court, attempts to deal with several of the issues which have arisen with respect to interpretation of the extent of the concept. Much of the litigation has concerned specific bequests of securities to which there have been stock splits or other changes or additions in form only. The Code provides that the specific legatee is entitled to these splits, additions or other changes in form which have been caused by action initiated by the security entity.³²⁷ Distributions such as cash dividends declared prior to death, although paid after death, are not part of the specific bequest, however.³²⁸

Another area of ademption with which the Code attempts to answer is the situation where the specifically devised property is sold by a conservator or a condemnation award is granted or insurance proceed is paid for a loss of the property to the conservator. The Code provides that the specific legatee is entitled to a general pecuniary legacy equal to the value of the property no longer in the conservator's posses-

324. Cf. U.P.C. § 2-603.

325. Since the rule in the text applies only to specific devises and bequests, definitions of the various classes of testamentary gifts are important. And, since the Code does not define these terms, the common law definitions are applicable. A specific devise or bequest is a gift of a specific item or portion of the estate. A general legacy or devise is a gift of a set value or generally described property which is to be charged against the whole estate and not a specific portion thereof. A demonstrative legacy is a gift payable out of the whole estate but which is in the first place to be charged against certain parts of the estate. Residuary gifts are gifts of the remainder of the estate. See generally 6 BOWE & PARKER, PAGE ON WILLS §§ 48.1-10 (3d rev. ed. 1962).

326. ATKINSON, WILLS § 134 (2d ed. 1953).

327. U.P.C. § 2-607(a).

328. U.P.C. § 2-607(b).

sion: if, however, the testator's disability ceases to exist for a year prior to death this provision does not apply.³²⁹ The rationale for these rules is to provide the specific legatee with some form of protection from the acts of conservators which unfairly affect his interests. Since the concept of ademption is typically based upon the testator's actions, acts of a third person should not materially and unfairly affect a specific legatee's interest.³³⁰

A third source of controversy has centered around the specific devisee's rights to assets which represent in part or in whole the remaining interest which the testator retains in the specifically devised property. The Code protects the specific devisee by giving him a right to these assets in four specified situations: (1) unpaid but owing balance of the purchase price; (2) unpaid amounts of a condemnation award; (3) unpaid fire or casualty insurance proceeds; and (4) property received by foreclosure or obtained in lieu of foreclosure on a specifically devised security.³³¹

All of the above discussed issues have created litigation. Consequently, the Code's attempt to clarify the rules is praiseworthy.

D. Ademption by Satisfaction

The ademption by satisfaction concept is related to the advancement concept under intestate distribution.³³² It provides that a general or residuary bequest³³³ is adeemed in whole or in part when a testator makes an inter vivos gift to a legatee after the execution of the will.³³⁴ As with advancements, the effect of the gift depends upon the testator's intent and this, of course, is typically difficult to establish.³³⁵ When intent is not clearly manifested several factors have been considered relevant: (1) is the testator *in loco parentis* to the legatee; (2) is the property transferred of the same nature

329. U.P.C. § 2-608(a).

330. Cf. MODEL PROBATE CODE § 23, Comment at 214.

331. U.P.C. § 2-608(b).

332. See text *supra* pp. 187-88.

333. See discussion *supra* note 325.

334. ATKINSON, *supra* note 326, at § 183. Of course, if a testator makes an inter vivos gift of property specifically bequeathed or devised to the legatee or devisee, the gift would be adeemed by extinction.

335. *Id.*

as that bequeathed; and (3) is the gift in the nature of a "portion" of the legacy.³³⁶ These factors have been used to raise presumptions one way or the other of whether the testamentary gift is adeemed; however, they have not been employed with any substantial or significant degree of consistency.

It is with this apparently in mind, that the Code specifically limits the application of ademption by satisfaction. Paralleling the provision on advancements, the Code provides that an inter vivos gift to a person is to be treated as partial or total satisfaction of a devise to that person only if there is written evidence that the testator intended that it be so treated.³³⁷ The written evidence may be manifested in the will, in a contemporaneous writing or in an acknowledgement in writing by the devisee. The Code alters its advancement rule under similar circumstances³³⁸ in that if a satisfaction is intended, it applies to the devisee's kindred who take in his place. Valuation is as of the date of possession, enjoyment or death, whichever occurs first.

