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# THE PERILS OF INTESTATE SUCCESSION IN NEW MEXICO AND RELATED WILL PROBLEMS

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The New Mexico laws of intestate succession pose some critical and puzzling perils for the practitioner, for any person facing intestacy, and for any person utilizing will language which incorporates the laws of intestate succession or which must be interpreted by reference to the laws of intestate succession. Herein, the practitioner will be apprised of those perils; and some legislative remedies will be proposed. A detailed and coordinated presentation of the New Mexico law will be avoided, except by chart treatment, in order to concentrate upon the problem areas. Hence, confronting the reader is the consideration of such problems as: The calculation of widows' shares in solvent and insolvent estates as affected by allowances, exempt property, and homestead rights plus the related problem of wills frustrated by rights of widows; the unresolved question of the *per capita* or *per stirpes* treatment of descendant and collateral heirs; the possible unequal treatment of half-blood brothers and sisters as among themselves as well as between whole bloods and half bloods despite the fact that no statute specifically deals with half bloods; the lack of an advancement statute, despite its existence in the other 49 states, and the consequent relegation to the 1670 Statute of Distribution with respect to personal property advancements and perhaps the English common law with respect to real estate advancements; and the monstrous complexity of the brief intestate succession statutes that permit escheat only after a chain reaction exhausting the infinite points of the family trees of a decedent and the decedent's spouse with the process being accompanied by unlimited representation and its concomitant fractionalization of shares.

The magnitude of any intestacy peril cannot be assessed with any degree of accuracy in traditional terms such as dollars or numbers of persons affected. This is true largely because past records are difficult to collect and past official records present only a partial record in view of many informal settlements in intestate situations.<sup>1</sup> Fur-

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1. For a brief discussion of the related lack of records on nonprobate transfer of assets through joint tenancies see Dunham, *The Method, Process and Frequency of*

thermore, past records need analysis on the basis of such future unpredictable matters as inflation, population changes, and trends in will making in the light of existing and future law. However, there are generalities of a fairly acceptable nature and some statistics which may be expressed in order to demonstrate that the magnitude of intestacy is relatively great; and hence, any intestacy peril, though rare or non-existent in one practitioner's life, is probably a recurring problem among the bar as a whole. Statistically, 1960 surveys<sup>2</sup> form the basis for the estimate that only three out of five estates *administered* in probate courts in the United States involve whole or partial testacy. A 1955 survey<sup>3</sup> reflected that less than 75 per cent of the nation's lawyers have wills. "Lawyers made a better showing, however, than the professional group as a whole or any other single profession. Nearly 22,000 of the 45,000 professional men and women who answered the survey said they hadn't drawn a will."<sup>4</sup>

The problems of intestacy haunt the will drafter who incorporates the laws of descent and distribution by detailed reference thereto or by the brief but very encompassing use of such words as "heirs." The will drafter also faces many of the same statutory modifications of basic devolutionary schemes that are engrafted upon intestacy statutes when the widow's protection and similar issues are involved.

## I

### THE INTESTACY LAW IN BRIEF

The accompanying chart depicts the basic scheme of passage of property by intestate succession in New Mexico. The chart is subject to the qualifications set forth in its footnotes and to the amplifications hereinafter set forth in this text.

## II

### SPECIFIC INTESTACY PROBLEMS

Numerous problems in intestacy may be isolated. The more prominent or peculiar problems find detailed treatment below. The reader

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*Wealth Transmission at Death*, 30 U. Chi. L. Rev. 241, 242 n. 6 (1963). See 6 R. Powell, *Real Property* §991 (1965) [hereinafter cited as Powell] for citation to statistical sources on intestacy in general.

2. See *Three Out of Five Leave Wills*, 99 *Trusts and Estates* 414 (1960).

3. See *Over 25% of Lawyers Have No Wills—Other Professions Worse*, 94 *Trusts and Estates* 282 (1955).

4. *Id.*





is cautioned that the isolated nature of the problems treated obviates the possibility of a cohesive discussion. Probably the only major interrelationship among the problems is that they all result in part from a brief statute designed to answer only the more obvious questions, leaving the courts to supply answers to difficult questions on the basis of a presumed legislative intent which the legislature probably never possessed because it simply never thought of the questions or the answers.

### A. Calculation of a Surviving Spouse's Share

The basic intestate succession rights of a surviving spouse include rights to the entire community estate<sup>5</sup> and one-fourth of the intestate's separate estate,<sup>6</sup> both being calculated after the deduction of ordinary debts, taxes, and administration expenses.<sup>7</sup> However, widow's allowances,<sup>8</sup> exempt personal property,<sup>9</sup> and homestead rights<sup>10</sup> can provide an estate for the surviving spouse in cases where none would otherwise exist and can serve to increase substantially the surviving spouse's share of the decedent's separate estate.<sup>11</sup> The treatment of allowances, exempt personal property, and homestead rights varies and creates rather complex accounting problems which must be explored in detail in order to make the statutory scheme of intestate succession complete. The accounting assignment's complexity is heightened because the statutes were not drafted with the integrated effects in mind,<sup>12</sup> because there are some gaps left for judicial interpretation yet to occur,<sup>13</sup> because at least one extant decision<sup>14</sup> is believed to be contrary to the statutes, and because the ap-

5. N.M. Stat. Ann. §§ 29-1-8 (1953) and 29-1-9 (Supp. 1965). It should be noted that even if the wife dies *testate*, the husband receives the entire community estate regardless of the wife's wishes; the converse is not true. For a discussion of this inequality of testamentary power between spouses see *infra* Comment, 7 Natural Resources J. 645 (1967).

6. N.M. Stat. Ann. § 29-1-10 (1953).

7. Of course, this is a basic principle enunciated by the related structure of the intestacy statutes.

8. N.M. Stat. Ann. § 31-4-1 (1953).

9. N.M. Stat. Ann. § 29-1-11 (1953).

10. N.M. Stat. Ann. § 24-6-3 (1953).

11. In an intestate estate, the allowances, exempt property, and homestead rights can likewise increase the surviving spouse's share of the intestate's community and separate estates, a matter discussed *infra* in the text.

12. This is best demonstrated by the discussion *infra* in the text of the homestead rights of widows and others, and the absence of clear statutory explanation of the effects of homestead rights upon the rights of the heirs or devisees of the homestead.

13. *E.g.*, the rights of two sets of competing half-bloods.

14. *Shortle v. McCloskey*, 39 N.M. 273, 46 P.2d 50 (1935).

plicable facts are subject to extreme variances.<sup>15</sup> Such problems are not uncommon to New Mexico. Although a general pattern in the form of some provision for exempt personal property, homesteads, and allowances exists in most states,<sup>16</sup> the provisions in the states vary greatly in substance and procedure.<sup>17</sup> The New Mexico problems, however, do not have the benefit of the clarity present in many states because of more integrated drafting<sup>18</sup> and numerous judicial decisions.<sup>19</sup>

If there is only a community estate involved, the problem is one of the rights of the surviving spouse as against creditors, both those acquiring rights before death and those, such as the administrator and the attorney, acquiring rights after death. A composite problem could present these facts: A secured creditor,<sup>20</sup> an unsecured creditor, an administrator and his attorney due their respective fees, a taxing authority owed property taxes, an undertaker owed for the funeral, a physician owed for last illness attendance, and a widow desiring the homestead, exempt property, and allowances. The crucial test of creditors' rights being in cases involving insolvency, assume that an estate having the above described claimants finds that its liabilities exceed its assets.<sup>21</sup>

The order of preference in New Mexico as it can best be determined under the statutes and cases, some of which leave doubt about the matter, is as follows:

*First Priority: Secured Claims.* But see fifth and sixth priorities below. In *Shorile v. McCloskey*,<sup>22</sup> the dispute was between a holder of a note secured by a deed of trust and persons due the payment of

15. The most common generic fact situations are insolvent estates with contests between widow and creditors and solvent estates with contests between widow and heirs or devisees.

16. See 3 C. Vernier, *American Family Laws* 629, 635 (1935). [Hereinafter cited as Vernier.]

17. Although somewhat outdated, the tables in Vernier beginning at 638 offer an excellent comparative study still valid for exemplification of the diversity among the states.

18. This matter should be solved in New Mexico by a complete interrelated reworking of all the intestacy, exempt property, homestead, and probate administration laws.

19. All the older, more populous states have this benefit.

20. Whether with respect to exempt property, the homestead, or other property.

21. Of course, insolvency can occur during administration in that assets may be depleted below liabilities; accordingly, before administration expenses are paid, the prospective solvency or insolvency must be ascertained. Under *Shorile*, only the equities in mortgaged properties are considered assets; great caution is dictated in the valuation of such assets.

22. 39 N.M. 273, 46 P.2d 50 (1935).

administration expenses. Relying on treatise authority and cases from other jurisdictions, the court held that the secured creditor prevailed over the payment of administration expenses. The court thus overruled the prior case of *Perez v. Gil's Estate*,<sup>23</sup> in which a questionable chattel mortgage was assumed valid but held to be inferior in right to the payment of administration expenses. In *Shortle*, the court dispensed with *Perez* by declaring: "While some language used therein is perplexing, we think that decision is not contrary to what we decide."<sup>24</sup> That was a rather modest statement of the 1935 court's action; the result was a distinct overruling of *Perez*. Judge Bratton, in *Perez*, after reviewing the applicable statutes still in existence to this date, stated for the court:

From these statutes, it plainly appears that all necessary and proper costs and expenses incurred in the care, management and control of an estate must be paid to the executor or administrator, as the case may be, before any of the claims of creditors, whether they be secured or unsecured, preferred or otherwise, and, so far as we are informed, such has been the uniform practice universally adopted throughout the state. . . . And assuming for the moment that the chattel mortgage held by the appellant was valid—a question which we neither decide nor express an opinion upon—such expenses would have to be first paid before the appellant would be entitled to receive anything upon his debt so secured.<sup>25</sup>

The key statute in both *Perez* and *Shortle* was identical to the present N.M. Stat. Ann. § 31-10-2 (1953) (emphasis added):

The executor or administrator may retain in his hand, *in preference to any claim or charge* against the estate, the amount of his own compensation and the necessary expenses of administration.

Since the statute quoted is so definite in its preferred status of administration claims before all others, it is obvious that the judicially imposed prior claim of secured creditors is the highest order of priority.

The dominant thought in *Shortle* was the protection of a creditor who relied upon security acquired prior to the incurring of administration expenses. The countering argument that the secured creditor

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23. 29 N.M. 313, 222 P. 907 (1924).

24. 39 N.M. at 280, 46 P.2d at 54 (1935).

25. 29 N.M. at 318, 222 P. at 909 (1924).



took his security with statutory notice of the possible administration expenses at death was deemed outweighed by the dominant thought. The technical answer to the matter was best summarized:

It appears to us that the executor does not become "possessed" of property mortgaged by the deceased during his lifetime, except as it is incumbered by the lien, or, in other words, that he only becomes "possessed" of the equity in such mortgaged property and not of the property itself.<sup>26</sup>

While *Shortle* remains the authoritative pronouncement on the matter, the horror of that decision is multi-fold. It flaunted precedent, it obviated clear statutory textual and contextual language, and it ignored the practicalities obviously underlying the statute and *Perez's* construction thereof. Insolvent estates of decedents are not regulated by the bankruptcy law but by state probate law.<sup>27</sup> If there is no preferred position for administration expenses, the orderly process set out by statute for insolvent decedents' estates is nullified. The entire statutory scheme seldom will be applied satisfactorily. Although an attorney might make the matter a legal aid project, he should not be expected to do so when the estate might involve very valuable property with the secured creditor benefiting from the orderly process. Furthermore, no administrator should be expected to go uncompensated. And, what of court costs? Under the federal bankruptcy law, administration expenses are not preferred over secured creditors;<sup>28</sup> but there is a sound basis for declaring that the New Mexico legislature, acting within its domain, intended to do otherwise in the distinguishable situation of the insolvent decedent. The insolvent decedent's estate is ineligible for bankruptcy proceedings which are perhaps more standardized and generally less expensive than probate proceedings. A living insolvent also can often muster financial support for his bankruptcy proceeding through commitments founded on moral obligations to his supporters or he can perhaps accumulate the small funds needed therefor. A dead

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26. 39 N.M. at 278, 46 P.2d at 53 (1935). This is essentially the same view of the matter taken by the federal bankruptcy laws. See J. MacLachlan, *Handbook of the Law of Bankruptcy* 145 (1956). Factually, however, the cases of bankrupt living persons and bankrupt decedents are distinguishable as the text of this present article later demonstrates.

27. See J. MacLachlan, *Handbook of the Law of Bankruptcy* 29 (1956).

28. *Id.* at 29.

person can find support from neither channel nor from elsewhere. Furthermore, the obvious displacement of the statutory scheme occasioned by placing secured claims first even before taxes and claims entitled to preference by express provision<sup>29</sup> is other evidence that *Shortle* wrongly interpreted the statutes. Almost universally in other jurisdictions, administration expenses supplant secured creditors and all other claims in the first priority.<sup>30</sup> It seems quite evident that the New Mexico legislature intended to effectuate that same position but was thwarted by the court in *Shortle*.

