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Cover Page Footnote
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THE NEW YORK LAW OF INTESTATE SUCCESSION COMPARED WITH THE UNIFORM PROBATE CODE: WHERE THERE'S NO WILL THERE'S A WAY

*Julian R. Kossow**

I. Introduction

The purpose of this Article is to analyze, compare, and contrast New York's law of intestacy with that of the Uniform Probate Code (Code). The Article may serve as a basis for estimating the impact on existing concepts of descent and distribution should New York adopt the Code. It addresses itself to the law of intestate succession, delves into present New York law on the subject, examines corresponding sections of the Code, analyzes the differences, and arrives at an evaluation of the benefits and detriments that adoption of the Code would bring.

II. Distributive Patterns

Intestate succession is the statutory plan governing distribution of a decedent's property as to which there has been no legally operative *inter vivos* or testamentary transfer. In New York, as in every state, the distribution of an intestate estate, after taxes, expenses, and debts have been satisfied, proceeds in accordance with a series of legislatively mandated priorities. Few states have precisely the same statutory scheme, yet most of them establish a pattern of devolution of intestate property that roughly parallels New York's arrangement.[1]

Quite naturally, the New York statute assigns top priority to the

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1. *See, e.g.*, ILL. ANN. STAT. ch. 3, § 11 (Smith-Hurd Supp. 1975); MASS. GEN. LAWS ANN. ch. 190, §§ 1-3 (Supp. 1975); N. J. STAT. ANN. § 3A:4-1 to -5 (1953); OHIO REV. CODE ANN. § 2105.06 (Page 1968). *See generally Symposium on Succession to Property by Operation of Law*, 20 IOWA L. REV. 181 (1935).

decedent's immediate family. If a spouse and child or children survive, they are entitled to inherit all of the intestate property.[2] Issue of deceased children, taking per stirpes, are included in this hierarchy. The spouse receives the first two thousand dollars[3] plus one half of the balance where only one child or issue of just one deceased child survive;[4] the child, of course, succeeds to the other half. The spouse's share is reduced to the first two thousand dollars plus one-third of the remainder in those cases where more than one child or their issue outlive the decedent.[5]

To illustrate this distribution, assume that the intestate estate, after expenses, debts and taxes, amounts to $38,000. If the spouse and only one child survive, the spouse takes $20,000 and the child inherits $18,000. Should this one child have predeceased the intestate and have children surviving, these grandchildren of the decedent will share equally the $18,000. If the spouse and more than one child or their issue survive, the spouse's share is reduced to $14,000 and the remaining $24,000 is divided among the decedent's living children and issue of predeceased children.

The New York statute enumerates further priorities. Where there are issue but no spouse living at the time of the decedent's death, the lineal descendants take the entire estate.[6] The converse does not obtain. If a spouse survives and there are no issue, the spouse takes the entire estate only if neither of the decedent's parents is alive at that time.[7] Assuming that there are no issue and that the spouse and one or both of the decedent's parents survive, the spouse receives the first twenty-five thousand dollars plus one-half of the residue; the balance of the estate goes to the parent or parents.[8] Using the same $38,000 estate for purposes of illustration, the surviving spouse's share is $31,500 while that of the parents is $6,500.

Siblings are the next class included in the statutory estate plan. Brothers or sisters or their issue inherit all of the intestate property where the decedent has left neither spouse, issue, nor parents.[9]

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2. N.Y. EST., POWERS & TRUSTS LAW §§ 4-1.1(a)(1), (2) (McKinney Supp. 1975).
3. This amount includes personal property not valued in excess of $2,000. *Id.*
4. *Id.* § 4-1.1(a)(2).
5. *Id.* § 4-1.1(a)(1).
6. *Id.* § 4-1.1(a)(6) (McKinney 1967); *see In re* Tash's Estate, 231 N.Y.S.2d 656 (Sur. Ct. 1962).
7. N.Y. EST., POWERS & TRUSTS LAW § 4-1.1(a)(5) (McKinney 1967).
8. *Id.* §§ 4-1.1(a)(3), (4). If there is no surviving spouse and no issue, the parent or parents will take the whole estate. *Id.*
9. *Id.* § 4-1.1(a)(7).

The next priority in the ever broadening hierarchy is accorded to grandparents. They inherit the entire estate in the relatively rare circumstance where spouse, descendants, parents, siblings, or their issue all fail to survive the decedent.[10] The legislative pecking order mandates distribution, in the absence of grandparents, to their issue.[11] At this level, the method of distribution is no longer by representation. Rather, the rights of issue of grandparents to succeed is determined by degree of kinship; those of the nearest degree take all in preference to those of more remote degree. The degree of kinship is calculated by "exclusion of the decedent and the counting of each person in the chain of ascent to and including the common ancestor, and then the counting downward of each subsequent descendant from the common ancestor to the claimant."[12]

By way of illustration, assume that the decedent's next of kin are two aunts and several first cousins. The two aunts, being three degrees of kinship from the decedent, inherit the entire estate in preference to the first cousins who are four degrees distant. Since the two aunts are of the same degree of kinship to the decedent, they share equally the intestate distribution.[13] The first cousins, even if they are children of predeceased aunts or uncles, take nothing because inheritance by representation does not extend this far.[14]

Recently New York has provided for inheritance by great-grandparents or their issue where they alone survive.[15] This distribution is of very limited significance as it only applies in cases where the decedent, at the time of his death, was an infant or an adjudged incompetent. However statistically improbable, were this to occur and great-grandparents or their issue be the nearest relatives, then the dispositive pattern is similar in all respects to that made in favor of grandparents.

Part 1 of Article II of the Uniform Probate Code presents the proposed law of intestate succession. Section 2-101 delineates the reach of the statute: "Any part of the estate of a decedent not

10. *Id.* § 4-1.1(a)(8). Grandparents occupied the same position in intestate succession under earlier New York law. Bogert v. Furman, 10 Paige 496, 500 (Ch. 1843).

11. N.Y. EST., POWERS & TRUSTS LAW § 4-1.1(a)(8) (McKinney 1967); *see In re* Willingham's Estate, 51 Misc. 2d 516, 273 N.Y.S.2d 562 (Sur. Ct. 1966).

12. *In re* Wendel's Will, 143 Misc. 480, 483, 257 N.Y.S. 87, 90 (Sur. Ct. 1932).

13. N.Y. EST., POWERS & TRUSTS LAW § 4-1.1(a)(8)(b) (McKinney 1967).

14. Per stirpes distribution is allowed only with regard to decedent's issue, siblings, or issue of siblings. *Id.* § 4-1.1(a)(8)(c).

15. *Id.* § 4-1.1(a)(9) (McKinney Supp. 1975), *quoted in In re* Estate of Schaefer, 76 Misc. 2d 488, 490, 351 N.Y.S.2d 312, 315 (Sur. Ct. 1973).

effectively disposed of by his will passes to his heirs . . . ."[16] Thus, the Code obliterates ancient distinctions between distributive patterns of real and personal property and directs similar treatment for all of the decedent's property not validly transferred by will.[17]

The Code then allocates the estate among the survivors. Section 2-102 prescribes the intestate share of the surviving spouse, who is the sole heir if neither issue nor parent of the decedent survives.[18] Should there be issue, all of whom are descendants of the surviving spouse, the spouse inherits the "first [$50,000], plus one-half of the balance of the intestate estate."[19] If one or more of the decedent's surviving issue are not also issue of the surviving spouse, the latter's share decreases to one-half of the intestate estate; the spouse loses the right to the first $50,000.[20] Finally, where one or both parents, but no issue of the decedent survive, the spouse is entitled to the first $50,000 and one-half of the remainder of the intestate estate.[21]

The Code's distribution to the surviving spouse differs substantially from the New York law. Using the same example of an intestate estate with $38,000 available after debts and taxes and assuming that a spouse and one child survive, in New York the spouse receives $20,000, while under the Code the spouse inherits the whole $38,000. Should two or more children survive along with the spouse, the latter's share in New York drops to $14,000. In contrast, were the Code in effect, the spouse would still be entitled to the entire $38,000. Even if the intestate estate available for distribution to next of kin is much larger, the differences between the Code and New York law remain significant. Assume that the estate, net of taxes, debts, and expenses, amounts to $182,000 and that the spouse

16. UNIFORM PROBATE CODE § 2-101.

17. *Id.* art. II, pt. 1, General Comment.

18. Section 2-102 (Share of the Spouse) of the Uniform Probate Code (Code) reads as follows:

> The intestate share of the surviving spouse is:
>
> (1) if there is no surviving issue or parent of the decedent, the entire intestate estate;
>
> (2) if there is no surviving issue but the decedent is survived by a parent or parents, the first [$50,000], plus one-half of the balance of the intestate estate;
>
> (3) if there are surviving issue all of whom are issue of the surviving spouse also, the first [$50,000], plus one-half of the balance of the intestate estate;
>
> (4) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

19. UNIFORM PROBATE CODE § 2-102(3).

20. *Id.* § 2-102(4).