Considering the difficulty which courts have had with respect to this common law concept, the specificity and limitations of the Code provision would be a meritorious addition to the law of decedents' estate.

E. Abatement

The problem of abatement pervades a large area of the law of decedents' estates. It can arise because the estate does not have enough funds to satisfy all of the legacies, devises or bequests due to creditors' claims, or to an election by the spouse, pretermitted heirs, or to expenses of administration, taxes or to an insufficiency of funds. The common law provided that in absence of a specific order indicated in the testators' will, the order of abatement for personal property was as follows: (1) intestate property, (2) residuary legacies, (3) general legacies, and (4) specific and demonstrative legacies.³³⁹ Within each of the classes of testamentary gifts,

336. 6 BOWE & PARKER, PAGE ON WILLS §§ 54.28, .30, .33, .35, (3d rev. ed. 1962).

337. U.P.C. § 2-612.

338. U.P.C. § 2-110.

339. MODEL PROBATE CODE at 353.

the assets would contribute and abate ratably.³⁴⁰ Although subject to specific statutory or judicial exceptions today, real property was not liable for debts.³⁴¹

Subject to an express order of abatement in a testator's will,³⁴² Wyoming has specific provisions for the abatement caused by debts, expenses of administration and family expenses. Intestate property is to abate first.³⁴³ All other bequests and legacies be they of residuary, general, demonstrative or specific types, are to abate and contribute pro rata except that specific devises and apparently demonstrative legacies are to abate last if necessary to carry out the intent of the testator.³⁴⁴ There is no preference between real and personal property.³⁴⁵ The Wyoming Supreme Court has held, however, that when dealing with the problem of a spouse taking his forced share, the judge of the probate court should disturb as little as possible the testator's testamentary scheme thereby leaving the order of abatement to the judge's discretion.³⁴⁶

Unless the testator otherwise provides, the Code³⁴⁷ follows the common law approach with three important exceptions. First, there is no preference between real and personal property.³⁴⁸ Second, the court, if it determines that an express or implied purpose of the testamentary plan would be defeated by following the ordinary order of abatement, may order that the abatement be in the manner necessary to carry out the testator's intent.³⁴⁹ Third, if the abatement problem is caused by a surviving spouse electing against the will, the Code provides that all beneficiaries under the will are to suffer the reduction pro rata.³⁵⁰ These features of the Code are meritorious because they give discretion across the board to the court with respect to general abatement problems and require all beneficiaries of the will to suffer an equal loss due to an elec-

340. *Id.*

341. *Id.*

342. WYO. STAT. § 2-282 (1957).

343. WYO. STAT. § 2-284 (1957).

344. WYO. STAT. §§ 2-297, -298 (1957). *See also* Uniform Estate Tax Apportionment Act, WYO. STAT. §§ 2-336 to -346 (Supp. 1971).

345. WYO. STAT. § 2-248 (1957).

346. *In re Dixon's Estate*, 66 Wyo. 197, 218, 207 P.2d 510, 517 (1949).

347. U.P.C. § 3-902.

348. U.P.C. § 3-902(a).

349. U.P.C. § 3-902(b).

350. U.P.C. § 2-207.

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tion of a surviving spouse. These rules are more in line with what a testator would probably actually desire if he had considered and taken care of the abatement problem in his will. In addition, the usual estate planning practice of giving the residue to the primary beneficiaries will not result after the death of the testator with this class of testamentary gift suffering most of the abatement as the common law rule would require.