*Second Priority: Administration Expenses.* The above quoted section 31-10-2, being subject only to the judicial exception of *Shortle*, makes it plain that the administration expenses are a preferred claim of the next highest order; and the necessity for such a provision is obvious.

*Third Priority: Funeral and Last Illness Expenses.* N.M. Stat. Ann. § 31-8-10 (1953) provides:

As soon as the executors are possessed of sufficient means over and above the expenses of administration, they shall pay off the charges of the last sickness and funeral of the deceased, and they shall next pay any allowance which may be made by the court as provided by law for the maintenance of the widow and children.

The statute is clear.

*Fourth Priority: Allowance for Widow and Children.* Section 31-8-10 again plainly controls the matter. The allowance is described in N.M. Stat. Ann. § 31-4-1 (1953):

The court shall if necessary, make an allowance to the widow, and children under fifteen [15] years of age, sufficient to maintain them for six [6] months from the death of the decedent.

The allowance must be set by the court; there can be no self-help in the matter.<sup>31</sup>

*Fifth Priority: Claims Entitled to Preference by Express Provision of Law.* N.M. Stat. Ann. § 31-8-11 (1953) provides:

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29. Admittedly, this is an extension of the exact holding of the case; but it is a natural result of its logic in light of the statutory scheme.

30. See 4 Bancroft's Probate Practice 250 (2d ed. 1950). Ironically, the author, apparently relying upon the clear language of the statute involved, cites New Mexico as a state exemplifying the almost universal position.

31. *White v. Mayo*, 31 N.M. 366, 246 P. 910 (1926).

Other demands against the estate shall be payable in the following order:

First. Claims entitled to preference by express provision of law of the United States or of this state.

Second. Taxes.

Third. All other debts.

Fourth. Legacies.

The exact meaning of the preference entitled "First" in the quoted statute is somewhat elusive because of the paucity of cases on such statutes. An established example is debts due the Farm Home Administration.<sup>32</sup> It should be noted that the *Shortle* doctrine would seem shaky or perhaps even obviated to the extent it conflicted with claims preferred by state or federal statute; this is further evidence of the weakness of the reasoning in the case.

*Sixth Priority: Taxes.* Here, again, the *Shortle* doctrine faces problems. Clearly, ad valorem taxes due on mortgaged property take precedence. However, there is nothing to indicate that death, income, and other taxes not reduced to a judgment lien prior to death would have any special standing before the sixth priority.

*Seventh Priority: Setting Aside of the Exempt Property for the Widow and Setting Aside of the Homestead.* N.M. Stat. Ann. § 29-1-11 (1953) declares:

When the decedent leaves a widow, all personal property which in his hands as the head of a family would be exempt from execution, after being inventoried and appraised, shall be set apart to her as her property in her own rights, and shall be exempt in her hands as in the hands of the decedent.

The exempt property covered thereby is primarily set forth in N.M. Stat. Ann. § 24-5-1 (1953):

Every person who has a family and every widow, may hold the following property exempt from execution, attachment or sale, for any debt, damage, fine or amercement, except such exemption shall not apply to debts incurred for manual labor, to-wit:

First. The wearing apparel of such person or family; the beds, bedsteads and bedding necessary for the use of the same; one [1] cooking stove and pipe; one [1] stove and pipe used for warming the

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32. See, e.g., *In re Hillesland's Estate*, 86 N.W.2d 522 (N.D. 1957). The case also demonstrates that a federally enacted governmental agency preference will supersede such a state enacted preference.

dwelling, and fuel sufficient for the period of sixty [60] days, actually provided and designed for the use of such person or family.

Second. One [1] cow, or if the debtor owns no cow, household furniture to be selected by him or her, not exceeding forty dollars [\$40.00] in value; two [2] swine, or the pork therefrom, or if he owns no swine, household furniture to be selected by him or her not exceeding fifteen dollars [\$15.00] in value; six [6] sheep, the wool shorn from them, and the cloth or other articles manufactured therefrom, or in lieu thereof, household furniture to be selected by the debtor, not exceeding twenty dollars [\$20.00] in value; and sufficient food for such animals for the period of sixty [60] days.

Third. The Bibles, hymn books, psalm books, testaments, school and miscellaneous books used in the family, and all family pictures.

Fourth. Provisions actually provided and designed for the use of such person or family, not exceeding fifty dollars [\$50.00] in value, to be selected by the debtor, his wife, agent or some member of the family, and other articles of household and kitchen furniture, or either, necessary for such person or family, to be selected as aforesaid, not exceeding two hundred dollars [\$200] in value.

Fifth. One [1] sewing machine, one [1] knitting machine, one [1] gun or pistol, and the tools and implements of the debtor necessary for carrying on his trade or business, whether mechanical or agricultural, to be selected by him or her, not exceeding one hundred and fifty dollars [\$150] in value.

Sixth. All articles, specimens, and cabinets of natural history or science, whether animal, vegetable or mineral, except such as may be intended for show or exhibition for money or pecuniary gain.

Since N.M. Stat. Ann. § 29-1-11 (1953) refers to personal property, a review of the less commonly applied exemption statutes covering specialized tangible personal property and intangible personal property as set forth in N.M. Stat. Ann. §§ 24-5-3 through 24-5-7 (1953) would be required to obtain a complete listing of the covered items.

The homestead rights of a surviving widow or children are governed primarily by N.M. Stat. Ann. § 24-6-3 (1953):

On petition of executors or administrators to sell to pay debts, the lands of a decedent who has left a widow and a minor child unmarried, and composing part of the decedent's family at the time of his death, the appraisers shall proceed to set apart a homestead, as provided in the next section, and the same shall remain exempt from sale on execution or attachment, and exempt from sale under any order of the court, so long as any unmarried minor child resides thereon, al-

though the widow die, and the unmarried minor child or children of a decedent, actually residing on the family homestead, shall be entitled to hold the same exempt from sale on execution or attachment, although the parent from whom the same descended, left no wife or husband living.

By specific statutory provision with respect to homestead, as well as the reasoning of *Shortle*, the homestead obviously passes charged with secured debts. It would appear that the same is true of exempt property under *Shortle's* reasoning, which to this extent would be correct.

Further elucidation of exempt property and homestead rights appears below in the course of the discussion of the relative rights of the widow in competition with other heirs.

*Eighth Priority: Unsecured Creditors.* At this point, in most jurisdictions, secured creditors other than those specifically secured by the homestead and exempt personal property would also appear, subject to the qualification that they are preferred over unsecured creditors. The general statutory scheme has been expressed as follows:

The statutes of the several states provide the order of priority, and while there is some variance in some of the statutes, in the main they follow the same general pattern. In most of the states, the expenses of administration constitute the first class properly considered as obligations of the estate, and they are almost universally made prior in right to payment over all other obligations. The executor or administrator is, in fact, commonly authorized to retain in his hands the necessary expenses of administration. The order for payment of other obligations is usually prescribed substantially as follows: (1) Funeral expenses; (2) expenses of the last sickness; (3) debts having preference by the laws of the United States; (4) judgments rendered against the decedent in his lifetime, and mortgages and other liens in the order of their date; (5) all other demands against the estate.<sup>33</sup>

The general result is that secured creditors deserve priority over only unsecured creditors unless their security is upon the homestead or exempt personal property. Thus, were it not for the *Shortle* case, the New Mexico statutes would be in accordance with the general scheme of most other jurisdictions.

The foregoing priorities analysis may seem far afield of the cal-

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33. 4 Bancroft's Probate Practice 250-51 (2d ed. 1950).

culuation of the surviving spouse's share; but in insolvent estates, whether insolvent at the time of death or prospectively insolvent, the priorities can cause the creation of an estate for a widow or widower where none would otherwise exist. For example, an insolvent intestate's estate involving a surviving widow and child could well entail these elements as her share: An allowance for support, all exempt personal property, and the homestead rights.

Solvent estate possibilities are even more illuminating of the variance in the widow's share beyond her usual all of the intestate decedent's community estate and one-fourth of his separate estate, than are insolvent estates. This statement is subject to the condition that the estate consists in part of separate property.<sup>34</sup> Assume these most favorable claims of the widow upon the intestate decedent's separate estate: The separate estate consists of cash, furniture and household goods, and the homestead. The basic intestacy share of the widow would be one-fourth of each of these assets with the remaining three-fourths passing to the children;<sup>35</sup> the widow would take all if there were no descendants.<sup>36</sup> The basic statutory share of the widow would be enhanced in the assumed fact situation. The widow would receive absolute title to all the furniture and household goods as exempt property, and the children would receive none thereof.<sup>37</sup> The widow would receive an allowance from the cash sufficient to maintain her and all children under age fifteen for six months following the decedent's death.<sup>38</sup> The widow would receive for her and her minor children the right to use the homestead during the minors' residence with the widow therein.<sup>39</sup>

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34. Of course, no heir competes with the widow of a solvent intestate who has only community property. N.M. Stat. Ann. § 29-1-9 (Supp. 1965).

35. Or to other descendants such as a child of a deceased child. N.M. Stat. Ann. §§ 29-1-10 and 29-1-12 (1953).

36. N.M. Stat. Ann. § 29-1-13 (1953).

37. N.M. Stat. Ann. §§ 29-1-11 and 24-5-1 (1953).

38. N.M. Stat. Ann. § 31-4-1 (1953).

39. N.M. Stat. Ann. § 24-6-3 (1953). Compare N.M. Stat. Ann. § 24-6-1 (Supp. 1965) which provides greater protection in a related situation in that the homestead of a widow or widower is protected if he or she is living with an unmarried daughter or an unmarried minor son. Apparently, the distinction between the applicability of the two sections is that § 24-6-3 covers homesteads created in whole or part from a decedent's realty whereas § 24-6-1 covers homesteads owned in the widow's or widower's own right. Note also that § 24-6-3 provides homestead rights for minor children under age 15. The value of the homestead is governed by N.M. Stat. Ann. § 24-6-4 (Supp. 1965); and despite a 1961 amendment thereof is still only \$3,000. Yet, the amount is comparatively better than the other New Mexico exemption statutes which furnish smaller protection to families of debtors in comparison to certain other southwestern states, notably Texas.

What would be the exact accounting procedure in calculating the widow's one-fourth share in view of the allowances, exempt property, and homestead passing to the widow?

The exempt property would not be counted as part of the widow's one-fourth share of the intestate's separate property. In *Conley v. Quinn*,<sup>40</sup> the court declared:

Appellant contends, and we agree, that even if the household furniture was the separate property of A. J. Conley, it should have been set apart to her in her own right under the mandate of Section 29-1-11, N.M.S.A., 1953 Compilation.

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Section 24-5-1, N.M.S.A., 1953 Compilation, sets forth the articles and amounts that are exempt under the above-quoted section, and these exemptions are just enough to cover all of the articles of household furniture listed in the amended inventory.

Section 29-1-11, *supra*, vests an unqualified right in the widow to such property immediately upon the husband's death. This is true whether or not the household furniture is separate or community property. The case of *In re White's Estate*, 41 N.M. 631, 73 P.2d 316, makes this clear. This court there directed that the exempt property be turned over to the heirs of the widow and that the trial court *then* determine whether the property left by the decedent husband was separate or community property and apportion it accordingly.<sup>41</sup>

The widow's allowance also is not counted as part of the widow's one-fourth. There are no New Mexico decisions directly on the question. However, in *Andros v. Flournoy*,<sup>42</sup> the court considered the right of a widow to such an allowance in addition to a specific bequest of \$20,000 described in the will as being "in lieu of all other demands against my estate." The court held that the allowance would not reduce the amount of the bequest. This was the best possible case for such a reduction; and in view of this and the court's explanation of the nature of the allowance, it seems obvious that the court would not use a different accounting procedure in calculating the widow's intestate share. In *Andros*, the court stated:

Under the statute in question, as is clearly shown by the adjudicated cases, the allowance to the widow or minor children is independent

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40. 66 N.M. 242, 346 P.2d 1030 (1959).

41. 66 N.M. at 252, 346 P.2d at 1036 (1959).

42. 22 N.M. 582, 166 P. 1173 (1917).

of any provisions made by the will for such dependents. The husband or father, if he so elected, is powerless to deprive the court of the right to make the allowance or regulate the same in any manner. The purpose of the statute is to provide adequate support and maintenance for the dependent wife and children during the process of the settlement of the estate and until such time, presumptively, as they receive the provisions made for them by the law or under the will. The question as to whether or not an allowance shall be made and the amount of the same rests in the discretion of the probate judge in the first instance, or the district court upon appeal, and is not subject to review by the appellate court, except for the gross abuse thereof. In the present case, it appears that the executrix had failed to pay to the widow the \$5,000 required to be paid immediately upon the death of the testator. The widow was without means of support. This being true, the probate court properly allowed her such sum as was shown to be necessary for her support for the statutory period. . . .<sup>43</sup>

The homestead right would seem subject to a different accounting procedure inasmuch as it involves a right which supersedes for a period of time the heirs' title to the homestead. To appreciate the accounting process, the nature of the New Mexico homestead right in the decedent's realty, a matter not at all clear from the statute's language, must be ascertained.

