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LAND AND WATER LAW REVIEW

The new Wyoming Probate Code became effective on April 1, 1980. The new Code significantly alters many areas of Wyoming probate law, and practicing attorneys must become familiar with the new provisions, as well as be aware of provisions retained from prior Wyoming law. This article is an analysis and critique of the Wyoming Probate Code of 1980. The author addresses both substantive and procedural sections of the new Code, pointing out interpretive problems, alterations, and similarities to prior law, and potential difficulties that the attorney may encounter.

THE WYOMING PROBATE CODE OF 1980: AN ANALYSIS AND CRITIQUE

*Lawrence H. Averill, Jr.**

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I. INTRODUCTION

Wyoming has a new Probate Code.¹ That is a fact. Whether it is the best the state might have had is irrelevant. What is relevant at this point is that on April 1, 1980 the new Code went into effect and it alters, both quantitatively and qualitatively, the law of decedents' estates in Wyoming.²

The purpose of this article will be to analyze a select number of the significant provisions in the Code. It is not a comprehensive review of all aspects of the new Code. To aid the practitioner, however, many interpretative and substantive problems raised by the new Code will be identified.³ The Code's provisions are analyzed from the standpoint of what they say. The analysis, generally, does not speculate about unexpressed intention.

Several pervasive considerations concerning the interpretation of a revision of an area of law, such as the new Probate Code require mention. They are: (1) The most minor and innocent alteration to a retained provision may require or cause an entirely different interpretation to be given to the provision; (2) An alteration to one provision may affect the interpretation to be given to an otherwise unaltered provision; (3) A provision taken from a particular source may require or receive a different interpretation from that made of it at the source; and (4) A previous interpretation of a retained provision, altered or otherwise, may not constitute binding precedent for future interpretations of the same provision.

For purposes of this article, a brief legislative history of the Code will suffice. What is now called the Wyoming Probate Code of 1980 originally was enacted as the Wyoming Probate Code of 1979. In 1979 the 45th Wyoming State

1. 1980 WYO. SESS. LAWS Ch. 54, at 267. (Codified as WYO. STAT. §§ 2-1-101 through 2-15-107 (1977 Repub. Ed., 1980). [Hereinafter referred to as the Code.]

2. 1980 WYO. SESS. LAWS Ch. 54, § 4, at 373.

3. For a discussion of the Wyoming law of decedent's estates prior to the 1980 Code see Averill, *Wyoming's Law of Decedent's Estates, Guardianship and Trusts: A Comparison with the Uniform Probate Code* Part I, 7 LAND AND WATER L. REV. 169 (1972); Part II, 8 LAND AND WATER L. REV. 187 (1973). [Hereinafter referred to as Part I and Part II respectively.]

Legislature enacted Chapter 142 which substantially altered prior Wyoming law.⁴ Because of a significant number of technical and substantive problems with that code, the 45th Wyoming State Legislature, in its second session, reenacted a full and substantially amended version. It is this 1980 Act that is the subject of this article.

II. TECHNICAL CONSIDERATIONS

Several somewhat ministerial matters concerning the Code are worthy of mention because they may cause problems in practice. The first point, which could cause a problem to the unwary, originates with the recodification of the 1957 Wyoming Statutes in 1977.⁵ One of the purposes behind the recodification was to conform all of the Wyoming Statutes to a consistent numbering system. The familiar 0-0-000 numbering system was adopted. The law of decedents' estates was incorporated into Title II with this numbering system.⁶ At this point, the use of this numbering system raises no significant problems.

The 1980 Probate Code also adopted the 0-0-000 numbering system. Although that alone raises no problem, the exact same numbers are used with no special indication that a particular section is part of the 1980 Wyoming Probate Code rather than a section that was part of the 1977 Republished Edition. If the two codes were parallel, section by section subject matter wise, there would not be as much danger of confusion. The difficulty is that 1980 Code substantially reorganized the 1977 version which means that most corresponding sections between the two codifications have different numbers.⁷ For example, Rules of Descent under the 1977 edition was section 2-3-101.⁸ Under the 1980

4. 1979 WYO. SESS. LAWS Ch. 142, at 256.

5. The republication was not intended to make substantive changes. See WYO. STAT. § 28-8-105(a) (v) (1977 Repub. Ed.).

6. 1 WYO. STAT., Preface (1977 Repub. Ed.).

7. Except for Sections 2-2-101 through 2-2-108, none of the sections in these two acts (the 1977 and 1980 versions) conform by number. For clarity, when referring to Wyoming's old probate code, cites will be as follows: WYO. STAT. § 2-3-101 (1977 Repub. Ed.). When referring to the 1980 Probate Code, cites will be as follows: WYO. STAT. § 2-3-101 (1977 Repub. Edition; 1980). The reader should note that the Wyoming Statutes are in looseleaf form and when the 1980 Probate Code became effective, the entire 1977 Title 2 pamphlet was removed and a 1980 pamphlet replaced it.

8. WYO. STAT. § 2-3-101 (1977 Repub. Ed.). This section was amended and renumbered in 1980 and is now § 2-4-101 (1977 Repub. Ed., 1980).

Code the identical number deals not with Rules of Descent but with the oath of the administrator or personal representative of an estate.⁹ In the New Code, the Rules of Descent section is section 2-4-101.¹⁰ Because of this non-matching of the substantive matter of most of the sections, researchers and draftsmen who make reference to the Wyoming Statutes in the area of decedents' estates will have to be very careful in dating their references. More importantly, previous authorities and documents which use the 1977 version will have to be cross-checked for the appropriate comparable section in the 1980 Code.

Another matter worthy of mention is the effective date of the new Code.¹¹ The effective date is spelled out in one paragraph without significant elaboration. It provides that the new Code applies to all proceedings in probate brought after the effective date, April 1, 1980.¹² It is also applicable to pending proceedings in probate with the exception that the court upon application may exempt a particular proceeding, in whole or in part. The prior law, of course, would apply in those exempt situations. Specific justifications for exemption include that it is not feasible to use the new Code and its application will work an injustice. It appears that the latter justification is intended to cover substantive changes in the law when matters are currently pending in the probate court.

No mention is made of the application of the new Code's substantive changes that effect transactions that have already occurred but that will not be raised in proceedings until after the effective date. One example that could raise a problem in this regard concerns the new Code's significant alteration of the requirements for proving that an heir received an advancement. The prior law required no formality and advancements would be determined from factual presumptions or extrinsic evidence.¹³ The new Code, however, requires that if an advancement is intended, intent must be

9. WYO. STAT. § 2-3-101 (1977 Repub. Ed., 1980).

10. WYO. STAT. § 2-4-101 (1977 Repub. Ed., 1980).

11. 1980 WYO. SESS. LAWS, Ch. 54, § 4, at 373.

12. WYO. STAT. § 2-1-102(d) (1977 Repub. Ed., 1980).

13. WYO. STAT. § 2-3-105 (1977 Repub. Ed., Repealed 1979).

declared in some form of a writing.¹⁴ The obvious question, then, is what about advancements not in writing made before the effective date of the new Code?¹⁵ Does the new formality rule requiring a writing apply and thereby wipe clean all advancements not in writing before its effective date? Is this a constitutional taking? Should the new Code be interpreted to apply only to procedural matters and not to substantive matters? These and other related questions will potentially have to be answered in future litigation.

The third technical consideration deals with the origins of the new provisions of the Code. Under several Wyoming Supreme Court decisions dealing with prior law, the court held that because Wyoming's probate law was derived from California, California court decisions must be given special consideration when construing this law.¹⁶ Under the 1980 Wyoming Probate Code, one must take extreme care in referring to California law. Although much of the new Code is similar to the prior law, many new sections are added and old ones amended. The source of these additions or substitutions come from two primary sources: the Iowa Probate Code and the Uniform Probate Code.¹⁷

It might seem logical, then, for Wyoming law to refer, when applicable, either to Iowa court decisions or interpretations of the Uniform Probate Code. A significant warning must be made in this regard, however. Although the source of many of the sections may be traced to these bodies of law, it must be remembered that the new Code incorporates the sections from these laws in a piecemeal fashion and not as a whole body of law. Consequently, the interpretation that is appropriate for a provision that is a part of one comprehensive, integrated, and fully coordinated code may be significantly different from the interpretation that is appropriate for the same section that has now been integrated into another different comprehensive code. This is not to

14. WYO. STAT. § 2-4-108 (1977 Repub. Ed., 1980).

15. See Averill, *supra* note 3, Part I, at 187-189.

16. Merrill v. District Court, 73 Wyo. 58, 272 P.2d 597, 598 (1954); In re Estate of Kimball, 583 P.2d 1274, 1279 (Wyo. 1978).

17. See Appendix I, at the back of this volume, for a list of the provisions in the new Code with their source and status.

indicate that the law of the source of origin is totally irrelevant. It is meant to warn the researcher to be careful not to over emphasize the relevance of the law of origin. In addition, for many of the new sections, California decisions will no longer rank with any priority.

III. INTESTATE SUCCESSION AND RELATED DOCTRINES

A. *Intestacy*

The new Code does not alter the basic pattern of intestate succession. The designated beneficiaries and their shares remain the same as under the prior law. Chart One¹⁸ graphically displays this pattern of intestate succession. Because the Code describes its intestate succession beneficiaries in the generic terms: husband, wife, children, descendants, father, mother, parents, brothers, sisters, grandfather, grandmother, uncles, and aunts; it is often necessary to determine who falls within the meaning of these classifications. This determination is a problem of status. The new Code contains many new rules dealing with status. In particular, new or altered provisions are included in the new Code with regard to persons born out of wedlock, to posthumous heirs, to half-blooded relatives and to adopted persons.

B. *Persons Born Out of Wedlock*

Issues concerning inheritance in intestacy may arise in several different ways when the status of a person born out of wedlock is involved. Using Chart Two, one can see that the issue of inheritance rights may develop in several ways. First, there may arise the inheritance rights of the person born out of wedlock (OW) from his or her natural parent including the mother (MP) and the father (PP). Second, if the mother or father (OW's parents) predeceased one or more of their ancestors (MGP or PGP) or collaterals (MA, MU, PU or PA), issues may arise as to inheritance rights of the person born out of wedlock or, if predeceased too, his or her issue (C) through the parents from the parent's relatives. The third issue, concerns the inheritance rights from the person born out of wedlock (OW), or, from his or her issue (C), to the natural parents including both

18. WYO. STAT. § 2-4-101 (1977 Repub. Ed., 1980). The word "descendant" is spelled "descendent" throughout this section.

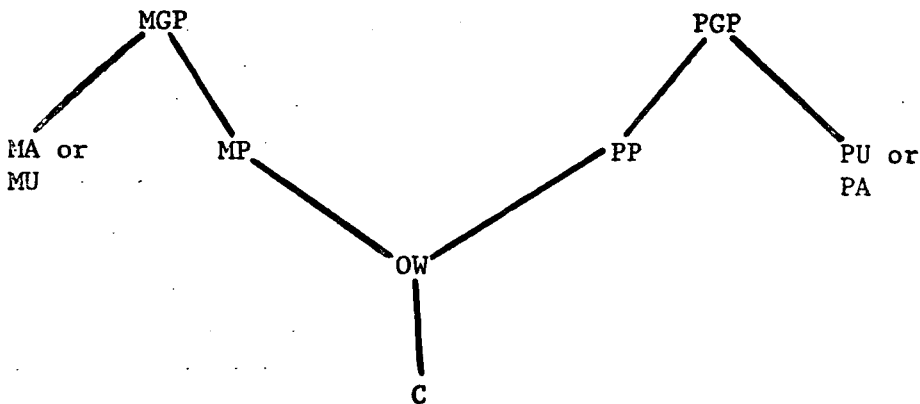
Chart One
**GENERAL PATTERN OF INTESTATE SUCCESSION
 UNDER THE WYOMING PROBATE ACT**

E V E N T	WYOMING STATUTES § 2-4-101					(NONE)	State
	Spouse	Children or Descendants per stirpes	Parents and Descendants	Grandparents and Descendants	Next Kindred without Representa- tion (No statutory grant, however)		
1	1/2	1/2	00	00	00	00	00
2	\$20,000 & 3/4 Re- mainder	NS	1/4 Re- mainder	00	00	00	00
3	\$20,000 & 3/4 Re- mainder	NS	NS	1/4 Remainder	00	00	00
4	ALL	NS	NS	NS	00	00	00
5	NS	ALL	00	00	00	00	00
6	NS	NS	ALL (Per capita among parents & siblings)	00	00	00	00
7	NS	NS	NS	NS	ALL	00	00
8	NS	NS	NS	NS	NS	ALL	00
9	NS	NS	NS	NS	NS	NS	00

LEGEND: NS indicates that no relative of the decedent qualifies within this class of distributees at the moment when dis-
 tribution shares are determined; 00 indicates that persons within this class would not take a share even if some
 of them qualify within this class when distribution is made.

father (PP) and mother (M). Finally, again if the parents are predeceased, inheritance rights issues may arise as to the rights of these parents' ancestors (MGP or PGP) and collaterals (MA, MU, PU or PA) to inherit from the person born out of wedlock (OW) or from his or her issue (C). Consequently, if inheritance rights with regard to persons born out of wedlock are to be treated differently from those rights with regard to persons born in wedlock, all four of these circumstances must be taken into account. The new Code has provisions dealing with these issues.

Chart Two



With respect to the inheritance rights from a person born out of wedlock, the new Code retains substantially the same provision that existed under prior law.¹⁹ Basically, it provides that inheritance from such persons (called "illegitimates") will be the same as for other persons except that the father, his ancestors and his collateral relatives cannot inherit. If parents, ancestors and collaterals are entitled to inherit from a person born out of wedlock, only the mother and mother's relatives will be able to take.

Although, as noted, this provision is the same that existed under prior law, there are some issues raised by its reenactment. In 1977, Wyoming adopted the Uniform Parentage Act.²⁰ The primary goal of this Act is to eliminate

19. WYO. STAT. § 2-4-102 (1977 Repub. Ed., 1980). The word "descendant" is spelled "descendent" throughout this section.

20. WYO. STAT §§ 14-2-101 through 14-2-120 (1977 Repub. Ed., 1980).

the concept of "illegitimacy" as a benchmark for one's legal rights.²¹ It attempts to accomplish this goal by abandoning for most purposes the importance of marriage and by emphasizing the importance of parentage.²² The only issue, then, is not whether one was married when a child is born but whether one is either the mother or the father of that child. Consequently, under the Act a parent-child relationship is established solely on the basis of parentage and not on the basis of the parents' marital status. In fact, the terms, "illegitimate" or "illegitimacy," are not used in the Act.

As used in the new Code, the term "illegitimate" is undefined. Presumably, it applies to any person who is born out of wedlock. Consequently, it can be seen that Wyoming has potentially conflicting statutes in this regard. The Uniform Parentage Act sets state policy that parentage is more important than marital status from the standpoints of rights of the parties. On the other hand, the new Code penalizes the father and the father's relatives because of the lack of a marital status notwithstanding the other circumstances of the case. For example, it makes no difference under the Code whether the father supported, lived with, or cared for the child born out of wedlock for purposes of the father's intestacy rights from that person.²³

With regard to the right of the child born out of wedlock to inherit from the father and his relatives, however, the new Code adopts the policy of the Uniform Parentage Act.²⁴ Under this provision parentage is the only issue and the child and the child's issue may inherit from the father and from the father's relatives if parentage is established under the Act.²⁵ In this regard it is important to note that

21. See WYO. STAT. § 14-2-101(b) (1977 Repub. Ed., 1980).

22. See WYO. STAT. § 14-2-101(a) (1977 Repub. Ed., 1980).

23. It is not uncommon to grant inheritance rights to the putative father if the father has openly treated the child as his own and has not refused to support the child. Uniform Probate Code § 2-109(2) (Alternate) (5th ed. 1978). [Hereinafter referred to as U.P.C.]

24. WYO. STAT. § 2-4-107(a) (iii) (1977 Repub. Ed., 1980). This provision is a modification of U.P.C. § 2-109(2) (Alternate).

25. WYO. STAT. § 14-2-104 (1977 Repub. Ed.).

parentage under the Act may be established after the death of the father.²⁶

C. *Posthumous Kindred*

The new Code makes it statutorily clear that all persons conceived before the decedent's death, but born thereafter, may inherit as if they were born during the decedent's lifetime.²⁷ The posthumous heir provision under prior law was specifically applicable only to children or descendants of the intestate.²⁸ A potential problem with the new provision is whether a stillborn child would come within its terms. Although stillborn persons may be technically "born," it would not be desirable to have such persons' estates inherit a part of a decedent's estate.

D. *Half-blooded Kindred*

The new Code changes the probable meaning of Wyoming's prior perplexing provision.²⁹ It adopts the modern rule that half-blooded persons inherit the same as whole-blooded.³⁰ Apparently to allay some confusion on this matter, the Code specifically states that step-children and foster children and their descendants do not inherit. Step-children and foster children, of course, are not blood relatives and would not ordinarily inherit unless adopted.

E. *Adoption*

The new Code contains an entirely new provision dealing with the effect of adoption on inheritance.³¹ The new provision prefaces the adoption provision with the statement that if one is determined to be in a relationship of parent and child under the terms of the section, intestate succession

26. WYO. STAT. § 14-2-104(c) (1977 Repub. Ed.).

27. WYO. STAT. § 2-4-103 (1977 Repub. Ed., 1980). This provision is a modification of U.P.C. § 2-108.

28. WYO. STAT. § 2-3-103 (1977 Repub. Ed., Repealed 1979).

29. WYO. STAT. § 2-3-104 (1977 Repub. Ed., Repealed 1979). See Averill, *supra* note 3, Part I at 186-187.

30. WYO. STAT. § 2-4-104 (1977 Repub. Ed., 1980). This provision is a modification of U.P.C. § 2-107.

31. WYO. STAT. § 2-4-107(a) (i) and (ii) (1977 Repub. Ed., 1980), Part (a) (i) is a modification of U.P.C. § 2-109(1).

may flow by, through or from persons in that relationship.³² This means that the ordinary rules of intestate succession will apply to the inheritance by, through or from a parent and by, through and from a child if the other terms of the section are met.

The first subparagraph of the section explains the importance of adoption. Under this provision, an adopted person is the child of the adopting parent and the adopting parent is the parent of the adopted child for all purposes of intestate succession. In addition, the adoption of a child by the spouse of a natural parent has no effect on the parent and child relationship of either natural parent.