F. Lapse

At common law when a legatee or devisee died between the execution of the will and the death of the testator, the gift to that person was held to lapse.³⁵¹ If this beneficiary was dead before the execution of the will, the gift was said to be void.³⁵² These gifts would then pass into the residuary if any, but if not or if the residuary was void or lapsed, they would pass in intestacy.³⁵³ Several methods have been used or developed to avoid this problem, *e.g.*, survivorship interests, class gifts and the most recent development, the enactment of anti-lapse statutes. Generally, these statutes permit the descendants of certain classes of dead legatees to stand in the ancestors place for purposes of taking under a testator's will.³⁵⁴ Wyoming is among the few, if not the only state, which does not have an anti-lapse statute.³⁵⁵ Consequently, the common law doctrine is apparently applicable in this state and in order to avoid the problem the other two devices mentioned above are commonly employed.

The Code contains a comprehensive package of constructional rules concerned with the problem of lapse. Paralleling its provision with respect to an heir surviving, all legatees and devisees are said to have predeceased the testator unless they survive him by 120 hours.³⁵⁶ Although this increases the potential of death of devisees and legatees by five days, protection is provided for all devisees who fall within the class of being a grandparent or a lineal descendant of a grandparent, *i.e.*, issue of such persons are permitted to take

351. 6 BOWE & PARKER, PAGE ON WILLS § 50.1 (3d rev. ed. 1962).

352. ATKINSON, WILLS § 140 (2d ed. 1953).

353. *Id.*

354. See Rees, *American Wills Statutes*, 46 VA. L. REV. 856, 861-64 (1960).

355. ATKINSON, *supra* note 352, § 140, at 779.

356. U.P.C. § 2-601.

in their ancestors place according to the Code's rule of representation.³⁵⁷ In addition, the anti-lapse provision specifically applies to descendants of such devisees under a class gift and in all applicable cases regardless of whether the common law would have said the gift was void or lapsed. The Comment argues that this last rule is probably more in line with what the testator would probably have desired.³⁵⁸ The common law rules of lapse, however, will still apply to legatees and devisees who do not fall within the class of covered persons. For example, relatives related by marriage would not be protected by the provision. This seems to be a reasonable limitation.

If lapse does occur, the Code has a specific section covering where the lapsed gift is to pass. If such a gift was other than a residuary bequest, it becomes part of the residue.³⁵⁹ If the residue is devised to two or more persons and one share fails for any reason, that person's share passes to the other residuary beneficiary or beneficiaries.³⁶⁰ This is a meritorious rule of construction in that it will avoid in many cases some part of the estate passing in intestacy. Of course, if all of the residuary beneficiaries fail, that part passing in the residue will go into intestacy.

G. Succession Contracts

In order to reduce confusion and litigation in the administration of decedents' estates, the Code has proposed that the rules be tightened with respect to the proof of contracts concerning succession, including contracts to make a will or not to revoke a will or to die intestate. The Code provides that such contracts can be established only by: (1) material provisions of the contract being stated in the will, (2) express references in the will to such a contract and other extrinsic evidence proving the terms of the contract, or (3) evidence of the contract in writing signed by the decedent.³⁶¹ This provision is not intended to otherwise alter the rules of evidence with regard to the proof of such contracts. No presumption of such a contract not to revoke a will can be created, however,

357. U.P.C. § 2-605. See U.P.C. § 2-106.

358. U.P.C. § 2-605, Comment at 57.

359. U.P.C. § 2-606(a).

360. U.P.C. § 2-606(b).

361. U.P.C. § 2-701. See *Nichols v. Pangarova*, 419 P.2d 688 (Wyo. 1966).

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by the mere execution of a joint will or mutual wills.³⁶² The stated reasons³⁶³ for these rules would seem to be justified. Considering that one of the parties to the contract is no longer available to testify, it is good public policy to require some form of written evidence that the contract actually existed.

H. Miscellaneous Code Provisions

The Code covers several other areas which deserve mention and with which present legislation typically does not take into account. First, the right of exoneration of a mortgage on specifically devised real and personal property is abolished regardless of a general directive in the will to pay debts.³⁶⁴ Although contrary to the common law and therefore presumably the Wyoming rule, this provision is more in line with modern philosophy³⁶⁵ and practice since estate planners have typically included such a provision in their client's wills. Second, general residuary or general disposition of all property clauses are not to be interpreted as exercising a power of appointment held by the testator unless a specific reference is made to the power or some other indication to include the power is included within the will.³⁶⁶ This rule is also in line with the modern estate planning practice of creating general powers of appointment in marital deduction trusts with the general idea that the surviving spouse will not exercise the power. Again, estate planners ordinarily impose the same restriction on donees in the donor's transferring instrument.