First, N.M. Stat. Ann. § 24-6-3 (1953) must be observed:

On petition of executors or administrators to sell to pay debts, the lands of a decedent who has left a widow and a minor child unmarried, and composing part of the decedent's family at the time of his death, the appraisers shall proceed to set apart a homestead, as provided in the next section, and the same shall remain exempt from sale on execution or attachment, and exempt from sale under any order of the court, so long as any unmarried minor child resides thereon, although the widow die, and the unmarried minor child or children of a decedent, actually residing on the family homestead, shall be entitled to hold the same exempt from sale on execution or attachment, although the parent from whom the same descended, left no wife or husband living.

Second, the general nature of homestead rights of survivors needs examination. The pattern of the homestead statutes in the

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43. 22 N.M. 582 at 587, 166 P. at 1174 (1917). The court's reference to the failure to immediately deliver a bequest of \$5,000 has reference only to the need for the allowance.



United States provides two things for the surviving spouse or minor children, ownership rights and the protection of those rights. The typical statutory scheme dictates: First, a life estate or absolute ownership of the homestead in the surviving spouse with estates for years in minor children if there is no surviving spouse. Second, the protection of the homestead from all creditors of the deceased except those with pre-existing and valid liens upon the homestead and all future creditors of the survivors except those properly acquiring liens on the homestead itself.

It is plain from the New Mexico statute that the survivors' homestead is protected at its inception and throughout its life from the claims of creditors. It is not plain how long that life lasts nor what are the title rights of heirs and creditors at the expiration of that life. There are no New Mexico cases on the matter. A similarly unenlightening statute has existed in Illinois since 1873 :

Such exemption shall continue after the death of such householder, for the benefit of the husband or wife surviving, so long as he or she continues to occupy such homestead, and of the children until the youngest child becomes twenty-one years of age; and in case the husband or wife shall desert his or her family, the exemption shall continue in favor of the one occupying the premises as a resident.<sup>44</sup>

The Illinois court has construed that state's statute to provide that the fee title in the homestead vests in the heirs subject to the widow's homestead rights.<sup>45</sup> If there is a will, the devisees also take their fee title subject to the widow's homestead rights.<sup>46</sup> It is apparent, then, that in an insolvent estate creditors could take fee title to the homestead subject only to the widow's homestead rights.

But, when do the widow's homestead rights cease so that the heirs, devisees, or creditors can take possession under their fee title? When there is no unmarried minor living at home. The New Mexico statutory language has a dual purpose in that it describes the protection period and the estate of the widow simultaneously. The statute first declares that there may be a petition for a homestead if there is a "widow and a minor child unmarried" and second declares

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44. Ill. Ann. Stat. ch. 52, § 2 (Smith-Hurd 1967).

45. *Roberson v. Tippie*, 209 Ill. 38, 41, 70 N.E. 584, 586 (1904) (The "fee-simple title therein vested immediately in his heirs, subject only to her right of homestead. . . .") and *Dinsmoor v. Rowse*, 200 Ill. 555, 559, 65 N.E. 1079, 1081 (1902) ("She took no estate of inheritance, but the fee became vested in the heirs. . . .").

46. *Smith v. Hollenbeck*, 231 Ill. 484, 83 N.E. 206 (1907).

that the property shall remain exempt "so long as any unmarried minor child resides thereon."<sup>47</sup> Since there is no other measuring period possible from a reading of the statute it must be that the homestead right, or estate if it can be called an estate,<sup>48</sup> lasts only so long as an unmarried minor still lives at home.<sup>49</sup> This could be a very short-lived period.

The summation of the widow's homestead right is a determinable estate for years<sup>50</sup> with remainder in the heirs, or perhaps devisees or creditors. In the assumed fact situation, the widow has a fee simple estate in one-fourth of the intestate's separate property homestead and the determinable estate for years in the other three-fourths. Hence, the widow's rights in the intestate's separate estate are enhanced to the extent of the determinable estate for years in the three-fourths share, there being no authority and no logical reason for the value of this determinable estate for years being offset against the widow's one-fourth interest in any other separate property. Likewise, she logically should receive no added part of the intestate's separate estate because her one-fourth of the homestead is subject to a homestead right partially in her favor.

The nature of the New Mexico allowances, exempt property, and homestead rights and their place in the accounting process in calculating the widow's one-fourth share of the intestate decedent's separate property is in fair accord with the general principles guiding other jurisdictions.<sup>51</sup>

The foregoing analysis of the calculation of the surviving spouse's share demonstrates the cautious treatment due the elementary principle that the intestate decedent's community estate and separate estate to the extent of one-fourth pass to the surviving spouse to the extent these estates exceed claims against the estate. The widow or

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47. N.M. Stat. Ann. § 24-6-3 (1953).

48. See 3 H. Tiffany, *Real Property* 139 (3d ed. 1939) for a discussion of the homestead right as an estate in land.

49. The Illinois statute's (footnote 44 *supra*) language that the "exemption shall continue . . . so long as . . . she continues to occupy such homestead" is quite similar to the New Mexico statute, and this language both grants the exemption and the measure of the life of the homestead. See the citations in notes 45 and 46 *supra*.

50. In the typical case, the years would be those necessary for the unmarried minors to reach adulthood, with earlier possible terminating events being death or marriage of the minors.

51. See, e.g., 3 Bancroft's *Probate Practice*, §§ 687-753 (1950); 2 R. Powell § 263; 6 R. Powell § 970; 2 G. Thompson, *Real Property* 758 (1939); 26 C.J.S. *Descent and Distribution* §§ 49 and 60 (1956); 34 C.J.S. *Exec. and Adm.* § 323 (1942); 40 C.J.S. *Homesteads* § 252 (1944); and 21 Am. Jur. *Exec. and Adm.* § 315 (1939).

widower<sup>52</sup> of an intestate may well receive an estate of relative consequence even in an insolvent estate and may receive a much higher fraction than one-fourth of the separate portion of a solvent estate. The related will drafting problem becomes obvious. The share of a widow or widower competing with devisees and legatees will be increased by allowances, exemptions, and homestead rights in much the same manner as her or his intestate share was increased.<sup>53</sup> This could thwart a testator's intention at times unless careful planning and draftsmanship occur.<sup>54</sup>

The complexity and vagueness of the calculation of the surviving spouse's share indicates that considerable legislative redrafting is in order. At the same time, serious consideration should be given to the idea of increasing the surviving spouse's share of the intestate's separate property when a small community estate is involved. The same principles could apply to testate estates. A good solution would be the requirement of a minimal dollar amount for the surviving spouse even though it might require the passage of all the separate property to him or her.<sup>55</sup> In this era of great mobility of families, inequities and conflicts of laws questions resulting from fact situations involving small community estates (because none has accumulated since entrance into New Mexico) would be obviated in large part.<sup>56</sup>

### B. *Calculating the Shares of Heirs—Per Stirpes or Per Capita; If Per Stirpes, Which Is the Root Generation?*

One of the most difficult questions arising from intestacy statutes

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52. The statutes declare that all provisions of the law "relating to wills and estates of deceased persons" which concern widows are equally applicable to widowers. N.M. Stat. Ann. § 29-1-22 (1953). Clearly then, the widow's allowance and exempt personal property provisions appearing in the chapters on estates would be applicable alike to widows and widowers. It would seem that a like result would obtain for homesteads because of the reference in the homestead statutes to action by the executors or administrators of a decedent.

53. The statutory language is as clearly applicable to one case as to the other. Specific authority is *Andros v. Flournoy*, 66 N.M. 242, 346 P.2d 1030 (1959). See also Annot., 97 A.L.R.2d 1319 (1964).

54. Some examples would include inadvertent passage of family heirlooms to a widow rather than descendants favored by will, use of cash for allowances thus forcing the sale of investments preferred to be retained, and transfer of ownership of a life insurance policy on the life of the widow to the widow rather than to another owner desired for tax planning reasons.

55. Observe operation of L. Simes and P. Bayse, *Problems in Probate Law: Model Probate Code* § 22 (1946). [Hereinafter cited as *Model Probate Code*.]

56. See Lay, *Marital Property Rights of the Non-Native in a Community Property State*, 18 *Hastings L.J.* 295 (1967).

is determining whether heirs of an intestate take *per capita* (in equal shares) or *per stirpes* (by representation, by "stocks," or by "roots").<sup>57</sup> Even if a *per stirpes* taking is determined to be applicable, there is an equally important question remaining: Which is the root generation? The law on these two questions often varies, depending sometimes upon the heirs being descendants<sup>58</sup> or collaterals<sup>59</sup> of the intestate.

In connection with this problem area, the nature of *per capita* and *per stirpes* and the consequences of the application of one or the other should be grasped first, elementary though it may be. *Per capita* means equally, by the head. In intestacy statutes its use generally determines two basic questions—who is to take and what his fractional share shall be. "To children *per capita*," standing alone, means that only living children shall take and that the bounty is divided equally among those living children. Though the language "to children" fundamentally denotes who is to take, the addition of the words *per capita* negates any implication of taking by issue of deceased children and hence makes it plain that living children alone shall take.<sup>60</sup> *Per stirpes* means through the stocks, a root generation. It is equally made applicable by the phrase "by representation." The use of *per stirpes* and its synonyms helps determine three basic questions: Who is to take, what his fractional share shall be, and how his share is affected by advancements and the like.<sup>61</sup> Strictly interpreted, "to children *per stirpes*," standing alone means: *First*, a division of

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57. The matter is extensively discussed in Bailey, *Intestacy in Texas, Some Doubts and Queries*, 32 Texas L.R. 775; Page, *Descent Per Stirpes and Per Capita*, 1946 Wis. L.R. 3 (1946); White, *Per Stirpes or Per Capita*, 13 U. Cin. L.R. 298 (1939); Ritchie, *Methods of Intestate Succession*, 14 U. Cin. L.R. 508 (1940); Atkinson, *Succession Among Collaterals*, 20 Iowa L.R. 185 (1935); and Eagleton, *Introduction to the Intestacy Act and the Dower Rights Act*, 20 Iowa L.R. 241 (1935). [Hereinafter these articles, except for Atkinson's, are cited by the author's name, *i.e.*, Bailey, Page, White, Ritchie, and Eagleton.] See also T. Atkinson, *Law of Wills* §§ 16 and 17 (2d ed. 1953) [hereinafter cited as Atkinson] and 6 Powell §§ 996 and 999.

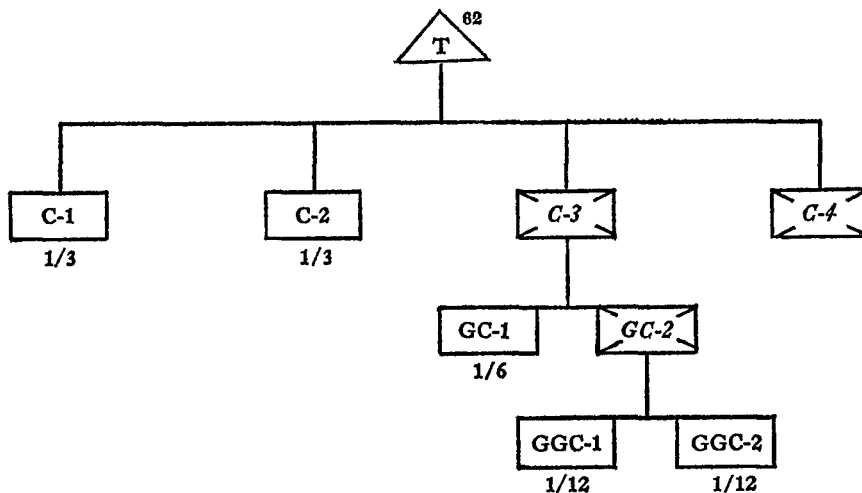
58. Descendants is used herein in the sense of bodily descendants of the intestate. Hence, children, grandchildren, great-grandchildren, etc., are covered.

59. Collaterals is used herein in the sense of bodily descendants of the ancestors of the intestate. Hence, siblings, nephews, nieces, uncles, aunts, cousins, etc., are covered.


60. In intestacy statutes and their interpretation, it is universally provided that issue of deceased children share in the intestate's estate. See Atkinson § 16.

61. See Bailey 507; but see criticism of the third function in 6 Powell § 996. In many jurisdictions, the problem of the third question is avoided by declaring that the representees take in their own right in substitution to their parent and do not "stand in his shoes" with the result of offsetting the effect of such doctrines as advancements. See the citations in 6 Powell § 1009. This third function of representation is deemed outside the scope of this present writing.