Up to this point this section of the new Code raises no serious interpretative problems. The new Code provides, however, that the adopted person is also the child of the natural parents for inheritance purposes.³³ This may or may not be good policy. Yet, the effect of this provision is more pervasive and far reaching than apparently realized. The above discussion concerning the meaning of the first paragraph of this section is instructive here, too. Consequently, a reasonable interpretation of the whole section would be not only to permit an adopted child to inherit from his natural parents but also for that adopted person to inherit from all of the other relatives of the natural parents and vice versa. In addition, it would permit the natural parents or their relatives to inherit from the adopted child and his adopted relatives, including potentially the adoptive parents.

An example may reveal the problem more clearly. If an adopted child died intestate with a valuable estate and is survived only by his adoptive parents and his natural parents, the above mentioned alteration in this section might permit or even require the natural parents to share equally

32. WYO. STAT. § 2-4-107 (a) (1977 Repub. Ed., 1980). The second sub-paragraph of this section recites again the rule that the adopted child will inherit through the adopting parent and the relatives of the adoptive parents will inherit through the adopting parents. WYO. STAT. § 2-4-107 (a) (ii) (1977 Repub. Ed., 1980). Other than to emphasize the right to inherit in this manner, the purpose of this subsection is unclear. This subsection is not in the Uniform Probate Code.

33. WYO. STAT. § 2-4-107 (a) (i) (1977 Repub. Ed., 1980).

with the adoptive parents in the distribution of the estate. An equal possibility would require the adoptive parents' ancestors and collateral relatives to share the adopted person's estate with the ancestors and collateral relatives of the natural parents, assuming, of course, that one or more of the respective parents are predeceased. Court litigation and interpretation will be required to solve these interpretive issues.

F. Advancements

An advancement is an irrevocable gift of money or property to an heir by a relative that enables the heir to anticipate his or her inheritance to the extent of the gift.³⁴ The new Code includes a provision that is designed to both clarify and to restrict the application of the advancement doctrine.³⁵ Under this provision, a gift is considered to be an advancement only if the donor "declared in contemporaneous writing" or the donee "acknowledged in writing" that the gift is an advancement. This formalization, and thus restriction, on the application of the advancement doctrine, coincides with modern practice and theory because most gifts today are not thought of as transfers in anticipation of an inheritance. By requiring that intent be in writing, the formality requirement also alleviates some of the evidentiary problems of proving intent. The requirement of a writing should not be over-burdensome on the donor when an advancement is intended.

Significantly, the Code extends the application of the advancement concept to all heirs. It does not limit it solely to the children of the decedent as prior law did.³⁶ The key word "heirs" is defined to mean "any person except the surviving spouse, who is entitled to property of a decedent under the statutes of intestate succession."³⁷ Consequently, advancements may be made to collateral relatives as well as descendants. The Code specifically provides, however,

34. ATKINSON, WILLS § 129 (2d ed. 1953). [Hereinafter cited as ATKINSON.]

35. WYO. STAT. § 2-4-108 (1977 Repub. Ed., 1980). This provision is a modification of U.P.C. § 2-110.

36. WYO. STAT. § 2-3-105 (1977 Repub. Ed., Repealed 1979).

37. WYO. STAT. § 2-1-301(a) (xx) (1977 Repub. Ed.).

that an intended advancement to a donee who dies before the donor does not affect the share of the donee's issue unless the writing expressly so requires.

It is not clear by the terms of the new provision whether it is applicable to situations only where the person died totally intestate or also to situations where partial intestacy is involved. Generally, the advancement concept does not apply when there is a will which disposes of all of the decedent's estate, and by a majority of decisions, does not apply when there is partial intestacy.³⁸ The determination of which rule Wyoming will adopt will require interpretation. Potentially significant in this regard is that the phrase "as to all his estate" in reference to one dying intestate was removed from the version enacted in the Code.³⁹ Whether this omission is determinative of the partial or total intestacy problem is not entirely clear.

Not willing to rely solely on the formalities to eliminate all implied advancement contentions, the Code includes a specific provision that states maintenance, education or supply of money to a minor is not deemed an advancement.⁴⁰ This section, of course, came from prior law.⁴¹

The determination of whether an advancement has been made requires both notice and a hearing before the court. The valuation of an advancement is determined as of the time of the donee's possession or enjoyment.⁴²

IV. TESTATION LIMITATIONS

A. Generally

Despite the broad recognition of freedom of testamentary and inter vivos disposition, other conflicting important policies have affected legislation in these areas. The

38. ATKINSON, *supra* note 34, at 723-724.

39. The Code omits the words "as to all his estate" after the word "intestate" in the first line in the U.P.C.'s version of this section. Compare WYO. STAT. § 2-4-108 (1977 Repub. Ed., 1980) with U.P.C. § 2-110.

40. WYO. STAT. § 2-4-108(b) (1977 Repub. Ed., 1980).

41. WYO. STAT. § 2-3-106 (1977 Repub. Ed., Repealed 1979).

42. WYO. STAT. § 2-4-108(a) (1977 Repub. Ed., 1980).

policies of protecting the surviving spouse and omitted children have frequently motivated legislatures to restrict full freedom of disposition and will continue to so motivate them in the future.⁴³ Three types of disposition limitations are common in this country. Typically the most significant type of limitation is the provision to protect the surviving spouse from disinheritance.⁴⁴ Despite their different size, shape and form, they basically are designed to provide the surviving spouse with a modicum of financial protection. With only a few exceptions, the states provide some form of protection for the surviving spouse.

Another form of testation limitation commonly found in the United States are the family protection provisions such as homestead, exempt property, and support allowance.⁴⁵ Within their limited terms, they also constitute a limitation on testation. If their value becomes too great an amount, they may constitute a serious restriction on testation for the small estate.

Finally, another common provision restricting testation deals with the unintentional disinheritance of issue.⁴⁶ Because a person ordinarily may be disinherited merely by being omitted in the will, states have enacted statutes, called pretermitted heir statutes, which attempt to protect unintentionally disinherited heirs by giving them an intestate share of some measurable amount. The statutes vary significantly as to whom, when and how their provisions are to be applied.⁴⁷

The new Wyoming Probate Code contains both a specific spousal protection provision⁴⁸ and family protection provisions.⁴⁹ Wyoming remains the only state which does not have some form of pretermitted heir provisions.⁵⁰ Conse-

43. Averill, *supra* note 3, Part I, at 195-196.

44. AVERILL, UNIFORM PROBATE CODE IN A NUTSHELL 62-63 (1978). [Hereinafter cited as AVERILL, NUTSHELL.]

45. *Id.* at 67.

46. *Id.* at 63.

47. ATKINSON, *supra* note 34, at 141-145.

48. WYO. STAT. § 2-5-101 (1977 Repub. Ed., 1980).

49. WYO. STAT. §§ 2-7-501 through 2-7-502 (1977 Repub. Ed., 1980).

50. ATKINSON, *supra* note 34, at 141.

quently, except as modified by the other two types of testamentary limitations, in Wyoming anyone may be disinherited by will merely by omission.

B. Family Protections

The new Code contains an array of protection devices for the surviving spouse and certain children. In general terms they are commonly referred to as allowances, homesteads, and exemptions.⁵¹ In one regard they are designed as protection against creditors. In this way they are similar to the same type of provisions that are provided for debtors who are insolvent or bankrupt. In fact there is interrelation and cross-reference between the similar sections for decedents' estates and their comparable sections for debtor's estates.⁵²

In decedents' estates, however, these devices serve an additional function. They constitute a minimum protection from disinheritance for surviving spouses and certain children.⁵³ What this means is that a testator may not convey by will to his or her surviving spouse or children less than these family protective devices. A testator may limit one's take from the estate to no more than these devices require, but not below. In this regard they are similar to the forced or elective share provisions for the surviving spouse. They are also in addition to that election.

Without delving into unnecessary detail, the new Code provides that a decedent's surviving spouse or minor children or both are entitled to specific homestead⁵⁴ and exemptions⁵⁵ and to a judicially determined allowance for support.⁵⁶ The Code does not change from prior law either the exemptions or the allowance available.⁵⁷ It does, however, make a

51. See WYO. STAT. §§ 2-7-501 and 2-7-502 through 2-7-504 (1977 Repub. Ed., 1980).

52. See WYO. STAT. §§ 1-20-101 through 1-20-108 (1977 Repub. Ed.).

53. AVERILL, NUTSHELL, *supra* note 44, at 67.

54. WYO. STAT. §§ 2-7-501 through 2-7-508 (1977 Repub. Ed., 1980).

55. WYO. STAT. § 2-7-504 (1977 Repub. Ed., 1980); WYO. STAT. § 1-20-107 (1977 Repub. Ed.).

56. WYO. STAT. §§ 2-7-501(a) through 2-7-502 (1977 Repub. Ed., 1980). The sections make reference to the "widow." For constitutionality purposes, one should assume that it applies to both surviving husbands as well as surviving wives.

57. See Averill, *supra* note 3, Part I, at 191-192.

very significant alteration in the value of the homestead. Under the new Code the homestead is valued at \$30,000.⁵⁸ This amount is exempt from the payment of debts of the decedent except for expenses of administration, and if other property is not sufficient, for expenses of decedent's last sickness and funeral.⁵⁹ After all other resources of the estate are consumed, liens and encumbrances on the property also take priority over the homestead.⁶⁰

Because of the size of the homestead, clients may wish to arrange their plans to take advantage of some of it or will desire advice on how to avoid it. Planning to take advantage of it, of course, would only occur in the most unusual cases.

More importantly for small estates valued near or below \$30,000, the homestead exemption constitutes an estate plan by rule of law. If decedent is survived by a surviving spouse or minor children, his or her last will will have no dispositive effect up to the value of all of the family protections including the homestead, plus deductible expenses and secured indebtedness. Although in certain cases this may prove to be beneficial because it financially protects certain beneficiaries who may need such protection, it also incorporates a degree of inflexibility into the disposition of small probate estates.

Creditors, who typically deal with their debtors on an unsecured basis, should be careful not to let their debtors get too far behind in their payments. With the ever presence of death, there may be danger that bills may never be paid because of the homestead exemption.

It must be emphasized that the family protections, including the \$30,000 homestead exemption, are applicable only to property passing through the decedent's estate and subject to the probate court. Under the usual rule these devices do not concern the rights to properties that pass in other manners such as joint property with right of survivor-

58. WYO. STAT. § 2-7-508 (1977 Repub. Ed., 1980).

59. WYO. STAT. § 2-7-504 (1977 Repub. Ed., 1980).

60. WYO. STAT. § 2-7-506 (1977 Repub. Ed., 1980).

ship, life insurance payable to a name beneficiary, or multiple party bank accounts payable to the survivors. These latter transfer devices would successfully pass the property to the appropriately named beneficiaries in addition to the homestead allowance that might be allowed to the estate.

The effect of joint property passing to the same beneficiaries as who take under the homestead or other family protections may become a relitigated issue, however. Under the prior law, the Wyoming Supreme Court held that if the surviving spouse took an equivalent homestead by survivorship, there would not be an additional homestead in the estate.⁶¹ This case might be applicable to the new Code because many of the provisions were taken, and only modified in part, from the prior law.

C. Right of Election of the Surviving Spouse

As far as the amount of the elective share is concerned, the new Code follows the same fractions provided under prior law.⁶² The elective share is one-half if the decedent has no surviving issue or if the surviving spouse is the parent of any surviving issue of the decedent.⁶³ The elective share is only one-fourth if the decedent has surviving issue none of whom are the children of the surviving spouse.⁶⁴

Under the Code the surviving spouse's election is limited to "the property which is subject to disposition under the will" less funeral and administrative expenses, the family protections and debts.⁶⁵ Consequently, it does not take into account gratuitous inter vivos transfers by the decedent either to the surviving spouse or to third persons. The failure to cover such situations permits, on the one hand, easy avoidance and on the other hand, potential over-qualification.⁶⁶ Disinheritance of the surviving spouse is

61. See *Wambeke v. Hopkin*, 372 P.2d 470, 474 (Wyo. 1962).

62. WYO. STAT. § 2-4-101 (1977 Repub. Ed., Repealed 1979).

63. WYO. STAT. § 2-5-101(a)(i) (1977 Repub. Ed., 1980).

64. WYO. STAT. § 2-5-101(a)(ii) (1977 Repub. Ed., 1980).

65. WYO. STAT. § 2-5-101(a) (1977 Repub. Ed., 1980).

66. See AVERILL, NUTSHELL, *supra* note 44, at 52-59.

apparently possible merely by creating revocable inter vivos trusts or survivorship interests in third persons or by making outright gifts of all of one's property.⁶⁷ Over-qualification is possible, because the surviving spouse is able to take the forced share notwithstanding other properties and assets received from the decedent during the decedent's lifetime or at his or her death via other time of death dispositive devices such as survivorship ownership or contractual arrangements.⁶⁸

Although inter vivos transfers of various kinds may avoid the spousal protection provision in the new Code, the Code may apply its spousal protection to property transactions not ordinarily considered part of the electable estate. In particular, it may apply to powers of appointment held by the decedent spouse. Rather than make reference to the assets that are part of the estate, as mentioned before, the Code provides that the election is available if the decedent deprives the surviving spouse of more than the elective share of "the property which is subject to disposition under the will."⁶⁹ This phrase could easily be interpreted to include property subject to a testamentary power of appointment held by the decedent spouse. Although the property of the power of appointment is not a part of the estate administered in the probate court, testamentary powers are clearly subject to the disposition by provisions in the will.⁷⁰

If the elective share does apply against powers of appointment there are additional questions that will have to be answered, for example: (1) Does it apply against

67. Doctrines, which are collateral to the forced share, such as "intent to defraud" and "illusoriness," have been judicially instituted in order to prevent disinheritance in some situations. See Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981 (1977). The existence and scope of these exceptions under Wyoming law will have to wait for development by the Wyoming Supreme Court. There is no reliable way to predict what the Court would do if the issue arose before it. If the court follows the current trend, there are very few situations where a complete inter vivos transaction would not be held to avoid a forced share statute such as included in the new Code. *E.g.*, Johnson v. LaGrange State Bank, 73 Ill.2d 342, 22 Ill. Dec. 709, 383 N.E.2d 185 (1978).

68. See AVERILL, NUTSHELL, *supra* note 44, at 51-53.

69. WYO. STAT. § 2-5-101(a) (1977 Repub. Ed., 1980).

70. Creditors of the holder of an exercised general testamentary power may reach the appointed property to the extent of their claims. SIMES & SMITH, FUTURE INTERESTS § 945, at 403-404 (2d ed. 1956).

special as well as general testamentary powers;⁷¹ (2) Does it make any difference whether the power was exercised in the will or whether the property would pass to the takers in default;⁷² (3) Does it make any difference whether the power was created by the decedent or created by third parties in the decedent.

Notwithstanding the answers to these problems, the elective share is available to the surviving spouse only if he or she is by will deprived "of more than the elective share."⁷³ Consequently, it would not be available if the will gives the spouse more than the elective share or if the decedent intestate. The Code does not indicate, however, how gifts in the will of less than fee to the surviving spouse are to be valued. For example, what is the value of a life estate in trust to the surviving spouse? Is it necessary to give a present value to that life interest? Are less than fee devises to be ignored? These same questions were unanswered under prior law and remain so under the new Code.

With regard to the period of time within which the surviving spouse must file an election, the Code provides that the court has a duty to advise the surviving spouse "any time after the filing of an inventory and not more than three (3) months after the admission of the will to probate."⁷⁴ In addition, the surviving spouse has no less than

71. It is very unlikely that the elective share would be applied against special powers in general because by definition the decedent-donee does not have a beneficial interest. *Id.* § 875, at 350. But consider a special testamentary power that could be exercised in favor of the surviving spouse but which is exercised by the will in favor of other appointees. No authority yet would let the spouse take. *Id.* § 947, at 411-414; *but cf.*, *Id.* § 945, at 403.

72. Generally, the exercise or non-exercise of the power does not affect creditors' rights. *Id.* at §§ 944 and 945.

73. WYO. STAT. § 2-5-101(a) (1977 Repub. Ed., 1980). The new Code provides the same protection for a surviving spouse whether the latter is disinherited intentionally or has been unintentionally omitted. The latter situation may arise when a decedent's will was executed prior to the marriage. Although under the new Code, provisions for an ex-spouse would be revoked, such revocation does not cause the will in whole to be revoked. WYO. STAT. § 2-6-118 (1977 Repub. Ed., 1980). The property passes as if the ex-spouse had failed to survive the decedent. Alternate gifts in the residuary clause, then, may pass the property to named beneficiaries rather than by intestacy. Consequently, under the new Code the new and omitted spouse would be limited to the elective share rather than an intestacy share. The former share is from one-fourth to one-half, the latter share is never less than one-half. For an example of a provision that would deal with the situation *see* U.P.C. § 2-301.

74. WYO. STAT. § 2-5-104(a) (1977 Repub. Ed., 1980).

thirty days after the advisement to file the election.⁷⁵ When analyzed, the advisement and period of grace requirements are quite perplexing if one tries to integrate them with the ordinary three month limitation on the election.

Does the Code mean that the advisement may not be made unless the inventory has been filed but still must be made within three months after probate? If this is a proper interpretation, inferentially it requires that the inventory be filed within three months, otherwise the court could not meet its advisement responsibilities. Under the inventory filing provision, however, inventories need not be filed for 120 days.⁷⁶ Has this limitation been impliedly reduced to three months when a surviving spouse has a right of election? If it is not necessary in this situation to file the inventory within three months, how is the court going to meet its obligation to notify the surviving spouse no more than three months after probate?

A related question asks, what happens if the court does not advise a surviving spouse within three months of probate? May the court merely advise the surviving spouse and begin the thirty day period of grace? Or, must the will be reprobated and the estate reopened and notices satisfied again?

These are questions that do not have answers at this point. Clearly, the safest and best course of action is to file the inventory within two months of the probate and of the appointment of the personal representative. This permits the court advisement to be made in proper time and the limitation on the election by the surviving spouse to expire normally.

One significant limitation on the application of the election of a surviving spouse deserves emphasis. The new Code clearly states that its surviving spouse provisions are applicable only against estates of decedents who died domiciled in Wyoming.⁷⁷ Spousal protection for the surviving

75. WYO. STAT. § 2-5-105(a) (1977 Repub. Ed., 1980).

76. WYO. STAT. § 2-7-403 (1977 Repub. Ed., 1980).

77. WYO. STAT. § 2-5-101(a) (1977 Repub. Ed., 1980).

spouse of a decedent not domiciled in Wyoming is governed by the law of the decedent's domicile at death.⁷⁸ For example, if D died domiciled in Colorado owning property in Wyoming, the spousal protection provision for D's surviving spouse would be governed by Colorado law.⁷⁹ This reference to the law of domicile is comprehensive and unrestricted. Presumably this would include the domicile state's laws concerning inter vivos transfers by the decedent and even community property concepts if the decedent dies domiciled in a community property state.⁸⁰

Under the new Code, the personal representative or guardian of the estate of the surviving spouse is permitted to make the election if the surviving spouse "died or becomes incompetent within (3) months after the will is admitted to probate or before being advised of the right of the election."⁸¹ Because of a fiduciary responsibility to creditors and successors of the estate being administered, the personal representative or guardian may be required to make the election even though the surviving spouse would not have made the election if able throughout the election period. This especially will be true where there are unsatisfied creditors or successors of the surviving spouse's estate.