21. *Id.* § 2-102(2).

and one child survive. In New York the spouse inherits $92,000 while his or her share under the Code is $116,000. Should two or more children survive and, as in each of the above examples, all of the children are also issue of the surviving spouse, the spouse's Code share continues to be $116,000, but under New York law it would be reduced to $62,000.

It is submitted that adoption, *vel non*, of the Code's law of intestate succession should stand or fall on a critique of section 2-102. The primary effect of New York's legislative acceptance of this part of the Code would be an increase in the intestate share of the surviving spouse. Thus, the burden is on the Code to justify the enhanced portion allotted to the surviving spouse.

The comment to section 2-102 states that the plan thereof "reflects the desires of most married persons, who almost always leave all of a moderate estate or at least one-half of a larger estate to the surviving spouse when a will is executed."[22] To sustain the validity of the Code's rationale, it must be assumed that (1) the so-called intestate intent is accurately mirrored by analysis of what is done by those who do leave wills and (2) effectuation of such intent ought to be the motivating factor in the statutory pattern of distribution.

As to the first question, whether analysis of testate distributions is a valid indicator of the intent of those who die without wills, the Code's general comment preceding the sections on intestacy states that "[t]he Code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death, and for this purpose the prevailing patterns in wills are useful in determining what the owner who fails to execute a will would probably want."[23] The comment presumes the validity of the correlation; the Code offers no explanation of its position or of the factors that may, and probably do, differentiate the intent of those who die with and without wills. In defense of the Code this assumption is an instinctive one for which there exists some supporting evidence.[24]

22. *Id.* § 2-102, Comment.

23. *Id.* art. II, pt. 1, General Comment.

24. *See* M. SUSSMAN, J. CATER & D. SMITH, THE FAMILY AND INHERITANCE 44 (1970); Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 260-63 (1963). Both of these studies analyzed the distributive patterns of a large number of wills and found variation from intestate statutes. In the Dunham study, one hundred percent of those testators survived by spouse and children left the entire estate to the spouse. Dunham, *supra* at 252. Sussman's group found that, when a spouse and lineal

The more difficult question is (2); whether patterns of descent and distribution ought to be predicated on the fiction of effectuating the decedent's intent. For myriad reasons, be they psychological, sociological, emotional, or intellectual, be they derived from ennui or even laziness,[25] each individual decedent has not expressed his intent. Why should millions of dollars worth of property be transferred in thousands of situations where no intent has been articulated? The point here is not to question such transfers but to examine their rationale.

Rather than using the presumed intent of the decedent as the primary rationale for laws of intestate succession, it would be preferable to recognize that no intent has been expressed and, for whatever reason, the individual has left the latter to be decided by society.[26] At the least,[27] society's interest is the transfer of family prop-

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kindred survived, eighty-five percent of all testators left everything to the spouse. SUSSMAN, *supra* at 89.

Age and financial differences between those who die with and without wills were also noted. These statistics indicate that persons who die intestate are typically younger and less wealthy than those who execute wills. SUSSMAN, *supra* at 62-82; Dunham, *supra* at 242-45, 248-51. However, attempts, based on the information contained in these studies, to recast intestacy laws have not adequately taken into account the effect of such distinctions. In addition to the differing characteristics of testate and intestate decedents, the very implications of volition in a will situation are often overlooked.

> The analogy of the dispositions made by testators is some answer, but not a conclusive one. It must be remembered that the testator who leaves his estate to his widow does so knowing the facts, and knowing his widow. In making a universal "will" the law ignores these factors, and there are good grounds for the law being more cautious than an individual dealing with his own property at his own risks.

Mitchell, *Report of the Committee on Intestate Succession*, 14 MODERN L. REV. 478, 480 (1951). Therefore the reliability of will surveys as a guideline to intestate "intent" remains open to question.

25. "Further, it seems probable that most intestates die as such, not because they are satisfied with the provisions the law makes for them but simply because they have never got round to making a will." Mitchell, *supra* note 24, at 480.

26. One commentator has stated:

> Intestacy is in fact mostly "chosen" only by default. It is a statutory plan adopted by government and imposed for social rather than individualistic reasons on all those who do not make use of volitional alternatives.

Friedman, *The Law of the Living, The Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 355.

27. Remarkably diverse commentators have advocated a more confiscatory approach by society. "The portion [of the earth] occupied by any individual ceases to be his when he himself ceases to be, and reverts to society." T. JEFFERSON, JEFFERSON'S WORKS 454 (Monticello ed. ____). "Inherited economic power is as inconsistent with the ideals of this generation as inherited political power was inconsistent with the ideals of the generation which established our Government." K. MARX & F. ENGELS, MANIFESTO OF THE COMMUNIST PARTY 30

erty so as to maintain the family as a secure unit. Society, through state legislatures, may well decide that the best way of transferring intestate assets so as to preserve the security of the family survivors is to channel all of the property to the spouse, trusting that he or she will make appropriate provisions for any children or elderly dependents.[28] Or, the interests of society may better be served by the Code's scheme of devolution in which the surviving spouse's share is greatly enhanced vis-a-vis traditional patterns of distribution. Irrespective of whether societal interest or reflection of the average intestate's intent offers the better rationale, the present New York practice of distributing two-thirds of the estate to children has distinct disadvantages. Several of the reasons against leaving only one-third of the estate to the spouse are: (1) where the children are grown, they may well be in a better position to care for themselves financially than is the spouse; (2) where the children are young, the surviving spouse usually becomes the financial guardian and is frequently burdened by the cumbersome formalities of managing the family assets;[29] and (3) a one-third share for the spouse seems incompatible with the fundamental concept of marriage as a partnership.

Concerning the question of whether there are compelling reasons for the present New York policy, the answer is no. New York, along with the rest of the colonies, modeled its rules of intestate succession after the English Statute of Distribution of 1670,[30] in which the

(1948). While legislatures have the power to abolish inheritance by the family, Irving Trust Co. v. Day, 314 U.S. 556, 562 (1941) ("the dead hand rules succession only by sufferance"), the exercise of such power beyond present schemes of taxation is undesirable.

28. Recent legislation indicates that a slight trend in this direction is discernible.

> [I]n three of the five states that have adopted substantially all of UPC, the enactments go farther than UPC in making the spouse the sole heir. Thus, in the Alaska, Colorado, and Arizona enactments of UPC, local draftsmen eliminated the decedent's parents as heirs when a spouse survived.

RESPONSE OF THE JOINT EDITORIAL BOARD TO THE STATE BAR OF CALIFORNIA'S "UNIFORM PROBATE CODE: ANALYSIS AND CRITIQUE" 3-4 (1974).

29. UNIFORM PROBATE CODE, § 2-102, Comment:

> [I]n the small estate (less than $50,000 after homestead allowance, exempt property, and allowances) the surviving spouse is given the entire estate if there are only children who are issue of both the decedent and the surviving spouse; the result is to avoid protective proceedings as to property otherwise passing to their minor children.

30. 22 & 23 Car. II, c. 10. For the adoption of the English statute in New York, see *In re* Youngs, 73 Misc. 335, 132 N.Y.S. 689 (Sur. Ct. 1911); Page, *Descent Per Stirpes and Per Capita*, 1946 WIS. L. REV. 3, 22-27. While the English rule applied only to personalty, realty being governed by the doctrine of primogeniture, many American jurisdictions soon rejected

widow and children were entitled respectively to one-third and two-thirds of the decedent's personalty. The English statute itself codified that which, by 1670, had been common law for generations.[31] Thus does a 20th century New York law patterned after a 17th century English law that itself drew on the values of a 13th century agrarian society attempt to serve the needs of families living in today's socioeconomic environment. While traditional policies are not necessarily inapplicable to present circumstances, the fact that these are laws founded on ancient notions is certainly not a compelling reason for their continuance today.

Concluding the critique of section 2-102, it is submitted that more generous treatment of the surviving spouse (1) will better advance society's interest in protecting the immediate family, (2) may better approximate the intent of the average intestate,[32] and (3) is not met with convincing arguments that justify retention of the existing statute. Adoption in New York of section 2-102 clearly would be a substantial improvement on present law.

With regard to its treatment of the other surviving members of the decedent's family the Uniform Probate Code's system of devolution of intestate property contains, with a few exceptions, relatively minor variations from New York law. Section 2-103[33] disposes of that

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this distinction. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 3 (2d ed. 1953). This decision to discard primogeniture may have been motivated by economic and philosphic needs of the colonies. Andrews, *The Influence of Colonial Conditions as Illustrated in the Connecticut Intestacy Law*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 431, 436 (1907). New York, however, did not abolish primogeniture until 1786, Morris, *Primogeniture and Entailed Estates in America*, 27 COLUM. L. REV. 24, 25 n.17 (1927), and did not treat personalty and realty in the same manner until 1929, Act of April 1, 1929, ch. 229, § 6, [1929] N.Y. Laws 504 (now N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 1967), *as amended*, (McKinney Supp. 1975)).