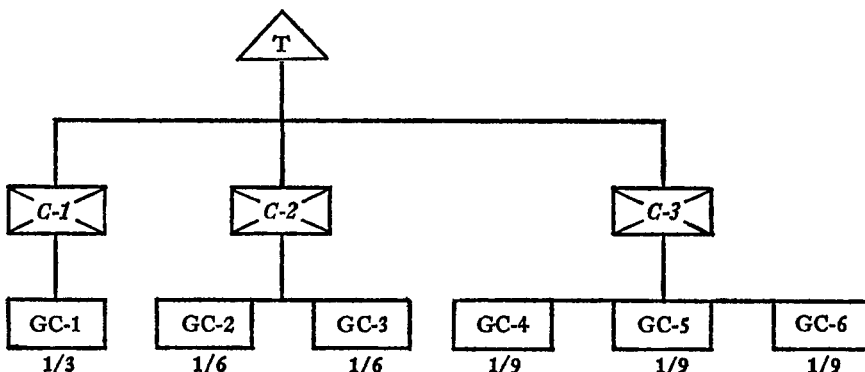
the bounty into as many shares as there are living children and deceased children who left issue surviving. For example, there are two living children, two living grandchildren, who are the issue of a third child who is deceased, and a fourth child who died without issue. The bounty is divided into three shares. *Second*, a passage of one share of the property to each living child and one share to the issue (as a group) of each deceased child, such issue to divide the one share among them. If any of the issue of the deceased child is deceased leaving issue surviving such deceased issue, the process is repeated with the portion of the share normally passing to the deceased issue going instead to the issue of the deceased issue. For example, the three shares in the previous example would pass one share to each of the two living children and one-half share to each of the two grandchildren. If one of the two grandchildren had been deceased with two children surviving him, these two great-grandchildren would have taken one fourth share each. Expressed diagrammatically by fractions of the whole estate or devise, the matter lies:



62. The following is the key to all the symbols used in the diagrams in this article:

- |   |                                       |
|---|---------------------------------------|
| T   | = Decedent                            |
| C   | = Child                               |
| GC  | = Grandchild                          |
| GGC   | = Great grandchild                    |
|  | = Person has predeceased the decedent |

The above *per stirpes* definition is described as a strict one.<sup>63</sup> The strictness of the interpretation is more evident in this diagrammed fact situation:



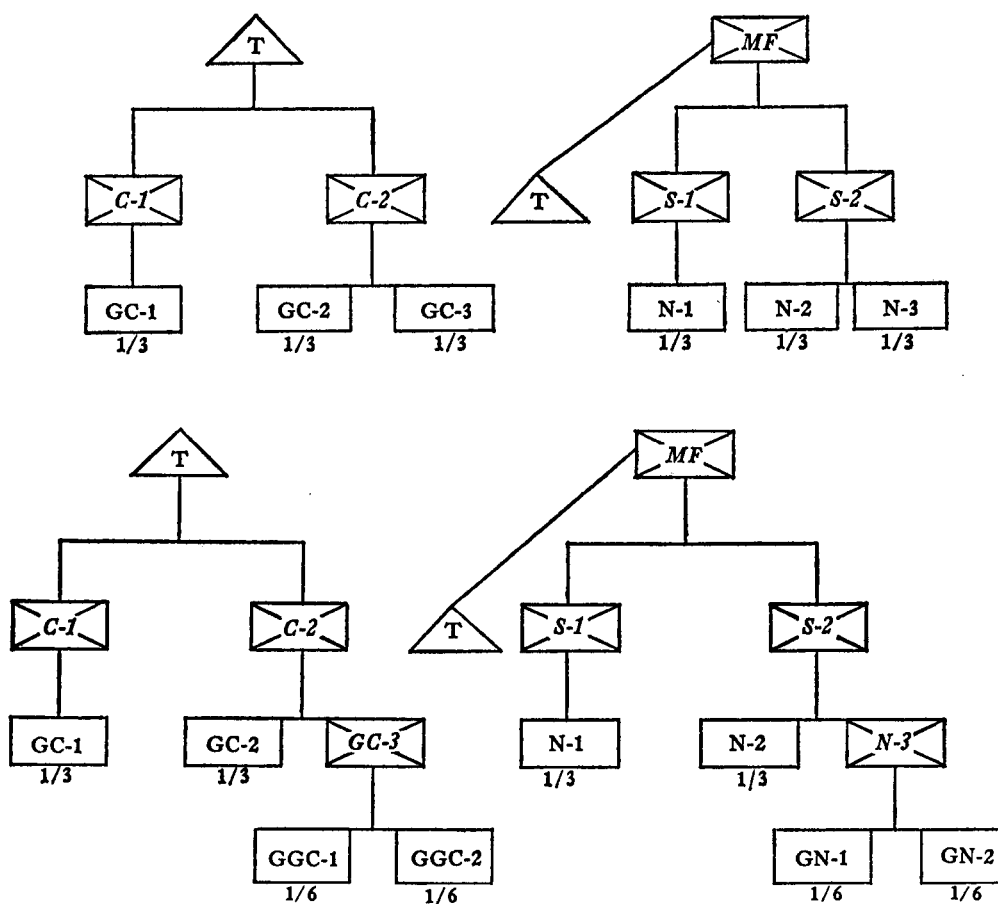
*Per stirpes* is not always so strictly defined. Many of the other *per stirpes* definitions in use in the United States have a common element, a different selection of the root generation—it is selected as: The generation nearest the decedent in which there are living members in the case of descendant heirs or the generation nearest the common ancestor (of the intestate and collateral heirs) in which there are living members. This definition henceforth shall be called *modified per stirpes*. Examples are:

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- M     = Mother
  - F     = Father
  - S     = Sibling (brother or sister)
  - N     = Niece or Nephew
  - GN    = Grandniece or Grandnephew
  - H     = Husband
  - W     = Wife
  - HB    = Half blood
  - FB    = Whole blood

The share a relative receives is indicated by a fraction below the rectangle which represents him.

In this diagram, the collateral heirs situation would be identical except that the common ancestor would be substituted for the decedent.

63. It is strict because no matter how many full generations are deceased, the division is always among the first generation after the intestate as to descendants and among the first generation after the common ancestor as to collaterals.



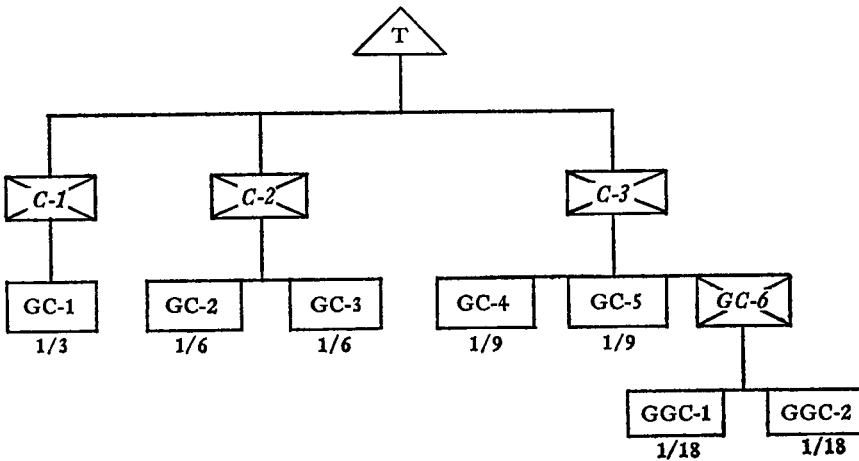
The modified *per stirpes* rule has also been called a *per capita* with representation or a *per capita—per stirpes* rule.<sup>64</sup>

A third rule involving *per stirpes* distribution will herein be called the strict *per stirpes* rule with a *per capita* exception. Many statutes declare that distribution shall be *per stirpes* except that if all the heirs are of the same degree of relationship, the distribution shall be *per capita*.<sup>65</sup> In cases involving only grandchildren or only nieces

64. Eagleton 246.

65. See 4 C. Vernier 114 for a listing of 24 jurisdictions providing that if all the descendants are of equal degree they take *per capita*, otherwise *per stirpes*.

and nephews, the answer is clear. But, if *e.g.*, there are grandchildren and greatgrandchildren who survive the deceased grandchildren or nephews and grandnephews who survive a deceased nephew, the question remains as to whether the distribution shall be by a strict or modified *per stirpes* rule. Which is the root generation under such statutes when unequal kindred compete and all members of one or more prior generations are dead? It would seem that the matter is open for applying either the strict or the modified *per stirpes* rule in the uncovered situations. Of course, if the modified *per stirpes* rule is utilized, the *per capita* exception to *per stirpes* explicitly directed by the statute fits into that modified rule without there being any further modification of the modified rule. The strict *per stirpes* rule coupled with the *per capita* exception is, of course, a form of modified *per stirpes* rule but not in the sense of that term as it has heretofore been defined. The expressed legislative preference for a modification of the strict *per stirpes* rule would naturally lead one to believe that a generally modified *per stirpes* rule is desired. Compare some results. All heirs being grandchildren, they take equally under the statute. But, suppose the facts are:



The division by a strict *per stirpes* rule is as indicated on the diagram. By the modified *per stirpes* rule, the division is identical to the statutory exception for *per capita* division (1/6 each) except that the deceased grandchild's portion is divided among his issue.



The modified *per stirpes* rule provides treatment closest to that specifically covered by the statute. On the other hand, the legislature has made only one specific exception to *per stirpes* treatment, and fact situations might arise in which strict *per stirpes* application produces a fairer result. At least one jurisdiction has considered the strict *per stirpes* rule applicable to such a statute when the specific *per capita* exception is not applicable.<sup>66</sup>

What is the relative prominence of the three *per stirpes* rules, strict, modified, and strict with the *per capita* exception? The answer is best discussed separately for collaterals and for descendants. This is so because the underlying policies in benefiting the different types of heirs are different and perhaps account for some of the variance in the results. In all cases, the true test of the matter arises in the fact situation in which all the children of the decedent or common ancestor are dead. As for descendants, the matter resolves itself into a choice between preference for new family branches<sup>67</sup> or preference for equal treatment among persons of the same degree of kinship.<sup>68</sup> Or, it could be stated as a choice between families of one's children or families with living heads.<sup>69</sup>

There is no New Mexico case law on the use of the strict or modified *per stirpes* system. Furthermore, the statute is difficult to understand. Therefore, the review of the prevalence of one rule or the other in various jurisdictions as a result of the joint working of case law and statute or the working of statutes alone will be

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66. *Maud v. Catherwood*, 67 Cal. App. 2d 636, 115 P.2d 111 (D.C. App. 1945) was the first California case on the subject. See a criticism of the case in Bailey 520. In the *Maud* case a great-grandchild received a share twice as large as each of the three grandchildren involved. *Maud* is noted in 33 Calif. L. Rev. 324 (1945) and was followed in *Lombardi v. Blois*, 230 Cal. App. 2d 191, 40 Cal. Rptr. 899 (1964). The cases involved trust language meaning which was controlled by the meaning of the intestacy statutes. An example of the modified *per stirpes* rule under a statute directing *per stirpes* treatment with the *per capita* exception would be *Balch v. Stone*, 149 Mass. 39, 20 N.E. 322 (1889) which has been followed several times in Massachusetts; the case involved collateral heirs.

67. As the choice is in England with respect to descendants, a matter discussed later in the text. This preference is expressed in *Ritchie* 521 and *Eagleton* 244, the latter as to descendants only.

68. This preference is expressed in *McCall and Langston*, *A New Intestate Succession for North Carolina*, 11 N.C.L. Rev. 266 (1933).

69. See the question posed in L. Simes and A. Smith, *The Law of Future Interests* § 746 (2d ed. 1956) and Wormser, *Per Capita or Per Stirpes*, 105 *Trusts and Estates* 91 (1966), both dealing with drafting problems and choices in wills and trusts.

exceedingly beneficial in evaluating the rules as aids in New Mexico. Some historical background is also essential.<sup>70</sup>

### 1. Per Stirpes Treatment Among Lineal Descendant Heirs in General

In England, the strict *per stirpes* rule applies among descendant heirs.<sup>71</sup> The United States cases result from varying statutes. Some statutes enunciate the strict *per stirpes* doctrine.<sup>72</sup> The Model Probate Code is a clear exposition of the modified *per stirpes* doctrine.<sup>73</sup> Many statutes set forth a *per stirpes* rule with a *per capita* exception which may result in either the modified *per stirpes* rule or the strict

70. Detailed history may be found in Bailey, Ritchie, and 6 Powell § 999.

71. *In re Ross's Trusts*, L.R. 13 Eq. 286 (1871) and *In re Natt*, L.R. 37 Ch. 517 (1888). See also Atkinson §§ 7 and 16.

72. E.g., Ky. Rev. Stat. Ann. § 391.040 (1963):

"When any or all of a class first entitled to inherit are dead, leaving descendants, such descendants shall take per stirpes the share of their respective deceased parents."

Fla. Stat. Ann. § 731.25 (1963):

"Descent and distribution, whether to lineal descendants or to collateral heirs, shall always be per stirpes."

See also Del. Code Ann. tit. 12, §§ 501 and 513 (1953).

Typical cases strictly construing such strict statutes include: (1) *In re Davol's Estate*, 100 So. 2d 188 (Fla. App. 1958). The collateral generation nearest the common ancestor was held to be the root generation although all members were dead. The same reasoning, because of the statute's wording, would seem to cause the court to follow the strict *per stirpes* rule with respect to descendants. (2) *Ballenger v. McMillan*, 205 Md. 94, 106 A.2d 109 (1954). A trust was deemed to adopt the provisions of the intestacy statutes. Children, though all were deceased, were held to be the root generation. (3) *Rodgers v. Rodgers*, 218 Miss. 655, 67 So. 2d 698 (1953). Relying upon Restatement, Property § 308 directing the use of the intestacy statutes when wills use such words as "heirs," the court construed the statute thus incorporated by the will to require a strict *per stirpes* division among descendants although an entire prior generation was dead. (4) *Crump v. Faucett*, 70 N. Car. 345 (1874). The rule covered real property only.