The provision for the surviving spouse who becomes incompetent after the date of death of a decedent spouse raises an interesting problem. Whereas it can be strenuously argued that the elective share should not survive the surviving spouse's death, protection for an incompetent surviving spouse is clearly within the desired purposes of the spousal protection statutes. Whereas permitting the election to be made after death only protects the surviving spouse's creditors and successors, permitting the election by the fiduciary for an incompetent, protects the surviving spouse, personally. Public policy wise this is clearly desirable. Un-

78. WYO. STAT. § 2-5-101(b) (1977 *Repub. Ed.*, 1980). This provision is U.P.C. § 2-201(b), *verbatim*.

79. The "augmented estate" concept would be included, too. *See, e.g.*, COLO. REV. STAT. ANN. §§ 15-11-201 through 15-11-207 (1974, 1979 *Supp.*).

80. This would include domiciliaries from Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

81. WYO. STAT. § 2-5-101(c) (1977 *Repub. Ed.*, 1980).

fortunately, the new Code by its literal terms only protects an incompetent surviving spouse if the incompetency occurs within three months (1) after the will is admitted to probate or, (2) before being advised of the right of election.⁸² This literal construction would not protect an incompetent surviving spouse whose incompetency preceded the testator's death and the three month notice limitation provision.

Antenuptial and post-nuptial waivers of the right of election, the homestead, exempt property, or the family allowance are recognized under the Code so long as they are in writing and are made after a fair disclosure.⁸³ Furthermore, all rights by each spouse in the property of the other including the elective share, homestead, exempt property and family allowance, are waived and all benefits that would otherwise pass to one from the other by intestate succession or by virtue of the provisions of any prior will executed are renounced if: (1) The spouse has waived "all rights" or equivalent language in the property or estate of a present or prospective spouse; or, (2) A complete property settlement has been entered into after or in anticipation of separation or divorce. Of course, the waiver or property settlement may provide otherwise. These provisions permit spouses in subsequent marriages to protect their issue from prior marriages without fear of the elective share disturbing the distribution.

V. EXECUTION AND REVOCATION

A. Execution

The new Code does not alter the execution requirements for the ordinary witnessed will.⁸⁴ Although rephrased, the new Code's provision for holographic wills is also the same.⁸⁵

Significantly, the Code creates a new execution technique called the "self-proving" or "self-proven" will.⁸⁶ Basic-

82. *Id.*

83. WYO. STAT. § 2-5-102 (1977 Repub. Ed., 1980). Except for editorial alterations, this provision is U.P.C. § 2-204 (1978).

84. WYO. STAT. §§ 2-6-101 through 2-6-112 (1977 Repub. Ed., 1980). For a discussion of these requirements see Averill, *supra* note 3, Part I, at 203-204.

85. WYO. STAT. § 2-6-113 (1977 Repub. Ed., 1980). For a discussion of these requirements see Averill, *supra* note 3, Part I, at 205-206.

86. WYO. STAT. § 2-6-114 (1977 Repub. Ed., 1980). This provision is a slightly modified version of U.P.C. § 2-504.

ally, it is similar to the procedure for an ordinary witnessed will except it includes a notarized affidavit executed by the testator and the witnesses. The forms for two alternative affidavits are included. These affidavits, similar to the technique of the attestation clauses commonly included in wills today, describe the formalities and facts that were followed and observed during the execution process. Because they are affidavits, however, they both require notarization. The first affidavit form provided permits the self-proven will affidavit to be part of the will itself.⁸⁷ In using this form the testator and the witnesses execute the affidavit and the will simultaneously. The second affidavit form is to be executed separate from and subsequent to the execution of the ordinary witnessed will.⁸⁸ When using this form, the testator and witnesses execute the will and then in either a separate or continuous proceeding sign and complete the affidavit.

The affidavits add three additional execution formalities not required in the execution process for the ordinary witnessed will: (1) The testator must declare to the witnesses that the will is his or her last will; (2) The witnesses must sign as witness to testator's will; and (3) The witnesses must sign in the testator's presence and hearing.

For clarity, the Code specifically provides that the single execution-affidavit process satisfies the requirements of the ordinary witnessed will section.⁸⁹

The most important feature of a self-proven will is that the will may be probated without further proof.⁹⁰ This procedural shortcut for self-proven wills makes it advisable for practitioners to use one or the other of the affidavits in each of their execution processes.

Another type of affidavit also is recognized in the new Code as having the benefit of aiding in the probate of a

87. WYO. STAT. § 2-6-114(a) (1977 Repub. Ed., 1980).

88. WYO. STAT. § 2-6-114(c) (1977 Repub. Ed., 1980). The execution of this separate affidavit alone, without the proper execution of the underlying will, does not satisfy the will execution requirements. *Matter of Estate Sample*, 572 P.2d 1232 (Mont. 1977).

89. WYO. STAT. § 2-6-114(b) (1977 Repub. Ed., 1980).

90. WYO. STAT. § 2-6-204 (1977 Repub. Ed., 1980).

will. The Code provides that a will may be admitted to probate without further proof on the affidavit of one of the subscribing witnesses.⁹¹ This is similar to a provision that existed under prior law.⁹² The provision, now, includes a sample form affidavit for the witness to use.⁹³

Ordinarily the inclusion of the form for the affidavit is very helpful because the practitioner merely needs to follow the affidavit to satisfy the probate execution requirements. Here there may be a subtle problem with the form provided. Because the section was taken from the Iowa Probate Code,⁹⁴ it follows the execution requirements of Iowa law.⁹⁵ The execution of an ordinary witnessed will under Iowa law is substantially more formalistic than under Wyoming law according to either the prior law or the new Code. According to the Iowa execution requirements and thus to the execution requirements included as part of the sample affidavit, a will is valid only if the affidavit states: (1) The testator declared the instrument to be his will; (2) The testator requested the witness to witness the will; (3) The witness subscribed the instrument; (4) The subscription process was accomplished in the presence of the testator; (5) The witness knew the other subscribing witness; and (6) The process occurred in the presence of the other witness. Although all of the above formalities are necessary in order to have a valid will under Iowa probate law, this is not true in Wyoming. The Wyoming ordinary witnessed will execution section requires substantially less.⁹⁶ Specifically, the Wyoming section does not require (1), (4), (5), or (6) in the above list. The obvious question is whether the affidavit must be followed merely in form or fully in substance as well. If the latter is the rule, another question arises whether this section has in effect created its own execution process. If the requirements of the affidavit are substantive formalities, the affidavit will

91. WYO. STAT. § 2-6-205(a) (1977 Repub. Ed., 1980). This provision is a modification of a section in the Iowa Probate Code. IOWA CODE ANN. § 633.279(2) (Supp. 1980-81).

92. WYO. STAT. § 2-4-210 (1977 Repub. Ed., Repealed 1979).

93. The provision states "if the testimony is in writing, it shall be substantially in the following form . . ." WYO. STAT. § 2-6-205(a) (1977 Repub. Ed., 1980).

94. See note 91, *supra*.

95. IOWA CODE ANN. § 633.279(1) (Supp. 1980-81).

96. See Averill, *supra* note 3, Part I, at 203-204.

not be useable for a previously executed will unless it was executed according to all of the stated formalities even though the will would otherwise be valid in Wyoming. Anomalously, the formality procedure outlined in this affidavit is even more demanding than what the self-proven affidavit requires.⁹⁷

The new Code also adopts a very broad choice of law rule with regard to will execution.⁹⁸ In addition to recognizing the validity of any foreign instrument that happens to be executed according to Wyoming law, the will is also valid and probatable in Wyoming if executed in compliance with the law of any of the following jurisdictions: (1) The place of execution; (2) The testator's domicile at the time of execution; (3) The testator's place of abode at the time of execution; (4) The place of the testator's nationality at the time of execution; (5) The testator's domicile at the time of death; (6) The testator's place of abode at the time of death; or (7) The testator's nationality at the time of death.

If any of the above relevant contacts is satisfied, this choice of law provision literally incorporates by reference the execution statute of the relevant jurisdictions. In effect the execution procedure of that jurisdiction constitutes an additional technique for executing a valid will for Wyoming probate.⁹⁹ The only expressed limitation placed by the provision on this reference to the execution laws of other jurisdictions is that the will must be "written"; consequently, nuncupative wills will not be recognized in Wyoming even if recognized by the law of the jurisdiction having one or more of the relevant contacts. It is not entirely clear, however, to what extent the reference to the other jurisdiction's law includes the latter's rules with regard to testator's and witnesses' capacities.¹⁰⁰

97. See notes 86-89, *supra*, and accompanying text.

98. WYO. STAT. § 2-6-116 (1977 Repub. Ed., 1980). This provision is, with minor alterations, U.P.C. § 2-506.

99. U.P.C. § 2-506 Comment.

100. For example, if the law of a relevant contact permitted, would a will executed by someone under 19 be valid [COLO. REV. STAT. ANN. § 15-11-501 (1974)] or would a witness who is a devisee be able to take without reduction for the interest? [COLO. REV. STAT. ANN. § 15-11-505 (1974)].

It is important to emphasize that this provision applies to wills being offered for probate in Wyoming as the decedent's domicile or at least for the first time. It is not restricted to wills that have been previously probated in a foreign jurisdiction. Ancillary procedures are separately dealt with in the new Code.¹⁰¹

B. Revocation

The new Code includes similar, but all new provisions, for the revocation of wills.¹⁰² These provisions specifically recognize the following three methods for revoking a will: (1) By physical acts; (2) By subsequent instruments; and (3) By operation of law due to changed circumstances.

With respect to revocation by physical act, the new Code includes the typical laundry list of methods by which a testator, or someone else in his or her presence, and by his or her direction, can revoke his or her will.¹⁰³ According to this list, the will may be wholly or partially revoked by being burned, torn, cancelled, obliterated or destroyed. The provision does not indicate, however, the degree to which any of these acts must be performed upon the instrument in order to accomplish partial or total revocation. Under similar statutes, the specific methods usually are interpreted to require some form of physical evidence of revocation on the will itself, but not to require total destruction or obliteration.¹⁰⁴ With the exception of the term "destroyed," the new section does not alter prior law concerning the grounds for physical revocation.¹⁰⁵

The new Code also recognizes revocation by subsequent instrument when it is accomplished by an instrument executed with the same formalities as any valid will.¹⁰⁶ Revocation of any prior will by this method may also be accomplished in whole or in part.

101. See WYO. STAT. §§ 2-11-101 through 2-11-105 (1977 Repub. Ed., 1980).

102. WYO. STAT. §§ 2-6-117 and 2-6-118 (1977 Repub. Ed., 1980). These sections are, basically, U.P.C. §§ 2-507 and 2-508.

103. WYO. STAT. § 2-6-117(a)(ii) (1977 Repub. Ed., 1980).

104. ATKINSON, *supra* note 34, § 86 at 437.

105. WYO. STAT. § 2-4-105 (1977 Repub. Ed., Repealed 1979).

106. WYO. STAT. § 2-6-117(a)(i) (1977 Repub. Ed., 1980).

Significantly, the provision explicitly provides that a subsequent will revokes the inconsistent provisions in the prior will. The consequence of this rule is that revocation of a subsequent will revalidates the inconsistent provisions of a prior will only if the doctrine of revival is satisfied.¹⁰⁷ Although the revocable effect of a subsequent provision that is inconsistent with a prior provision is clear, the provision does not delineate the meaning of "inconsistence." The courts will have significant leeway in the application and meaning of this term.

Finally, the new Code takes the modern approach to revocation by operation of law. It rejects the common law situations¹⁰⁸ and recognizes that only the termination of a marriage will have a revocatory effect on a will.¹⁰⁹ By the terms of this provision, a testator's divorce or annulment, which occurs after the execution of his will, revokes any disposition or appointment of property made in that will to the former spouse. In addition, divorce or annulment revokes any grant of a general or special power of appointment to the former spouse and any nomination of the former spouse as executor, trustee, conservator or guardian.

Functionally, any devise, grant of a power or nomination for fiduciary office is interpreted and carried out as if the surviving former spouse predeceased testator. The provision then specifically provides that no other change of circumstance may be deemed to revoke a will by operation of law.

Several limitations on the scope and application of this provision are important. First, if by the terms of the will the testator anticipates divorce or annulment and indicates his or her desire to benefit, empower or nominate the former spouse notwithstanding the divorce or annulment, the provisions of the will for the former spouse will be carried out.¹¹⁰ Second, the testator's remarriage to the former spouse

107. See Averill, *supra* note 3, Part I, at 211-212.

108. *Id.* at 209-210.

109. Wyo. STAT. § 2-6-118 (1977 Repub. Ed., 1980). See note 102, *supra*.

110. *Id.*

revives all provisions for the former spouse that were revoked solely because of this provision. And third, a mere separation decree does not terminate the marriage and is not a divorce. The provision defines divorce or annulment as "any divorce or annulment which would exclude the spouse as a surviving spouse."

The limitation with respect to a separation decree is not to be confused with the situation where there has been a complete property settlement between the testator and the spouse. Unless the property settlement provides otherwise, the settlement constitutes a renunciation by the spouse of all benefits under any prior will.¹¹¹

VI. CONSTRUCTIONAL AND OTHER MISCELLANEOUS PROBLEMS OF TESTAMENTARY DISTRIBUTION

A. *General Review*

Many of the rules of construction in the new Code are similar, if not identical, to their counterpart under prior law.¹¹² For example, the Code retains the rule of construction that wills are to be construed to pass all property that the testator owns at death including property acquired after the will is executed.¹¹³ The Code also codifies the standard rule that the testator's intent, as expressed in his or her will, controls the legal effect of the disposition.¹¹⁴ Consequently, other rules of construction included in the Code apply only if the testator has not indicated by the will a contrary intent.

B. *Choice of Law*

The general choice of law rules concerning the validity, effect and construction of a will and its provisions are to refer to the law of the testator's domicile for purpose of determining the disposition of personal property and to the law of the situs with regard to the disposition of real property.¹¹⁵

111. WYO. STAT. § 2-5-102 (1977 Repub. Ed., 1980). This provisions is U.P.C. § 2-204.

112. See Averill, *supra* note 3, Part I, at 218-226.

113. WYO. STAT. § 2-6-102 (1977 Repub. Ed., 1980). This provision is U.P.C. § 2-604. Compare WYO. STAT. § 2-4-103 (1977 Repub. Ed., Repealed 1979).

114. WYO. STAT. § 2-6-105 (1977 Repub. Ed., 1980). This provision is U.P.C. § 2-603.

115. ATKINSON, *supra* note 34, § 94, at 489; § 145, at 807.

The new Code includes a provision that deals directly with the question of choice of law as to the meaning and effect of wills.¹¹⁶ Adopting an unorthodox rule, the provision states that the meaning and legal effect of a disposition in a will is determined by the law of the state of the place of execution.¹¹⁷ Only two exceptions to this rule are mentioned. First, it permits the testator to indicate the applicable law of any particular state desired. Presumably, this indication can both negate the law of the place of execution as well as select the law of another state to be applicable. The second exception provides that the law of the place of execution may not be applicable if it is contrary to the public policy of Wyoming if the law of Wyoming is otherwise applicable to the disposition.

The syntax of this section is ambiguous. The proviso phrases "unless the will otherwise provides," and "unless the application of that law is contrary to the policy," modify and restrict the reference to the law of the place of execution. They do not relate to each other. Consequently, it is possible to interpret the provision to mean that the first proviso dealing with the expressed intent of the testator is not subject to or limited by the second proviso dealing with the public policy limitation. This could cause some anomalous results to occur. Consider, for example, whether a testator by designating South Dakota as the applicable law, could disinherit a surviving spouse in Wyoming because South Dakota law does not protect the spouse from disinheritance? It is reasonably assumable that if the will is merely executed in South Dakota, this disinheritance would not be recognized as a matter of Wyoming public policy.

The type of issues that are covered by this section and that require a reference to the law of another jurisdiction include, for example, (1) whether a particular clause of one

116. WYO. STAT. § 2-6-104 (1977 Repub. Ed., 1980). This provision is a substantially modified version of U.P.C. § 2-602 (1978).

117. The reference to the law of the place of execution is contrary to both the common law rule and to the rule in the Uniform Probate Code. The purpose of the provision in the Uniform Probate Code is to accord greater influence to the testator's intent by permitting the testator, within limits, to select the law of a particular state. Under the Uniform Probate Code the ordinary choice of law rules would be applicable unless the will so states.

will is revoked by the terms of a clause in a subsequent will, (2) when class gifts would close as far as membership is concerned, (3) whether pretermitted heir statutes are applicable to the will, (4) whether a gift in a will lapses, and (5) whether the gift violates the Rule against Perpetuities. Some of these issues may raise public policy considerations and thus may fall under the second proviso in the section. Others will not and assumably would be controlled by the law chosen by the Code section or testator.

C. *Ademption by Extinction*

Ademption by extinction is a common law rule of construction that, when a specifically devised item of property is not a part of the testator's estate at the time of his or her death, holds the devise fails.¹¹⁸ Although the new Code leaves most problems with interpretation and applicability of the rule to determination by the courts, it includes several provisions dealing with the most frequently reoccurring issues.

A substantial amount of litigation concerned with ademption by extinction has dealt with specific bequests of shares of a security to which, between the time the will was executed and the testator's death, stock splits, accessions or other changes in form have occurred. The new Code codifies and clarifies the law concerning the scope of a devisee's interest in such specifically devised security.¹¹⁹ In addition to being entitled to as many of the shares of the devised security as are part of the estate at the testator's death, the devisee is also entitled to additional or other securities in the following three situations:¹²⁰ (1) The devisee is entitled to additional securities of the same entity that were issued by reason of action initiated by the entity and that are attributable to the testator's ownership of the devised security; (2) The devisee is entitled to securities of other entities that are the result of a merger, consolidation, reorganization or other similar action and that represent the

118. ATKINSON, *supra* note 34, § 134, at 741-742.

119. WYO. STAT. § 2-6-108 (1977 Repub. Ed., 1980). This provision is a modified version of U.P.C. § 2-607 (1978).

120. WYO. STAT. § 2-6-108(a) (i) through (a) (iv) (1977 Repub. Ed., 1980).

ownership of the testator in the devised security; and, (3) The devisee is entitled to all shares received by the testator that are the result of reinvestment and that represent ownership of the testator in the devised security.