31. While the early history of intestacy laws is obscure, Gross, *The Medieval Law of Intestacy*, 18 HARV. L. REV. 120 (1904), there was a medieval development in the law of wills that foreshadowed the rules of succession. Under early common law a testator could only will one-third of his personalty if he was survived by his wife and issue, the wife taking one-third and the issue one-third. 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 550-54. If only the wife or only the issue survived, one-half of the estate could be claimed. These rights, enforceable by the writ *de rationabili parte bonorum*, analogous to a forced share, gradually lost their place in English law. However, there is little question that they formed the basic framework of intestacy law from the 13th to the 17th century. *Id.* at 554-63. The portion of an intestate's personalty over and above the shares of widow and children was called "the dead man's part." Originally to be "distributed for the benefit of his soul," this part could fund the saying of masses or maintenance of roads. Gross, *supra* at 128 & n.4.

32. *But see* note 24 *supra*.

33. Section 2-103 (Share of Heirs Other Than Surviving Spouse) of the Code reads as follows:

part of the intestate estate not inherited by the surviving spouse, or all of the estate where there is no spouse. The property passes in accordance with a series of priorities, the first of which is the issue of the decedent. Lineal descendants take the entire estate in preference to any other relatives (again, the rest of this discussion relates only to property not designated for the surviving spouse). Irrespective of whether the issue are the decedent's children or grandchildren or even great-grandchildren, they share equally so long as they are of the same degree of kinship. However, where they are of unequal degree, those further down the line take by representation.[34] Assume that the intestate is survived by two daughters and three grandchildren, children of a predeceased son. The two daughters each fall heir to one-third of the estate and the three grandchildren are each entitled to one-ninth of the property, in effect, sharing equally their deceased father's one-third interest.

The next priority is accorded to the decedent's parents. If either or both parents, but no issue, survive, the parent or parents inherit everything above and beyond the spouse's share.[35] The Code continues the practice observed in many states preferring all lineal descendants to any lineal ascendants. In the great majority of cases, where the beneficiaries are children or grandchildren, the result is justified, if for no other reason than instinct. However, in the statisti-

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The part of the intestate estate not passing to the surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes as follows:

(1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;

(2) if there is no surviving issue, to his parent or parents equally;

(3) if there is no surviving issue or parent, to the brothers and sisters and the issue of each deceased brother or sister by representation; if there is no surviving brother or sister, the issue of brothers and sisters take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree then those of more remote degree take by representation;

(4) if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.

34. UNIFORM PROBATE CODE § 2-103(1).

35. *Id.* § 2-103(2).

cally rare cases where the nearest lineal descendants are great-grandchildren, it seems absurd that the law passes everything down to beneficiaries that are three generations down the line without providing anything for the decedent's parents, especially since the parents would, at the least, have to be in their mid-seventies.[36]

In the absence of any lineal descendants or parents, the estate goes to the decedent's brothers and sisters and issue of any deceased siblings by representation.[37] Should no siblings survive the intestate, the descendants of brothers and sisters divide the estate equally unless they are not of the same degree of relationship to the decedent, in which case those of more remote degree inherit by representation. Thus, if the decedent's closest surviving relatives are two nieces and one nephew, the estate is divided three ways. Change the example and assume that the decedent's next of kin are two nieces and two grandnephews who are sons of a predeceased nephew. Now each niece inherits one-third of the estate and each of the grandnephews is entitled to a one-sixth share.

The last priority mandated by section 2-103 occurs when the closest surviving relatives are the decedent's grandparents or their issue. In such cases, the estate is distributed half and half through the paternal and maternal grandparent lines.[38] If, for example, both paternal grandparents die leaving children, the paternal aunts and uncles share equally that one-half of the estate alloted to the paternal side. Should any of the paternal aunts or uncles predecease the decedent and leave issue, the latter, first cousins to the decedent, share the interest allotted to their predeceased parent. Finally, in the event that there is neither a surviving grandparent nor issue of a grandparent on one of the two sides, then the one-half of the estate designated for that side passes to relatives on the other side.

It is apparent that with regard to the share of heirs other than the surviving spouse, the Code and New York law are quite similar. Under the Code the enhanced portion for the spouse decreases the share assigned to children or parents of the decedent, depending upon the particular combination of survivors. Once the spouse is removed from the picture, both the Code and New York law create

36. One possible reason for this preference is to avoid the tax on successive transfers of the property that would result from inheritance by the older person. This may be a case of tax considerations restraining the development of a more socially desirable distribution.

37. UNIFORM PROBATE CODE § 2-103(3).

38. *Id.* § 2-103(4).

priorities first to issue, then to parents, then to siblings or their lineal descendants and finally to grandparents or their issue. New York's provision for great-grandparents or their issue[39] will so rarely be relevant that the Code's termination of inheritance beyond the line of grandparents and their issue is not a substantial deviation from New York law. Both statutes "simplif[y] proof of heirship and eliminate will contests by remote relatives"[40] by essentially limiting inheritance to grandparents and their issue.

Two substantive differences between New York's and the Code's dispositive patterns should be mentioned. The first relates to the Code's extension of per stirpes distribution to issue of grandparents. In contradistinction, New York uses the civil law computation-of-degrees method. To illustrate the difference, assume that the intestate's nearest relatives are three aunts and one first cousin, the son of a predeceased uncle. In New York, the three aunts, three degrees removed, would each inherit one-third of the estate; the first cousin, being four degrees distant from the decedent would be excluded. Analyzing the same example under the Code, the first cousin would be entitled, by representation, to his predeceased father's one-fourth share and the portion of each aunt would be one-fourth rather than one-third.

The second substantive difference concerns the Code's half and half allocation to maternal and paternal grandparents or their issue. Using the preceding hypothetical assume that the first cousin, son of the decedent's predeceased uncle, is on the paternal side of the family and the three aunts are on the maternal side. The Code distribution would be one-sixth to each of the aunts and one-half to the cousin. As seen above, in New York the cousin would be excluded. Apart from these two instances, Code section 2-103 would not significantly alter New York law.

III. Survivorship

An apothegm of the common law of descent and distribution declares that to be an heir one must survive the decedent. However, establishing the fact of survivorship has become more difficult as

39. The purpose behind this extension of intestate succession where the decedent was an infant or an adjudged incompetent is to broaden the class of potential distributees when the decedent is unable to execute a will. *In re* Estate of Schaefer, 76 Misc. 2d 488, 490, 351 N.Y.S.2d 312, 315 (Sur. Ct. 1973) (dictum).

40. UNIFORM PROBATE CODE, art. II, pt. 1, General Comment.

multiple deaths in transportation accidents have increased. To remedy this problem of proof, New York adopted the Uniform Simultaneous Death Act in 1944.[41] For the purpose of determining one's heirs, the statute provides that, where there is "no sufficient evidence that the persons have died otherwise than simultaneously," each person shall be deemed to have survived the others.[42]

One major drawback of the Uniform Simultaneous Death Act is its failure to alleviate the burden of complex factual investigations into the question of survivorship for an instant. The answer to this question can have a profound effect on the statutory scheme of distribution. In New York proof that an individual survived by one second will suffice to qualify that person as an heir.[43]

Hoping to eliminate intricate evidentiary problems that too frequently invite hypothetical answers,[44] the drafters of the Uniform Probate Code created a requirement in section 2-104 that, to be an heir, one must survive the decedent by *120 hours*.[45] The Code's unstated premise seems to be that those who survive an accident for five days are likely to live substantially longer. If survival for five days cannot be established, then, as in the Uniform Simultaneous Death Act, there is a presumption that the potential heir does not inherit.

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41. N.Y. EST., POWERS & TRUSTS LAW § 2-1.6 (McKinney 1967).

42. *Id.* § 2-1.6(a).

43. *In re* Di Bella's Estate, 199 Misc. 847, 856, 100 N.Y.S.2d 763, 770 (Sur. Ct. 1950), *aff'd*, 279 App. Div. 689, 107 N.Y.S.2d 929 (3d Dep't 1951). In this case all the members of a family were found dead due to asphyxiation by gas. The order of survivorship was established by the relative states of decomposition of the bodies and the asthmatic condition of one of the victims. *Id.* at 854-55, 100 N.Y.S.2d at 768-69.

44. *See In re* Moore's Will, 14 Misc. 2d 85, 178 N.Y.S.2d 1000 (Sur. Ct. 1958) (double murder and suicide; order of death of trust beneficiaries determined by need for murderer to reload revolver, number of wounds in bodies, and other circumstantial evidence).

45. Section 2-104 (Requirement That Heir Survive Decedent for 120 Hours) of the Code reads as follows:

> Any person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for the purposes of homestead allowance, exempt property and intestate succession, and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. This section is not to be applied where its application would result in a taking of intestate estate by the state under Section 2-105.