73. Section 22(c) declares:

'Representation' refers to a method of determining distribution in which the takers are in unequal degrees of kinship with respect to the intestate, and is accomplished as follows: after first determining who are in the nearest degree of kinship of those entitled to share in the estate, the estate is divided into equal shares, the number of shares being the sum of the number of living persons who are in the nearest degree of kinship and the number of persons in the same degree of kinship who died before the intestate, but who left issue surviving; each share of a deceased person in the nearest degree shall in turn be divided in the same manner among his surviving children and the issue of his children who have died leaving issue who survive the intestate; this division shall continue until each portion falls to a living person. All distributees except those in the nearest degree are said to take by representation.

*per stirpes* rule with the *per capita* exception.<sup>74</sup> Other statutes are not very clear or detailed, so grasping the rule from the statute alone is difficult.<sup>75</sup> Even when the statute seems to clearly call for strict *per stirpes* distribution there are cases engrafting the modified *per stirpes* rule.<sup>76</sup>

In summation, the dominance of one rule or another among descendant heirs is unascertainable because of the statutory variances, the variable approaches by the courts, and the lack of interpretations of many statutes. Clearly, the properly applicable doctrine is fundamentally a question of legislative design. If the statute on descendant heirs speaks in *per stirpes* or representation terms with nothing added, a strict *per stirpes* construction should be unavoidable. Likewise, a modified *per stirpes* treatment is the required re-

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74. A typical statute is Cal. Prob. Code § 222 (West 1955) :

"If the decedent leaves no surviving spouse but leaves issue, the whole estate goes to such issue; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take by right of representation." [Emphasis added.]

Other typical statutes are: Ind. Ann. Stat. § 6-201 (1953), as amended, (Supp. 1965); Me. Rev. Stat. Ann. tit. 18 § 1001(2) (1964); Mich. Stat. Ann. § 27.3178 (150) (1962); and Okla. Stat. Stat. Ann. tit. 84 § 213 (1951). Cases exemplifying the modified *per stirpes* division among descendant heirs include *Codman v. Brooks*, 167 Mass. 499, 46 N.E. 102 (1897) and *Healey v. Cole*, 95 Me. 272, 49 A. 1065 (1901), both cases involving the rights of grandchildren and greatgrandchildren to French spoliation claims compensation which passed under the respective states' intestacy statutes.

As would be expected, the statutes do not clearly enunciate the applicable doctrine but rely upon judicial pronouncements to complete the scheme. It is unfortunate that writers have assumed that those of equal degree share equally is alone an adoption of the modified *per stirpes* rule as herein defined. Note the detail deemed necessary to make the matter clear in Model Probate Code § 22(c). Any statute with a *per stirpes* declaration followed by the *per capita* exception among those of equal degree of kinship is susceptible to two interpretations. See the text at notes 65 through 66. See 4 Vernier 114 for the collection of 24 jurisdictions which might fall within this category.

Vernier's work is somewhat out-of-date, and he does make this additional point:

The writer does not wish to be dogmatic in the statements concerning shares of deceased children, for the problem is more often than not one of construction of indefinite, ambiguous statutes. In many jurisdictions, therefore, local decisions must be consulted. 4 Vernier at 114.

Exemplifying wisdom in his caution is the fact that his citation of Texas as a jurisdiction among the 24 providing for *descendants* of equal degree taking *per capita* is subject to great debate. See Tex. Prob. Code Ann. § 43 (1956) and Bailey 505-520.

75. *E.g.*, N.M. Stat. Ann. § 29-1-12 (1953) and Tex. Prob. Code Ann. § 43 (1956). See also note 74, *supra*.

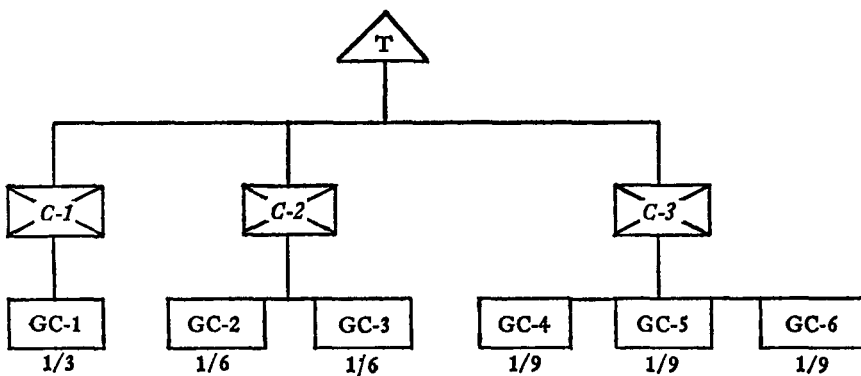
76. The classic example is *In re Martin's Estate*, 96 Vt. 455, 120 A. 862 (1923). There, the court applied the English rule as interpreted at the time the Vermont statute, modeled on the Statute of Distribution, was adopted. The English law later changed. See note 71, *supra*.

sult if clear language like that in Model Probate Code § 22(c) is employed. Hence, the really questionable area is a choice between strict *per stirpes* with a *per capita* exception and modified *per stirpes* in those cases involving a requirement of *per capita* treatment when all descendant heirs are of the same degree of kinship. Although cases going both ways on this latter question are authority for interpretation of the statutes at their first consideration, the cases on statutes clearly declaring strict *per stirpes* distribution or modified *per stirpes* distribution are at best persuasive only as to their underlying policies. And, the reverse is even more forcefully true: Cases on statutes expressly requiring *per capita* treatment among descendant heirs must be avoided in interpreting statutes demanding strict or modified *per stirpes* treatment.

There are no New Mexico cases on *per stirpes* treatment among descendant heirs. N.M. Stat. Ann. § 29-1-12 (1953) provides:

If any one [1] of the children of the intestate be dead, the heirs of such child shall inherit his share in accordance with the rules herein prescribed in the same manner as though such child outlived his parents.

This statute demands a strict *per stirpes* interpretation when interpreted in conjunction with N.M. Stat. Ann. § 29-1-10 (1953). Though it is not a patent demand and though the statute requires thought, there is no other justifiable interpretation. Assume these facts which pose the true test of the strict *per stirpes* doctrine:



Under the statute, each set of grandchildren must, as heirs of

their parents, take their parents' shares.<sup>77</sup> The parents' shares were one-third each. So, the division is as the diagram indicates. There is nothing else that can be read from the statute. There is no basic injustice in the matter—family lines have been chosen as more equitable than degree of kinship, or at least as equitable. It is not an uncommon resolution among the statutes of other states, and the choice has an historical basis. All the cases dealing with statutes having an exception of *per capita* treatment for heirs of equal degree of kinship are totally inapplicable. It is an unmodified *per stirpes* statute with only a strict interpretation applicable.<sup>78</sup> Accordingly, the statute would grant a one-third share to GGC-1, child of GC-1, if GC-1 were dead in the above diagram and if the rest of the diagram remained as it is. Later, further disparity in the treatment of kindred of closer degree as compared with some of lesser degree will be shown to be the result of the New Mexico parentelic system dividing shares between multiple ancestral lines; this is contextual evidence that the New Mexico intestacy scheme favors family lines over degree of kinship and hence the strict *per stirpes* treatment among descendant heirs.

Prior New Mexico legislation demonstrates a desire for a *per stirpes* treatment without any modification. The legislation has been substantially as at present with two exceptions.

An early act stated:

Provided, that if the intestate shall have left, at his death, grandchildren only, alive, they shall inherit *equally per stirpes*.<sup>79</sup>

This is the only New Mexico statute which varied from the strict *per stirpes* language. The above language is susceptible to interpretation as a strict *per stirpes* doctrine with a *per capita* exception as to grandchildren only. Conceivably, a modified *per stirpes* doctrine could be formulated from the statute. Nevertheless, all interpretations are clouded by the addition of the words "*per stirpes*" at the end. With this confused language, there is no wonderment at the statute's later change to a clear *per stirpes* treatment.

The other, and later, exception to language substantially as the

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77. The parents would have had equal one-third shares. N.M. Stat. Ann. § 29-1-10 (1953).

78. Nor does the case in note 76 *supra* affect the matter in view of Vermont's adoption of the pre-existing English interpretation of the matter along with their statute's adoption.

79. N.M. Laws 1887, ch. 32, § 2 (repealed 1889) (emphasis added).

present statute was the wording "to descendants of such children by right of representation."<sup>80</sup> This clearly demands application of the strict *per stirpes* doctrine. The root generation was the children with subsequent divisions as earlier explained.<sup>81</sup> So, prior legislation lends no detractor to the strict *per stirpes* intention of the legislature.

Observe that in the present statute, the language is that if "one" of the children be dead, his heirs take as though the child had survived. It cannot be argued that if all the children be dead the statute and hence *per stirpes* treatment is inapplicable because of the use of the word "one." This is so because there would be no other statutory explanation as to devolution in such a factual circumstance of all children being dead. The statute does not treat children as a group but individually determines the devolution of their representative shares. If the intestate leaves in one chain of his descendants both a deceased child and a deceased grandchild with surviving greatgrandchildren, the interaction of the sections<sup>82</sup> continues the *per stirpes* process. The statute commences with a passage of property "in equal shares to the children of decedent and further, as provided by law."<sup>83</sup> The word "further" manifestly does not modify "equal shares" in any way, for it would mean strict *per capita* treatment among all descendants regardless of equality or inequality of a relationship—a procedure foreign to American intestacy statutes. "Further" has reference to N.M. Stat. Ann. § 29-1-12 (1953). That statute provides *per stirpes* treatment by passing a deceased child's share as though he died owning it. This requires recurrence to section 29-1-10 to determine how an owner's property passes. Of course, it passes to his children (at this point the intestate's grandchildren) and the share of a deceased child (the intestate's grandchild), pursuant to section 29-1-12, passes as though the deceased child (the intestate's grandchild) died owning the property. To determine the heirs of this hypothetical owner (the intestate's deceased grandchild), there is again recourse to section 29-1-10 with his children (the intestate's greatgrandchildren) being the heirs.<sup>84</sup>

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80. N.M. Laws 1927, ch. 163, § 1 (repealed 1943).

81. See also 26A C.J.S., Descent and Distribution § 23 (1956):

Taking by representation . . . means taking *per stirpes*; and it occurs when descendants of a deceased person take together the same share of the estate of another person that their ancestor would have taken, if living.

82. N.M. Stat. Ann. §§ 29-1-10 and 29-1-12 (1953).

83. N.M. Stat. Ann. § 29-1-10 (1953).

84. Of course, to properly present the *per stirpes* question, the shares of the surviving spouses are ignored.

If one of these children (the intestate's greatgrandchildren) is dead, section 29-1-12 repeats the process again and so on until the chain is exhausted. Absolutely, this is a strict *per stirpes* treatment.

## 2. Per Stirpes Treatment Among Collateral Heirs in General

The strict *per stirpes* rule is not as frequently applied to collateral heirs as it is to descendant heirs.<sup>85</sup> The prominence of the modified *per stirpes* rule as opposed to the strict *per stirpes* rule with the *per capita* exception is impossible to judge without analyzing all of the statutes and their construction by cases. In addition many of the statutes have not been construed. In any event, all three rules seem to find expression in the statutes covering collateral heirs.<sup>86</sup> The applicability of one rule or another is again a statutory interpretation question with cases of one jurisdiction often being totally inapplicable in another given jurisdiction, just as discussed earlier concerning the statutes covering descendant heirs.

## 3. Per Stirpes Treatment Among Collateral Heirs in New Mexico

In New Mexico, the same strict *per stirpes* rule and reasoning applicable to descendant heirs finds total applicability to collateral heirs. There are no cases on the matter, but the statutory analysis provides the answer.

N.M. Stat. Ann. § 29-1-14 (1953) commences the process:

If both parents be dead, the portion which would have fallen to their share, by the above rule, shall be disposed of in the same manner as if they outlived the intestate, and died in the possession and ownership of the portion thus falling to their share; and so on through the ascending ancestors and their issue.

So, the hypothetical ownership at death incorporates the provisions of sections 29-1-10 and 29-1-12. There is the same result among siblings, nephews and nieces, grandnephews and grandnieces of an intestate survived only by these collateral heirs as the result among

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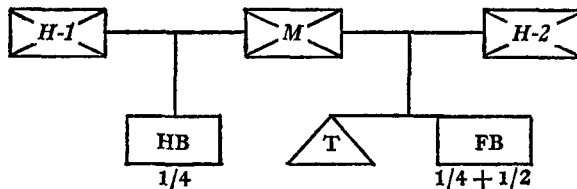
85. See Atkinson § 17.