All other kinds of distributions prior to death, including shares of the devised security acquired by the exercise of purchase or options, are explicitly not made a part of this specific devise.¹²¹ The latter limitation includes cash dividends declared prior to death although not paid until after death.¹²²

A second common source of controversy dealt with by the Code concerns the specific devisee's rights to assets that represent, in part or in whole, the remaining interest that the testator retains in the specifically devised property.¹²³ This provision protects the specific devisee by giving him or her a right to those remaining interests existing at the testator's death in the four specified situations that follow.¹²⁴ The remaining interest belongs to the specific devisee when it constitutes: (1) Unpaid owing balance of the purchase price; (2) Unpaid amount of a condemnation award; (3) Unpaid fire and casualty insurance proceeds; or, (4) Property received by foreclosure or obtained in lieu of foreclosure on a specifically devised obligation. These rights are, of course, in addition to the specific devisee's rights to any part of the specifically devised property remaining in the estate at the testator's death.

The third provision provides partial relief to the devisee for a transaction made by or with a lifetime conservator of the testator.¹²⁵ Three specific situations are covered: (1) When the conservator has sold the specifically devised property; (2) When the conservator has received a condemnation award for the specifically devised property; and, (3) When insurance proceeds are paid to the conservator for the loss of the property due to fire or casualty. In all three situations, the provision states that the specific devisee

121. WYO. STAT. § 2-6-108(b) (1977 Repub. Ed., 1980).

122. See U.P.C. § 2-607 Comment.

123. WYO. STAT. § 2-6-109(b) (1977 Repub. Ed., 1980).

124. WYO. STAT. § 2-6-109(b) (i) through (b) (iv) (1977 Repub. Ed., 1980).

125. WYO. STAT. § 2-6-109(a) (1977 Repub. Ed., 1980).

is entitled to a general pecuniary devise equal to the net sale price, condemnation award or the value of the insurance proceeds. This right exists even though the conservator prior to the testator's death had already received the amounts and had integrated them into the testator's other assets. If the testator survives, for one year or more, a judicial termination of his or her disability, however, the protection provided to the specific devisee by this provision is no longer applicable. In addition, the devisee's rights under this provision are reduced by his or her rights under the other provision of this section.¹²⁶

The rationale for protecting the specific devisee under the latter situations derive from the philosophy that because the concept of ademption by extinction is typically based upon the testator's actions, acts of a third person, including a testator's conservator, should not materially and unfairly affect a specific devisee's interest.¹²⁷

D. Abatement

In the law of decedents' estates, the problem of abatement arises because an estate does not have sufficient funds to satisfy all of the testamentary gifts. The reason for the abatement may be due to creditors' claims, the election by the surviving spouse, expenses of administration, taxes or a general insufficiency of funds.¹²⁸

The new Code includes a totally new order of abatement.¹²⁹ Under this provision the abatement may be caused by the need to pay debts, charges, federal and state taxes, legacies and the share of the surviving spouse.¹³⁰ There is no preference between real and personal property for abatement purposes under this provision. The order follows the standard common law order with one exception. The exception is that any testamentary gift made to the surviving spouse abates

126. WYO. STAT. § 2-6-109(a) (1977 Repub. Ed., 1980). The provision actually refers to itself but this is clearly an error.

127. AVERILL, NUTSHELL, *supra* note 44, at 105.

128. ATKINSON, *supra* note 34, § 136 at 754.

129. WYO. STAT. § 2-7-808 (1977 Repub. Ed., 1980).

130. WYO. STAT. § 2-7-808(a) (1977 Repub. Ed., 1980). This provision is basically IOWA CODE ANN. § 633.436 (Supp. 1980-81).

last. The order of abatement is as follows: (1) intestate property; (2) non-spousal residuary gifts; (3) non-spousal general gifts; (4) non-spousal specific gifts; and (5) testamentary gifts to the surviving spouse.

The above abatement order need not be followed under two explicit exceptions. First, the will may set and establish an order of abatement and this order must be followed.¹³¹ Second, abatement must be made in a different manner when not to do so would defeat the testamentary plan or the express or implied purpose of a devise.¹³² The purpose of the latter exception is to provide flexibility so that there is a greater opportunity for carrying out the testator's intent.

There are several inconsistencies with regard to abatement that will eventually have to be determined by the courts. Several other sections peripherally deal with abatement in that they deal with the allocation of various fees and expenses and to the apportionment of taxes. It is important to emphasize that allocation and apportionment are similar concepts with abatement. It all depends upon who is going to suffer the loss due to an expenditure that must be made by the estate.

The section discussed above for normal abatement problems is very comprehensive in the scope of reasons that may cause abatement. It not only includes debts, legacies and the surviving spouse's elective share, but it also includes abatement caused by federal and state taxes and by charges.¹³³ The difficulty arises because the words "charges" and "federal and state taxes" are also used in other sections of the Code which set a different order of abatement.

131. WYO. STAT. § 2-7-808(a) (1977 Repub. Ed., 1980).

132. WYO. STAT. § 2-7-808(b) (1977 Repub. Ed., 1980).

133. WYO. STAT. § 2-7-808(a) (1977 Repub. Ed., 1980). The word "Charges" is defined to include "costs of administration, funeral expenses, cost of monument and federal and state estate taxes." WYO. STAT. § 2-1-301(a) (iv) (1977 Repub. Ed., 1980); "Costs of administration" is defined to include "court costs, fiduciary's fees, attorney fees, all appraisers' fees, premiums on corporate surety bonds, cost of continuation of abstracts of title, recording fees, transfer fees, agents' fees allowed by order of court and all other fees and expenses allowed by order of court in connection with the administration of the estate." WYO. STAT. § 2-1-301(a) (viii) (1977 Repub. Ed., 1980).

For example, a special section directs that expenses of administration be paid first out of income of the estate received by the personal representative and then from the residue of the estate.¹³⁴ This is a direct affront to the ordinary abatement statute. In addition the payment of Federal estate taxes are dealt with in sections found in another part of the Code. Generally, these sections apportion the taxes on a pro rata basis among all the recipients under the will.¹³⁵ No distinction is made between the type of gift involved whether it be residuary, general or specific.¹³⁶ Again, this is a direct affront of the normal abatement statute.

There is no easy solution or recommendation that can be made to solve these inconsistencies. One reasonable and practical approach is to employ the more specific abatement sections first and to leave the ordinary abatement section to apply to all other abatement issues. This would allow the provisions that deal with cost of administration and with the apportionment of tax act to prevail.¹³⁷

Fortunately, all of these sections explicitly provide that the will may include its own abatement provision. A word to the wise is sufficient.

E. Lapse, Anti-lapse and Survivorship

Lapse is the failure of a devise because the devisee is unwilling or unable to take the devise at testator's death.¹³⁸ Thus at common law unless the will provided otherwise,

134. WYO. STAT. § 2-7-802(b) (1977 Repub. Ed., 1980). See also Section 2-7-810 where the income taxes on capital gains from sales of assets used to pay the "costs of administration" are to be allocated according to the ordinary abatement provision. WYO. STAT. § 2-7-810(a) (i) (1977 Repub. Ed., 1980). But income taxes on capital gains from sales of assets for other purposes are to be apportioned in other ways. WYO. STAT. § 2-7-810(a) (ii) through (a) (iv) (1977 Rpub. Ed., 1980). With the repeal of the carry-over basis rule for estates, this provision does not have great significance although it is not totally obsolete. See I.R.C. § 1023 (as amended 1980).

135. WYO. STAT. §§ 2-10-101 through 2-10-110 (1977 Repub. Ed., 1980). These provisions constitute the UNIFORM ESTATE TAX APPORTIONMENT ACT. WYO. STAT. § 2-10-101 (1977 Repub. Ed., 1980).

136. WYO. STAT. § 2-10-103 (1977 Repub. Ed., 1980).

137. One of the apparent reasons these inconsistencies exist is that as indicated the ordinary abatement provision was taken from the Iowa Probate Code. See note 130, *supra*. Iowa law does not have a separate federal estate tax apportionment provision as does Wyoming. Consequently, the federal estate taxes are apportioned in Iowa under the ordinary abatement provision.

138. ATKINSON, *supra* note 34, § 140, at 777.

the devise to a devisee who died before the testator executed the will was void and the devise to a devisee who died between the execution of the will and the testator's death was lapsed. The consequence, is that lapsed and void gifts do not pass to the devisee's successors but pass to the testator's residuary, if any, or if the residuary is void or lapsed, by intestacy.

The new Code includes a comprehensive although restricted anti-lapse provision designed to prevent lapse and voidness under certain circumstances.¹³⁹ Under this provision, issue of any devisee, who comes within the class of being testator's grandparent or a lineal descendant of a grandparent, are permitted to take their ancestor's place on a *per stirpes*¹⁴⁰ basis. This provision applies notwithstanding the devisee (1) died before the testator's will was executed, (2) died between the execution date and the testator's death, or, (3) for any other reason is deemed under the new Code to have predeceased testator.¹⁴¹ In addition, the anti-lapse provision specifically applies to issue of devisees of class gifts regardless of whether the common law would have said the devise was void or lapsed.

Several features of the provision deserve further elaboration. First, as with the other rules of construction in the new Code, the provision does not apply if the testator by the terms of his or her will indicates that he or she does not want it to apply.¹⁴² Second, it deals only with the issue of devisees who fall within the specifically mentioned group of blood relatives. The lapse doctrine still applies to devisees who do not come within this group. For example, issue of devisees who are only relatives related by marriage or who are legal strangers would not be protected by this provision. Third, even within the group of covered persons, only the devisee's issue are protected. This means that other relatives of the

139. WYO. STAT. § 2-6-106 (1977 *Repub. Ed.*, 1980). This provision is a modified version of U.P.C. § 2-605.

140. Unfortunately, the key term "*per stirpes*" is not defined.

141. The purpose of situation (3) is to apply the anti-lapse rules to a disclaimer by a devisee. The Wyoming disclaimer provision is not coordinated with this provision on this issue, however. See WYO. STAT. § 2-1-404 (1977 *Repub. Ed.*, 1980) and notes 181-185, *infra*, and accompanying text.

142. WYO. STAT. § 2-6-105 (1977 *Repub. Ed.*, 1980).

devisee, such as ancestors and collaterals, are not protected by the provision. Even issue of the testator's spouse, who is a devisee, would not be protected by the provision.

If lapse occurs, the new Code includes a special provision designating to whom the lapsed gift passes.¹⁴³ A lapsed devise other than a residuary devise becomes part of the residue and passes to the residuary devisees.¹⁴⁴ When the residue is devised to two or more devisees and one share fails for any reason, that lapsed share passes to the other residuary devisee or devisees.¹⁴⁵ This is a meritorious rule of construction because it will frequently avoid part of the estate passing by intestacy. Of course, if all of the residue fails for any reason, that part of the estate passing through the residue will pass by intestacy to the decedent's heirs.

F. Miscellaneous Constructional Rules

Exoneration: Under the new Code the common law right of exoneration of a mortgage, security interest or lien on specifically devised real and personal property is abolished regardless of a general directive in the will to pay debts.¹⁴⁶ The consequences of this provision are that properties, which are specifically devised, are to be distributed to the proper successors still subject to any mortgage interest, security interest or other lien attached to the properties that existed at the testator's death. This is a good rule under today's estate planning practices and probably more properly carries out the testator's intent.

Exercise of Powers of Appointment: The new Code includes a provision that deals with the problem whether a testamentary power of appointment is exercised by a will. It provides that 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

143. WYO. STAT. § 2-6-107 (1977 Repub. Ed., 1980). This provision is substantively U.P.C. § 2-606.

144. WYO. STAT. § 2-6-107(a) (1977 Repub. Ed., 1980).

145. WYO. STAT. § 2-6-107(b) (1977 Repub. Ed., 1980).

146. WYO. STAT. § 2-6-111 (1977 Repub. Ed., 1980). This provision is basically U.P.C. § 2-609.

reference is made to the power or some other indication to exercise the power is included in the will.¹⁴⁷ This limitation on the exercise of powers of appointment is also beneficial because it follows modern estate planning techniques and is in line with the probable intent of most testators.

VII. DISCLAIMERS

A. *Generally*

It is sometimes desirable for a person to refuse to accept the burdens and liabilities of property ownership.¹⁴⁸ When the interest in the property has been recently conveyed, there exists the possibility that the recipient may be able to avoid the problems of property ownership by disclaiming the interest. The idea behind a disclaimer is to prevent property interests from ever becoming the property of the disclaimant. Consequently, the disclaimant not only avoids all burdens of property ownership but also avoids the liabilities that arise from the transfer of the property such as income, gift and estate taxes. Other typical burdens of ownership avoided include the rights of creditors to get at one's property and the statutory limitation or penalties on the ownership of certain property.

The new Code includes a series of provisions dealing with the scope of and procedure for the technique of disclaiming property interests.¹⁴⁹ It is clear from the language and structure of these disclaimer provisions that they are designed to parallel the disclaimer provision of the Internal Revenue Code section that was enacted as part of the 1976 Tax Reform Act.¹⁵⁰ It also is just as clear that the intent of these Code provisions is to qualify Wyoming disclaimers for federal tax purposes. By paralleling the provisions, it is assumed that it will be easier to qualify under the federal

147. WYO. STAT. § 2-6-110 (1977 Repub. Ed., 1980). This provision is U.P.C. § 2-610.

148. UNIFORM DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT, 8 U.L.A. Commissioners' Prefatory Note 21-22 (Supp. 1980).

149. WYO. STAT. §§ 2-1-401 through 2-1-405 (1977 Repub. Ed., 1980).

150. I.R.C. § 2518.

requirements. This is obviously true if all of the federal requirements are made a part of the parallel state law.

The Wyoming provisions do not conform verbatim, however, to the federal tax section.¹⁵¹ In addition, the Code does not even mention the federal law or expressly provide that the provisions must be construed in accordance with federal law. These two points raise some questions. Will Wyoming courts interpret the law in the same manner as the federal law is interpreted? Will the Wyoming courts accept Internal Revenue Code Regulations as proper interpretations?¹⁵² What happens to conformity when Congress amends the federal provision?¹⁵³ The above are only a few of the issues left unresolved despite the Code's disclaimer provisions.

From a tax standpoint the consequences of any substantive nonconformity are very adverse. The Internal Revenue Service has taken the position that disclaimers must be valid under both federal and state law.¹⁵⁴ Obviously, conformity of requirements of the two laws is essential but difficult to guarantee. The Wyoming provision now basically conforms. Whether it will continue to do so, after interpretations are rendered by state and federal bodies and amendments are made to either or both laws, is not completely free from doubt.

151. When there has been a desire to conform the law of one jurisdiction to the law of another jurisdiction, several methods have been used. One very efficient and effective method has been to incorporate by reference the existing and prospective law of the other jurisdiction into the laws of the state. This method is meritorious in that the law conforms both at enactment and in the future. There are legality problems, however. Incorporation by reference of the law as it exists on the date of the enactment, poses no particular legal problems. *Santee Mills v. Query*, 122 S.C. 158, 115 S.E. 202 (1922). Incorporation by reference acts merely as a short form method of reciting the text of the law referred to. *See* 166 A.L.R. 516 (1947); 42 A.L.R.2d 797 (1955). If the reference includes future alteration in the law of reference, however, it may constitute a delegation of legislative authority and depending on the incorporating jurisdiction's constitution may be unconstitutional. *See Hutchins v. Mayo*, 143 Fla. 707, 197 So. 495, 133 A.L.R. 394 (1940). Some states have changed their constitutions to permit the incorporation of a prospective nature particularly in the tax area. *See, e.g.,* COLO. CONST. art. X, § 20. Whether the Wyoming legislature would or could pass a law of this nature can not be answered at this point.

152. *See* I.R.C. § 7805(a).

153. Congress has already amended the tax provision and this amendment is not reflected in the new Code. *Compare* I.R.C. § 2518(b)(4) *with* WYO. STAT. § 2-1-404 (1977 Repub Ed., 1980).

154. (PROPOSED) TREAS. REG. § 25.2518-1(c).

B. Basic Requirements for Disclaimers

The following list contains the basic requirements necessary in order to have a valid disclaimer under Wyoming law:¹⁵⁵ (1) A written irrevocable and unqualified refusal by the disclaimant to accept an interest in property must be executed; (2) The writing must be received by the transferor of the interest, his legal representative or the holder of legal title; (3) The writing must be received by the proper person within nine months after the later of: (a) the day on which the transfer creating the interest in the person is made; or (b) the day on which the person attains age 21; and (4) The disclaimant must not have accepted the interest or any of its benefits.

C. Interests Disclaimable

A person is entitled to disclaim any interest in property received "by gift, bequest, devise or inheritance."¹⁵⁶ The quoted words are potentially too restrictive.¹⁵⁷ For example, do they cover the interest that a beneficiary receives under a life insurance or annuity policy.¹⁵⁸ Although such persons are sometimes called third party donees, their rights derive from contract law. It is not clear whether their interest would be entitled to be characterized as a gift.¹⁵⁹

Although the Code also provides that one may disclaim a concurrent survivorship interest including joint tenancy and tenancy by the entirety property, it does not indicate what

155. WYO. STAT. § 2-1-403(a) (1977 Repub. Ed., 1980).

156. WYO. STAT. § 2-1-401 (1977 Repub. Ed., 1980).

157. The federal disclaimer provision is not so restricted. It permits a disclaimer for "any interest in property" that has been "transferred" to a person. I.R.C. § 2518(a). "Transferred" is a broader more generic term.

158. The regulations to the federal disclaimer provision recognizes disclaimers of life insurance and annuity interests. (PROPOSED) TREAS. REG. § 25.2518-4.