A similar provision was adopted in Ohio prior to the promulgation of the Code. OHIO REV. CODE ANN. § 2105.21 (Page 1968) (30-day survival requirement). There is a similar requirement in the Code for those who would take under a will. UNIFORM PROBATE CODE § 2-601.

The Code's requirement of extended survivorship also rectifies a second failing of the Uniform Simultaneous Death Act—succession by a surviving spouse who in turn survives but a brief time, then dies leaving both estates to his or her collateral relatives. For example, if a childless couple were involved in an automobile accident, both dying intestate with no parents surviving, and the wife lived only a day longer than her husband, under current New York law the wife's relatives would receive the whole of the couple's property and the husband's family would inherit nothing. Under the Code, the wife would not qualify as her husband's heir. Thus his property would pass to his family and the wife's property would devolve to hers. This distribution not only approximates the husband's intent had he foreseen the brief survival of his wife, but also produces a more equitable result.

A potential impediment to the adoption of section 2-104 is its interrelationship with the major estate tax concern, the marital deduction.[46] If the spouse does survive for 120 hours and qualifies as an heir, the deduction is still available. However, if the spouse does not survive for 120 hours, the marital deduction is lost. The drafters of the Code are of the opinion that, considering the size of most intestate estates, the loss of the deduction is outweighed by the potential benefit this section confers should one spouse die shortly after the other.[47]

One exception to the entire plan of section 2-104 arises when disqualification of a person as an heir would result in an escheat to the State. In this event the person attains the status of an heir even though he fails to survive the decedent by the requisite 120 hours.

Balance the evidentiary considerations and the likelihood of more equitable distributions against the potential loss of some estate tax benefits. The Code's requirement of survivorship is to be preferred to the corresponding law of New York.

IV. Escheat

Section 2-105 of the Uniform Probate Code directs that, "[i]f there is no taker under the provisions of this Article, the intestate

46. INT. REV. CODE OF 1954, § 2056. Conditions requiring survivorship for up to six months will not result in disqualification of the interest passed for the marital deduction. *Id.* § 2056(b)(3).

47. UNIFORM PROBATE CODE § 2-104, Comment.

estate passes to the [state]."[48] This statement is also declarative of New York law.[49] The only difference between proposed and present law is that escheat can, in theory, occur earlier under the Code. If the nearest relative is beyond the line of grandparents or their issue, for example a great-uncle, under the Code the state will always take in preference to the "heir." In New York, there is a possibility that the great-uncle could inherit. This would happen only where the decedent was an infant or an adjudged incompetent at the time of his death.[50] Thus, the impact of section 2-105 on New York law would be negligible.

V. Representation

Representation is the process by which issue of a predeceased relative of the decedent inherit the share such relative would have obtained had he survived. In New York the devolution of intestate property by representation is limited to the decedent's lineal descendants and to siblings and their issue.[51] Here the statute directs distribution per stirpes,[52] with the added proviso that where the distributees are equally related to the decedent their shares are equal.[53]

Most states mandate distribution per stirpes, but the question remains at what generational level is the primary division effected. Some states respond by making the primary division at the level of familial relationship that is closest to the decedent, irrespective of whether anyone of that status is alive.[54] Each succeeding generation then takes by representation. To illustrate this arrangement, assume that the decedent is survived only by two nephews who are children of a predeceased brother and by one niece who is the child of a predeceased sister. There are no siblings living and no others

48. *Id.* § 2-105.

49. New York requires escheat of real property, N.Y. ABAND. PROP. LAW § 200 (McKinney 1944), and personal property, *In re* Hammond's Estate, 2 App. Div. 2d 160, 154 N.Y.S.2d 820 (2d Dep't 1956), *aff'd*, 3 N.Y.2d 567, 147 N.E.2d 777, 170 N.Y.S.2d 505 (1958), if there are no heirs to the property.

50. *See* text accompanying notes 15, 39 *supra*.

51. N.Y. EST., POWERS & TRUSTS LAW §§ 4-1.1(a)(1), (2), (6), (7), (c) (McKinney 1967), *as amended*, (McKinney Supp. 1975).

52. *Id.*

53. *Id.* § 4-1.1(b) (McKinney 1967).

54. *See, e.g.*, *In re* Estate of Frear, 180 Cal. App. 2d 829, 4 Cal. Rptr. 801 (1960); *In re* Estate of Davol, 100 So. 2d 188 (Fla. Dist. Ct. App. 1958) (acknowledging that this is the minority rule); Appeal of Messler, 97 N.J. Eq. 271, 127 A. 85 (Prerogative Ct. 1924).

have died leaving issue. The basic division would be at the brother-sister level; the property would pass by representation, one-half to the niece and one-fourth to each nephew.

However, New York, exemplifying the majority of American jurisdictions,[55] would divide the estate differently. The New York practice is to go to the nearest relationship where someone is alive and make the primary division at that generational level, all others taking by representation.[56] In the preceding example, the basic division would be made at the niece and nephew level and each of the survivors would inherit one-third of the estate.

The Uniform Probate Code prescribes a similar pattern of distribution. Section 2-106 states:[57]

> If representation is called for by this Code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.

Both the Code and New York emphasize the equal treatment of people who are equally related to the decedent. The only significant difference between the two systems is the Code's extension of inheritance by representation to issue of grandparents.[58] New York dis-

55. *See, e.g., In re* Reil's Estate, 70 Idaho 64, 211 P.2d 407 (1949) (Idaho's recent adoption of the Code reinforces this position); Parett v. Paul, 115 Ohio App. 488, 185 N.E.2d 798 (1962); *In re* Le Roux's Estate, 55 Wash.2d 889, 350 P.2d 1001 (1960). On the subject of per stirpes and per capita generally, see Page, *Descent Per Stirpes and Per Capita*, 1946 WIS. L. REV. 3.

56. *In re* Nunziato's Estate, 202 N.Y.S.2d 39 (Sur. Ct. 1960); *In re* McKeon's Estate, 25 Misc. 2d 850, 199 N.Y.S.2d 158 (Sur. Ct. 1960).

57. UNIFORM PROBATE CODE § 2-106.

58. There is another instance in which the Code's definition of representation would produce a distribution different from that of New York. Assume the intestate is survived only by a daughter and three great-grandchildren who are grandchildren of a predeceased son. The Code would first divide the estate at the nearest degree of kinship at which an heir survives. This would be the level of the intestate's children; the daughter would take one-half and the other half would be divided among the predeceased son's issue "in the same manner." By using this phrase, the Code sanctions a later per capita division after the first allocation of shares. In our example, since no one on the level of intestate's grandchildren survives, the three great-grandchildren inherit equal, one-sixth shares of the estate. In New York and virtually all other jurisdictions, one would need to know the number of grandchildren and their respective offspring before shares could be allocated per stirpes to the intestate's great-grandchildren. If the three great-grandchildren were descended, one from a predeceased grandchild, and two from another predeceased grandchild, their shares, by representation, would be respectively one-quarter, one-eighth, and one-eighth. *See* Waggoner, *A Proposed*

tributes to issue of grandparents on a winner-take-all basis; those in the nearest degree of kinship inherit the estate.

Given the posture of distant inheritance, beyond the immediate family, among the decedent's aunts, uncles, first cousins, and first cousins once removed, it seems preferable to distribute intestate property widely rather than to a select few.[59] Thus, the change section 2-106 would bring to New York is both slight and salutary.

VI. Half Blood Kindred

If two persons have but one natural parent in common they are half blood siblings.[60] Accordingly, the descendants of such persons will be relatives of the half blood. With the incidence of divorce on the rise, it follows that half blood relationships occur more frequently. Elimination of distinctions between half blood and whole blood relatives has a beneficial effect in that it may reduce tensions within the family. For purposes of intestate succession, both New York[61] and the Uniform Probate Code's section 2-107,[62] in wording that is virtually identical, treat half blood relatives of the decedent as if they were of the whole blood.[63]

VII. Afterborn Heirs

Traditionally, an unborn person's property rights come into existence at the moment of conception providing that person is later born

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Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants, 66 NW. U. L. REV. 626, 630-31 (1971).

59. Both systems are flawed in some instances. A seeming inequity under the Code would be a maternal aunt sharing an estate equally with a paternal first cousin twice removed. Under New York's approach, a paternal uncle could take all in preference to fifteen maternal first cousins. While no system is infallible with regard to all possible combinations of survivors, error in favor of a wider class of distributees appears to be the lesser evil.

60. Parett v. Paul, 115 Ohio App. 488, 491, 185 N.E.2d 798, 800 (1962).

61. N.Y. EST., POWERS & TRUSTS LAW § 4-1.1(d) (McKinney 1967).

62. "Relatives of the half blood inherit the same share they would inherit if they were of the whole blood." UNIFORM PROBATE CODE § 2-107.