86. E.g., *In re Yonk's Estate*, 204 P.2d 452 (Utah 1949) (strict *per stirpes*); *Kraemer v. Hook*, 168 Ohio St. 221, 152 N.E.2d 430 (1958) (modified *per stirpes*); *In re Nunziato's Estate*, 202 N.Y.S.2d 39 (1960) (modified *per stirpes*); and Model Probate Code § 22(c) (modified *per stirpes*). Again, any statute providing for *per stirpes* treatment with a *per capita* exception is subject to a modified *per stirpes* or a strict *per stirpes* with *per capita* exception interpretation.

children, grandchildren, and great-grandchildren of an intestate survived only by these descendant heirs. And so on, not only among further removed heirs in the parentela of the parents but also among uncles, aunts, cousins, etc., if resort to the parentela of the grandparents<sup>87</sup> of the intestate is required because of exhaustion of the parents' parentela without finding living heirs.<sup>88</sup>

### C. *The Problem of Half Bloods*

New Mexico apparently varies from the majority rule that where there is no statute covering half bloods, they inherit equally with whole bloods.<sup>89</sup> For, although New Mexico has no such statute, the apparent operation of its intestacy provisions permitting collaterals to take results in a half-blood's share always being smaller than the whole blood's.



Under the above facts, decedent's full brother, FB, takes *all* of the deceased father's half portion (which hypothetically goes *through* the deceased father under N.M. Stat. Ann. § 29-1-14 (1953) as his sole heir. In addition, FB takes  $\frac{1}{2}$  of his deceased mother's half portion; FB's share is thus  $\frac{1}{2} + \frac{1}{4}$  or  $\frac{3}{4}$  of decedent's estate. Decedent's half brother, HB, however, takes only  $\frac{1}{4}$ , as he is only a hypothetical heir of one-half the deceased mother's one-half.<sup>90</sup>

87. The ancestors are assumed to have predeceased the intestate in order again properly to pose the *per stirpes* question.

88. The discussion *infra* in the text will aid in an understanding of the parentelic system utilized in New Mexico.

89. Atkinson, *Succession Among Collaterals*, 20 Iowa L. Rev. 185, 197-202 (1935); J. Ritchie, N. Alford & R. Effland, *Cases and Materials on Decedents' Estates and Trusts* 56 (2d ed 1961); 23 Am. Jur 2d *Descent and Distribution* § 47 (1965); *Gradwohl v. Campagna*, 46 A.2d 850 (Del. Ch. 1946).

90. A step-son, being a blood relation of the mother only, is entitled to take his step-father's estate only after a search for the step-father's blood relatives has proved fruitless. N.M. Stat. Ann. § 29-1-15 (1953). See also Op. Att'y Gen. 1917-18, p. 23 allowing a step-father to inherit from his step-son with a showing that there were no other possible heirs.



A detailed analysis of the critical statutes would be:

The statutes first prefer the children and surviving spouse,<sup>91</sup> but if there be none, then the parents or the survivor of them.<sup>92</sup>

If both parents be dead, the portion which would have fallen to their share, by the above rule, shall be disposed of in the same manner as if they had outlived the intestate, and died in the possession and ownership of the portion thus falling to their share; and so on through the ascending ancestors and their issue.<sup>93</sup>

So, the passage of property to siblings, half blood or otherwise, occurs only if both the parents are deceased; descendants, ancestors through father and mother, and spouse being preferred before collateral kindred of any kind. As a short cut the statute passes the property to the parents' issue as though the parents had died owning the property. The latter hypothesis requires recurrence to the statutory first preference for children and surviving spouse whereby the separate property passes one-fourth to the surviving spouse and three-fourths to the issue.<sup>94</sup> In the assumed fact situation above, it would thus appear that the earlier brief analysis of the property's devolution is correct, there being no surviving spouses of the deceased parents. Similar results have been reached in two other jurisdictions.<sup>95</sup> New Mexico, Iowa,<sup>96</sup> and Kansas<sup>97</sup> are the only states with similar statutes on the matter. One case<sup>98</sup> indicates the Iowa statute was the forerunner to the New Mexico statute while another<sup>99</sup> indicates that the Kansas statute was the forerunner. The

91. N.M. Stat. Ann. §§ 29-1-10 and 29-1-13 (1953).

92. N.M. Stat. Ann. § 29-1-13 (1953).

93. N.M. Stat. Ann. § 29-1-14 (1953).

94. N.M. Stat. Ann. § 29-1-10 (1953). An odd result of the New Mexico statutes is that a surviving step-parent can receive a share as a result of the process of incorporating other statutes in order to avoid drafting a more detailed statute. If there are no children of the second marriage of one parent, both parents being deceased, the step-parent would receive one-fourth of one-half and the siblings from the first marriage would receive the balance. See note 90 *supra*. See also *In re Parker's Estate*, 97 Iowa 593, 66 N.W. 908 (1896). This result of favoring step-parents over siblings, whole or half blood, is extraordinarily unusual. The probable ultimate ownership of part of the property by step-siblings as opposed to blood siblings seems contrary to what a statutory will should contain, relationships between step-siblings being so unpredictable.

95. *Tays v. Robinson*, 68 Kan. 53, 74 P. 623 (1903) and *In re Parker's Estate*, 97 Iowa 593, 66 N.W. 908 (1896) (the case involved half bloods against a step-mother). See also *Atkinson* § 19.

96. Iowa Code Ann. § 633.219 (1963).

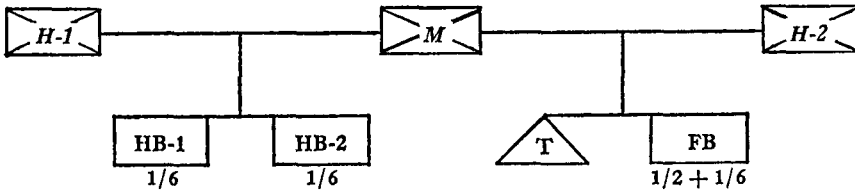
97. Kan. Stat. Ann. § 59-508 (1963).

98. *In re Vigil's Estate*, 38 N.M. 383, 34 P.2d 667 (1934).

99. *In re Gossett's Estate*, 46 N.M. 344, 129 P.2d 56 (1942).

exact statutory ancestry appears unimportant, however, because both states have interpreted the statute in accord with the earlier brief analysis applicable to the assumed fact situation.<sup>100</sup>

Nevertheless, a caveat should be cast. Canons of statutory interpretation and precedent notwithstanding, the ultimate judicial role with respect to legislation is an ascertainment of the purpose of the statute—the discovery of the legislative intent. It is presumptuous to believe that the legislature had any legislative intent whatsoever involving half bloods when it enacted this statute, indeed an entire probate code, without one single word of reference to half bloods. This is particularly true when one notes that the three-fourths and one-fourth division results in a half blood receiving only a one-third share of a whole blood despite a fifty per cent relationship.<sup>101</sup> Judges by and large being practical men not desiring to recall the ancient and sometimes confusing common law<sup>102</sup> on the matter, the three-fourths and one-fourth treatment between a competing half blood and whole blood probably will prevail. However, at some point, adherence to the statute's literal and seemingly applicable language should not continue into some bizarre results it can create. Regarding competition between whole bloods and half bloods, change the assumed facts to provide:



Strictly following the statute, FB takes  $\frac{1}{2}$  plus  $\frac{1}{6}$  or  $\frac{2}{3}$ , while each half brother takes a mere  $\frac{1}{6}$ ; so the whole blood share is four times that of a half blood rather than just three times as in the first assumed fact situation. Nine half brothers would produce a division of  $\frac{11}{20}$  for the whole blood and  $\frac{1}{20}$  for each half blood. The

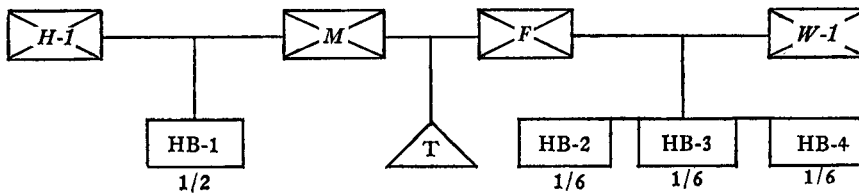
100. See note 95 *supra*.

101. In most American jurisdictions, a half blood is treated equally with a whole blood; and the next most dominant rule is that a half blood takes one-half of a whole blood share. See Atkinson § 19.

102. For a succinct statement of the common law see Atkinson § 8. It is probable that a half blood would receive no real estate at common law but suffer no discrimination as to personal property. See *Gradwohl v. Campagna*, 46 A. 2d 850 (1948).

progressive favoritism continues as the number of half bloods increases. Furthermore, the reverse situation can produce unusual results. Ten whole bloods could each take  $21/220$  against  $10/220$  for a single competing half blood with the result that the whole blood takes barely more than twice the share of a half blood. Such haphazard relative treatment between competing siblings hardly can be presumed the intention of a legislature. The intestacy statutes constitute a statutory form of will. One cannot imagine a person so haphazardly and oddly determining the benefits he desires to leave his siblings. Any lawyer proposing such a will treatment for a client would be considered a jackass.

Even if the foregoing treatment of contests between whole and half bloods is authoritatively pronounced in New Mexico, there remains the bizarre results an extension of the statute to contests between different sets of half bloods would entail. Assume:



A literal extension of the statute would provide  $1/2$  for HB-1 and  $1/6$  each for the other three half bloods. What reasoning traditional to the organization of intestacy statutes could dictate inequality among siblings? None! Such treatment is so contrary to the elemental principle of justice that those equally situated are treated equally as to make unbelievable the statute's extension to this fact situation.<sup>103</sup> The hypothetical facts are not far-reaching. This is an era of divorce and remarriage. Any lawyer acquainted with divorces among those in the thirty-to-forty-year age bracket can recall numerous possibilities of the occurrence. Typically, more often than not, a male in that age bracket can find himself the father of two or more children by his first wife. Counseling upon the prospects for the divorced husband's future, the lawyer might well advise him that not only will he lose, within a year or two, most of the contact

103. There are no cases on the matter in either New Mexico, Iowa, or Kansas. The situation is not comparable to strict *per stirpes* treatment among family lines which is so steeped in history and logical family wishes.

with his children but that he also has a substantial probability of re-marriage to a younger woman who is likewise divorced and who likewise has two or more children and expects one or more children from her second marriage. They hence ultimately have his, hers, and their children. These facts breed the competing half-blood problem.

Obviously, the practitioner needs to know the perils of half-blood problems not only for the resolution of intestacy cases in fact but also for the purpose of drafting around the problem. References to siblings should be defined not only with respect to such matters as step brothers and sisters, adopted parties, and related questions but also as to present and even prospective half bloods.<sup>104</sup> Estate planning information gathering must glean the pertinent information. Finally, once again a clause adopting the statutes of descent and distribution by specific reference or by the use of such words as "to my heirs" can leave the client in a morass in New Mexico; and the lawyer might well wreak the embarrassment and financial brunt thereof.

*D. Inheritance by the Ancestral and Collateral Parentelae  
of Both the Decedent and the Decedent's Spouse—  
Is this Tortuous Extension Worthwhile?*

Most intestacy statutes specifically enumerate certain classes of relatives and the shares they are to receive. The general order is spouse, descendants with rights of representation, parents, and siblings and their issue with right of representation.<sup>105</sup> Then, the property will pass to the next of kin computed in accordance with the civil law method of counting degrees of kinship.<sup>106</sup> This method has been chosen obviously because of its simplicity in tracing kinship and thence the heirs, because it avoids in part the fractionalization of property interests, and because there is ordinarily less concern by an intestate for his remote collateral heirs. Escheat normally occurs if there is no next of kin by blood, in-laws thus being favored before the state only if there is a will involved. The statutes of most juris-

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104. Adults making wills may have fathers presently married to women of child-bearing age.

105. See Atkinson § 17.

106. See Atkinson § 18. This method involves counting the steps from the decedent to the nearest common ancestor and thence to the relative in question. The total of such upward and downward steps is the degree of kinship, and the smaller the number the closer the kinship. Those of equal degree of kinship would divide the property equally. Georgia utilizes the canon law or common law system of determining degrees of kinship; it utilizes the longest of the upward line or downward line of steps. Ga. Code Ann. § 113-903(9) (1959).

dictions are thus modeled after the 1670 Statute of Distribution<sup>107</sup> originally governing the passage of personal property.

The New Mexico system, after providing for spouses, is a parentelic system which probably finds its ancient ancestry in the common law canons of descent<sup>108</sup> which governed the devolution of real property. First, the parentela of the decedent is exhausted by eliminating his issue, the blood branch of the family springing from him.<sup>109</sup> Second, parents and their parentela, the decedent's siblings and their issue are exhausted.<sup>110</sup> Third, one-half passes to the maternal grandparents and their parentela, the decedent's maternal uncles, aunts,

107. The Statute of Distribution (1670), 22 & 23 Car. 2, c. 10.

108. For a brief statement of the canons, see Atkinson § 6.

109. N.M. Stat. Ann. § 29-1-10 (1953). See *In re Vigil's Estate*, 38 N.M. 383, 34 P.2d 667 (1934) for a general treatment of the subject.

110. N.M. Stat. Ann. §§ 29-1-13 through 29-1-15 (1953). If both parents are dead, one-half of the property would pass to the heirs of each parent. Normally, this would mean their joint issue, the intestate's siblings. But, if a deceased parent is survived by a second spouse, issue of a second spouse, or both, the property's devolution becomes quite complex. The half blood problem has been discussed in the text earlier. The share of the step-parent has been briefly mentioned in note 94 *supra*.