159. Tax law does not help in this regard. For gift tax purposes, life insurance is not gifted if the insured holds or retains sufficient incidents of ownership such as the power to vest the economic benefits in the insured or to change the beneficiaries or their proportionate benefits. TREAS. REG. § 25.2511-1(h) (8). In such cases the insurance proceeds would be a part of the insured's gross estate at death. I.R.C. § 2042; TREAS. REG. § 20.2042-1(c) (3). Within the terms of when a transfer is "made," a beneficiary may disclaim life insurance or annuity proceeds both during the insured's lifetime as transferee or at death as beneficiary. (PROPOSED) TREAS. REG. § 25.2518-4(b). If the tax interpretations are accepted, the receipt of the proceeds by a beneficiary of a life insurance policy upon the death of the insured is not a "gift" for tax purposes. It is also clear that such an interest received is not a devise, bequest or inheritance. Consequently, the new Code's provision may be too restrictive in application.

interest may be disclaimed.¹⁶⁰ In other words, where the disclaimant has neither contributed part of the value of the property nor accepted the benefit of it, may the disclaimant merely disclaim the undivided interest of the donor or decedent or must the disclaimant disclaim the entire interest? Apparently, the Federal disclaimer provision will be interpreted to require that the disclaimant disclaim the entire interest in the property that is the subject of the tenancy and that the disclaimer occur within nine months of the creation of the tenancy.¹⁶¹ Again, we can only assume that a similar interpretation would be given to the Code's provision. It is important to note, however, that the new Code's provision is not as specific as the mentioned federal regulation is.

D. Requirement of Receipt of Disclaimer

One of the technical requirements of both disclaimer laws is that in order to be effective the disclaimer must be "received" by the particular person to whom it is properly addressed.¹⁶² In defining this term the tax regulation states that the disclaimer must be "delivered" to the appropriate person.¹⁶³ No definition of what "delivered" means is provided except that the regulation requires that it must meet any additional requirements imposed by local law. In order to protect oneself with respect to this requirement, it would be wise to rely only upon personal delivery and a signed acknowledgment of delivery by the proper person.

The "received" and the "delivered" requirements relate to the time limitation. If the disclaimer is not "received" or "delivered" within the specified time period, the disclaimer is ineffective. The question occurs whether mailing would be a satisfactory means of delivery. The Federal tax regulations specifically state that timely mailing does not constitute timely delivery.¹⁶⁴ The ordinary rules with respect to dates which fall on Saturday, Sunday or legal holidays is applicable, however.¹⁶⁵

160. WYO. STAT. § 2-1-402(a) (i) (1977 Repub. Ed., 1980).

161. (PROPOSED) TREAS. REG. § 25.2518-2(d) (3).

162. WYO. STAT. § 2-1-403(a) (ii) (1977 Repub. Ed., 1980); I.R.C. § 2518(b) (2).

163. (PROPOSED) TREAS. REG. § 25.2518-2(b) (2).

164. (PROPOSED) TREAS. REG. § 25.2518-2(c).

165. (PROPOSED) TREAS. REG. § 25.2518-2(c); see TREAS. REG. § 301.7503-1.

E. Effect of Disclaimer on Disclaimant's Creditors

Before the statute was enacted, the Wyoming Supreme Court held that a disclaimer was a fraudulent transfer with respect to the disclaimant's creditors.¹⁶⁶ It may be assumed that the Code's new disclaimer provisions reverses this decision and provides that if a disclaimer satisfied the specific requirements, it will avoid the disclaimant's creditors as well as avoid tax consequences. In fact, it would be totally inconsistent with the primary purpose of the statute not to find that a qualified disclaimer avoids the disclaimant's creditors. It is clear that the primary purpose of the disclaimer provisions is to qualify disclaimers made under Wyoming law for federal tax purposes. For a disclaimer to be qualified under the Federal tax disclaimer provision, the tax regulation requires that under the local law the disclaimed property must be free from the disclaimant's creditors.¹⁶⁷ Unfortunately, the Wyoming provisions do not explicitly indicate the effect of a disclaimer on the disclaimant's creditors.¹⁶⁸

F. Time Limitation on Disclaimer

One of the key provisions in the disclaimer law concerns the determination of the date from which the nine month limitation period runs. Both the Wyoming and the Federal tax provisions include the same two specific dates from which this limitation runs.¹⁶⁹ One of the dates does not raise significant interpretative issues. It provides that the limitations run from the date on which the disclaimant attains the age of 21.

The other reference date, however, is not clear on its face. It states that the limitation runs from the "day on which the transfer creating the interest in the person is

166. *Matter of Estate of Reed*, 566 P.2d 587 (Wyo. 1977).

167. (PROPOSED) TREAS. REG. § 25.2518-1(c) (2).

168. An example of a type of provision that would be helpful in this regard is found in the Uniform Disclaimer of Property Interest Act. In relevant part it provides: "a disclaimer relates back for *all purposes* to the date of death of the decedent, or of the donee of the power, or the determinative event, as the case may be." [Emphasis added]. UNIFORM DISCLAIMER OF PROPERTY INTEREST ACT § 4(a), 8 U.L.A. 19 (Supp. 1980).

169. WYO. STAT. § 2-1-403(a) (ii) (1977 Repub. Ed., 1980); I.R.C. § 2518(b) (2).

made.”¹⁷⁰ Due to the significant number of different types of sophisticated transfer devices, it is not readily apparent in many situations on which day the transfer was made. The legislative history of the Federal provision indicates the intent behind this phraseology was to consider a transfer made “when it is treated as a completed transfer for gift tax purposes with respect to inter vivos gifts and upon the date of the decedent’s death with respect to testamentary transfers.”¹⁷¹ The federal regulation adopts the same rule for most purposes.¹⁷² Unfortunately, the rules for determining when a lifetime transfer is a complete gift for federal gift tax purposes are not entirely settled or clear in application. The few situations that are relatively clear as to when a gift has or has not been made are very technical in nature.¹⁷³ The following situations are illustrative:¹⁷⁴ (1) A gift in trust, wherein donor reserves a power to revoke, is not a taxable gift until the power to revoke is relinquished or the power holder dies; (2) A gift in trust, wherein donor reserves a power to alter or amend the trust by designating new or alternative beneficiaries, is not a taxable gift until the power is relinquished or the power holder dies; (3) A gift to an irrevocable trust is a taxable gift even though the trustee has discretion as to when, whether, or to whom the income or property is to be distributed; (4) A gift to an irrevocable trust is a taxable gift even though another person has a special power of appointment with respect to the trust property or its income; (5) A gift in trust or otherwise which includes a general power of appointment is a taxable gift to the holder of the power as of the date of the creation of the power; (6) A gift in trust or otherwise which includes a general power of appointment is not a taxable gift to permissible appointees or takers in default of appointment until the date of either the lapse or the

170. WYO. STAT. § 2-1-403(a)(ii)(A) (1977 Repub. Ed., 1980). The federal disclaimer is effectively the same. I.R.C. § 2518(b)(2)(A).

171. H. R. REP. NO. 94-1380, at 67.

172. (PROPOSED) TREAS. REG. § 25.2518-2(c)(2). The Regulation makes an exception to this rule with regard to joint survivorship property when the date made is always considered to be the date the tenancy was created. (PROPOSED) TREAS. REG. § 25.2518-2(d)(3).

173. See MCCORD, 1976 ESTATE AND GIFT TAX REFORM: ANALYSIS, EXPLANATION AND COMMENTARY 247-248 (1977).

174. See I.R.C. § 2511, TREAS. REG. § 25.2511; (PROPOSED) TREAS. REG. § 25.2518-2(c)(2).

exercise of the power by the holder; (7) A gift in trust or otherwise which includes a special power of appointment is a taxable gift on the date of the creation of the power to the holder of the power, permissible appointees or takers in default of appointment.

The need for conformity between the federal and state disclaimer provisions with respect to the limitation period is critical. As previously mentioned, a disclaimer is only valid if it is a valid disclaimer under both the federal and the state law. Consequently, if the time periods within which a disclaimer must be made and the point from which these periods run are not the same, disclaimers may prove to be invalid for tax purposes.

The following hypotheticals should help in understanding this problem. Assume that under federal tax law, a transfer is "made" upon the creation of the instrument but according to local law it is not "made" until the death of the life tenant. A disclaimer under local law that occurs after the death of a life tenant may not qualify for federal law purposes because it is not within the limitation period that ran from the date of the creation of the instrument. Concomitantly, assume that according to federal tax law a transfer is "made" at the death of a life tenant but under local law it is "made" on the date of the creation of the instrument. If one does not disclaim until the period permitted for federal tax purposes, the disclaimer would still not be valid for tax purposes if the limitation for state law purposes has run.

Consequently, it is paramount that the state courts maintain interpretative conformity between the disclaimer laws. Because issues other than taxation may arise, this is a delegation of responsibility the courts may not always be able or willing to accept.

G. Disposition of Disclaimed Interests

Probably the most problematic part of the new disclaimer law deals with how the law disposes of the disclaimed interest. The tax provision on this issue, which was

amended in 1978, merely provides that the disclaimed interest must pass without any discretion on the part of the disclaimant and either (1) to the spouse of the decedent,¹⁷⁵ or (2) to a person other than the disclaimant.¹⁷⁶ So long as these requirements are met, the federal law is neutral on how it is accomplished. Consequently, local law may set its own rules on this matter.

The Code's provision sets out seven methods for disposing of a disclaimed interest depending upon the terms of the instrument of conveyance or the situation of the taking.¹⁷⁷ These methods are:

For inter vivos and testamentary instruments—(1) The conveying instrument may expressly determine the disposition of the disclaimed interest;

For inter vivos instruments—(2) If the transferor is living on the date of the disclaimer, the disclaimed interest reverts to the transferor; (3) If the transferor is not living on the date of the disclaimer, the disclaimed interest passes by the residuary clause of the transferor's will if he or she died testate prior to the disclaimer; (4) If the transferor is not living on the date of the disclaimer and if the disclaimant is also the residuary beneficiary under the transferor's will, the disclaimed interest passes by intestate succession as if the disclaimant is not a residuary beneficiary and is not an heir at law;

For testamentary transfers—(5) If the transfer is a non-residuary testamentary gift, the disclaimed interest passes under the residuary; (6) If the transfer is a res-

175. The recognition that the spouse may be the person to benefit from a disclaimer was a modification to the federal statute made in 1978. This change permits a spouse, for example, to effectively disclaim the marital deduction provision in an estate plan and still be able to receive benefits from a non marital trust into which the disclaimed interest passes and is comingled. SEN. REP. NO. 95-745, at 96-97. The new Code's disclaimer statute does not explicitly recognize this arrangement. It might be possible to accomplish this under the Code's provision by specifically providing for this in the instrument of transfer. WYO. STAT. § 2-1-404(a) (1977 Repub. Ed., 1980). Whether a requirement of this nature in the instrument might violate other requirements of the law and thus cause the disclaimer to be ineffective is not clear at this point. For example, would taking under the non-marital trust constitute acceptance of "the interest or any of its benefits."? WYO. STAT. § 2-1-403(a) (iii) (1977 Repub. Ed., 1980).

176. I.R.C. § 2518(b) (4) (A), (B).

177. WYO. STAT. § 2-1-404 (1977 Repub. Ed., 1980).

iduary testamentary gift, the disclaimed interest passes "as though the disclaimant was not a beneficiary and not an heir at law of the transferor"; or (7) If the transferor dies intestate, the disclaimed intestacy interest passes by the intestacy provision "as though the disclaimant was not an heir at law of the transferor."

Because the above rules raise a plethora of problems, it cannot be overemphasized how important it is for instruments now to specifically provide for the contingency that a recipient or beneficiary may disclaim an interest under it. It is suggested that if a disclaimer is a reasonable possibility and an existing instrument permits modification of its terms, amendments to these instruments should even be made that specify how property disclaimed will pass.¹⁷⁸

The methods described in (2) through (7) above for disposing of a disclaimed interest have serious defects in them. The second method provides that the disclaimer of an inter vivos transfer will cause the transfer to revert back to the transferor if the latter is living at the date of the disclaimer.¹⁷⁹ If this provision operates as stated, because of the

178. Disclaimer provisions in instruments should reflect what the transferor desires. For example, a clause in an inter vivos transfer might provide:

Any property or interest disclaimed under this instrument or contract shall (1) devolve as if the disclaimant had died before the effective date of the instrument or contract; and (2) if a future interest that takes effect in possession or enjoyment at or after the termination of the disclaimed interest takes effect, devolve as if the disclaimant had died before the event determining that the taker of the property or interest had become finally ascertained and his or her interest indefeasibly vested. A disclaimer relates back for all purposes to the effective date of the instrument or contract or the date of the determinative event, as the case may be.

See UNIFORM DISCLAIMER OF PROPERTY INTEREST ACT § 4(b), 8 U.L.A. 19 (1980 Supp.). In a testamentary instrument a sample clause might state:

If property or an interest given under this will is disclaimed, including the interest as appointee under a power of appointment, the interest devolves as if the disclaimant had predeceased the decedent or, if the disclaimant was designated to take under a power of appointment exercised by a testamentary instrument, as if the disclaimant had predeceased the donee of the power. Any future interest that takes effect in possession or enjoyment after the termination of the estate or interest disclaimed takes effect as if the disclaimant had died before the event determining that the taker of property or interest had become finally ascertained in his interest is indefeasibly vested. A disclaimer relates back for all purposes to the date of death of the decedent, or of the donee of the power, or the determinative event, as the case may be.

See UNIFORM DISCLAIMER OF PROPERTY INTEREST ACT § 4(a), 8 U.L.A. 19 (1980 Supp.).

179. WYO. STAT. § 2-1-404(a)(ii) (1977 Repub. Ed., 1980).

intricacies of the time that a transfer is "made" rules, a gift for which a gift tax has been paid may revert to the donor at a time when the donor may no longer be able to amend the gift tax return. Consider for example an irrevocable gift in trust to a spouse for life, remainder to the spouse's children. If that spouse has a general power of appointment over the assets, a disclaimer by any child does not have to take place until nine months after the power expires which would probably be the date of the spouse's death. If the spouse lives more than three years from the date the gift tax return is due, a disclaimer by one of the children would cause that child's interest to revert to the donor, if alive, who can no longer amend the return. In addition, the interest would again be part of the donor's estate for possible estate tax consequences. Not only would this have adverse tax consequences but you can be sure that it is not what would be intended in such a transaction.

Putting the tax problems aside, the effect of this disposition is undesirable in other situations, too. For example, if a transferor irrevocably transfers property in trust for A for life, remainder to the transferor's children and if A disclaims the life interest, while the transferor is alive, what happens to the present interest disclaimed? At least two answers are derivable: (1) the life interest reverts to the transferor for the life of the disclaimant, (2) the life interest is destroyed and transferor's children take in fee immediately. The first is required by the terms of the provision. The second would be preferred by most if given a choice.

The third and fourth methods also raise the same estate tax problem.¹⁸⁰ A disclaimed irrevocable gift would apparently unexpectedly be a part of the transferor's estate again. The point here is that once a person has made a complete gift for tax purposes, he or she does not want it to suddenly revert back and be subject to estate and gift taxes again.

180. WYO. STAT. § 2-1-404(a) (ii) (1977 Repub. Ed., 1980). In the 1980 enactment a word was omitted in the second line of this provision. See 1979 WYO. SESS. LAWS, Ch. 142, § 1, at 261 (§ 2-1-405(a) (ii)). The line should read "transfer's will if he died *testate* prior to the disclaimer." This correction does not improve the effect of the provision.

The fifth method in the statute for disposing of a disclaimed interest also raises problems. It says that a disclaimed non-residuary provision in the will passes to the residuary.¹⁸¹ What happens if the disclaimant is testator's grandparent or lineal descendant of a grandparent of the testator whose interest would be covered by the new antilapse provision?¹⁸² Does the issue of the disclaimant, who would ordinarily take under this antilapse provision, lose their interest?¹⁸³ This result would not ordinarily carry out the intent of the testator, but again the provision appears to require it.

A similar problem is raised with the sixth method that passes the residuary gifts as if the claimant/residuary beneficiary was not a beneficiary and not an heir at law of the testator.¹⁸⁴ Again the antilapse provisions are ignored.¹⁸⁵

When one is considering whether to disclaim an interest, it is always important to that decision to know where the property will pass. If the disclaimer law disposes of the property in an unusual or unnatural manner, the effect may be to discourage the use of disclaimers. The new Code's provisions on this matter may have this adverse effect.¹⁸⁶

As previously mentioned, the new Code recognizes that the transferor by the terms of the instrument may control the disposition of the disclaimed interest. This is a meritorious provision for two reasons. It lets the intent of the transferor prevail and it allows the draftsman to concen-

181. WYO. STAT. § 2-1-404(a) (ii) (1977 Repub. Ed., 1980).

182. See WYO. STAT. § 2-6-106 (1977 Repub. Ed., 1980).

183. This assumes that the issues are not residuary beneficiaries.

184. WYO. STAT. § 2-1-404(a) (ii) (1977 Repub. Ed., 1980).

185. The phrase "not an heir at law," which appears both in the sixth and seventh methods of disposing of disclaimed interests listed above, raises significant interpretations on its face. If a disclaimer is "not an heir of law" does it mean that the disclaimant's heirs are also not heirs at law? From a literal standpoint, if one is not an heir at law of another person neither would one's heirs be an heir at law of that person. The consequence of this interpretation could prevent the disclaimant's heirs from inheriting either from the will as an alternative residuary beneficiary or as an heir in intestacy.

186. It is suggested that the provision dealing with the disposition of disclaimed interest be amended. For a possible replacement see the UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT § 4, 8 U.L.A. 19 (Supp. 1980). Slightly modified versions are found in note 177, *supra*.

trate on satisfying the federal law requirements alone rather than having to weave between both. It can be assumed, however, that despite this control in the transferor, a disclaimer would still have to meet the other requirements. For example, the transferor could not provide that a disclaimer of a life estate by the life tenant creates the same interest in the same life tenant.¹⁸⁷

H. Disclaimer By Guardian

The disclaimer provisions in the new Code permit a duly appointed, qualified and acting guardian of the property of an incompetent to make a disclaimer for the ward upon obtaining court approval.¹⁸⁸ In deciding whether to grant the disclaimer or not, the court is to take into account and to determine whether the disclaimer is the best interest of the ward. A guardian may be appointed merely for the purpose of making a disclaimer and of obtaining court approval. Curiously, the provisions specifically provide that a guardian may act for a "person under the age of twenty-one (21) years." Guardians of the property for minors terminate when the minor becomes nineteen years of age in Wyoming.¹⁸⁹ Consequently, someone between the ages of nineteen and twenty-one would neither have a duly appointed guardian of the property nor need one. The person who is nineteen and above can make the decision whether to disclaim or not on his own. The obvious idea behind this provision in the Code was to tie it into the federal tax provision which refers to persons under the age of twenty-one. The fact that the federal disclaimer law permits a person to delay disclaiming an interest up to nine months after that person becomes twenty-one years of age does not alter the general application and scope of the state's guardianship law. Clearly, it would be unnecessary to have a guardian of the property appointed for someone who is above the age of nineteen. Hopefully, it would not be interpreted that such a guardian would have to be appointed in order to disclaim.