63. *See, e.g.*, ILL. REV. STAT. ch. 3, § 11 (1965); MASS. GEN. LAWS ANN. ch. 190, § 4 (1969); N.J. STAT. ANN. § 3A:4-6 (1953); N.C. GEN. STAT. § 29-3(3) (1966). *But see* CAL. PROB. CODE § 254 (West 1956) ("ancestral estates"); FLA. STAT. ANN. § 732.105 (Spec. Pamphlet 1975) (half blood relatives take half-shares when heirs include those of whole blood); WASH. REV. CODE ANN. § 1.04.035 (Supp. 1975) ("ancestral estates"). The "ancestral estates" rule, which denies half blood relatives a share in property the decedent derived from an ancestor unless the half blood was also of that ancestor's blood, was applied by New York until 1929 when the current statute was enacted. Act of April 1, 1929. ch. 229, § 6, [1929] N.Y. Laws 504 (now N.Y. EST., POWERS & TRUSTS LAW § 4-1.1 (McKinney 1967), *as amended*, (McKinney Supp. 1975)).

alive.[64] Similarly, the right of an unborn child to inherit attaches at conception if that child is later born alive. While some states will only preserve intestate rights for unborn children who are issue of the decedent,[65] both New York[66] and the Uniform Probate Code's section 2-108[67] protect a larger class of unborn persons. Collateral relatives' unborn offspring, assuming they are born alive, are within the ambit of these statutes. New York extends the right to inherit to those "distributees" conceived before decedent's death and "born alive" thereafter,[68] while the Code allows "relatives" conceived before decedent's death and "born" thereafter to share in the estate.[69] "Relatives" seems more precise than "distributees," but "born alive" is more exact than "born." New York's protective policy toward all heirs *en ventre sa mere* would continue unchanged under the Code's formulation.

VIII. Adoption

Since 1887, New York has allowed an adopted child and an adoptive parent to inherit from each other.[70] Until recently, however, these rights had not precluded dual inheritance; after adoption the child could still take from and through his natural parents.[71] Desir-

64. 1 W. BLACKSTONE, COMMENTARIES *130.

65. *See, e.g.*, FLA. STAT. ANN. § 732.106 (Spec. Pamphlet 1975) (afterborn issue); ILL. REV. STAT. ch. 3, § 13 (1965) (afterborn child); MASS. GEN. LAWS ANN. ch. 190, § 8 (1969) (afterborn child).

66. N.Y. EST., POWERS & TRUSTS LAW § 4-1.1(e) (McKinney 1967).

67. "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent." UNIFORM PROBATE CODE § 2-108.

68. N.Y. EST., POWERS & TRUSTS LAW § 4-1.1(e) (McKinney 1967).

69. UNIFORM PROBATE CODE § 2-108. Would a child born within 120 hours of the decedent's death have to survive for the remainder of the 120 hours to satisfy the requirements of section 2-104 and qualify as an heir? The answer appears to be yes. Section 2-108 treats the afterborn heir as if he were born in the lifetime of the decedent and section 2-104 requires *any* heir to survive for 120 hours after the decedent's death.

70. Act of June 25, 1887, ch. 703, [1887] N.Y. Laws 909. This statute also gave the child's heirs and the next of kin the right to inherit from the adoptive parent. The statute was construed to provide inheritance rights for children adopted from institutions. United States Trust Co. v. Hoyt, 150 App. Div. 621, 135 N.Y.S. 849 (1st Dep't 1912). For a history of adoption and inheritance in New York, see 38 ST. JOHN'S L. REV. 380 (1964).

71. Act of April 9, 1938, ch. 606, § 1, [1938] N.Y. Laws 1615; Act of April 22, 1915, ch. 352, § 1, [1915] N.Y. Laws 1068. In fact, involvement with the natural family was greater since the child could not take from relatives of his adoptive parents. Hopkins v. Hopkins, 202 App. Div. 606, 195 N.Y.S. 605 (4th Dep't 1922), *aff'd mem.*, 236 N.Y. 545, 142 N.E. 277 (1923). This was thought to reflect the absence of consent by the relatives to the adoptive parent's decision. However, these relatives could inherit from the child. *In re* Estate of Hollstein, 251 App. Div. 771, 295 N.Y.S. 598 (3d Dep't 1937) (per curiam).

ous of "placing the adopted child so far as possible within the bloodlines of his new family for inheritance purposes,"[72] the New York legislature severed the remaining ties of succession between natural family and adopted child and further strengthened the relationship with the adoptive family by granting the child the right to inherit from his adoptive parents' relatives.[73] The first change, eliminating the natural family, is subject to exception where a natural parent consents to the adoption of the child by such parent's spouse. Due to ambiguous phrasing, this exception was interpreted to preserve intestate succession rights in and from *both* natural parents.[74] Clarifying the legislative intent, a later amendment provided that the only time an adopted child and his natural parent will share inheritance rights is when the natural parent is married to an adoptive parent of the child.[75] With this one qualification, present New York rules of descent and distribution declare that an adopted child stands with his adoptive parents as if he were a natural child.

Cognizant of the psychological and sociological importance of transplanting the child as completely as possible into the adopting family, the drafters of the Uniform Probate Code structured a similar provision. In section 2-109(1)[76] the adopted person is considered the child of the adopting parent and not of the natural parents,[77] but

72. *In re* Bankers Trust Co., 31 N.Y.2d 322, 327-28, 291 N.E.2d 137, 139-40, 338 N.Y.S.2d 895, 898 (1972).

73. Act of April 16, 1963, ch. 406, § 1, [1963] N.Y. Laws 1788 (codified at N.Y. DOM. REL. LAW § 117 (McKinney Supp. 1975).

74. *In re* Karron's Will, 52 Misc. 2d 367, 275 N.Y.S.2d 933 (Sur. Ct. 1966). The statute at this time provided that if adoption by a spouse occurred there would be no effect on the rights of child and consenting spouse "to inherit from and through each other *and their natural and adopted kindred.*" Act of April 16, 1963, ch. 406, § 1, [1963] N.Y. Laws 1788, *as amended*, N.Y. DOM. REL. LAW § 117 (McKinney 1975) (emphasis added).

75. Act of March 8, 1966, ch. 14, § 1, [1966] N.Y. Laws 35 (codified at N.Y. DOM. REL. LAW § 117 (McKinney Supp. 1975)).

76. Section 2-109(1) of the Code reads as follows:

> If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person,
>
> (1) an adopted person is the child of an adopting parent and not of the natural parents except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and that natural parent.

77. Section 2-109 of the Code is also important as a reference point for section 2-611 of the Code, which adopts the intestate succession definitions of "child" in order to construe generic terms in wills. This treatment is paralleled in New York where an adopted child will be treated as a natural child in determining the members of a class referred to as "children," "issue," etc., in a will. N.Y. EST., POWERS & TRUSTS LAW § 2-1.3(a)(1) (McKinney 1967); *see In re* Bankers Trust Co., 31 N.Y.2d 322, 291 N.E.2d 137, 338 N.Y.S.2d 895 (1972); *In re* Grace's Will, 46 Misc. 2d 878, 261 N.Y.S.2d 236 (Sur. Ct. 1965).

there is an exception to prevent the adoption from altering the inheritance rights between the child and *that* natural parent whose spouse is adopting the child.[78]

There is a possibility that this latter position will be modified. The Joint Editorial Board for the Uniform Probate Code has recommended that the Uniform Law Commissioners adopt a revised version of section 2-109(1). The proposed amendment would alter the exception to provide that, when the spouse of a natural parent adopts the child, inheritance from, through, or by *both* natural parents will be preserved.[79] The policy of protecting the child from traumatic revelations of his former family may be inapplicable here. The continued presence of one natural parent increases the likelihood that the child knows the details of his past and that ties with relatives of the other natural parent still exist.

One further distinction between section 2-109(1) and current New York law involves the right of *prior* adoptive parents where the child is adopted a second time. While the policies of both the Code and the law of New York favor limiting inheritance rights of the adopted child to only one family, the New York statute may more readily be construed to reach that result. Section 117 of New York's Domestic Relations Law, while not explicitly stopping inheritance from or by prior adoptive parents, does so by implication.[80] The Code terminates only the relationship with natural parents; it does not address itself to the question of prior adoptive parents. Two commentators have criticized the Code's lack of clarity on this point.[81] To implement fully the single-family policy, the Code should eliminate prior adoptive parents from any inheritance scheme subject to the usual exception where the child is adopted by the new spouse of the prior adoptive parent.

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78. UNIFORM PROBATE CODE § 2-109(1).

79. UPC NOTES, No. 12, at 4 (June 1975).

80. The New York statute provides an exception to the loss of inheritance rights where a "natural *or adoptive* parent" consents to adoption by his or her spouse. N.Y. DOM. REL. LAW § 117 (McKinney Supp. 1975) (emphasis added). This implies that prior adoptive parents would otherwise be eliminated as potential heirs of the child.

81. Curry, *Intestate Succession and Wills: A Comparative Analysis of Article II of the Uniform Probate Code and the Law of Ohio*, 34 OHIO ST. L.J. 114, 126 (1973); O'Connell & Effland, *Intestate Succession and Wills; A Comparative Analysis of the Law of Arizona and the Uniform Probate Code*, 14 ARIZ. L. REV. 205, 219 (1972).