An even more fundamental problem must be discussed, however: What if one deceased parent has no living heirs but the other does? Heretofore, in Kansas, the one-half share of the parent with no heirs would escheat. *In re Brown's Estate*, 168 Kan. 612, 215 P.2d 203 (1950). Cf. *In re Doyle's Estate*, 152 Kan. 23, 103 P.2d 52 (1940). Legislative amendment later cured the matter by adding ". . . but if either of said parents left no such heirs, then and in that event his property would pass to the living heirs of the other parent." Kan. Laws 1949, ch. 310. In Iowa, the result was covered by statutes very similar to those of New Mexico; and the court held that all the property passed to the heirs of the parent who had living heirs. *In re Tripp's Estate*, 239 Iowa 1370, 35 N.W.2d 20 (1948). See also *Hartely v. Langdon & Company*, 347 S.W.2d 749 (Tex. Civ. App. 1961). The New Mexico court must logically reach a result identical with that in Iowa. In determining the heirs of a deceased parent of an intestate in order to determine the heirs of such intestate, when there are no blood heirs, N.M. Stat. Ann. § 29-1-15 (1953) as incorporated by N.M. Stat. Ann. § 29-1-14 (1953) passes the property to the heirs of the deceased parent's spouse. There is only one minor problem in this reasoning. N.M. Stat. Ann. § 29-1-15 (1953) does not speak in terms of "spouse" nor in terms of "widow," which is expanded by N.M. Stat. Ann. § 20-1-22 (1953) to include "widowers," but in terms of "wife." Nevertheless, no one would expect a court to be so literal in its interpretation of the word as to exclude husbands because of the context. A contrary interpretation of this key statute which is fundamental to the operation of many applications of the New Mexico statutes of descent and distribution would create unimaginable havoc with apparent legislative intent, equitable distribution, and the normal expectations of property owners.

On the point of avoiding escheat of one moiety of an estate, N.M. Stat. Ann. § 29-1-15 (1953) is laudable in many fact situations; but there is no doubt that it is a circuitous method which also involves the equivalent of burning a forest to kill a tree. The Kansas solution seems more desirable than that of New Mexico and Iowa. For a discussion of similar problems in other jurisdictions see Bailey, *Intestacy in Texas: Some Doubts and Queries*, 32 Texas L. Rev. 775 (1954).

and cousins; and one-half similarly passes to the paternal grandparents and their parentela.<sup>111</sup> Fourth, the division is in one-fourths to the four sets of great grandparents and their parentela, a group of extremely remote kindred in the eyes of most Americans.<sup>112</sup> And so on, *ad infinitum*. There is universal representation in each parentela until it is utterly extinguished. If the theory of Adam and Eve is accepted, the decedent's next-door neighbor eventually finds a kinship somewhere; and he might take the property before the statutory provisions for relatives of the decedent's spouse or escheat operate. It is theoretically impossible to find a New Mexican without an heir. Again, woe to the lawyer that drafts a will leaving property to a client's heirs!

Now, it would seem that the foregoing should be an end to the matter. But, no, failing to find a blood relative, however remote, the same process is repeated among the heirs of the decedent's deceased spouse. Then, if it could possibly occur, failure to find such an heir of the deceased spouse brings forth escheat. It could well be called the intestacy lottery. As the state grows, some litigation fruitful for lawyers and virtual windfall recipient heirs should be expected. In most other states, the populace as a whole would benefit before the wife's heirs, many of whom the decedent never knew existed. He may have had a similar unfamiliarity with his own blood kin who might be eventual heirs, but at least the strand of connection has more semblance of reason and historical perspective than does the in-law relationship of his deceased wife's cousin five times removed.

The New Mexico statutes on this matter are unconscionable in their lack of a stopping point. As far as the usual next of kin statutes are concerned, they are somewhat subject to the same criticism; but

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111. N.M. Stat. Ann. §§ 29-1-14 and 29-1-15 (1953). As the discussion in note 110, *supra*, demonstrates, there is first a division into moieties at the parental level. Subsequently, to find the ancestral or collateral heirs, the statutory language "and so on through ascending ancestors and their issue" requires later divisions of the original moieties. There will be four grandparents, eight great-grandparents, etc. In simple cases, a logical property devolution occurs. But, assume only a maternal cousin five times removed in competition with a paternal uncle. They share equally despite a fantastic disparity in degree of relationship. There is no reason for passage of property to such remote relatives; the closer kindred should be preferred as in the next of kin statutes. Furthermore, at some point even remote next of kin should be forgotten in favor of escheat under either a parentelic or next of kin statute. Compare The British Administration of Estates Act of 1925, 15 Geo. 5, c. 23, § 46, which escheats property if there are no collaterals beyond uncles and aunts and their issue, and Model Probate Code § 22(b)(6) which escheats property if there are no issue of the grandparents.

112. N.M. Stat. Ann. §§ 29-1-14 and 29-1-15 (1953).

the next of kin statutes do avoid the unlimited representation problem and its concomitant fractionalization of property interests into small shares. Additionally, the passage of property to the heirs of the decedent's deceased spouse if the decedent has no blood heirs is the rejuvenation of a dead horse for very little obvious social benefit except in the closely related cases of the spouse's parents, siblings, and their issue, at best. The legislature should re-examine the entire scheme. The Model Probate Code<sup>113</sup> again could serve as a reasonable guide. The practitioner and probate courts certainly need aid. At what point does a lawyer or judge cease his search for heirs?<sup>114</sup> Even ignoring the theory of Adam and Eve, in most cases there is bound to be an heir. Surely, it would be reasonable to declare the search unnecessary beyond a specified degree of kinship with a resultant escheat at that point.

### *E. Whose Status to Inherit Is Questionable?*

#### 1. Adoption

The New Mexico statute<sup>115</sup> on this subject was amended in 1951 and is a good example of legislative clarity and precision in matters of intestacy. Prior to 1951, the statute provided that an adopted child was entitled to inherit *from* the adopting parents:

Whenever a child has been legally adopted, such child shall inherit *from the adopting* parents, and each of them, to the same extent as if he were a natural child of the adopting parents.<sup>116</sup>

This wording created at least two potential problems: First: Did adopting parents or their heirs take from a deceased adopted child over the adopted child's blood parents? Second: Did an adopted child inherit *through*, as well as from the adopting parents? The New Mexico courts answered the first problem in the negative,<sup>117</sup>

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113. § 22 thereof.

114. The Texas courts, having a statute providing a similar handicap, state the search test as being simply a requirement of reasonable diligence. *Robinson v. State*, 117 S.W.2d 809 (Tex. Civ. App., *err. ref.* 1938) and *Hartely v. Langdon & Company*, 347 S.W.2d 749 (Tex. Civ. App. 1961).

115. N.M. Stat. Ann. § 29-1-17 (1953).

116. N.M. Laws 1945, ch. 16, § 1 (emphasis added).

117. The case of *Dodson v. Ward*, 31 N.M. 54, 60, 240 P. 991 (1925) was decided before passage of a specific adoption section in the intestacy law. However, in view of the wording of the 1945 law, *Dodson* was probably authority until 1951. The court

and did not have the occasion to confront the second. Several jurisdictions, however, have construed similar statutes in such a way as to defeat the adopted child's rights when the adopting parents had predeceased the intestate and the child was attempting to take *through* such parents.<sup>118</sup> The 1951 amendment to the New Mexico statute clarified the law and now provides an affirmative reply to both questions:

Whenever a child has been legally adopted, such child shall inherit from the adopting parents . . . and the adopting parents *and each or either of them shall inherit from the adopted child*, to the same extent as if he were a natural child of the adopting parents. *For all inheritance purposes without exception the adopted child shall be considered a natural child of the adopting parents . . .*<sup>119</sup>

## 2. Illegitimates

In New Mexico, children born out of wedlock inherit from the mother, and the mother inherits from the child.<sup>120</sup> When the father has recognized the child in writing with the intent to recognize the child as his heir, the child may inherit from him. It is also provided that, even if an illegitimate is recognized by his father,<sup>121</sup> the father may inherit from the illegitimate offspring only if the recognition has

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allowed an adopted child's blood relatives to take rather than passing the child's property to the parents of the child's deceased adopting parents:

The act of adoption gives to and does not take away from the child. It makes him the heir of another, but it does not make that other his heir. It makes him a child to inherit, but *it does not make him the one adopting him as a parent to inherit from him.* [Emphasis added.]

118. *E.g.*, *Quintrall v. Goldsmith*, 134 Colo. 410, 306 P.2d 246 (1957); *In re Hewett's Estate*, 153 Fla. 137, 13 So. 2d 904 (1943); *Dye v. Ghann*, 216 Ga. 743, 119 S.E.2d 700 (1961); *In re Harmount's Estate*, 336 Ill. App. 322, 83 N.E.2d 756 (1949); *Hockaday v. Lynn*, 200 Mo. 456, 98 S.W. 585 (1906); *In re Brenner's Estate*, 149 Misc. 412, 267 N.Y.S. 765 (1933); *see also* *Atkinson* § 23.

119. N.M. Stat. Ann. § 29-1-17 (1953) (emphasis added); for the principle that the statute is to be construed liberally, *see Delaney v. First Nat'l. Bank*, 73 N.M. 192, 386 P.2d 711 (1963). But *see Lovington Nat'l. Bank v. Horton*, 74 N.M. 512, 395 P.2d 235 (1964) for the proposition that although an adopted child takes just as would a natural child under the pretermission statute, *neither* an adopted nor a natural child is entitled to community property where the intestate's spouse is still living.

120. N.M. Stat. Ann. § 29-1-19 (1953). *See also* *State v. Chavez*, 42 N.M. 569, 82 P.2d 900 (1938).

121. New Mexico cases dealing with recognition: *Grates v. Garcia*, 20 N.M. 158, 148 P. 493 (1915); *Sanchez v. Torres*, 35 N.M. 383, 298 P. 408 (1931). *See also* *Op. Att'y Gen.* 1957-58, No. 57-174.



been mutual.<sup>122</sup> Moreover, when an illegitimate child has been recognized, and then left out of his father's will, the New Mexico courts permit him to take his intestate share as a pretermitted heir.<sup>123</sup>

Although several jurisdictions<sup>124</sup> do not allow an illegitimate child to inherit through a *deceased* mother, New Mexico has resolved this problem in favor of allowing the illegitimate to take. In one case, the decedent's mother had an illegitimate child who similarly produced an illegitimate child. The New Mexico court, following a policy of construing the statutes liberally in favor of illegitimate children, allowed the surviving doubly illegitimate to take the decedent's entire estate.<sup>125</sup>

### 3. Criminals

New Mexico, like most American jurisdictions,<sup>126</sup> does not disqualify an heir for committing criminal acts short of murdering the intestate. Prior to 1955, New Mexico did not even disqualify for murder of the intestate.<sup>127</sup> The present statute<sup>128</sup> prevents an heir from taking an intestate's property when the heir has been convicted of ". . . either a capital, first or second degree felony, and might receive some benefit therefrom either directly or indirectly . . ."<sup>129</sup>

A problem arises when, for example, the heir himself is disqualified, but leaves a minor son who would take were the murderer-heir deceased. The New Mexico statutes provide that the murderer cannot profit from his crime when he "might receive some benefit therefrom either directly or *indirectly*."<sup>130</sup> Is the murderer, whose minor son will now inherit the murdered intestate's property, indirectly benefited even though he himself is not permitted to take?

122. N.M. Stat. Ann. § 29-1-19 (1953).

123. *In re Gossett's Estate*, 46 N.M. 344, 129 P.2d 56; Annot., 142 A.L.R. 1441 (1942).

124. *See, e.g.*, *Spencer v. Burns*, 413 Ill. 240, 108 N.E.2d 413 (1952) (illegitimate child not allowed to take from maternal collaterals); *see also* C. Vernier, *American Family Laws* § 249 (1936); Vernier and Churchill, *Inheritance by and from Bastards*, 20 Iowa L. Rev. 216 (1935).

125. *State v. Chavez*, 42 N.M. 569, 82 P.2d 900 (1938).

126. *See* Annot., 139 A.L.R. 1309 (1942); *Collins v. Metropolitan Life Ins. Co.*, 232 Ill. 37, 83 N.E. 542 (1907); and U.S. Const. art. I, §§ 9, 10.

127. *Reagan v. Brown*, 59 N.M. 423, 285 P.2d 789 (1955).

128. N.M. Stat. Ann. § 40A-2-10(B) (Repl. 1964).

129. *Id.*

130. *Id.*

At least one jurisdiction has decided that the murderer's heirs or representatives cannot take through the murderer and are therefore barred from taking the victim's estate.<sup>131</sup> Other jurisdictions<sup>132</sup> treat the murderer as having predeceased his victim, so that the murderer's forfeited interest passes to the victim's other heirs at law (including the murderer's issue). Since the New Mexico statute does not provide an express resolution to this problem, the status of heir of *both* the murderer *and* the intestate victim is unclear.