187. See note 174, *supra*.

188. WYO. STAT. § 2-1-405 (1977 Repub. Ed., 1980).

189. WYO. STAT. § 8-1-102 (1977 Repub. Ed.).

I. Prohibition on Receipt of Interest or Benefit

Under the provisions of both the new Code and the Federal law, a person may not disclaim an interest from which he or she has accepted or received any of its benefits.¹⁹⁰ The regulations for the federal statute prohibit express or implied acceptance or both.¹⁹¹ For example, this includes the exercise of a power of appointment by a donee/disclaimant or the acceptance of any consideration in return for the disclaimer. Significantly, however, under the Federal tax regulation, persons under twenty-one may still disclaim within nine months after their twenty-first birthday even though they have received benefits from the property if the benefits received were made without any action on the part of the disclaimant before attaining twenty years of age.¹⁹² In addition, fiduciaries who are also beneficiaries may retain their administrative powers after disclaiming their beneficial interests so long as the administrative powers do not include any power to direct the enjoyment of the disclaimed interest.¹⁹³

VIII. JURISDICTION AND NOTICE

A. Jurisdiction of the Probate Court

With only minor technical alterations, the new Code retains the same provisions dealing with subject matter jurisdiction of the probate court and venue.¹⁹⁴ No further discussion of these sections would be made except for the recent Wyoming Supreme Court decision dealing with the separation of the probate court from the court of general jurisdiction.¹⁹⁵ The court held: (1) the personal representative has the right to maintain replevin actions; (2) replevin actions must be instituted in the court of general jurisdiction; (3) a petition in the probate court for an order to show cause for delivery of property is not a proper proceeding and is void.

190. WYO. STAT. § 2-1-403(a)(iii); I.R.C. § 2518(b)(3).

191. (PROPOSED) TREAS. REG. § 25.2518-2(d)(1)(i).

192. (PROPOSED) TREAS. REG. § 25.2518-2(c).

193. (PROPOSED) TREAS. REG. § 25.2518-2(d)(1)(ii).

194. WYO. STAT. §§ 2-2-101 and 2-2-102 (1977 Repub. Ed., 1980). See Averill, *supra* note 3, Part II, at 188-190.

195. In the Matter of the Estate of Blaney, 607 P.2d 354 (Wyo. 1980).

This decision reaffirms previous decisions of the court holding that subject matter jurisdiction in the Wyoming courts is bifurcated as far as probate and general jurisdictions are concerned.¹⁹⁶ These decisions emphasize the necessity to take great care in determining where particular proceedings should be instituted. The new Code does not include any relief from these very technical rules for docketing cases.

B. Notices for Probate and Administration

The new Code incorporates new techniques for satisfying the notice requirements during the administration of a decedent's estate.¹⁹⁷ These techniques bring a needed degree of flexibility, efficiency and uniformity to Wyoming probate law.

The basic methods for notice are the same as under prior law. They include notice by publication and usually, but not always, an alternate form of notice such as mailing notice to designated persons. Within the specific types of notice (with one exception) the methods of accomplishing the notice by publication are uniform.¹⁹⁸ From an efficiency standpoint, the Code permits notices to be consolidated for most, if not all, of the issues that arise at the time of opening an estate.¹⁹⁹ A single notice may be sufficient for several purposes as long as it recites the necessary information. This technique will definitely save estates on publication and mailing costs. The various forms for the notices are also conveniently set out in the relevant sections of the Code.

The following material is broken down into the various parts that constitute the notice requirements. This includes [Chart Three] a breakdown of the various publication techniques and of the methods and recipients for alternative

196. See *Church v. Quiner*, 31 Wyo. 222, 227, 224 P. 1,073, 1,074 (1924); *Merrill v. District Court*, 73 Wyo. 58, 272 P.2d 597 (1954); *State ex rel State Board of Charities & Reform v. Bower*, 362 P.2d 814, 820 (Wyo. 1961); *Gaunt v. Kansas Univ. Endowment Assoc.*, 379 P.2d 825 (Wyo. 1963); *Wayman v. Alanko*, 351 P.2d 100 (Wyo. 1960).

197. WYO. STAT. §§ 2-7-201 through 2-7-206 (1977 Repub. Ed., 1980).

198. WYO. STAT. §§ 2-7-201 and 2-7-202 (1977 Repub. Ed., 1980).

199. WYO. STAT. § 2-7-201 (1977 Repub. Ed., 1980).

service. This information is then consolidated into a chart [Chart Four] that displays the purpose for the notice and a cross-reference to the appropriate techniques and procedures that must be followed.

Chart Three PUBLICATION TECHNIQUES

Publication Methods of Notice

	Location	Frequency	Duration
A.	Daily or Weekly Newspaper of General Circulation	Once a Week	Three Consecutive Weeks
B.	Newspaper of General Circulation	Once	During one Week

Alternate Service

Methods Required

- C. Mailed only
- D. Mailed or delivered
- E. Certified mail

Recipients of Service

- F. Surviving spouse, heirs (in intestacy) and beneficiaries (if in testacy).
- G. Surviving spouse, heirs (if intestacy) or beneficiaries (if testacy).
- H. Creditors and distributees listed in (G)

Chart Four PRINCIPAL NOTICE REQUIREMENTS

Purpose of Notice	Publication	Alternate	Made Jointly	Timing
1. Opening of Probate Intestacy ²⁰⁰	A	CF	Yes	Immediately after issuance of letters.
2. Prior Probate of Will ²⁰¹	A	CF	Yes	Immediately after probate.
3. Limitation on Filing Creditors' Claims ²⁰²	A	CF	Yes	Immediately after (1), or (2) above and issuance of letters.
4. Limitation on Contest of Will ²⁰³	A	CF	Yes	Immediately after (2).
5. Hearing to Show Cause for Setting Off Exempt Property (Consolidated) ²⁰⁴	A	CF	Yes	Simultaneously with (1) and not less than 10 days both before hearing and after appraisement is filed.
6. (Same) (Unconsolidated) ²⁰⁵	B	CF	No	Not less than 10 days both before hearing and after appraisement is filed.
7. Public Sale of Property ²⁰⁶	A	CG	No	Ten days prior to sale.

200. WYO. STAT. §§ 2-7-201 and 2-7-205 through 2-7-206 (1977 Repub Ed., 1980).

201. *Id.*

202. *Id.*

203. *Id.*

204. WYO. STAT. §§ 2-7-203(b) and 2-7-505 (1977 Repub. Ed., 1980).

205. WYO. STAT. §§ 2-7-203(a), (c), 2-7-205(b), and 2-7-505 (1977 Repub. Ed., 1980).

206. WYO. STAT. §§ 2-7-202, 2-7-205(b), and 2-7-622 (1977 Repub. Ed., 1980).

8. Private Sale of Real Property ²⁰⁷	—	DG	No	Ten days prior to sale.
9. Hearing on Petition to Sell, Mortgage, Exchange, Pledge, or Lease Property ²⁰⁸	—	CG	No	Ten days prior to sale.
10. Hearing on Interim Report and Accounting ²⁰⁹	—	EH	No	Ten days prior to hearing.
11. Hearing on Distributions ²¹⁰	—	CG	No	At least thirty days after expiration of creditors' claims limitation and 10 days prior to hearing.
12. Final Settlement and Distribution ²¹¹	—	CG	No	No less than 3 months after first publication of opening of probate notice and then 10 days prior to hearing.

In order to take advantage of the consolidated notice, it will be essential that practitioners plan ahead. Clearly, the notices for opening the estate, admission of the will to probate, creditors' claims and contest of will may easily be included within a single notice. When the estate is small enough to fall within the exempt property limits additional planning may be required. As Chart Four indicates, the notice with regard to setting off exempt property requires that it be made not less than ten days after the filing of the appraisalment.²¹² If this notice is to be consolidated with the other notices, it will be essential that the necessary requirements for inventory and appraisalment be arranged before the notices are made.²¹³

Proof of publication, mailing and delivery is also simplified by the Code. For proof of publication one needs only an affidavit of the publisher.²¹⁴ For proof of mailing or delivery, only an affidavit of the personal representative or his or her attorney is necessary.²¹⁵ All of these affidavits must then be filed with the clerk of the probate court.²¹⁶

207. WYO. STAT. § 2-7-205(c) (1977 Repub. Ed., 1980).
 208. WYO. STAT. §§ 2-7-205(b) and 2-7-615 (1977 Repub. Ed., 1980).
 209. WYO. STAT. §§ 2-7-205(b) and 2-7-806 (1977 Repub. Ed., 1980).
 210. WYO. STAT. §§ 2-7-205(b) and 2-7-807 (1977 Repub. Ed., 1980).
 211. WYO. STAT. §§ 2-7-205(b) and 2-7-811 (1977 Repub. Ed., 1980).
 212. WYO. STAT. § 2-7-203(b) (1977 Repub. Ed., 1980).
 213. See WYO. STAT. § 2-7-403. If the inventory and appraisalment cannot be handled in time, it is not too burdensome to use the special, separate notice provided for this procedure. It only requires one additional publication and mailing. WYO. STAT. § 2-7-203(a) (1977 Repub. Ed., 1980).
 214. WYO. STAT. § 2-7-206(a) (1977 Repub. Ed., 1980).
 215. WYO. STAT. § 2-7-206(b) (1977 Repub. Ed., 1980).
 216. WYO. STAT. § 2-7-206(c) (1977 Repub. Ed., 1980).

The notice provisions are clearly an improvement from prior law. The primary objection to these notice provisions concerns the requirement of notice by mail to the surviving spouse, heirs or devisees of an intended sale of real property even though a will gives to the personal representative the power to sell.²¹⁷ This is ordinarily an unnecessary additional formality. The notice may stir up unnecessary debate and cause unnecessary delay in the administration. If the testator accorded the personal representative the authority to sell the real property, assumably the testator wanted to exempt the personal representative from the statutory procedures including notice.²¹⁸

IX. ADMINISTRATION AND PROBATE PROCEDURE

No attempt will be made to explain in full all of the provisions of the new Code dealing with administration and probate. Emphasis will be placed on analyzing major changes and outlining basic requirements of available procedures.

A. *Small Estates and Summary Administration Procedures*

The new Code eliminates one procedure, adds a new one, significantly expands the coverage of two other procedures and leaves two intact.

Determination of Heirship Procedures: The new Code retains the determination of heirship provisions that existed under prior law.²¹⁹ These provisions permit a decedent's heirs to clear title to real estate after the passage of two years from the death of the resident decedent, by petitioning the court for a determination of heirship.²²⁰

Survivorship Affidavits: The new Code retains the provisions under prior law dealing with the transfer of titles in survivorship property to the survivor.²²¹ These are very efficient provisions and have proved to be extremely bene-

217. WYO. STAT. § 2-7-205(c) (1977 Repub. Ed., 1980).

218. This notice requirement contradicts the power to sell provision. See WYO. STAT. § 2-7-609 (1977 Repub. Ed., 1980).

219. WYO. STAT. §§ 2-9-201 through 2-9-204 (1977 Repub. Ed., 1980).

220. See Averill, *supra* note 3, Part II, at 199-200.

221. WYO. STAT. §§ 2-9-101 through 2-9-103 (1977 Repub. Ed., 1980).

ficial in the past. They are, of course, limited to the transfer of title to properties held in joint tenancy or tenancy by the entireties where there is a right of survivorship.²²²

County Attorney Administrations: The new Code eliminates the procedure requiring county attorneys to administer very small estates that had an estimated value of \$1,500 or less.²²³ Administration under this procedure was beginning to cause a significant burden on the county attorneys. The option of repealing the provision or significantly increasing its threshold amount was decided in favor of repeal. With the provision substituted, its absence will not be noticed.

Collection of Personal Property by Affidavit: The new Code includes a new procedure that will guide post mortem techniques for most small estates.²²⁴ In effect, it is a non-administration procedure. In its most general terms, the procedure concerns the preparation of an affidavit and the use of this affidavit to collect the decedent's personal property or to have title to that property put in the proper distributees name or both.

More particularly, when the entire estate, no matter where located, does not exceed \$30,000, less liens and encumbrances, the Code provides that if the successor or successors to these assets present an affidavit to the debtor or possessor of decedent's tangible personal property or of decedent's instrument evidencing a debt, obligation, stock or chose in action, the debtor or possessor must make payment of the indebtedness or deliver the tangible personal property or an instrument of property to the successor or successors.²²⁵ The affidavit must aver certain things:²²⁶ (1) The property does not exceed the proscribed monetary amount; (2) Thirty days have elapsed since decedent's death; (3) No application for the appointment of a personal representative is pending or has been granted in any jurisdiction; (4) The successor

222. See Averill, *supra* note 3, Part II, at 197-198.
 223. WYO. STAT. § 2-1-102 (1977 Repub. Ed., Amended 1980). Actually the section no longer exists. The amendment consumed its existence.
 224. WYO. STAT. §§ 2-1-201 through 2-1-202 (1977 Repub. Ed., 1980). These provisions are substantively U.P.C. §§ 3-1201 through 3-1202.
 225. WYO. STAT. § 2-1-201(a) (1977 Repub. Ed., 1980).
 226. WYO. STAT. § 2-1-201(a) (i) through (a) (iv) (1977 Repub. Ed., 1980).

or successors claiming the property are entitled to payment or delivery of it; (5) The facts concerning distributees' relationship to decedent; and, (6) No other distributees of decedent have a right to succeed to the property under probate proceedings.

With a similar affidavit delivered to security transfer agents, titles to securities can also be changed to the distributees or distributees.²²⁷ Similarly, upon presentation of the affidavit, the county clerk must transfer titles to vehicles from the decedent to the distributee or distributees²²⁸ and financial institutions, such as banks, savings and loan, and credit unions must pay deposits, plus interest and dividends, held alone in decedent's name to the distributee or distributees.²²⁹ A proceeding may be brought by the rightful successor or successors to force a debtor to pay, possessor to deliver, or transfer agent or entity to transfer the property.²³⁰

Significantly, the availability and effectiveness of this affidavit procedure does not depend upon decedent dying domiciled in Wyoming where the affidavit is presented. Use of this type of affidavit outside of Wyoming, however, will depend upon the recognition given to such a device in the state where the debtor, possessor or transfer entity is located. Because the basic parts of this section come from the Uniform Probate Code, these affidavits should be effective in jurisdictions which have enacted that code including, for example, Colorado, Nebraska, Montana, Idaho, and Utah.²³¹

The purpose and effect of the affidavit is to discharge and to release the person paying, delivering, transferring or issuing the personal property or evidence of it pursuant to the affidavit as if, and to the extent, the person had dealt with the decedent's personal representative.²³² This person is further protected by not being required to see to the

227. WYO. STAT. § 2-1-201(b) (1977 Repub. Ed., 1980).

228. WYO. STAT. § 2-1-201(c) (1977 Repub. Ed., 1980).

229. WYO. STAT. § 2-1-201(d) (1977 Repub. Ed., 1980).

230. WYO. STAT. § 2-1-202 (1977 Repub. Ed., 1980).

231. See 8 U.L.A.—Estate, Probate and Related Laws 99 (1980 Supp.).

232. WYO. STAT. § 2-1-202 (1977 Repub. Ed., 1980).

application of the personal property or to inquire into the truth of the content of the affidavit. The successor who receives payment, delivery or title is, of course, answerable and accountable to any personal representative of the decedent's estate or to any other person having a superior right.

This new provision will have significant effects upon the manner of handling the small estate. Other than its monetary limitation and its non-application to real property, there are no limits to the use of the technique. It makes no difference whether the decedent died testate²³³ or intestate or whether he was survived by one or more successors. For property located in Wyoming, this provision provides the successors with the necessary device and authority to settle small estates without administration and in a most efficient way. It would be hoped that foreign transfer agents of securities, for example, will also recognize the affidavit and will not require letters from a personal representative. It would seem that an original of the affidavit, death certificate, and a copy of Wyoming law on the subject should prove sufficient to convince most transfer agents of securities to make the necessary transfers.

Although the entire estate may not exceed \$30,000, the word "estate" in the provision is limited to the estate that would be subject to being administered by a personal representative.²³⁴ It does not include will substitutes such as survivorship property, life insurance and other contractual properties that pass to beneficiaries according to the terms of the arrangement. This interpretation is relatively clear because the provision dealing with release²³⁵ refers to the power of a personal representative, and, of course, a personal representative would have no authority over those will substitute properties either. This interpretation means that even more estates will be able to use the affidavit technique.

Exempt Property Termination of Administration: A shortcut administrative procedure that has been hiding in

233. Use of these provisions exempts the successors from the penalty for failing to probate a known will. WYO. STAT. § 2-7-102 (1977 Repub. Ed., 1980).

234. See WYO. STAT. § 2-1-301(a) (xiv) (1977 Repub. Ed., 1980).

235. WYO. STAT. § 2-1-202 (1977 Repub. Ed., 1980).

the old law for many years and that has been exposed and revitalized by the new Code deals with the estate that does not exceed the value of exempt property, cost of administration, liens and encumbrances.²³⁶ The limits of its application are that it is available only if the estate is being administered and only after both the first publication of the notice of the opening of probate and the filing of the appraisalment.²³⁷ If these terms are satisfied, any interested person at any time during administration may file a petition requesting that the exempt property, including the homestead, be set over to the appropriate persons.²³⁸ If at the hearing it is determined that the whole estate of the decedent is exempt and is set over to the appropriate persons, no further proceeding is necessary in the administration of the estate unless, of course, additional assets are discovered.²³⁹

A special notice must be satisfied, and it requires notice not less than ten days prior to the hearing on petition to be published once in a newspaper of general circulation and to be mailed to the surviving spouse and to each heir and beneficiary.²⁴⁰ This notice requirement may be combined with the notice of opening probate; however, notice must be made no less than ten days before the hearing and no less than ten days after the filing of the appraisalment.²⁴¹

The monetary limit on the use of this procedure is quite generous. It equals the total of: (1) the homestead exemption (\$30,000); (2) the other exemptions (from \$1,000 to \$2,000); (3) the liens and encumbrances against the property in the estate; and, (4) the costs of administration. This total will ordinarily come to a relatively large amount and thus the procedure under this provision will be applicable to a large number of estates.

Another inherent limitation on the use of this procedure must be mentioned, however. The procedure is only available when there is exempt property involved in an estate. This

236. WYO. STAT. § 2-7-505 (1977 Repub. Ed., 1980).

237. *Id.* and WYO. STAT. § 2-7-203 (1977 Repub. Ed., 1980).