IX. Illegitimacy

Ever since the common law first labelled him *filius nullius*,[82] the illegitimate child has been denigrated. Decedents' estate law is no exception. Under early New York law the inheritance rights of the illegitimate child were severely restricted. He could only inherit from his mother when she died leaving no lawful issue.[83] Nothing could pass to the illegitimate child from any of his mother's lawful kindred.[84] Never was there any inheritance from or through the father.[85]

The practice of withholding rights from illegitimate children is predicated on the belief that, by so doing, prohibited social behavior will more effectively be deterred. The efficacy of this policy is highly questionable and it has undoubtedly created undeserved hardships by "punish[ing] illegitimate children for the misdeeds of their parents."[86]

Recently New York has moved to restore certain rights to illegitimate children by decreasing the number of children labelled illegitimate and by increasing their inheritance rights.[87] Since 1965 New York law has treated the illegitimate child as a legitimate offspring of the mother and permitted inheritance in both directions among the child, mother, and maternal kindred.[88] If there is a judicial

82. *In re* Cady's Estate, 257 App. Div. 129, 130, 12 N.Y.S.2d 750, 751 (3d Dep't), *aff'd*, 281 N.Y. 688, 23 N.E.2d 18 (1939); 1 W. BLACKSTONE, COMMENTARIES *248.

83. Decedent Estate Law § 89, ch. 18, § 89, [1909] N.Y. Laws 14, *as amended*, Act of April 1, 1929, ch. 229, § 6, [1929] N.Y. Laws 504 (repealed 1965). Until 1929 the legitimate descendants of an illegitimate child could not inherit from the mother even if she died without lawful issue. Act of April 1, 1929, ch. 229, § 6, [1929] N.Y. Laws 504 (repealed 1965).

84. *In re* Cady's Estate, 257 App. Div. 129, 12 N.Y.S.2d 750 (3d Dep't), *aff'd*, 281 N.Y. 688, 23 N.E.2d 18 (1939). The only exception to this rule allowed the illegitimate child to inherit when the intestate was another illegitimate offspring of his mother. *In re* Karenius' Estate, 170 Misc. 652, 11 N.Y.S.2d 44 (Sur. Ct. 1939). When the illegitimate child himself was the intestate, his mother and maternal kindred were allowed to succeed to his property as if he were a legitimate child, subject of course to the rights of his widow and descendants. Decedent Estate Law § 98(9), ch. 18, § 98(9), [1909] N.Y. Laws 14, *as amended*, Act of April 1, 1929, ch. 229, § 6, [1929] N.Y. Laws 504 (repealed 1965).

85. Saks v. Saks, 189 Misc. 667, 668, 71 N.Y.S.2d 797, 798 (Fam. Ct. 1947) (suit to establish paternity).

86. Labine v. Vincent, 401 U.S. 532, 557 (1971) (Brennan, J., dissenting). "It is certainly unusual in this country for a person to be legally disadvantaged on the basis of factors over which he never had any control." *Id.* at 557-58.

87. Act of July 9, 1965, ch. 958, § 1, [1965] N.Y. Laws 2220 (now N.Y. EST., POWERS & TRUSTS LAW § 4-1.2 (McKinney 1967)).

88. The surviving spouse or issue of the illegitimate child may also inherit as if he were legitimate. N.Y. EST., POWERS & TRUSTS LAW § 4-1.2(b) (McKinney 1967).

finding of paternity and an order of filiation[89] entered in a proceeding instituted either during the pregnancy of the mother or within two years of the child's birth, the child and father may inherit from each other. However, kindred of the father still do not share inheritance rights with the child.[90]

In an effort to reduce the number of children considered illegitimate, New York modified the traditional legitimation procedure in 1969. Prior to that time a marriage between the parents of a child, either before or after his birth, had to be valid to legitimatize the child.[91] Under the revised statute any marriage, even if void, voidable, or annulled, will confer upon a child of that union the status of legitimacy.[92]

The process of restoring and protecting the rights of illegitimate children is given further impetus by the Uniform Probate Code's provision on illegitimacy and intestate succession, section 2-109(2).[93] As in the New York statute, the illegitimate child is, for the

89. The constitutionality of requiring an order of filiation as a condition on the right of an illegitimate child to succeed to his father's estate has been upheld in New York. *In re* Estate of Belton, 70 Misc. 2d 814, 335 N.Y.S.2d 177 (Sur. Ct. 1972). But the same provision has been held invalid to deny participation in a wrongful death recovery. Holden v. Alexander, 39 App. Div. 2d 476, 336 N.Y.S.2d 649 (2d Dep't 1972) (father recovering for illegitimate daughter's death); *In re* Johnson's Estate, 75 Misc. 2d 502, 348 N.Y.S.2d 315 (Sur. Ct. 1973).

This split follows the line drawn by the Supreme Court as to what type of statute discriminates against illegitimates. Labine v. Vincent, 401 U.S. 532 (1971), gave the states broad discretion in dealing with the rights of illegitimates under statutes of descent and distribution. In contrast, earlier decisions, Levy v. Louisiana, 391 U.S. 68 (1968), and Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), had held that the equal protection clause would not allow a state to discriminate against illegitimate children or their parents in wrongful death actions.

90. N.Y. EST., POWERS & TRUSTS LAW §§ 4-1.2(a)(2), (b) (McKinney 1967).

91. Act of April 17, 1961, ch. 843, § 1, [1961] N.Y. Laws 2346 (repealed 1969).

92. N.Y. DOM. REL. LAW § 24 (McKinney Supp. 1974) (originally enacted as Act of April 30, 1969, ch. 325, § 1, [1969] N.Y. Laws 1074).

93. Section 2-109 (Meaning of Child and Related Terms) of the Code reads as follows:

> If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person,
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> . . . .
>
> (2) In cases not covered by (1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:
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> (i) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or
>
> (ii) the paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, except that the paternity established under this subparagraph (ii) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child.

purposes of intestate succession, a child of the mother. This means full inheritance rights flow among the child, mother, and maternal kindred.

For the illegitimate child to be a child of the father, conditions similar to those in the New York statutes must be met. First, a marriage ceremony before or after the birth of the child will establish inheritance rights among the child, father, and paternal kindred even if the marriage is void.[94] Alternatively, under the Code an adjudication establishing paternity will create rights of inheritance in the child.[95] Here, there is some procedural variation from New York law. The Code sets no time limit after birth for instituting the paternity proceeding. Adjudications of paternity would even be allowed after the father's death if paternity could be established by clear and convincing proof. The purpose of this provision is to prevent the neglect of others from jeopardizing the child's opportunity to attain the status of a legitimate offspring.

Even where an adjudication of paternity is made, the right of the father and paternal kindred to inherit from or through the child is not assured. The father must have openly treated the child as his own and must not have refused to support him. Rarely would distribution to an unresponsive father approximate the intent of an illegitimate child. With the exceptions (1) of the possibility of inheritance by and from paternal kindred and (2) of the longer time allowed in which to file paternity suits, the Code's treatment of the right of illegitimate persons to succeed to intestate property is similar in all respects to New York.

X. Advancements

Under early statutes in England and this country, *inter vivos* gifts by a parent to a child that were not made in discharge of parental obligations reduced that child's intestate share, unless the parent manifested a contrary intent.[96] Due in part to increased *inter vivos*

94. UNIFORM PROBATE CODE § 2-109(2)(i).

95. *Id.* § 2-109(2)(ii).

96. The English Statute of Distribution of 1670, 22 & 23 Car. II, c. 10, § 5 served as the model for New York's advancement statute. *See* Beebe v. Estrabrook, 79 N.Y. 246, 250 (1879). Although the statute did not require that every gift from parent to child be considered an advancement, there arose a judicial presumption that any sizable transfer implied an intent to anticipate the child's share of the parent's estate. *Id.* at 254. Nevertheless, the New York statute had expressly exempted "maintaining or educating a child" from possible advancement treatment. Decedent Estate Law, § 89, ch. 18, § 89, [1909] N.Y. Laws 14, *as amended*,

transfers and their role in estate planning,[97] and in part to problems of proving intent, both New York and drafters of the Uniform Probate Code re-examined the doctrine of advancements. New York reversed the statutory connotation of an *inter vivos* gift by providing that neither a bequest in a will nor an intestate share will be diminished unless there is a contemporaneous writing by the donor or donee acknowledging such diminution.[98] Along with this curb on the unintentional use of the doctrine, New York extended the class of persons subject to a possible advancement of their testate or intestate share to include any distributee or beneficiary, not just those to whom the decedent stood in loco parentis.[99] The Code in section 2-110[100] requires a contemporaneous writing by donor or donee to establish the intent to charge an *inter vivos* gift against the heir's interest in the donor's estate.