#### 4. Posthumous Heirs

New Mexico has codified the common law rule that a posthumous child is deemed to be in being and is therefore entitled to inherit if he is born alive after the intestate's death.<sup>133</sup> The statute's wording creates a potential problem, however. It provides:

Posthumous children unprovided for by the father's will shall inherit the same interest as though no will had been made.<sup>134</sup>

The statute reads as though it applies only in instances in which the father has in fact made a will. The statute does not describe what the posthumous child's share is, but merely gives him "the same interest as though no will had been made." It would be unreasonable, however, to assume any construction other than the following: A posthumous heir takes equally with other children in cases of intestacy.

#### 5. Aliens

At common law, an alien could dispose of and receive personal property, but was barred from doing the same with real property.<sup>135</sup> New Mexico Constitution provides:

*Until otherwise provided by law no alien, ineligible to citizenship*

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131. *E.g.*, *Price v. Hitaffer*, 164 Md. 505, 165 A. 470 (1933).

132. This is usually accomplished by means of a statute. For example, see *Bates v. Wilson*, 313 Ky. 572, 232 S.W.2d 837 (1950) (discussing the Ohio statute); *Bird v. Plunkett*, 139 Conn. 491, 95 A.2d 71 (1953). See J. Ritchie, N. Alford & R. Effland, *Cases and Materials on Decedents' Estates and Trusts*, 74-84 (2d ed. 1961) for a more complete discussion of this subject.

133. N.M. Stat. Ann. § 29-1-16 (1953).

134. *Id.*

135. See *Atkinson* § 10.

under the laws of the United States, . . . shall acquire title, leasehold or other interest in or to real estate in New Mexico.<sup>136</sup>

A New Mexico statute,<sup>137</sup> which was enacted prior to 1921 (the date of the constitutional provision), and appears to allow aliens to inherit real property on an equal basis with citizens, has been interpreted as subject to the constitutional prohibition.<sup>138</sup> Thus aliens in New Mexico who are not eligible for citizenship are not given the right to inherit unless a post-1921 law expressly confers such a right.

Treaties of the United States with foreign governments may, however, affect the rights of aliens to take.<sup>139</sup>

## 6. Ancestral Property

The doctrine of ancestral property limits the descent of real property to relatives of the blood of the ancestor who was the first purchaser of the realty. In the past a New Mexico statute<sup>140</sup> provided for a form of the doctrine, giving property which had been *separate property* in the hands of the deceased spouse back to the heirs of such deceased spouse rather than passing it to the heirs of the widow or widower.<sup>141</sup>

At the present time, however, New Mexico does not adhere to any form of the doctrine.<sup>142</sup>

136. N.M. Const. art. II, § 22.

137. N.M. Stat. Ann. § 70-1-24 (Repl. 1961):

Foreigners shall have full power . . . to acquire or hold real estate by . . . inheritance . . . and also to . . . transfer the same to their heirs . . . whether such heirs . . . be, or not, citizens of the United States; and when a foreigner having title or interest in any lands or estate dies, such lands or estate shall descend and vest in the same manner as if such foreigner were a citizen of the United States, and such circumstance shall not be an impediment to any person holding an interest in said estate, although not a citizen of the United States, for all said persons shall have the same rights and resources and shall, in all respects, be treated on the same footing as native citizens of the United States with respect to the personal estate of a foreigner dying intestate, and all persons interested in said estate, under the laws of this state, whether foreigners or not.

138. Op. Att'y Gen. 1929-30, p. 11.

139. For a discussion of this subject, see C. Vernier, *American Family Laws* §§ 288-292 (1938).

140. N.M. Laws 1927, ch. 163, § 1 (repealed 1943).

141. *In re Morrow's Will*, 41 N.M. 723, 73 P.2d 1360 (1937).

142. There is a statement in 5 G. Thompson, *Real Property* 359 (Repl. 1957) that erroneously attributes this form of the doctrine to New Mexico's present law. This is perhaps an indication of the complexity of the New Mexico intestacy law.

*F. Advancements*<sup>143</sup>

The New Mexico law of advancements is the most unique among the states, for 49 states have advancement statutes with New Mexico being the sole exception.<sup>144</sup> As a result the common law,<sup>145</sup> which for New Mexico purposes includes statutes enacted prior to July 4, 1776,<sup>146</sup> applies in New Mexico.

In 1776, the Statute of Distribution<sup>147</sup> enacted in England in 1670 was in effect as to the devolution of personal property, and thus appears to be the law of New Mexico today with respect to personal property advancements. The common law canons of descent governed the devolution of real property. Under the canons of descent, there generally could be no problem of advancement since under the doctrine of primogeniture there was only one heir with the result that any advancee and heir would be synonymous with no effect in the application of the hotchpot accounting procedure. However, if there were no sons but only daughters, the daughters shared the real property equally. Accordingly, application of the advancement theory and hotchpot with respect to daughters would have made sense. There is authority<sup>148</sup> that the custom of the times did entail an advancement theory respecting real estate; so it would seem that this may well be the law of New Mexico today with respect to real estate.

Details on the mechanics of advancement are sufficiently treated elsewhere.<sup>149</sup>

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143. In brief, advancements exist when a person gives property to a prospective heir with the intention that it be counted as part of the heir's share of the donor's estate. The doctrine generally is applicable only to intestate estates, it being thought that a testator has fully accounted for all such matters in composing his will. If an advancement occurs, the advancee cannot share in the estate unless he first constructively brings the gift into hotchpot with the assets of the estate so that the estate finally considered in allocating share values is the aggregate of the probate estate and the advancements. The advancement discussion herein is very limited in scope, the accounting and related questions being too engrossing for this limited work. Probably the most thorough work on the general subject is a series of three law review articles: Elbert, *Advancements*, 51 Mich. L. Rev. 665 (1953); 52 Mich. L. Rev. 665 (1953); 52 Mich. L. Rev. 231 (1953) and 52 Mich. L. Rev. 535 (1954).

144. See Atkinson § 129 and Elbert, *supra* note 142, 51 Mich. L. Rev. 665, 674 (1953). New Mexico does not have a lapse statute either.

145. Effectuated by N.M. Stat. Ann. § 21-3-3 (1953).

146. *Browning v. Browning*, 3 N.M. (G) 659, 9 P. 677 (1886).

147. 22 and 23 Car. 2, c. 10.

148. See Elbert, *supra* note 139, 51 Mich. L. Rev. 671-675; Atkinson § 129, and 6 R. Powell, Property § 1009 (1962).

149. See Elbert, *supra* note 139; Atkinson § 129; and Powell, *id. supra* note 148. There are no New Mexico cases on the subject.

G. *When Are Degrees of Relationship Described by N.M. Stat. Ann. §§ 29-1-1 through 29-1-4 (1953) Significant?*

The first four sections<sup>150</sup> of Article 1 of New Mexico's law governing descent and distribution define, in a somewhat obscure manner, degrees of collateral and direct relationship of consanguinity

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150. N.M. Stat. Ann. § 29-1-1 (1953):

The relation of consanguinity being the relation or connection which exists between persons united by the ties of blood shall be considered in the direct and collateral lines, for civil purposes, in the computation thereof.

N.M. Stat. Ann. § 29-1-2 (1953):

Relationship in the direct line, counted from fathers to sons and remoter descendants, shall be computed by the number of persons begotten, and these are degrees not counting the trunk; for example, the father is the trunk, the son is the first degree, the grandson the second degree, the second grandson the third degree, the third grandson the fourth degree, the fourth grandson the fifth degree, the fifth grandson the sixth degree, and so on with the rest, and these are called descendants. But from this point, counting upwards they are called ascendants, so the last is called son, in respect to his predecessor, and such predecessor is called father, and going upward, the one [1] that comes next in order is grandfather, second grandfather, third grandfather, fourth grandfather.

N.M. Stat. Ann. § 29-1-3 (1953):

Relationship in the collateral line in its computation is reckoned by the number of persons begotten, not counting the trunk, to which they are referred as having descended from it, but which are separate laterally, as branches pendant from that trunk; for example, brothers are of the second degree, because they are two [2] persons, begotten by and descended from the same trunk, or, if the number of brothers be greater, the comparison is always one [1] with another; the sons of these are of the fourth degree, as being four [4] persons separate from each other, but from the same trunk, those that follow are of the sixth degree, and the next of the eighth degree. Therefore, counting in even series, as has been shown, they go on increasing two [2] by two [2] ad infinitum, and this is the regular collateral line. But if, for example, one [1] of the second degree, be considered in reference to one [1] of the fourth degree, this will be the irregular collateral line.

N.M. Stat. Ann. § 29-1-4 (1953):

The relation of affinity is contracted by the union of man and woman in the bonds destined for the propagation of the species, and its computation is in the same order as the relation of consanguinity in respect to the direct line, in descendants and ascendants, and in respect to the collateral line; and it extends only to the eighth degree of civil computation, if the union be by legitimate matrimony, and to the fourth, if the union be without matrimony, it being observed that the man and woman only, who contracted the union, are individually connected by affinity, with the blood relations of the other party, and those blood relations are connected by affinity with the consort of their blood parent; and this relationship shall only be valid for the civil purposes which may be explained in the laws and acts of individuals of the human race.

We have quoted the sections in full so that the reader will get the effect of their archaic complexity.

and affinity. These sections describe the civil law<sup>151</sup> method of computing an intestate's next of kin. After deciphering these complex statutes, the practitioner might well ask: When is it necessary for problems of intestacy to determine next-of-kin by the civil law system in New Mexico? Never!<sup>152</sup>

New Mexico follows the parentelic system of descent and distribution, as has been described earlier. Under this system, the determination of the intestate's next of kin is irrelevant. For example, if intestate dies survived only by a nephew, that nephew is of the third degree of relationship to the intestate according to N.M. Stat. Ann. § 29-1-3 (1953). The later distributive sections of the chapter, however, *never* refer to this relationship. Instead, the intestate's property passes back to his deceased parents, then down the parentela through the intestate's deceased brother to the nephew.

These first four sections of Chapter 29 were enacted in 1852 and are crude,<sup>153</sup> literal translations from the original Spanish civil law. They have been carried along with the intestacy law until the present compilation, yet they have absolutely no utility in relation to this subject.<sup>154</sup>

Since the sections were originally separate<sup>155</sup> from the intestate provision, it might be said that they are merely misplaced, and should not be repealed, but merely relocated. Supporting this idea is the fact that the description of how to count degrees of relation-

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151. Op. Atty. Gen. 1947-48, No. 5040.

152. N.M. Stat. Ann. § 31-13-1 (1953) speaks in terms of next of kin but obviously means heirs because the statute involves the payment of money in small estates without formal process. Other such imprecision in language occurs in the probate related laws. *E.g.*, N.M. Stat. Ann. § 24-6-9 (1953) speaks in terms of protecting "the right of dower" which is abolished by N.M. Stat. Ann. § 29-1-23 (1953).

153. *E.g.*, the translation "second grandson" for "bisnieto" in N.M. Stat. Ann. § 29-1-2 (1953). Normally, the English translation would be "great-grandson." *See* Velazquez, Spanish Dictionary (1948).

154. In the case of *Dodson v. Ward*, 31 N.M. 54, 240 P. 991 (1925) the court did in fact make use of N.M. Stat. Ann. § 29-1-1 (1953). However, the case could have been decided without reference to this section, in that the question involved was whether the heirs of a deceased adoptive parent inherited from an adopted child. Moreover, it may be that the "consanguinity" section would be superseded by N.M. Stat. Ann. § 29-1-17 (1953) in that it is no longer necessary to be a "blood relation" to inherit from a relative by adoption.

155. In Laws 1852-53, p. 71, the section was not connected to the intestacy law, being entitled simply "An act on relationship and the computation of its degrees." In the 1865, 1884, and 1897 Compilations, these sections were in the "Domestic Relations" area [showing legislative intention to keep them connected to the forbidden incestuous marriage?]. It was not until the Code of 1915, § 1853, that the sections were commingled with the intestacy law.

ship has been examined only once in over a hundred years—but in a situation involving nepotism,<sup>156</sup> not intestacy. It thus could be said that the sections are still relevant as concerns nepotism, incest, etc.

This position is well taken insofar as nepotism is concerned. The statutes<sup>157</sup> describing this matter, although making no explicit cross reference to our four problem sections, do call for a compilation of degrees of relationship of affinity or consanguinity. The incest statute,<sup>158</sup> however, defines the crime without its being necessary to count degrees of relationship and could stand on its own without the troublesome four sections.

Thus, the four sections have no place in New Mexico's intestacy law and, except for the instance of nepotism, are irrelevant in any legal context. At the least, the sections should be removed from Chapter 29 and placed in the only section to which they are relevant, the nepotism section.

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156. Op. Att'y. Gen. 1947-48, No. 5040.

157. N.M. Stat. Ann. §§ 5-1-10, -11 (Repl. 1966) and N.M. Stat. Ann. § 39-2-6 (Repl. 1964).

158. N.M. Stat. Ann. § 40A-10-3 (Repl. 1964):

Incest consists of knowingly intermarrying or having sexual intercourse with persons within the following degrees of consanguinity: parents and children including grandparents and grandchildren of every degree, brothers and sisters of the half as well as of the whole blood, uncles and nieces, aunts and nephews.