238. See discussion of exempt property *supra* notes 51-61 and accompanying text.

239. WYO. STAT. § 2-7-505 (1977 Repub. Ed., 1980).

240. WYO. STAT. §§ 2-7-203(a) and 2-7-205(b) (1977 Repub. Ed., 1980).

241. WYO. STAT. § 2-7-203(b) (1977 Repub. Ed., 1980).

means that decedent must have been survived by a spouse or minor children or both.²⁴²

With a little preplanning in small estates and with the capability of consolidated notice capabilities, the homestead set off procedure should become a very commonly used technique for avoiding many of the formalities and technicalities of ordinary administration.

Sole Legatee/Executor Summary Administrations: The new Code also retains an apparently little known and little used procedure for shortening the administration process.²⁴³ Located in a curious place²⁴⁴ in the Code, this section provides that if the person named as executor is also the sole legatee under a valid will that disposes of all of the decedent's property subject to probate, a shorter less formal procedure is available for administering the estate. There are no maximum monetary or types of property limitations on the use of this technique. After the probate of the will, the issuance of letters, the publication of notice to creditors, the filing of the inventory and appraisal, and the expiration of the period for filing claims against the estate, the estate under this provision vests absolutely in the legatee-executor. The debts of the decedent become the debts of the legatee. The legatee-executor is required to file a special bond with the state of Wyoming that is intended to secure the payment of claims against the estate. The amount of bond and time within which claims must be filed are set by the court. Presumably, if all creditors have been paid by the legatee, the amount of the bond would be zero.

Although this procedure has some advantageous applications, it is limited in application because of the sole

242. See WYO. STAT. §§ 2-7-501 and 2-7-504 (1977 Repub. Ed., 1980).

243. WYO. STAT. § 2-11-301 (1977 Repub. Ed., 1980).

244. It is the first section in Article 3, Foreign Personal Representatives, a part of Chapter 11, Foreign Wills. It is, clearly, misplaced. Substantively, however, it is the same section and even the same heading as it was under prior law. WYO. STAT. § 2-4-106 (1977 Repub. Ed.). The issue arises whether the new location affects the scope of the content of the provision. At this point no firm answer can be given. This issue will have to be determined by the courts. Several observations are worthy of mention on the matter. First, by the words of the provision it is not applicable merely to foreign personal representatives. Second, as far as legislative intent is concerned, it is doubtful that the legislature had any particular intent concerning the purpose of the provision.

legatee-executor requirement. Consequently, the existence of multiple beneficiaries under the will may destroy the usefulness of the technique. If the executor is the residuary beneficiary, it might be possible to qualify for this procedure by having other legatees disclaim their interests in favor of the residuary beneficiary.²⁴⁵ The assignment by legatees to a sole legatee/executor should also work. The requirement for the executor is limited to those named executor in the will.²⁴⁶ Consequently, unless the named executor or named successor is the sole legatee, the procedure is not available.

B. Ordinary Administration Procedure

No attempt will be made to fully explain the administration procedure under the new Code for the estate requiring full administration. Much of the procedure remains the same as it existed under prior law. The following will emphasize only a few of the changes that have been made with regard to this procedure.

Inventory and Appraisalment: The new Code retains the inventory requirement. Personal representatives in all estates are required to make and to file an inventory under oath of all of the decedent's estate, including the homestead, within his possession and knowledge, no later than 120 days after the date of appointment.²⁴⁷ Extensions of time may be obtained from the court for good cause shown.²⁴⁸

An appraisalment must also be made of the assets listed on the inventory.²⁴⁹ Three disinterested appraisers must be appointed to make the appraisalment.²⁵⁰ The appraisals must

245. See discussion of disclaimer *supra* notes 148-93 and accompanying text. When using disclaimers in order to have all interest vest in the executor, it is important to make sure that the disclaimer will have that effect.

246. WYO. STAT. § 2-11-301 (1977 Repub. Ed., 1980).

247. WYO. STAT. § 2-7-403 (1977 Repub. Ed., 1980).

248. *Id. Compare* WYO. STAT. § 2-7-403 (1977 Repub. Ed., 1980) (Requires fines for non-good faith delay in filing inventory to be paid into the corpus of the estate) with WYO. CONST. art. 7, § 5 (Requires "all fines and penalties under general laws of the state shall belong to the public school fund of the respective counties and be paid over to the custodian of such funds for the current support of the public schools therein.")

249. WYO. STAT. §§ 2-7-404 and 2-7-405 (1977 Repub. Ed., 1980).

250. The appraisers' compensation is strictly limited thereby making their appraisals of relatively limited use. WYO. STAT. § 2-7-404 (1977 Repub. Ed., 1980).

be under oath, follow a particular form, be signed by the appraisers and verified by the personal representative.²⁵¹ There is no statutory time limit for filing the appraisal except that it must be filed with the clerk of court "forth with."²⁵²

There may be situations where it is desirable to file the inventory before the 120 day period has expired. If the value of the estate is less than the family protections, expenses of administration and secured debts, it is very useful to file the inventory and appraisal as soon as possible so that the estate may be distributed on petition to set off exempt property.²⁵³ In addition, in order to definitely start the limitation period on the election against a will by a surviving spouse, it is also desirable to file the inventory as soon as possible.²⁵⁴ If filed within sixty days, the mandatory court advisement of the surviving spouse may then immediately be made and the limitation period will expire at the date of three months after the admission of the will to probate.

Claims Against Decedent's Estate: Several changes by the new Code with respect to creditors' claims deserve mention. For insolvent estates, a new more comprehensive and specific list of creditor priority is provided.²⁵⁵ This provision, of course, must be consulted if the estate does not possess assets sufficient to pay all debts and charges against the estate.

Several important changes were also made with respect to the creditor filing procedure under the new Code. Ordinarily, creditors must file their claims on or before three months after the date of the first publication of notice to creditors.²⁵⁶ The new code includes a significant exception to this limitation. It provides that claimants filing

251. WYO. STAT. § 2-7-406 (1977 Repub. Ed., 1980).

252. *Id.*

253. WYO. STAT. § 2-7-505 (1977 Repub. Ed., 1980). See discussion of exempt property termination of administration procedure, *supra* notes 236-242 and accompanying text.

254. WYO. STAT. § 2-5-104 (1977 Repub. Ed., 1980). See discussion of surviving spouses election, *supra* notes 74-76 and accompanying text.

255. WYO. STAT. § 2-7-701 (1977 Repub. Ed., 1980).

256. WYO. STAT. § 2-7-201 (1977 Repub. Ed., 1980).

after the limitation shall not be barred if they are entitled to equitable relief due to peculiar circumstances.²⁵⁷ The effect of this rule is to open the absoluteness and definiteness of the creditor nonclaim period to the discretionary judgment of the court on a case by case basis. Only time will tell whether this opens the door too wide and increases uncertainty too greatly. This provision is taken from the Iowa Probate Court.²⁵⁸ Experience in that state has shown that this provision creates a significant "loophole" in the creditor claim limitation.²⁵⁹ It will be interesting to see whether Wyoming has better results with the provision than Iowa has.²⁶⁰

The new Code states that when claims are filed they must be filed with the court in duplicate.²⁶¹ No longer is it satisfactory to file them with the personal representative.²⁶² This is a significant change from prior law and should be noted by all practitioners.

Claims of \$200.00 or less may be allowed by the personal representative without the creditor having to file the claim.²⁶³ The propriety of the personal representative's action in such a situation must be tested at the hearing on the final report and accounting.

Once notice of a rejected claim has been made, the claimant must bring the appropriate action against the personal representative within thirty days.²⁶⁴ Prior law allowed three months to bring the claim.²⁶⁵

Closing the Estate: Because of mounting public objection to the problem of delay in the administration of the

257. WYO. STAT. § 2-7-703(c) (1977 Repub. Ed., 1980).

258. IOWA CODE ANN. § 633.410 (West, Supp. 1980).

259. *In re Estate of Zimmerman*, 160 N.W.2d 502 (Iowa 1968). Approximately sixty "peculiar circumstances" had been dealt with by the Iowa Supreme Court by 1968.

260. If the reason for ignoring the nonclaim period is because the notice procedure is inadequate, it would seem that better results could be obtained by improving that procedure. One potential suggestion in this regard might be to require that known creditors received mailed notice in addition to notice by publication. This rule would improve the notice requirements of the Code for creditors and still permit the nonclaim period to be absolute.

261. WYO. STAT. § 2-7-703 (1977 Repub. Ed., 1980).

262. *See* WYO. STAT. § 2-6-205 (1977 Repub. Ed.).

263. WYO. STAT. § 2-7-703(d) (1977 Repub. Ed., 1980).

264. WYO. STAT. § 2-7-718 (1977 Repub. Ed., 1980).

265. WYO. STAT. § 2-6-207 (1977 Repub. Ed.).

estate, the new Code adopts as a "policy of the state of Wyoming" that estates be completed as rapidly as possible taking into account the need to protect all interested parties.²⁶⁶ As a means of instituting this policy, the Code requires that all estates be completed within one year from the date of the appointment of the personal representative unless the personal representative can demonstrate in a verified report good cause for not completing the administration.²⁶⁷ A court order is then required for any further continuance of the administration. Failure to comply with this requirement is reason for a variety of penalties against the personal representative including citation for contempt, removal, or any other remedy the court determines appropriate in order to promptly close the estate. In addition, the clerk of the court is required to keep a calendar on each estate and must notify the court of the failure of any personal representative to meet Code deadlines. The provision is not clear on whether after the first year, failure to close must be approved by the court for each succeeding year.

Several points deserve mention with respect to this provision. First, the rule is more cosmetic than substance. It will not cure dilatory practices because those who are bent upon delay typically have plenty of ammunition to justify continuing the estate. The end result is that the clerk of court becomes a bureaucrat who dispenses red tape. Those who have legitimate reasons to continue the estate now have to file a verified report and obtain a court order for continuance and those who may not have justified reasons for continuance will in most cases be able to fabricate or creatively develop the necessary reason for continuance. In both cases, time and money must be spent to satisfy the rule.

A more significant problem with respect to the rule, is that it will actually delay the closing of estates. Although many estates may be closed in much less than a year's time, the statutory one year rule may become a time benchmark against which the administration of all estates will be

266. WYO. STAT. § 2-7-801(a) (1977 Repub. Ed., 1980).

267. WYO. STAT. § 2-7-801(c) (1977 Repub. Ed., 1980).

measured. In other words, if one does not have to close an estate until one year from the personal representative's appointment, the tendency will be not to do so. Hopefully, the one year rule will not have that effect.

Under the new Code another new provision turns the court in effect into a shepherd for the tax collectors. The Code requires that before a final decree of distribution is entered, the court must be satisfied that all federal, state, county and municipal taxes legally levied upon the property of the estate or due on account of the estate or death of a decedent have been paid in full.²⁶⁸ The provision requires proof of such payment by presentation of receipts, cancelled checks, certificates, closing letters and other proof. The use of the conjunction "and" implies that all of those items must be shown if relevant. The rule is mandatory and there are no explicit exceptions.

Although this provision is apparently intended to improve the proof of marketable title, it has several unintended adverse consequences.²⁶⁹ First, there is the problem of causing an invasion of privacy of the parties involved. By the terms of the provision it makes many of the tax documents public records. This is a direct affront to the attempts by the federal congress²⁷⁰ and Wyoming legislature²⁷¹ to make tax records

268. WYO. STAT. § 2-7-812 (1977 Repub. Ed., 1980).

269. It is not clear that this provision aids in the marketability of title. First, where title insurance is involved, the insurers will usually insure the title of property but except all tax liens from the risk. Second, under federal tax laws, the title problems are more serious for the personal representative when he or she tries to sell during administration than for the successor after administration. HOCKY, ESTATE TAX PAYMENTS AND LIABILITIES, 219 T.M. A-35 to A-44 (3d ed. 1977). The personal representative may sell free of the tax liens only under specified circumstances. Otherwise the personal representative must obtain a release of the lien from the Internal Revenue Service. Property purchased from the successors would probably be released from the liens regardless whether the taxes have been paid. Second, in actuality the establishability of whether full payment has been made is less important from the purchaser's standpoint than the proof of whether the personal representative has been released from liability. I.R.C. § 2204. If the new probate Code is really concerned with improving marketability of property which passes through estates, it would be better to require the personal representative to obtain a release from personal liability for federal estate taxes. Third, by injecting a new requirement in the closing process, this rule may actually retard marketability because purchasers may now worry that they are on notice that taxes have not been paid if the requirements of this provision have not been satisfied.

270. I.R.C. § 6103.

271. WYO. STAT. § 39-6-809 (1977 Repub. Ed.).

a matter of private concern not subject to public scrutiny. Although the provision does not require the tax return itself to be put on file, the information required would at least put on file the amount of taxes paid. This is information that might otherwise remain confidential particularly if not paid for in whole or in part by the estate.

This provision may also unduly require estates to remain open. By requiring that all taxes be "fully paid," it prevents any estate from closing that elects to pay the federal estate taxes on the installment basis.²⁷² This requirement to keep the estate open under this provision is apparently applicable even though the Federal tax law recognizes a special lien procedure that imposes the lien on only a segment of the estate sufficient to cover the tax due and interest and does not impose the lien against the whole estate.²⁷³ Consequently, an estate may have to remain open for as long as fifteen years.²⁷⁴ This result is directly contradictory to the previously mentioned policy of the state which favors rapid completion of estates.²⁷⁵ The only beneficiaries of this rule are the tax collectors and it is very doubtful that they need this protection.

C. Probate and Contest of Wills:

The new Code recognizes and adopts the no notice, no nonsense probate.²⁷⁶ Basically, this means that under most circumstances, with adequate proof, the court or the clerk will enter an order admitting the will to probate upon the filing of a petition for probate.²⁷⁷ Just as important, the order of probate must also include the appointment of an executor.²⁷⁸ Upon entering this order, the clerk is required

272. I.R.C. §§ 6161 (up to 10 years), 6166 (up to 15 years), and 6166A (up to 10 years). Because of tax recapture possibilities under a special valuation election, must the estate stay open until the fifteen year waiting period passes? See I.R.C. § 2032A.

273. I.R.C. § 6324A.

274. See note 272 *supra*.

275. See *supra* notes 266-267 and accompanying text. Presumably, the inability to close because taxes have not been paid in full would constitute good cause for not closing the estate within a year.

276. This approach to probate is usually referred to as probate in common form. PAGE, WILLS § 26.11 (Bowe-Parker Ed. 1961).

277. WYO. STAT. §§ 2-6-203 through 2-6-209 (1977 Repub. Ed., 1980).

278. WYO. STAT. § 2-6-209 (1977 Repub. Ed., 1980).

to send a copy of the will and the order to each beneficiary named in the will and to each of decedent's heirs.

Proof of the will can take several forms. A self proving will may be probated without further proof.²⁷⁹ Other wills may be proved on the affidavit of one or more of the subscribing witnesses to the will.²⁸⁰ A deposition may be used as a substitute for the affidavit.²⁸¹ If the witnesses are not available either because of death or for other reasons, the will may be proved on the sworn testimony of two credible disinterested witnesses who identify the signatures of the testator and of the witnesses.²⁸² If this evidence is not available, the Code provides that a will may be proved by any other "sufficient evidence of execution."²⁸³ Holographic wills may be proved the same as any private writing.²⁸⁴

Although the new quick and easy probate procedure is meritorious, it is not without its interpretative difficulties. The court or the clerk is clearly given the authority to deny probate to a will under this procedure.²⁸⁵ What then does the proponent do if a will is denied probate under this system? The new Code does not clearly provide an answer. If the clerk or court denied probate to a self-proven will, the writ of mandamus ought to issue against that denial because the statute says such will shall be probated without further proof.²⁸⁶ Also, if one ran into an unruly or unreasonable clerk, a sort of informal appeal to the judge of the court could prove remedial. Where the clerk or court has within his or her discretion the authority to deny probate, however, the proper remedy becomes more difficult to determine.

279. WYO. STAT. § 2-6-204. (1977 Repub. Ed., 1980). See discussion of self-proven will, *supra* notes 86-90 and accompanying text.

280. WYO. STAT. § 2-6-205(a) (1977 Repub. Ed., 1980). For a will probated previously in another state or country, authenticated copies of the will and probate certificates are sufficient. WYO. STAT. §§ 2-11-101 through 2-11-105 (1977 Repub. Ed., 1980).

281. WYO. STAT. § 2-6-205(b) (1977 Repub. Ed., 1980).

282. WYO. STAT. § 2-6-205(c) (1977 Repub. Ed., 1980).

283. *Id.* Unfortunately, the Code retains the special probate procedure for lost or destroyed wills. WYO. STAT. § 2-6-207 (1977 Repub. Ed., 1980). This provision contains an inherently ambiguous requirement that if the right circumstances arise, will require interpretive litigation. See Averill, *supra* note 3, Part I, at 213.

284. WYO. STAT. § 2-6-206 (1977 Repub. Ed., 1980).

285. WYO. STAT. § 2-6-209 (1977 Repub. Ed., 1980).

286. WYO. STAT. § 2-6-204. See WYO. SUP. CT. R. 16.

The probate provision requires the court or the clerk to enter an "order" disallowing the probate.²⁸⁷ The question is whether this order is a final order from which an appeal may be sought.²⁸⁸ There are arguments on both sides. Certainly an order denying probate to a will with no other procedure to follow would be one "affecting a substantial right and in effect determines the outcome of the action."²⁸⁹ Thus, maybe an appeal to the Wyoming Supreme Court should follow. On the other hand, the order is made with little or no record and without discovery proceedings, summary judgment proceedings or a trial. Consequently, it would seem to be premature and a waste of time and money to require an appeal to the Supreme Court to overrule an order denying probate.

An alternative procedure that might be applicable and relevant to this dilemma would be an action under the Uniform Declaratory Judgement Act.²⁹⁰ An action is permitted under this Act for the purpose of determining the validity of a will.²⁹¹ It would have the meritorious result of permitting a full trial on the issue before an appeal to the Supreme Court would be appropriate. Whether this is the proper course of action to take is not clear. The outcome will have to wait until a proponent's will is denied probate under this no notice probate system. Until it becomes clear what the proper action is, one might be wise to "cover all bases." This would include informal discussions with the judge of the court, filing a notice of appeal and filing a declaratory judgment action. Naturally, if the reason for probate denial is a technical error in the petition and its supporting documents, the proponent should correct the error and repeat the process. The problem raised here assumes that the proponent has exhausted all efforts to properly conform the petition and its supporting data and still the court or clerk denies the probate.

287. WYO. STAT. § 2-6-209 (1977 Repub. Ed., 1980).

288. WYO. R. A. P. 1.05.

289. *Id.*

290. WYO. STAT. §§ 1-37-101 through 1-37-115 (1977 Repub. Ed.).

291. WYO. STAT. § 1-37-103 (1977 Repub. Ed.).

If probate is granted and if the proper notice is made, the probate of the will is conclusive after three months from the date of the first publication of notice.²⁹² No direct contest may be made after this period expires.