The third special provision concerns terms of status and their use in testamentary instruments. The Code specifically provides that the intestacy definitions for half-bloods, adopted persons and illegitimates are to be employed for determining members of a class mentioned in a will.³⁶⁷ An illegitimate, however, is not to be considered a child of the father unless the father has openly and notoriously treated that person as a child. These rules of construction are meritorious in that they will hopefully prevent different definitions being given to

362. U.P.C. § 2-701. See *Canada v. Ihmsen*, 33 Wyo. 439, 240 P. 927 (1925).

363. U.P.C. § 2-701, Comment at 61.

364. U.P.C. § 2-609.

365. See ATKINSON, *WILLS* § 127, at 707 (2d ed. 1953); MODEL PROBATE CODE § 189, Comment at 175.

366. U.P.C. § 2-610.

367. U.P.C. § 2-611.

the same word depending on whether the issue arises in intestacy or in testacy.

A fourth provision deals with the postmortem planning device of renunciation.³⁶⁸ Although the basic concept is probably universally recognized,³⁶⁹ there have been some unnecessary limitations and unclear areas with respect to it. The Code, of course, attempts to correct these problems. It provides that a person or his personal representative may renounce in whole or in part any type of succession transfer.³⁷⁰ This renunciation must be evidenced by a writing describing the property or interest to be renounced, the extent of the renunciation and signed by the person renouncing³⁷¹ within six months of the death of the decedent or six months after the taker or the interest is ascertained.³⁷² Once renounced the interest passes as if the renouncing person had predeceased the decedent or the donee as applicable to the particular situation.³⁷³ Specified actions by the person attempting to renounce will bar the right.³⁷⁴ Limitations upon the person's interest in the property, such as a spendthrift clause, do not, however, affect the right to renounce.³⁷⁵ Because of the potential importance of the right to renounce to postmortem planning,³⁷⁶ a full elaboration of the applicable rules is desirable.

INTERVAL

A few preliminary concluding remarks are appropriate at this point of this multipart article. The above discussion indicates that in some of the areas discussed present Wyoming law is adequate. The discussion also demonstrates that in some of the other areas discussed present Wyoming law is

368. ATKINSON, *supra* note 365, § 139.

369. U.P.C. § 2-801, Comment at 63.

370. U.P.C. § 2-801(a). This provision permits an heir to renounce although such a person could not at common law because title was held to pass immediately upon death. ATKINSON, *supra* note 365, § 139, at 776. This rule has caused severe tax consequences in some cases. *See, e.g., Hardenbergh v. Commissioner*, 198 F.2d 63 (8th Cir. 1952), *cert. denied*, 344 U.S. 836 (1952).

371. U.P.C. § 2-801(a).

372. U.P.C. § 2-801(b).

373. U.P.C. § 2-801(c).

374. U.P.C. § 2-801(d).

375. U.P.C. § 2-801(e).

376. *See e.g., Note*, 37 U. CIN. L. REV. 567 (1968).

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confused, archaic and totally lacking. In addition, an all encompassing criticism of Wyoming statutory law is that it lacks many of the meritorious features of modern draftsmanship.

It is extremely unlikely, however, that anyone would claim that the Uniform Probate Code is a perfect document and should be enacted by legislatures without alteration. On the other hand, it is just as untenable a proposition that no reform of present intestacy and testacy laws is needed and even if needed the Code is an inadequate document and should not be considered. In the middle is a persuasive argument that the Code represents an extremely useful manual for reform which should occur in the future concerning the areas of law discussed. It also represents a reason or motivation for reform in this area. Because it exists and because it is so comprehensive, it gives legislatures and legislatures' committees an excellent opportunity to review not just part of the law of distribution at death but the whole multi-subject area. The Code gives hope that much needed uniformity and modernization is a real possibility.

Wyoming should consider the Code with these factors in mind.