To calculate the effect of an advancement on intestate shares, the usual procedure is to add the amount of the advancement to the estate's assets available for distribution, to divide that total according to the percentage due each distributee, and then to deduct the amount advanced from the donee's share. To illustrate, assume that two nephews and a niece whose aunt died intestate are the sole distributees of a net estate worth $39,000. If the niece received a $6,000 *inter vivos* gift as an advancement, the estate will yield shares of $15,000 for each nephew and $9,000 for the niece. New York mandates the use of this procedure[101] and, while the Code does

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Act of April 1, 1929, ch. 229, § 6, [1929] N.Y. Laws 504.

97. "Most inter vivos transfers today are intended to be absolute gifts or are carefully integrated into a total estate plan." UNIFORM PROBATE CODE § 2-110, Comment.

98. N.Y. EST., POWERS & TRUSTS LAW § 2-1.5 (McKinney 1967).

99. *Id.* § 2-1.5(a).

100. Section 2-110 (Advancements) of the Code reads as follows:

> If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue, unless the declaration or acknowledgment provides otherwise.

The Code treats satisfaction in will situations separately in section 2-612.

101. N.Y. EST., POWERS & Trusts Law § 2-1.5(c) (McKinney 1967). There is also a safeguard provision in section 2-1.5(e) to prevent the addition of such "fictitious" assets to the total estate from affecting the elective share of a surviving spouse.

not on its face require it, the comment to section 2-110 recognizes the general acceptance of the method of computation.[102]

Two aspects of the law of advancements are accorded different treatment by New York and the Code. The first variation is slight. Under section 2-110 of the Code an advancement to a donee who later predeceases the decedent will *not* be allowed to diminish the intestate shares of the donee's issue. This is contrary to the practice of most jurisdictions.[103] Until 1966, New York, firmly with the majority, allowed the advancement to be charged to descendants of a child predeceasing the intestate.[104] The current New York statute, although susceptible to ambiguity, appears to mandate a similar result.[105] The Code's position, treating the issue of a donee as takers in their own right, comports with restrictions placed on the inadvertent use of the advancement doctrine. If the donor/intestate desires to charge the donee's issue, it is no great burden to expect some manifestation of that intent in a contemporaneous writing.

The primary divergence of the Code's advancement provision from New York law concerns the time of the valuation of the gift. The Code usually evaluates the *inter vivos* gift as of the time the heir came into possession.[106] New York prefers to evaluate the gift

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102. "The statute does not spell out the method of taking account of the advance, since this process is well settled by the common law and is not a source of litigation." UNIFORM PROBATE CODE § 2-110, Comment.

103. Elbert, *Advancements: III*, 52 MICH. L. REV. 535, 555-57 (1954). This result is either prescribed by statute or attributed to the theory of representation.

104. "[S]uch child *and his descendants* shall receive so much only . . . as shall be sufficient to make all the shares of all the children in the whole property, including the advancement, equal." Act of April 1, 1929, ch. 229, § 6, [1929] N.Y. Laws 504 (emphasis added); *see* Beebe v. Estabrook, 79 N.Y. 246 (1879).

105. "[T]he donee *or his successor in interest* may take his intestate share or testamentary interest reduced by the amount of the advancement." N.Y. EST., POWERS & TRUSTS LAW § 2-1.5(c) (McKinney 1967) (emphasis added); *see* N.Y. TEMPORARY STATE COMM'N ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, FIFTH REPORT 525-26, 696-701 (1966). It appears that "successor in interest" was added to accommodate the broader class of distributees affected by the new advancement statute. New York has interpreted its anti-lapse statute as requiring the deduction of an advancement from the shares of issue of a beneficiary who predeceased the intestate. *In re* Offermann's Estate, 160 Misc. 787, 291 N.Y.S. 447 (Sur. Ct. 1936), *aff'd*, 251 App. Div. 791, 298 N.Y.S. 166 (4th Dep't 1937). In this case, testator had made equal advancements to her three children. After the death of one child just prior to his mother's death, the issue of the predeceased child claimed that their shares should not be reduced by the advancement. The court allowed the executor to count the advancement against the grandchildren. *Id.* at 789, 298 N.Y.S. at 449. The drafters of the Code acknowledge that this is the proper result in the case of wills, due to the action of the anti-lapse statute. UNIFORM PROBATE CODE § 2-612, Comment.

106. If the death of the decedent occurs before the heir comes into possession or enjoyment

as it is or would be appraised for estate tax purposes, unless the contemporaneous writing specifies otherwise.[107] The latter approach, appraising the gift closer to the time of the intestate's death, puts the heirs in a more equal monetary position[108] and has the added benefit of a more readily ascertained value. Both of these reasons, lessening the difficulty of evaluation and adhering to the fundamental rationale of the advancement concept, indicate the preferability of the New York approach. While some of the practical difficulties may be eased by the description of the gift implicit in the requirement of a contemporaneous writing, the Code's use of the earlier time of valuation detracts from the desirability of enacting section 2-110 in New York.

XI. Distributee's Debts to Decedent

Section 2-111, of the Uniform Probate Code provides that debts of the distributees owed to the intestate will only be charged against the share of the debtor.[109] In cases where the debtor dies before qualifying as an heir, section 2-111 expressly prohibits charging the debt to the decedent against the intestate share of the debtor's issue. This clear precept on debts owed to an intestate stands in contrast to the Code's ambiguity on the treatment of debts owed to a testator by a predeceased devisee whose issue take under the anti-lapse statute.[110] New York case law prohibits a beneficiary from claiming his share until all the obligations to the estate are satis-

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of the property, the gift will be valued as of this earlier date. UNIFORM PROBATE CODE § 2-110.

107. N.Y. EST., POWERS & TRUSTS LAW § 2-1.5(d)(2) (McKinney 1967). Until 1966 New York had valued the gift as of the date of transfer. Act of April 1, 1929, ch. 229, § 6, [1929] N.Y. Laws 504.

108. The theory underlying the advancement doctrine is "the accomplishment of equality in participation between the children of an intestate." *In re* Singer's Estate, 171 Misc. 509, 510, 13 N.Y.S.2d 37, 39 (Sur. Ct. 1939).

109. Section 2-111 (Debts to Decedents) of the Code reads as follows:

> A debt owed to the decedent is not charged against the intestate share of any person except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's issue.

110. The comment to section 2-111 of the Code states that 2-111 supplements section 3-903, which calls for the personal representative to offset from any successor's interest in the estate the amount of the indebtedness owed to the estate by that person. However, neither 3-903 nor section 2-605, the Code's anti-lapse provision, explicitly addresses the question of charging a debt to issue of a deceased devisee/debtor. The better inference drawn from these two sections indicates an affirmative answer; if so, the Code is treating testate and intestate situations differently.

fied.[111] To accomplish this, the executor or administrator may retain all or a portion of a debtor's interest in the estate to offset debts owed to the estate or to the decedent.[112] The portion of the debtor's share thus retained is not added ratably to the shares of the other distributees; but, as in the case of advancements, the amount of the debt increases the total value of the estate for the purposes of division and is then deducted from the debtor's share.[113]

On the question of charging the debts against the intestate shares of the debtor's issue, New York has no clear guidelines. However, in a case involving a will, where the issue of the debtor were saved a legacy by the anti-lapse statute, the court offset the debt from the bequest.[114] This would not necessitate similar results in cases of intestacy where the issue of a debtor take their intestate portions in their own right.

XII. Rights of Aliens

New York allows a nonresident alien to inherit property from a New York decedent.[115] However, if that alien resides in a country which is subject to certain fiscal sanctions by the United States or if that alien would not have "the benefit or use or control" of the inheritance, than his share will be held by the court for the alien's benefit.[116] If there is any uncertainty on this point, the burden of proving that the recipient will have the benefit of the funds is on the recipient.[117]

The Uniform Probate Code goes further. Section 2-112 abolishes all distinctions between an alien and a domestic heir.[118] The primary reason for this position is the decision of the United States Supreme Court in *Zschernig v. Miller*[119] which considered an Oregon statute providing for escheat of dispositions to nonresident aliens unless

111. *In re* Van Nostrand's Will, 177 Misc. 1, 7, 29 N.Y.S.2d 857, 864 (Sur. Ct. 1941).

112. *In re* Bradley, 122 Misc. 184, 203 N.Y.S. 490 (Sur. Ct. 1924); *In re* Robinson, 45 Misc. 551, 92 N.Y.S. 967 (Sur. Ct. 1904).

113. *In re* Cordier's Estate, 168 Misc. 577, 582, 6 N.Y.S.2d 270, 274 (Sur. Ct. 1938).

114. *In re* Metz' Estate, 184 Misc. 8, 52 N.Y.S.2d 359 (Sur. Ct. 1944). The New York court viewed the loan creating the debt as similar to an advancement, which was, at that time, chargeable to the issue's share. *See* note 105 *supra*.

115. N.Y. REAL PROPERTY LAW § 10(2) (McKinney 1968).

116. N.Y. SURR. CT. PRO. LAW § 2218(1) (McKinney Supp. 1975).

117. *Id.* § 2218(3).