X. THE PERSONAL REPRESENTATIVE

The new Code alters prior law concerning the personal representative in many areas, including matters dealing with selection, bonding and powers.

A. Selection of the Personal Representative

In the selection of a personal representative, the new Code distinguishes two situations. The appointment of an administrator when a person has died intestate²⁹³ is distinguished from the appointment of an executor when a person has died testate.²⁹⁴ This distinction is similar to prior law except it is retained even though an executor is not named or appointed under the will. In other words there are only two types of personal representatives: an administrator and an executor. There is no longer an administrator CTA.²⁹⁵

The Code sets out different orders of priority depending upon whether the appointment is for an administrator or an executor. The priority order for the appointment of administrator is the same as it was under prior law:²⁹⁶ (1) surviving spouse; (2) surviving spouse's selectee; (3) children; (4) either parent; (5) brothers; (6) sisters; (7) grandchildren; (8) other heirs; (9) creditors; or, (10) any other competent person. Partners of the decedent are not

292. WYO. STAT. §§ 2-6-306 and 2-7-201 (1977 Repub. Ed., 1980). Significantly, "conclusive" may not stand for conclusive. The Code does not deal specifically with the situation where instead of a direct contest, the will opponents petition beyond the three month period for the probate of another revoking or inconsistent will. Presumably, such a petition would not be barred by the limitation period because there is no time limit directly applicable to this petition. Obviously, the probate of a subsequent will constitutes just as effective a contest as would an ordinary contest action.

293. WYO. STAT. § 2-4-201 (1977 Repub. Ed., 1980).

294. WYO. STAT. § 2-6-208 (1977 Repub. Ed., 1980).

295. See Averill, *supra* note 3, Part II, at 221-222.

296. WYO. STAT. § 2-4-201(a) (i) through (a) (ix) (1977 Repub. Ed., 1980). The preference for brothers over sisters in paragraphs (iv) and (v) is probably unconstitutional. See *Reed v. Reed*, 404 U.S. 71 (1971).

incompetent from becoming administrators so long as their status on the priority list is not solely as a creditor or other legally competent person.²⁹⁷

While under prior law a nonresident was incompetent to serve as administrator,²⁹⁸ under the new Code a nonresident may serve as administrator so long as a resident is appointed coadministrator.²⁹⁹ The only other reasons that a person is incompetent to be an administrator are: (1) being under the age of majority or (2) having been judged to be incompetent to execute the duties of the trust.³⁰⁰ Neither the conviction of an infamous crime or drunkenness nor improvidence, constitutes incompetence *per se* to being an administrator as they did under prior law.³⁰¹

The preference for an executor is as follows:³⁰² (1) persons named in will; (2) beneficiaries named in will; (3) selectee of beneficiaries named in will; (4) any creditor of decedent; (5) selectee of any creditor of decedent; or (6) any court determined qualified person. It is worthy of note that the order of priority gives no preference to the surviving spouse except as the spouse may be named executor in the will or is a beneficiary named in the will. All executors whether designated in the will or not have the same authority.³⁰³

B. Bonding of the Personal Representative

The new Code retains the requirement that generally in all estates bond must be issued for not less than value of personal property plus the estimated annual income from real property belonging to the estate.³⁰⁴ The Code, however, significantly expands the situations in which bond may not be required. It lists three situations in which letters testamentary or of administration may be issued without the

297. WYO. STAT. § 2-4-201(b) (1977 Repub. Ed., 1980).

298. WYO. STAT. § 2-5-203(a) (ii) (1977 Repub. Ed.).

299. WYO. STAT. §§ 2-4-201(c) and 2-4-203(a) (ii) (1977 Repub. Ed., 1980).

300. WYO. STAT. § 2-4-203(a) (i) and (a) (iii) (1977 Repub. Ed., 1980).

301. WYO. STAT. § 2-5-203(a) (iii) and (a) (iv) (1977 Repub. Ed.).

302. WYO. STAT. §§ 2-6-208(a) (i) through (a) (iv) (1977 Repub. Ed., 1980).

303. WYO. STAT. § 2-6-211 (1977 Repub. Ed., 1980).

304. WYO. STAT. § 2-3-102 (1977 Repub. Ed., 1980).

execution and filing of a bond. These include:³⁰⁵ (1) when the will expressly waives bonds; (2) when by statute no bond is required; or (3) when the distributees waive the bond requirements in writing. A proper waiver is applicable to the additional bond requirement for sales of real estate too.³⁰⁶ Although bond is waived, the court is given the authority to require a bond when necessary.³⁰⁷

It is very desirable in most estates to avoid the expense of bonding. In estates that do not have a will waiving the bonding requirement, waiver by the distributees in writing will become very popular.³⁰⁸ Where the surviving spouse and adult children constitute all of the distributees, it will be very easy to obtain the waiver. With regard to minor children who may inherit or take under a will, the issue arises whether the guardian of the children including the natural guardian can sign the waiver. Preferably the answer to this question is affirmative. Another problem that may arise is where a trustee is a distributee under a will. Does the trustee sign the waiver or must the beneficiaries of the trust sign the waiver? Again, it would be preferable that the trustee be permitted to sign the waiver.³⁰⁹

C. General Powers of the Personal Representative

The new Code includes several important provisions expanding the personal representative's authority. First, the Code gives the personal representative authority to incur and pay at any time without court approval reasonable and necessary expenses in the administration of the estate.³¹⁰ The only qualifications to this rule are that they must be exercised under a fiduciary standard of care and must be approved by the court in the final decree of distribution. The Code includes a long nonexclusive list of expenses that may be paid in this manner. Expenses under this provision

305. WYO. STAT. § 2-3-111(a) (1977 Repub. Ed., 1980).

306. WYO. STAT. §§ 2-3-105 and 2-3-111(b) (1977 Repub. Ed., 1980).

307. WYO. STAT. § 2-3-111(c) (1977 Repub. Ed., 1980).

308. "Distributee" is defined by the Code as "a person entitled to any property of the decedent under his will or under the statutes of intestate succession." WYO. STAT. § 2-1-301(a)(xiii) (1977 Repub. Ed., 1980).

309. The definition of "distributee" infers that the trustee/devisee would have this authority. *Id.*

310. WYO. STAT. § 2-7-802(a) (1977 Repub. Ed., 1980).

are to be paid first out of the income of the estate and then from the residue.³¹¹ On the allocation problem, the will may provide otherwise.

Another provision affecting the personal representative deals with the authority of the personal representative or any distributee to petition for complete or partial distribution of the estate any time after thirty days from the expiration of the time to file claims.³¹² Notice of the hearing on distribution must be given to the personal representative and to the surviving spouse, heirs or devisees.³¹³ At the hearing the court is to determine whether there is sufficient property necessary to pay the costs of administration, claims and taxes.³¹⁴ If so, the court may direct distribution. Distributees may be required by the court to give bond to secure a proportionate part of the debts and taxes of the estate.

If partial distribution is approved by the court, the Code requires that each distributee shall get his or her proportion of the property ready for distribution.³¹⁵ It is not clear whether this means that only proportionate partial distributions can be made. For example, if you distribute partially to one distributee, you must at the same time distribute proportionately to all other distributees. It is hoped that this interpretation would not be made. Mandatory proportionate partial distribution of property may cause unfortunate income tax consequences to some of the beneficiaries. Any distribution of the property, except to satisfy a specific devise in a will, may constitute a distribution of income earned and accumulated during the administration to the beneficiary who receives the distribution.³¹⁶ Undesirable income tax consequences, therefore, could be caused to a beneficiary who does not want to receive what is considered income at the particular time but who is forced to do so by a beneficiary who does. A better interpretation of this pro-

311. WYO. STAT. § 2-7-802(b) (1977 Repub. Ed., 1980). It is not clear whether this allocation against income applies to income from the property given as specific devises, too.

312. WYO. STAT. § 2-7-807(a) (1977 Repub. Ed., 1980).

313. WYO. STAT. § 2-7-807(b) (1977 Repub. Ed., 1980).

314. WYO. STAT. § 2-7-807(c) (1977 Repub. Ed., 1980).

315. *Id.*

316. I.R.C. § 663(a)(1).

vision in the Code would be that distributions must be proportionate but not immediate and in possession for all beneficiaries. This interpretation would permit the personal representative to take into account the income tax consequences to each beneficiary for each partial distribution.³¹⁷

D. Power to Sell Property

The new Code made several significant changes with respect to the personal representative's power to sell property of the estate.³¹⁸ Although the Code does not give the personal representative carte blanc authority to sell property, it does increase significantly the personal representative's authority in this area.

The foundational rule, however, is that a personal representative may not sell, mortgage, pledge, lease or exchange property without petition, notice and hearing and a court order.³¹⁹ There are some very important exceptions to this rule. The personal representative may sell, without following the above mentioned procedure, the following property in the estate: (1) perishable personal property;³²⁰ (2) personal property having a regularly established market;³²¹ (3) any property when the power to sell is explicitly given to the personal representative in a will.³²² When the will gives a power to sell or otherwise deal with the property, it makes no difference whether it is real or personal property.³²³ For sales of real property that do not require a court order though, the Code requires that notice be given to the surviving spouse, devisees, and heirs ten days prior to the sale.³²⁴

317. See WEINSTOCK, *PLANNING AN ESTATE: A GUIDEBOOK OF PRINCIPLES AND TECHNIQUES* 336-338 (1977).

318. Many of these provision are derived primarily from the Iowa Probate Code. See IOWA CODE ANN. §§ 633.383 through 633.390, 633.392 through 633.401 (1964, Supp. 1980).

319. WYO. STAT. §§ 2-7-614, 2-7-615, and 2-7-621 (1977 Repub. Ed., 1980); see also WYO. STAT. § 2-3-501 through 2-3-504 (1977 Repub. Ed., 1980).

320. WYO. STAT. § 2-7-613 (1977 Repub. Ed., 1980).

321. *Id.*

322. WYO. STAT. § 2-7-609 (1977 Repub. Ed., 1980). This provision also provides that an explicit power in the will can give the personal representative the power to mortgage, lease, pledge or exchange property without court involvement.

323. WYO. STAT. § 2-7-402 (1977 Repub. Ed., 1980). See also WYO. STAT. § 2-1-301(a) (xxix) (1977 Repub. Ed., 1980).

324. WYO. STAT. § 2-7-205(c) (1977 Repub. Ed., 1980). See note 207, *supra* and accompanying chart.

The expansion of the power in the personal representative to sell and otherwise deal with property is a meritorious feature of the new Code.

XI. ANCILLARY ADMINISTRATION

The new code makes several significant changes with regard to the administration of the estates of nondomiciliaries.

A. *Fully Administered Estates at Domicile*

The first important change is that the monetary limit in its summary administration procedure provisions for fully administered nondomiciliary estates is increased from \$10,000³²⁵ to \$30,000.³²⁶ Basically, this procedure permits the estate of a nondomiciliary whose property in Wyoming does not exceed \$30,000 to fully administer the Wyoming property by filing the following: (1) a petition stating the estate has been duly probated and settled in another state, (2) certified copies of the petition, order of appointment of the personal representative, inventory and the final decree of distribution of the estate in the other jurisdiction, (3) proof that the debts of the estate have been paid, and (4) proof that publication was made for three weeks (presumably once a week in each week) stating that the proceedings will be admitted as the probate of the estate in Wyoming. After a hearing on the petition and if no one objects, the estate will be considered as fully administered.³²⁷

The two primary limitations on this procedure are (1) the \$30,000 limitation; and (2) the estate must have been fully administered in another jurisdiction. Consequently, the procedure may not be available because the Wyoming estate may be too large or there may be a need or desire to settle the Wyoming estate before the domiciliary administration is complete.

325. Wyo. STAT. § 2-6-601 (1977 Repub. Ed.).

326. Wyo. STAT. § 2-11-201 (1977 Repub. Ed., 1980).

327. *Id.* Creditors can object to this proceeding at the hearing and if they do the court must allow them to petition for the appropriate letters as in ordinary cases. *Id.*

B. Local Agent Appointment

The new Code also includes a new alternative device for administering nondomiciliary estates in Wyoming. Basically, it permits the domiciliary foreign personal representative to function in Wyoming in a manner similar to that of a domiciliary personal representative.³²⁸ In fact, the Code gives the domiciliary foreign personal representative greater flexibility and authority than it gives to the domiciliary personal representatives.

In order to be empowered to act in Wyoming, the domiciliary foreign personal representative must merely designate a Wyoming resident, bank or trust company as his or her agent or attorney upon whom any order, notice or process may be served.³²⁹ After completing this requirement, a domiciliary foreign personal representative is entitled to exercise all powers which a local personal representative could exercise.³³⁰

These powers specifically include the power to bring legal proceedings that any nonresident could bring in Wyoming courts. Presumably, the domiciliary foreign personal representative also has the authority to sell assets under the same conditions and powers the local personal representative has.³³¹ Even where sale can only take place with court order, it may be presumed that this domiciliary foreign personal representative can merely follow the proper procedures for sale of an asset without having to go through other qualification requirements of a personal representative.³³²

If the nonresident's Wyoming estate is composed solely of personal property, this provision permits the domiciliary foreign personal representative to gather up all the assets, sue in Wyoming courts for claims or property, and remove

328. WYO. STAT. §§ 2-11-301 through 2-11-303 (1977 Repub. Ed., 1980).

329. WYO. STAT. § 2-11-301 (1977 Repub. Ed., 1980).

330. WYO. STAT. § 2-11-302 (1977 Repub. Ed., 1980). This provision is substantively U.P.C. § 4-205.

331. See WYO. STAT. §§ 2-7-612, 2-7-613, and 2-7-609 (1977 Repub. Ed., 1980).

332. See WYO. STAT. §§ 2-7-614 and 2-7-615 (1977 Repub. Ed., 1980). The notice requirements would also have to be satisfied. WYO. STAT. §§ 2-7-202 and 2-7-206(c) (1977 Repub. Ed., 1980).

these assets out of the state for administration in the domiciliary estate.

There are restrictions on the use of the above procedure. The domiciliary foreign personal representative has the above described authority only if local administration is not pending or a local personal representative is not functioning pursuant to resident appointment proceedings.³³³ Actually, the institution by interested persons of local administration proceedings terminates the domiciliary foreign personal representative's power under this provision except as allowed by the court.

Persons who dealt with the domiciliary foreign personal representative before they received notice of a pending local administration proceeding, however, are not to be prejudiced as far as any change of position is concerned. If a local personal representative is appointed, he or she assumes all duties and obligations that have arisen during the exercise of a domiciliary foreign personal representative's powers. He or she may also be substituted for the domiciliary foreign personal representative in all actions or proceedings pending in Wyoming.

The net affect of these provisions is that for a large number of nondomiciliary decedents who leave property located in Wyoming, no actual administration will take place. The administration will be handled by way of the powers given to the personal representatives and the assistance of the court when sought and desired by the domiciliary foreign personal representative. Unless there are some substantial unpaid creditors, no one ordinarily will desire to require local administration.

XII. ESTATE PLANNING UNDER THE NEW CODE

No attempt will be made to outline in full all estate planning considerations that the new Code raises. Several points, however, deserve mention.

333. WYO. STAT. § 2-11-303 (1977 Repub. Ed., 1980). This provision is substantively U.P.C. § 4-206.

In many parts of the Code, a particular rule or requirement may be changed or altered by specific statements in the relevant documents such as the will of the decedent. Although this is not a change from prior law, these references do emphasize the need to specifically state in a will the desires of the testator. For example, it is important for wills, trusts and other dispositive instruments to include provisions dealing with the following points or issues: (1) disclaimer by the intended beneficiaries should be anticipated; (2) the status of persons born out of wedlock, adopted persons and half-blooded persons should be set; (3) the fiduciary and successor fiduciaries should be named; (4) the fiduciary should be given broad express powers to deal with property including the power to sell both real and personal property; (5) abatement and apportionment due to the elective share of a spouse, debts, costs of administration, taxes, and other inadequacy of funds should be set; and (6) bond for the various fiduciaries should be waived.

Unfortunately, for the larger estate, the new Code does not offer a much improved administration procedure than existed under prior law. The new Code's procedure is still based primarily upon continuous court involvement and supervision throughout the proceedings. This involvement is not altered even though the successors are in agreement and the creditors have been satisfied. Consequently, the time, effort, and expense of administration will continue to be at approximately the same level as existed under prior law.

From an estate planning standpoint, the failure to streamline administration and cut its costs means that the practitioner needs to carefully consider probate avoidance devices. The revocable inter vivos trust continues to serve as a viable alternative to probate administration. Add the element of privacy to features such as continuity, efficiency, and flexibility, and one can see that the revocable inter vivos trust offers a very useful estate planning device.

Even for the estate \$30,000 and below, the revocable trust offers a means to avoid the problems caused by the

\$30,000 homestead exemption. Where a person is not survived by a spouse but is survived by minor children, this exemption would prohibit his or her will from passing the estate into a trust for the benefit of those children. It provides that the homestead is the absolute property of minor children and would have to be transferred over to them. The appointment of a conservator would then be necessary to manage the estate of the minor. The revocable trust would offer a means of avoiding this provision. The children, of course, would be the principal beneficiaries of the trust but the trust would manage the property rather than a conservatorship. In addition the trust may last to an age older than 19. Conservatorships, of course, terminate at 19.

These are only a few of the estate planning considerations that need to be taken into account in practicing under the new probate code. As with all new laws, the practitioner needs to peruse the law carefully. There is always the potential of pitfalls and unfortunate traps lurking in the closet of a new act.

XIII. CONCLUSION

The Wyoming Probate Code of 1980 is neither fish nor fowl. It contains a substantial number of improvements to the law of decedents' estates in Wyoming. On the other hand, it fails to deal with many issues that should be considered, and raises interpretative problems with some that it does cover. Some of these problems will be worked out and solved either informally or by judicial decision. Others, however, will require legislative amendment.

The failure to enact an independent administration procedure for estates of all sizes and comprehensive powers provisions for all personal representatives are the most unfortunate failures of the new Code. Until these concepts become the law in Wyoming, the administration of many estates will continue to be inefficient, overly time consuming, and expensive.

The need for probate law reform in Wyoming has not been fully met. There is still much work to be done. The new Code includes too many interpretive problems. It also contains undesirable provisions, while omitting some desirable ones. With these points in mind, it is hoped that this Article will prove useful to those who must practice under the new Code, and will serve as a catalyst for continued efforts to improve Wyoming's probate law.