118. "No person is disqualified to take as an heir because he or a person through whom he claims is or has been an alien." UNIFORM PROBATE CODE, § 2-112 (Alienage).

119. 389 U.S. 429 (1968).

reciprocity of inheritance rights and absence of "confiscation" were shown.[120] The Court held that, in applying the statute, the Oregon courts' practice of carefully examining the foreign country's involvement in the transmittal of an inheritance to an alien was unconstitutional as "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[121]

Despite this pronouncement, it is arguable that not all state statutes fall within the Oregon statute. The New York Court of Appeals subsequently upheld the constitutionality of the state's "benefit or use or control"[122] statute, instructing the lower courts to curtail any detailed investigation of foreign practice.[123] Soon thereafter, a panel of three federal judges upheld the current version of the New York statute against claims of unconstitutionality on grounds of unwarranted interference in foreign affairs,[124] denial of due process,[125] and denial of equal protection.[126]

The Code's restriction on state control over the inheritance rights

120. *Id.* at 430 n.1.

121. *Id.* at 432. Two members of the Court found the statute unconstitutional on its face. *Id.* at 442 (Stewart, J., concurring, joined by Brennan, J.). Two other justices found the law constitutional as applied. *Id.* at 460 (Harlan, J., concurring), 462 (White, J., dissenting).

122. *In re* Estate of Leikind, 22 N.Y.2d 346, 239 N.E.2d 550, 292 N.Y.S.2d 681 (1968), *appeal dismissed sub nom.* Laikind v. Attorney General of New York, 397 U.S. 148 (1970). This case was decided before the amendment of New York's alien statute in 1968, *see id.*, and therefore the court of appeals was not confronted with new paragraph one of the statute which deals with aliens in countries on the United States Treasury List. N.Y. SURR. CT. PRO. LAW § 2218(1) (McKinney Supp. 1975).

123. "Thus, if the courts of this State, in applying the 'benefit or use or control' requirements, simply determine, without animadversions, whether or not a foreign country, by statute or otherwise, prevents its residents from actually sharing in the estates of New York decedents, the statute would not be unconstitutional under the explicit rationale of the *Zschernig* case." *In re* Estate of Leikind, 22 N.Y.2d 346, 352, 239 N.E.2d 550, 553, 292 N.Y.S.2d 681, 685 (1968), *appeal dismissed sub nom.* Laikind v. Attorney General of New York, 397 U.S. 148 (1970). *Zschernig*, reaffirming an earlier decision, allows "a routine reading of foreign laws" to evaluate the conditions on an alien's inheritance rights. 389 U.S. at 433.

124. Bjarsch v. DiFalco, 314 F. Supp. 127 (S.D.N.Y. 1970). This decision rules on the new paragraph one of section 2218 of the Surrogate's Court Procedure Act, but the court noted that the Treasury List which that paragraph utilizes as a "confiscation" guideline now includes only Albania and the German Democratic Republic. *Id.* at 130 n.2.

125. The panel dissipated the due process challenge by reading into the statute a requirement that the court grant a hearing if beneficiaries apply for withdrawal of the funds deposited with the court. *Id.* at 135.

126. Use of the Treasury List as a rebuttable presumption of confiscatory policies was "not arbitrary or unreasonable and the differentiation does relate to the legitimate purpose of the statute." *Id.* at 136.

of an alien is more pervasive than *Zschernig* demands. States should be permitted to exercise as much control as is consistent with *Zschernig*.[127] New York has attempted to do so,[128] but an excess of caution may be inhibiting the proper degree of judicial involvement.[129] On balance, New York's delicate approach to the problem is preferable to Code section 2-112 which, in effect, removes all state supervision.

XIII. Dower and Curtesy

Section 2-113 of the Uniform Probate Code extinguishes the estates of dower and curtesy.[130] Modern statutory safeguards against disinheritance of a spouse have largely usurped the role of these common law estates.[131] Their failure to accomplish the purposes for which they were created and the impediment to real estate transactions which they create weigh heavily against them. New York abolished the estate of curtesy[132] and curtailed the right of dower[133] in

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127. As Justice Harlan, concurring in the *Zschernig* result, noted:

> [I]n the absence of a conflicting federal policy or violation of the express mandates of the Constitution, the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations.

389 U.S. at 458-59.

128. *See* note 123 *supra*. New York's legislative response to *Zschernig* was the addition of a new paragraph to the statute. Act of June 22, 1968, ch. 998, § 1, [1968] N.Y. Laws 1985, *amending* N.Y. SURR. CT. PRO. LAW § 2218 (McKinney 1967) (codified at N.Y. SURR. CT. PRO. LAW § 2218(1) (McKinney Supp. 1975)). This amendment was intended to "substantially support the New York statute from a constitutional point of view." Memorandum of State Dep't of Law, Surrogate's Court—Deposit in Court for Benefit of Legatee, Distributee, or Beneficiary, N.Y. Sess. Laws 2326, 2327 (McKinney 1968). Apparently, the insertion of the Treasury List as a guideline was meant to reduce the intensity of judicial inquiry into the "benefit or use or control" question.

129. *See, e.g., In re* Estate of Hajridin, 40 App. Div. 2d 685, 336 N.Y.S.2d 265 (2d Dep't 1972) (mem.), *aff'd*, 33 N.Y.2d 955, 309 N.E.2d 131, 353 N.Y.S.2d 731 (1974) (mem.), (allowing, without much discussion, Albanian heirs to inherit notwithstanding Albania's presence on the Treasury List). For an interesting example of the type of time consuming and politically sensitive research these questions entail, see *In re* Estate of Danilchenko, 37 App. Div. 2d 587, 588, 323 N.Y.S.2d 150, 151 (2d Dep't 1971) (mem.) (Benjamin, J., dissenting), *aff'd*, 30 N.Y.2d 504, 280 N.E.2d 650, 329 N.Y.S.2d 820 (1972). In fact, although the New York statute applies to legatees as well as distributees, it has been held that a testator may leave the "benefit" question to the discretion of his executor. The executor's decision, if made in good faith, is binding on the court, entirely circumventing judicial intervention. *Id.* This is a questionable grant of discretion.

130. UNIFORM PROBATE CODE § 2-113.

131. *See* Kossow, *Probate Law and the Uniform Code: "One for the Money . . .",* 61 GEO. L.J. 1357, 1381-93, 1383 n.172 (1973).

132. N.Y. REAL PROP. LAW § 189 (McKinney 1968).

133. *Id.* § 190 (McKinney 1968).

1930.[134] Further diminishing the value of dower, the statute on intestate succession provides that any share passing intestate to the widow of a decedent shall be in lieu of dower.[135] The widow must elect between her dower rights and her intestate share.[136] The power of the legislature to abolish the right of dower is recognized in New York[137] and, after nearly fifty years of letting the light grow dim, it would be appropriate to extinguish it completely.

XIV. Conclusion

Is the Uniform Probate Code's law of intestate succession an impetus or an impediment to adoption by New York of the entire Code? This is the bottom line question. Earlier it was said that the enactment of this part of the code rested upon a critique of section 2-102, the intestate share of the surviving spouse. It was just concluded that there existed persuasive social and economic justification for the Code's enhanced allocation to the spouse.

Although section 2-102 is the single most important reason for acceptance of the Code's law of intestate succession, it does not stand alone. The requirement of survivorship for 120 hours, a significant change that section 2-104 would bring to New York law, is a distinct plus because it would lessen attendant evidentiary problems. The increased use of inheritance by representation among the descendants of grandparents, section 2-109(2), is an additional tally in the affirmative column.

Certain features of this part of the Code compare unfavorably with current New York law. Two examples of this are New York's more sophisticated approach to inheritance by nonresident aliens and to the time of the valuation of advancements. As to the remaining major topics of intestacy law, the share of heirs other than the surviving spouse and the relationship of adoption and intestate succession, there is little difference between the Code and New York law.

The final analysis reveals that, on balance, the Uniform Probate Code's treatment of intestate succession is preferable to present

134. The only vestige of dower remaining is the right of a widow, married to decedent before September 1, 1930, to one-third of all land of which her husband was seized both prior to September 1, 1930, and during their marriage. *Id.*

135. N.Y. EST., POWERS & TRUSTS LAW § 4-1.1(g) (McKinney 1967).

136. *In re* Hume's Will, 139 Misc. 327, 332, 248 N.Y.S. 415, 421 (Sur. Ct. 1931).

137. *In re* Bachmann's Estate, 151 Misc. 761, 762, 272 N.Y.S. 467, 469 (Sur. Ct. 1934).

New York law. To the already well known reasons supporting the entire Code (nationwide uniformity of probate law, greater ease of administration, substantive improvements in the law of decedents' estates, and others), there should be added these words of Plato: "Otherwise they will spend their lives making a host of petty regulations and amending them in hope of reaching perfection."[138]

138. PLATO, THE REPUBLIC 116 (F. Cornford transl. 1941).